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147 Cal. 536

WHITNEY v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. 4,231.)

(Supreme Court of California. Aug. 12, 1905.)

New Trial—Denial of Motion—Setting Aside Order—Inadvertence.

Where defendant's motion for a new trial was brought up, in the absence of defendant's attorney, without argument or opportunity upon the part of defendant to be heard, it was proper for the court, under Code Civ. Proc. § 473, authorizing relief against proceedings taken against a party by mistake, inadvertence, or excusable neglect, to set aside an order denying the motion, made on the sole ground that defendant had neglected to prosecute the same, and, without any consideration of the merits, to restore the cause to the calendar for a hearing upon the merits.

In Bank.

Petition by Arthur L. Whitney, as assignee in the matter of M. A. McKinnon, an insolvent debtor, for writ of mandate against the superior court of the city and county of San Francisco. Denied.

Samuel Rosenheim, for petitioner. Herbert Choynski, for defendant Gallick.

VAN DYKE, J. This is an application for a peremptory writ of mandate commanding the superior court of the city and county of San Francisco to direct the clerk of said court to issue execution on a judgment in favor of the petitioner. It appears from the petition herein that on the 2d of November, 1901, the plaintiff, as assignee in the matter of M. A. McKinnon, obtained a judgment against one M. Gallick, as defendant in said action, for the sum of $1,200 and costs; that no part of said judgment has been paid; that after notice of decision and judgment in said action the defendant, on December 16, 1901, gave notice of intention to move for a new trial. Thereafter a bill of exceptions on said motion for a new trial was proposed by said defendant, and was settled and allowed by the judge of said superior court, Hon. J. M. Seawell, who tried said cause, and was filed in said action December 9, 1902. Thereafter, on December 15, 1903, said bill of exceptions was amended, and on February 12, 1904, the following order was entered in the minutes of said court in said action: "In this cause the defendant's motion for a new trial came on this day regularly to be heard, S. Rosenheim, Esq., appearing as counsel for plaintiff, and no one appearing for the defendant. Thereupon, on motion of counsel for the plaintiff, it is ordered that the said motion be, and is hereby, submitted to the court for consideration and decision." On February 16th an order was entered in said cause by said court denying the defendant's motion for a new trial. It is alleged in said petition that on the next day, to wit, the 17th day of February, 1904, without notice to the attorney for the plaintiff, and in his absence, the court, upon the ex parte application of counsel for the said defendant, M. Gallick, made and caused to be entered upon its minutes the following order, to wit: "In this cause it is ordered by the court that the order denying defendant's motion for a new trial, made and entered on the 16th day of February, 1904, be, and the same is hereby, vacated and set aside, and said motion for a new trial be restored to the law and motion calendar of this court for argument." And thereafter, on the 15th day of March, 1904, the court made and entered the following order in said cause: "In this cause the defendant's motion for a new trial herein having been heretofore submitted to the court for consideration and decision, and now, the court having fully considered the same, and being fully advised in the premises, it is ordered that said motion be, and the same is hereby, granted." It further appears from the petition herein that upon the 17th day of September, 1904, plaintiff in said action filed a notice of motion, together with affidavits annexed thereto, and served the same on the attorney for the defendant; that on the 23d day of September, 1904, he would move the said superior court for an order directing the clerk thereof to issue execution in said action upon the judgment therein recorded on November 2, 1901, setting forth the grounds of said motion, which were in the main similar to the grounds of the application to this court for a peremptory writ of mandate. Upon being served with said notice of motion and affidavits in support thereof, the defendant's attorney in said action, being the same as in the present proceeding in this court, filed his affidavit in reply thereto, which affidavit, among other things, states that in pursuance of a stipulation between the attorneys for the respective parties the motion for new trial was continued in the superior court from time to time, and that said attorneys agreed that the motion should be taken up for argument only upon notice by one to the other, and no such notice was ever given prior to the 17th day of February, 1904, and notwithstanding said stipulation the said attorney for the plaintiff did appear in said court on the 12th day of February, 1904, in the absence of the attorney for said defendant, and did ask the said court to take up the motion for new trial, and stated to said court that the defendant's attorney had abandoned the said motion, and no argument was ever had thereon, but that the clerk of the court inadvertently and improvidently marked the said motion for new trial submitted upon the calendar of said court, and said court thereupon inadvertently and improvidently was made to appear to have denied the said defendant's motion for new trial, when in truth and in fact the same had never been submitted to said court for decision; that upon said court's attention being called to the said proceedings the said minute orders were set aside; that thereupon said plaintiff's attorney was notified that said order denying said motion for new trial, so inadvertently and improvidently made, had been set aside, and that said motion for new trial had been placed upon the calendar of said court for argument and consideration; that pursuant to said last-named notice the said attorney for the plaintiff regularly and duly appeared in said court, and then and there argued against the said motion for a new trial, and that no objection was made to the said consideration of said motion for new trial on said last-named day, but, on the contrary, the said attorney for plaintiff participated fully therein, without objection or protest to the argument, presentation, or consideration of the same; and that after the order of said court had been made granting defendant's motion for a new trial the plaintiff in said action served and filed his notice of appeal from said order granting said motion for new trial, and the said appeal is now pending in the Supreme Court. In the reply affidavit on the part of the plaintiff in said action upon said application for mandamus in the superior court it is denied that there was an understanding between the attorneys of the respective parties that the motion for new trial should not be submitted except upon notice. It is not denied, however, that the plaintiff's attorney appeared at the hearing of the motion for new trial, as stated in the foregoing affidavit; nor is it denied that the plaintiff took an appeal from the order granting the new trial in said action to this court which is now pending. The order of the trial court, setting aside the previous minute order denying defendant's motion in said action for new trial, which said order is copied in the petition herein, is as follows: "It appearing to the court that at the time when the order was made herein on the 16th day of February, 1904, denying defendant's motion for a new trial, said defendant had not made any motion for a new trial, and said motion having been denied solely for the reason that defendant had neglected to prosecute the same, and without any consideration of the merits thereof or of the record, and defendant's attorney having requested the court to set aside said order denying a new trial and to grant to defendant an opportunity to be heard by the court on said motion, it is ordered that the order made and entered on the 16th day of February, 1904, denying defendant's motion for a new trial, be, and the same is hereby, vacated, and set aside, and that the said motion for a new trial be restored to the law and motion calendar of this court for argument." After a hearing in the superior court upon said application for an order directing the clerk to issue an execution the following order was made, dated February 1, 1905 (after the title of the court and the cause): "In this cause the motion of the plaintiff for an order directing the clerk to issue execution herein having been heretofore submitted to the court for consideration and decision, and now the court having fully considered the same and being fully advised herein, it is ordered that said motion be, and the same is hereby, denied."

The contention of the petitioner that the judgment in the action of the petitioner against M. Gallick, rendered in the superior court in November, 1901, is still in force, under the circumstances herein, cannot be sustained. The motion for new trial in that case was by the defendant. He was the moving party. It was brought up, as appears, in the absence of the defendant's attorney, without any argument, or opportunity upon the part of the defendant to be heard, and under the circumstances it was right and proper for the court to do as it did—set aside the order denying the motion for a new trial, and thereupon give the moving party an opportunity to present the motion. In Morris v. De Celis, 41 Cal. 331, it is said: "If a motion for a new trial is decided by the court before it has been submitted, the order denying or granting the new trial should be set aside as improvidently made, if application is made therefor." In Stewart v. Taylor, 68 Cal. 5, 8 Pac. 605, it is said: "There is no doubt that the court in which an irregular order is made and entered may, where the irregularity is apparent, on suggestion, motion, or ex mero motu, set it aside at any time before an appeal is taken from it." In 2 Hayne on New Trial (section 199) the author says: "Where an appealable order was improvidently or inadvertently made, the aggrieved party may move the court below to set it aside, and may appeal from the order denying his motion. Thus, where a motion for a new trial was granted without any submission of the motion, and before the record upon the motion was completed, it was held to be proper practice for the aggrieved party to move upon affidavits to have the order granting the new trial set aside; and the order denying such motion was reversed. [Referring in note to case of Morris v. De Celis, supra.] The fact that the order was made irregularly takes it out of the general rule." See, also, Spelling's New Trial & App. Prac. vol. 1, § 379. The late case of Holtum v. Greif, 144 Cal. 521, 78 Pac. 11, one of the cases relied upon by the petitioner, after stating the general rule that an order granting or refusing a new trial regularly made and entered cannot be set aside by the trial court, states that, if the orders "have been entered prematurely or by inadvertence, they may be set aside on a proper showing. (Odd Fellows' Sav. Bank v. Deuprey, 66 Cal. 170, 4 Pac. 1173, and cases cited); and if the order as entered is not the order as made, the minutes may be corrected so as to make them speak the truth" (citing other cases). In the case referred to, the court held that it clearly appeared from the terms and recitals in the order that it was not a correction of an erroneous entry in the minutes. The order here in question appearing to deny the motion of defendant for a new trial was evidently made through the mistake or inadvertence or excusable neglect of the defendant—the moving party—and upon his application it was within the power of the court to grant the relief it did by setting aside the order so improvidently entered, and placing the case on the calendar for hearing upon its merits. Code Civ. Proc. § 473. The petitioner here—the plaintiff in the case in question—seems to have recognized this as the proper proceeding on the part of the court by appearing at the hearing of the motion for new trial and taking part therein, and by taking an appeal to this court from the order granting a new trial. For the foregoing reasons the petitioner is not entitled to the writ prayed for.

The writ is denied.

We concur: ANGELLOTTI, J.; SHAW, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

(147 Cal. 514)

BELL v. WYMAN et al. (L. A. 1,301.)

(Supreme Court of California, Feb. 2, 1905. On Rehearing, Aug. 2, 1905.)

HUSBAND AND WIFE—TITLE BY DEVISE—EVIDENCE — SUFFICIENCY —STATUTE — WIFE'S SEPARATE PROPERTY.

In an action to quiet title, evidence examined, and *held* sufficient to show that defendant, a married woman, acquired title by devise during coverture, so that, under the direct provisions of Civ. Code, § 162, it became her separate property.

Beatty, C. J., and Henshaw and Lorigan, JJ., dissenting.

Commissioners' Decision. Department 2. Appeal from Superior Court, Santa Barbara County; W. S. Day, Judge.

Action by Robert F. Bell against Annie E. Wyman and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Rehearing denied September 8, 1905.

Canfield & Starbuck, for appellant. Charles H. Armstrong and James W. Taggart, for respondents.

GRAY, C. This action is brought to quiet title to a one-fourth interest in a tract of land consisting of some 305 acres, situated in Santa Barbara county. Plaintiff claims title to this one-fourth interest as successor to William Wyman through several conveyances. The claim of plaintiff is that the tract of land was the community property of said Wyman and his wife. The said wife, and defendant herein, Annie Wyman, claims the tract as her separate property. The defendant William Wyman filed a disclaimer in the case. The defendants Wineman and the Bank of Santa Maria hold mortgages executed by Annie Wyman on the property. At the conclusion of plaintiff's evidence the court, on motion of the defendants, granted a nonsuit and dismissed the case because of failure of plaintiff's proof. The plaintiff appeals from the judgment which followed, and his contention is that the evidence introduced by him showed that the property was acquired by Mrs. Wyman under such circumstances as to make it community property. To this we cannot agree. The evidence on this subject consisted of 26 letters written by Mrs. Wyman from Santa Barbara county to her husband in the state of Washington, together with the recitals of a will hereinafter referred to. These letters show that Mrs. Wyman left her husband on a piece of government land in Washington, and came to Santa Barbara, where they had formerly lived, and where her father, mother, and other relatives were then living; that for some months after she came to Santa Barbara county from time to time she sent her husband small sums of money out of her earnings. Some seven months after she arrived at Santa Barbara county she opened a restaurant, and had as one of her boarders, a bachelor, some 95 years of age, named David Brown, usually known as "Uncle Davie." This old man was a cripple, and so nearly helpless that, in addition to $15 for his board, he paid Mrs. Wyman $20 a month to take care of him. From the beginning of her services to Uncle Davie, Mrs. Wyman's purpose was to "get around him," as she expresses it, and by condoning his fits of ill humor and being pleasant to him finally succeed in inducing him to make a will in her favor devising all his property to her. The restaurant business did not pay, and with the assistance of Uncle Davie, Mrs. Wyman, after some four or five months, paid the debts that had accumulated and quit the business. Thereafter Mrs. Wyman continued with Uncle Davie, and the latter came to have a high regard for her, and promised her that if she would stay with him to the end he would see that she did not want for anything when he was gone. How long Uncle Davie continued to pay Mrs. Wyman the $20 a month for "nursing" him, as he called it, the evidence does not disclose. Mrs. Wyman continued with Uncle Davie to the time of his death, some two years after she quit the restaurant business. From the first Wyman was very much averse to his wife remaining with Uncle Davie, and kept writing her to come to him in Washington. She informed him fully as to her relations with Uncle Davie, and of her hopes in regard to finally securing his property. In August, 1896, Uncle Davie made his will, devising and bequeathing most of his property, including the land here in question, to Mrs. Wyman. The correspondence between Mr. Wyman and his wife seems to have ceased with a letter written by her, dated January 15, 1897. Brown's death occurred on May 27, 1898. The letters of Mrs. Wyman written after the will was made indicate that her husband had become reconciled to the situation, and was making no further objections to his wife remaining with Brown. The services required of Mrs. Wyman in caring for Brown seem to have been of a very exacting nature. She was required to dress and undress him, to unfasten and fasten his clothes before and after his going to the closet, to attend and treat his sore eye, etc. Added to this Brown was fretful and fault-finding, all of which Mrs. Wyman bore with patience. Some two or three months after Brown's death Mrs. Wyman commenced a suit in Santa Barbara against her husband for a divorce, and it was in the employment of counsel and to defray expenses of a defense to that suit that Wyman parted with the alleged title to the one-quarter interest in the real estate involved in this action.

The will of Brown contains the following clause: "The said gift, bequest and devise to the said Annie E. Wyman of the large part of my estate is made without her knowledge, not as a payment for her care of me but is made as my desire that she shall have it in preference to others, I having no near relatives, and as the highest mark of esteem that I can show her for the faithful care and attention she has given me in my old age." On the death of Brown his will was duly probated, and the 305 acres of land involved was duly distributed to Mrs. Wyman by decree of the probate court.

Appellant contends that there was a contract between Mrs. Wyman and Brown, and that the will was made in pursuance of the contract and in payment for services rendered, and that this contract might have been specifically enforced. No such construction can reasonably be placed on the evidence before us. Mrs. Wyman expressly declares in one of her letters, in reply to her husband's demand that she "have Uncle Davie to sign an agreement just what he will do" for her, and send it to him in Washington, that: "I will not ask anything of the kind of him. I am here, and I know him better than to do anything of that sort." The intention of Mrs. Wyman was to procure a devise of this property to herself by last will, and not otherwise. It was also the intention of Brown, as clearly indicated in the language of the will above quoted, that Mrs. Wyman should have the property "not as a payment for her care of me," but as a mark of his esteem, and because he had "no near relatives"; and it was his desire that she should "have it in preference to others." No strained construction of the law should be allowed to defeat the intention of the parties so clearly shown. Property acquired by the wife after marriage "by gift, bequest, devise or descent * * * is her separate property." Civ. Code, § 162. Community property is property acquired after marriage by either spouse in some manner other than by gift, bequest, devise, or descent. Civ. Code, § 164. There was not any evidence even tending to show a contract in any way relating to the land in question. All the interest and title that Mrs. Wyman has in the property rests on the devise by will. The property was therefore not community property, but the separate property of Mrs. Wyman, and Wyman never had any interest in it to convey to any one. The nonsuit was properly granted.

We advise that the judgment be affirmed.

We concur: COOPER, C.; SMITH, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

On Rehearing.

SHAW and ANGELLOTTI, JJ. Upon further consideration of this case upon rehearing, we adhere to the views expressed in the opinion heretofore rendered in department 2. For the reasons therein given, the judgment is affirmed.

VAN DYKE, J. I concur in the judgment of affirmance, not so much from what is said in the department opinion, as from the fact that the title to the real estate in question became vested in Mrs. Wyman by the devise, and the Constitution in direct terms declares that in such case it is the separate property of the devisee.

McFARLAND, J. I concur in the judgment of affirmance upon the views expressed in the opinion delivered in department. I also think that the judgment is right upon the further ground that the land in controversy is the separate property of the defendant Mrs. Wyman, because she acquired it by "devise," and under the state Constitution all property acquired by devise is separate property, no matter what motive may have moved the testator to make the devise.

BEATTY, C. J. I dissent. It is the settled doctrine of this court that a man may bind himself by a contract, written or oral, to make a particular disposition of his property by will, and that such contract may be specifically enforced in favor of the promisee. Owens v. McNally, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369; McCabe v. Healy, 138 Cal. 81, 70 Pac. 1008. In this case the plaintiff, claiming that David Brown made such a promise, and fulfilled it by devising the land in Santa Barbara to Mrs. Wyman, undertook to maintain the legal proposition that property passing by such a devise to a husband or wife becomes community property alienable by the husband, and this for the reason that the Constitution (section 8, art. 20) and the statute (Civ. Code, §§ 162, 163), which declare that all property acquired by either spouse during coverture by gift, bequest, or devise is his or her separate property, ought not to be construed as embracing property passing under the form of bequest or devise when such provision was obligatory upon the testator, and made in requital of the personal services of the devisee or legatee. In support of this proposition he relied upon the principle underlying the distinction between separate and community property in the civil law, the source from which our law was taken, viz., that property earned by the services of either spouse should belong to the community, while property acquired gratuitously by either should belong exclusively to the donee. Upon this principle he contended that the word "devise," being generally defined as a gift of real property by will, and dispositions by will being with rare exceptions entirely voluntary, was used in that restricted sense in the Constitution and in the Code, and should be so construed as to exclude a devise which has been earned by the personal services of wife or husband—services subtracted from the community, and therefore a devise which merely pays a debt due to the community. To this argument upon the principal question of law involved in the appeal from the judgment of nonsuit it is not too much to say that the brief of respondents contains no answer. No notice of it was taken in the opinion of the department, because there the judgment of the superior court was sustained upon the ground that there was "no evidence even tending to show a contract in any way relating to the land in question." That decision was set aside and a rehearing granted because it was considered by those concurring in the order that there was evidence directly tending to prove the disputed fact, and because in view of such evidence it became necessary to decide the question of law. It is a somewhat singular outcome of the order for a rehearing that the case is finally disposed of by the court in bank without a decision of either of the two questions involved in its determination. Two justices are satisfied to adhere to the views of the department—that there was a total failure of evidence as to the existence of a contract; one places his affirmance upon the sole ground that a devise, whether voluntary or obligatory—whether a gift or the payment of a debt due for the personal services of a husband or wife—constitutes the land the separate property of the devisee; and one places his conclusion on both grounds. The case is thus disposed of, but nothing is decided. I have stated the substance of the argument against the literal construction given to the word "devise" by Justice VAN DYKE, but I have by no means stated the argument in its fullness and force. If there is an answer to it, I think it merits an answer, and certainly it is not answered by simply saying a devise is a devise. When the question arose whether a street or suburban railroad chartered by local authority was a railroad within the meaning of those clauses of the Constitution relating to the fixing of rates and the mode of assessment for the purpose of taxation, it was not thought a sufficient answer to say a railroad is a railroad. On the contrary, it was held that, although railroads in a general sense, street railroads and suburban railroads chartered by cities or counties are not the railroads contemplated by those provisions of the Constitution. And so in a great number and variety of instances this court and other courts have placed a narrower or more liberal construction upon constitutional and statutory provisions than their literal terms would justify, and this upon considerations in no wise different from those urged by the appellant against the literal construction of the provision in question here. Allowing any weight to the principle of discrimination plainly evident in the terms of the Constitution and consistently enforced by the commentators upon this feature of the civil law, it would certainly be permissible to hold that a devise made in fulfillment of a contract for the personal services of a married woman in nursing and caring for an infirm and helpless old man during the last years of his life is not the devise contemplated by a clause of the Constitution—where it is coupled with other modes of transfer, always gratuitous in the case of gift and descent—and, with rare exceptions, equally gratuitous in cases of bequest or devise. According to the rule "noscitur a sociis" only gratuitous bequests and devises are meant.

But it is not with this question of construction that I am so particularly concerned. It is not decided, and may never call for a decision. I take sharper issue with the adhesion of Justices SHAW, ANGELLOTTI, and McFARLAND to what was held in department, viz., that there was no evidence "even tending to show a contract in any way relating to the land in question." There was, in my opinion, not only some substantial evidence tending to prove such a contract, but there was evidence very direct and very convincing to that effect. The opinion delivered in department gives the general features of the case, but entirely fails to state the most important and direct evidence bearing upon this point. It quotes from the will a declaration to the effect that it is made without the knowledge of Mrs. Wyman, and not as a payment of her services, but merely because of the testator's desire that she should have the property in preference to his distant relatives. It does not notice the statements contained in Mrs. Wyman's letter commenced on the 12th of August and finished on the 14th, in which she explains that the visit of herself and Uncle Davie to Santa Maria for the purpose of having his will drawn and executed is being postponed from day to day on account of his illness, and in which she says: "He is going to make his will tomorrow he has bin talking to me a long time this morning telling me what to do and how to get along and what he wants done with his things his mules I have to keep as long as they live on this ranch they are down on John Rices place now on pasture he said Again this morning that he was going to leave me everything he had in the world." This is especially significant. The will was made on the 18th of August, and contains a clause providing for the mules. This not only shows the falsity of the declaration that the devise of everything to her was without her knowledge; it shows that she was fully informed as to the details of the provisions of the will in other respects; and this false declaration is coupled with a statement of his motive in making the will equally opposed to Mrs. Wyman's repeated statements in her letters to her husband to the effect that he had promised to give her everything, the evident design being to defeat any claim on the part of the husband, from whom she sought a divorce as soon as the property was distributed to her. Another item of conflicting evidence not entitled to be considered on a motion for a nonsuit, but to which an undue significance is accorded in the department opinion, is the refusal of Mrs. Wyman to ask for a promise in writing. Her whole letter, from which a few lines are quoted, and the whole correspondence show that the reason why she refused to ask for a written promise was because she was afraid of alarming Uncle Davie's suspicions by asking for a writing, and thought it more prudent to trust to his fulfillment of his repeated oral promises—a point in which her judgment was vindicated by the result. Another significant passage from a letter of May 23d is the following in reference to this particular land: "uncle Davie is going to build A new house and dig an artision well and fix up thing down their and we are going to go down their to live that is the way he is talking now he sais he wants to fix up A good home for me when he is gon so I will not have to work out any more he is going to have everything fine now I tell you; if he lives long eough to fix it up for me and he sais if he dont live to fix it up he wants me to carrie out his plans so he can see me working at it when he is in the spirit life and I tell him all rite I will do it." Writing July 16th she says: "you know that he told me just yesterday that when we get down their in our own house and get in the fall rent which will come in November then he is going to fix up his business and he is going to will me everything he has in the world." In the same letter she tells of the burning of a former will and proceeds: "now he will make one to me some of these days be fore long he told me so yesterday and wyman my Dear if can get that then you nor me will not have to work so hard any more nor we will not have to be apart we can live where we please we will have an income that will support us and more to." Again, referring to this land, she says: "uncle Davie says he will Be Redy to die when we get down their in the new house get the well dug and the duck pond full of watter get me all fixed to live then he will want to die and get out of my way." But it is not to these or any number of isolated expressions gathered from her letters that attention should be confined, persuasive as they are as to the fact that Uncle Davie had promised to leave her all his property generally, and this ranch in particular, in consideration of her services. The whole tenor of the correspondence, and the circumstances, including the making of the will, all tend to show that there was a contract, based upon a sufficient consideration, that such a will should be made. The order granting a nonsuit cannot be sustained upon the ground that there was no evidence of a contract relating to this land, and there is greater reason to suppose it was in fact based upon Justice VAN DYKE'S construction of the Constitution and Code in their definition of separate property.

We concur: HENSHAW, J.; LORIGAN, J.

147 Cal. 510

GLASSELL v. GLASSELL et al. (L. A. 1,344.)

(Supreme Court of California. Aug. 9, 1905.)

1. LIMITATIONS—WAIVER OF DEFENSE—REPUDIATION BY WILL.

Where a will expressly enumerates various obligations of testator, and directs the executors to pay the obligations so enumerated without reference to any law of limitations, "which I positively repudiate and waive," such waiver of the defense of limitations against the enumerated obligations is binding on the executors, and enforceable against them in a suit brought by one of the enumerated creditors on his claim.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 751.]

2. APPEAL—REVIEW OF FACTS—CONCLUSIVENESS OF FINDING.

Where there is a material conflict in the evidence, the finding of the trial court is conclusive on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3935-3937.]

3. GUARDIAN AND WARD — BALANCE DUE WARD—ALLOWANCE OF INTEREST—MISCONDUCT OF GUARDIAN.

Where a guardian, upon the receipt of his ward's money, immediately converted the same to his own use, deposited it in his own name in bank, and used the same in his own business, mingled with his own funds, without any authority from the court so to do, and never filed an inventory or appraisement, nor rendered an account as guardian, nor kept an account upon his books from which an accounting could be rendered, it was not error to allow the ward compound interest on the amount due him, although the guardian was guilty of no fraud in his use of the ward's money.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Guardian and Ward, § 253.]

4. SAME—COMPENSATION OF GUARDIAN—DENIAL.

Nor was it error to refuse compensation to the guardian under the circumstances.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Guardian and Ward, §§ 506, 507.]

5. TRIAL—FINDINGS—ISSUES NOT RAISED.

The court need not find on an issue not raised by the pleadings.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 935.]

6. SAME.

There need be no finding upon an issue of laches where there is no evidence upon which a finding of laches could be based.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 935.]

Department 2. Appeal from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Action by Alfred Leigh Glassell against Andrew Glassell and another, executors of the estate of Andrew Glassell, deceased. From a judgment for plaintiff and from an order denying a new trial, defendants appeal. Affirmed.

Rehearing denied September 5, 1905.

McNutt & Hannon, for appellants. Stephens & Stephens, for respondent.

McFARLAND, J. The deceased, Andrew Glassell, was the father and the guardian of the person and estate of the plaintiff herein, and this action is brought for the recovery of money alleged to be due from deceased as such guardian. The case was tried without a jury, and the court made findings and rendered judgment in favor of plaintiff for a certain sum of money found to have been due by the deceased as such guardian to the plaintiff. From this judgment and from an order denying their motion for a new trial, defendants appeal.

The deceased was appointed and qualified as guardian of plaintiff in September, 1880, at which time plaintiff was a minor. He attained his majority on the 24th day of August, 1897. Deceased died testate on the 28th day of January, 1901, and this action was commenced on December 4, 1901, and appellants pleaded and contend that the action was barred by subdivision 1 of section 339, Code of Civil Procedure, which provides that "an action upon a contract, obligation, or liability, not founded on an instrument in writing," is barred in two years. It appears that when plaintiff became of age the deceased did not render any account as guardian, but continued to manage the ward's property as before; and, although the strict relation of guardian and ward had ceased at the ward's majority, still a fiduciary relation continued, and in such a case the authorities are somewhat conflicting as to when an action against the former guardian will be barred. But in the case at bar we need not discuss this general subject, for, in our opinion, the will of the deceased settles the question against appellants' contention. The plaintiff was the son of the deceased, and he, together with eight brothers and sisters, all children of the deceased, became entitled to certain property as heirs of their maternal grandfather, Dr. H. H. Toland, and this was the property which went into the hands of the deceased as guardian; the deceased being also guardian for several of the other children who were minors. In his will the deceased refers to this property of his children, and says: "After the payment of my just debts—inclusive of balances due & payable to my children or any of them on account of moneys received by me for their use from property derived from their grandfather, Dr. H. H. Toland," etc.; and he states certain balances due some of them, and, among others, a certain money balance due the plaintiff herein. Afterwards, in a codicil, he refers to a note which he owed to one C. A. Ware, and says: "I hereby expressly request my executors to pay this and all other notes and obligations referred to in this will without reference to any law of limitations which I positively repudiate & waive." This language clearly refers to all his obligations, including those to plaintiff and the other wards. It is not within the rule that a mere acknowledgment of a debt made to a stranger, and not to the creditor, is not binding. Such an acknowledgment is generally made without reference to the statute of limitations, and without intent to make a binding contract. In the case at bar the testator, having referred to various obligations, and expressly stated his obligation as guardian to respondent, the acknowledgment and waiver were clearly to and for the direct benefit of respondent; and in our opinion the testator clearly had the right to make such waiver. Indeed, the clause of the will of the testator, waiving and repudiating the statute of limitations and expressly directing his executors to pay all obligations notwithstanding such statute, is a part of his testamentary disposition of his property, which he had the right to make, and which his executors should enforce. He certainly could have directly bequeathed to respondent whatever balance there might be in his favor on a fair and correct squaring of the account, without reference to time or limitations; and that is substantially what he did. He expressed on the face of his will his intent that all his actual obligations, including that to respondent, should be paid without reference to the law of limitations; and there is no good reason why that testamentary intent should not be carried out by his executors as well as any other part of the will. It is contended by appellants that in 1897, after respondent's majority, there was a final settlement between him and the deceased of all matters growing out of the guardianship. There is, no doubt, some plausibility in this contention; but in the evidence as to the alleged settlement there was clearly a material conflict, and therefore we cannot disturb the findings of the trial court that there was not such a settlement.

The court below allowed interest on the amounts found due at 7 per cent. per annum, compounded annually, and appellants contend that the court erred in allowing compound interest. There is no fraud charged or found against the deceased touching his conduct as guardian. The court found, however, upon sufficient evidence, "that upon the receipt of said sums of money by the said deceased he immediately converted the same to his own use, depositing such and all of said sums to his own account in his own name in the bank where he kept his individual account, and that the said sums of money were intermingled with the funds of the said deceased, and all of said sums of money were used by the said Andrew Glassell, deceased, in his own business, mingled with his own funds in various investments"; that "said deceased never filed an inventory or appraisement, and never rendered any account in either of such guardianships, and never kept any account upon his books from which a proper accounting could be rendered to the said court"; and that "the said deceased, as guardian, never obtained any order from the court authorizing him to use any of the funds of the said plaintiff in the manner hereinbefore referred to, or in any manner whatever." Under these circumstances we cannot say that the allowance of compound interest was erroneous. Estate of Stott, 52 Cal. 403; In re Eschrich, 85 Cal. 101, 24 Pac. 634; Estate of Cousins, 111 Cal. 441, 44 Pac. 182; In re Clary, 112 Cal. 292, 44 Pac. 569. And for the above reasons, and others given by the court below, it was not erroneous to refuse compensation to the guardian.

It is objected that the court did not find on the question of the laches of respondent. In answer to this point it is sufficient to say, first, that this issue was not made by the pleadings, and, in the second place, there was no evidence upon which the court could have found such laches.

The foregoing are all the points which call for special notice. The correctness of the settlement of the account by the court is sustained by the evidence, and is, indeed, not very seriously contested by appellants.

It is proper to state, in justice to the memory of the deceased, Andrew Glassell, that he never intended to wrong respondent, or any of his wards. He was an able and conscientious business man, and no doubt used the funds of his wards to their advantage. He accumulated a large fortune, in comparison with which the property held by him as guardian of his ward's estate was small; and he left nearly all of this fortune to his children—the respondent herein receiving of this fortune about $100,000. The adverse criticism by appellants that under these circumstances respondent should not have brought this action against his father's estate, merely raises questions of sentiment and good taste. It does not affect the legal merits of the action.

The judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

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147 Cal. 523

Ex parte BERRY. (Cr. 1,229.)

(Supreme Court of California. Aug. 10, 1905.)

1. MUNICIPAL CORPORATIONS—ORDINANCES—REASONABLENESS—BURDEN OF PROOF.

The burden of showing an ordinance unreasonable is on the one attacking it on that ground.

2. COURTS—JUDICIAL NOTICE—AUTOMOBILES.

Under Code Civ. Proc. § 1875, enacting that the court will take judicial notice of the true signification of all English words and phrases, the courts have common and current knowledge relating to automobiles.

3. COUNTY ORDINANCE—REASONABLENESS—AUTOMOBILE REGULATIONS.

A county ordinance prohibiting the running of automobiles on country roads between sunset and sunrise is not unreasonable.

In Bank. Application by Thomas C. Berry for a writ of habeas corpus to obtain his release from custody on a charge of violating an ordinance. Writ discharged.

Chickering & Gregory, for petitioner. Thos. P. Boyd, Dist. Atty., for respondent.

McFARLAND, J. There was an ordinance of the board of supervisors of the county of Marin, Cal., which, after prohibiting the use of automobiles on certain parts of some of the public roads of that county and regulating their use in other respects, provides as follows: "Sec. 8. No person shall run an automobile on any of the said unprohibited highways of Marin county between the hours of sunset of any day and of sunrise on the day following;" and a violation of the section is made punishable by a fine or imprisonment. The above-named Thomas C. Berry was convicted of a violation of said section 8, and judgment was rendered against him sentencing him to imprisonment. He appealed to the superior court of said county, and the judgment was there affirmed. Thereupon this present application is made on his behalf for a writ of habeas corpus, and his discharge is asked upon the ground that said section 8 of the ordinance is invalid and void for certain assigned reasons.

There is nothing in any of the positions taken by petitioner which requires special notice, except the position that the provision of the ordinance here in question is void because unreasonable; and, in our opinion, that position is not tenable. When the validity of an ordinance is attacked on the ground that it is unreasonable, the burden of showing its unreasonableness is upon the person attacking it. In Ex parte Haskell, 112 Cal. 412, 44 Pac. 725, 32 L. Ed. 527, where an ordinance was attacked for reasons similar to those asserted in the case at bar, the court said: "A municipal ordinance must be very clearly obnoxious to such objections as those made, or some one of them, before it will be declared invalid by the courts. Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the lawmaking power; and a contrary conclusion will never be reached upon light consideration." In the case at bar there is nothing in the record to show anything about the alleged unreasonableness of the ordinance except the ordinance itself, and the burden is on the petitioner to maintain that, upon its face, the ordinance is unreasonable. There is nothing in the record which shows with any particularity what an automobile is, and, of course, a court could not declare unreasonable a regulation about something of which it has no knowledge. Therefore, in order to at all consider the question here involved, we must assume judicial knowledge of an automobile and its characteristics and the consequences of its use, under the statutory provision that courts take judicial notice "of the true significance of all English words and phrases." Section 1875, Code Civ. Proc. We may assume, therefore, to have what is common and current knowledge about an automobile. Its use as a vehicle for traveling is comparatively recent. It makes an unusual noise. It can be, and usually is, made to go on common roads at great velocity—at a speed many times greater than that of ordinary vehicles hauled by animals; and, beyond doubt, it is highly dangerous when used on country roads, putting to great hazard the safety and lives of the mass of the people who travel on such roads in vehicles drawn by horses. Fearful accidents to persons driving animals which are frightened into unmanageable terror by automobiles are of common occurrence. And while there are usually laws regulating and limiting the speed at which they may be driven, it is matter of common knowledge that these laws are frequently violated, and that it is exceedingly difficult for officers, even in the daytime, to stop them when going at forbidden speed, and arrest the drivers. And it is apparent that this would be much more difficult to do in the nighttime. Moreover, in the nighttime even those drivers of automobiles who might be considerate of the safety of others would not be able to see an approaching team in time to take the proper precautions. Considering these matters, and many others which might be suggested, we see nothing unreasonable in the regulation—and it is only a regulation—which forbids the use of automobiles on country roads in the nighttime. Of course, if the use of automobiles gradually becomes more common, there may come a time when an ordinance like the one here in question would be unreasonable. As country horses are frequently driven into cities and towns, many of them will gradually become accustomed to the sight of automobiles, and the danger of their use on country roads will grow less. But the supervisors who passed this ordinance were dealing with present conditions in Marin county, and we are not prepared to say judicially that under present conditions the ordinance is so unreasonable as to be void.

We do not think it necessary to discuss the question further, because a general law has recently been passed by the State Legislature which probably supersedes the ordinance here in question, and the decision of the case at bar will not be of much value as a precedent.

The person on whose behalf this writ was applied for is remanded to the custody of the sheriff, and the writ is discharged.

We concur: BEATTY, C. J.; SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.; LORIGAN, J.

147 Cal. 439

SPINKS v. CLARK et al. (L. A. 1,378.)

(Supreme Court of California. Aug. 5, 1905.)

1. CONTRACT — RESCISSION — FALSE REPRESENTATIONS.

A contract may not be rescinded on the ground of fraudulent representations unless the representations were believed and acted upon.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 1163, 1164.]

2. EXCHANGE OF PROPERTY — RESCISSION — EVIDENCE—SUFFICIENCY.

In an action to rescind an exchange of plaintiff's real estate for corporate stock, evidence considered, and *held* sufficient to show that the exchange was not brought about by plaintiff's having acted on any false representations of defendants.

3. SAME — FRAUD — AGENCY — DEALINGS BETWEEN PRINCIPAL AND AGENT.

Where defendants were authorized by plaintiff to sell real estate, and placed a sign, with their names thereon, on the property, and received one or two offers, which they submitted to plaintiff, and which were declined, and subsequently plaintiff, having investigated certain corporate stock, transferred the real estate to the agents in exchange for stock in the corporation belonging to them, there was no such relation of principal and agent as could affect the validity of the exchange.

4. HARMLESS ERROR—EVIDENCE—EXCLUSION.

Where, in an action to rescind an exchange of plaintiff's real estate for corporate stock belonging to defendants, plaintiff was not permitted to answer a question as to what effect it would have had upon him if defendants had told him that they were exchanging their own shares instead of those of any other person, any error in the ruling was not prejudicial, plaintiff immediately thereafter stating that defendants' representations that they were not disposing of their stock was one of the inducements which brought about the transaction.

5. EXCHANGE OF PROPERTY—RESCISSION—EVIDENCE.

Where, in an action to rescind an exchange of plaintiff's real estate for corporate stock, it was stipulated that the real estate exceeded the value of the stock by a certain sum, basing the value of the stock on the market value, and that plaintiff had suffered financial damage to such extent, there was no error in limiting plaintiff, in the introduction of evidence as to the value of stock, to the market value as fixed by sales on a neighboring market, and in not allowing plaintiff to prove the value of the property or assets, or to show that the quoted market value was greater than the intrinsic value of the stock.

6. WITNESSES—EXAMINATION—REPETITION OF QUESTIONS.

There was no error in not permitting a witness to answer questions which had been fully answered by him in testimony previously given.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 827, 828.]

7. EXCHANGE OF PROPERTY—RESCISSION—EVIDENCE.

In an action to rescind an exchange of real estate for oil stock, evidence as to the amounts expended in exploration for oil on the lands of the corporation prior to its formation was properly excluded.

8. EVIDENCE—OPINION OF WITNESS.

A question to a witness as to whether in his opinion there was any such stable, fixed, or steady market price for shares of stock in corporations in that neighborhood that the demand would have withstood the putting upon the market of shares to the amount of all those exchanged was incompetent as calling for an opinion.

9. APPEAL — HARMLESS ERROR—EVIDENCE—COMPETENCY.

In an action to rescind an exchange of real estate for the stock of an oil company there was no prejudicial error in sustaining an objection to a question to a witness on direct examination as to whether the market quotations of such oil stocks would be a fair criterion upon which to value large blocks of stock or the total capitalization of oil companies, the witness immediately after testifying that he could not say whether the quotations of the stock of the company in question, by which the assets would figure a certain sum, would represent a fair valuation or not.

10. EXCHANGE OF PROPERTY—FRAUD—RESCISSION—EVIDENCE.

There was no error in sustaining an objection to a question to defendant as to whether he had any arrangement whatever with any of the other stockholders relative to the delivery of shares of stock, or the manipulation or management or sale of shares of stock, or the fixing of prices in the company upon the market.

Department 1. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Suit by M. E. Spinks against Wesley Clark and others. From a judgment in favor of defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

Byron Waters and Waters & Wylie, for appellant. Geo. J. Denis, Graves, O'Melveny & Shankland, and Anderson & Anderson, for respondents.

ANGELLOTTI, J. This is an action to rescind a contract whereby certain real property of the plaintiff was exchanged for certain oil stock of defendants Clark & Bryan in the Westlake Oil Company. The exchange was effected June 6, 1900. The action was commenced September 21, 1901. The cause of action stated in the original complaint was one for the rescission of the contract upon the ground of fraudulent misrepresentations on the part of Clark & Bryan. On the trial the complaint was amended by adding thereto certain allegations designed to show, in addition to the actual fraud theretofore alleged, a case of constructive fraud, said allegations tending to show that Clark & Bryan were from January 6, 1897, to the date of the transaction in question, the agents of plaintiff, under a contract of employment for the sale of said real property, and that by reason of such agency Clark & Bryan became possessed of information as to the estimation in which plaintiff held the property, and he reposed faith and confidence in them to the effect that with reference to any sale or negotiation of said property they would use their efforts to obtain the best obtainable price for him. Anna F. Leach was made a defendant because she had before the commencement of the action become the holder of the record title to the real property. The findings and judgment were in favor of the defendants, and plaintiff appeals from the judgment entered thereon, and from an order denying his motion for a new trial.

It is practically conceded that as to defendant Leach the judgment and order must be affirmed. The findings of the court, supported by testimony free from conflict, are to the effect that she purchased the real property for a valuable consideration, viz., $16,000, which was the full value thereof, without any notice whatever of any claim on the part of plaintiff, and without any notice of any prior dealings between plaintiff and Clark & Bryan with relation to said property.

Plaintiff contends that, although the real property may have found its way into the hands of an innocent purchaser for value, the contract of exchange may nevertheless be rescinded, and Clark & Bryan adjudged, in the event of such rescission, to deliver the money received for such property in lieu of the property itself. It will be assumed for the purposes of this decision that plaintiff's claim in this regard is well founded.

The findings of the court are attacked upon the ground of insufficiency of evidence to sustain them, and this attack presents the main questions for consideration on this appeal.

The alleged fraudulent misrepresentations may, for the purposes of the discussion, be divided into two classes, the first being representations of Clark & Bryan to the effect that they would not exchange any of their stock in said corporation for plaintiff's real property; that they were not disposing of any of their stock, and that the stock which it was proposed to exchange belonged to a stockholder resident in San Francisco; and the second being certain alleged representations as to the value of the stock, its dividend producing capacity, the freedom of the corporation from debt, and that the quoted value of the stock upon the stock board was based upon the intrinsic value of the property of the corporation and the merits of the business, and was not at all fictitious or inflated in any way.

To the extent stated above, the trial court found that the representations of the first class had been made. As to the second class, the court found that none of the alleged representations had been made, except a single one to the effect that the corporation had paid 2 per cent. dividends, and this representation the court found to be true. A careful examination of the record makes it clear that the findings as to the precise representations made are sufficiently supported by evidence. The evidence is also sufficient to support the finding that the representation made as to dividends was true.

This leaves us to consider only the effect upon the transaction of the representations of the first class, viz., those as to the indisposition of Clark & Bryan to part with their own stock, and the further representation, in aid thereof, to the effect that the stock to be transferred belonged to a San Francisco stockholder. The trial court found that no representation of any kind was made by defendants to plaintiff for the purpose of inducing him to make such exchange; that plaintiff did not act upon the faith of any representation made by defendants, and consented to such exchange and made his conveyance without regard to any such representation. It is clear that if this finding is sustained by sufficient testimony it is a complete answer to plaintiff's claim, so far as alleged actual fraud is concerned.

The well-settled rule in this regard, as stated by Mr. Pomeroy, is as follows, viz.: "Another element of a fraudulent misrepresentation, without which there can be no remedy, legal or equitable, is that it must be relied upon by the party to whom it is made, and must be an immediate cause of his conduct which alters his legal relations. Unless an untrue statement is believed and acted upon, it can occasion no legal injury. It is essential, therefore, that the party addressed should trust the representation, and be so thoroughly induced by it, that, judging from the ordinary experience of mankind, in the absence of it he would not, in all reasonable probability, have entered into the contract or other transaction." Pomeroy's Eq. Jur. § 890. See, also, Civ. Code, § 1568. The evidence was clearly sufficient to support the conclusion of the court that the representations under discussion did not operate to induce action on the part of plaintiff. A brief statement as to some of the evidence will make this plain.

Plaintiff purchased the real property in January, 1897, through Clark & Bryan, who were partners in the real estate business, and who, in that transaction, were acting for the vendor, a Mrs. Haley. He paid $12,000 therefor. The improvements on the property were only of nominal value, and the rents therefrom were very small in proportion to the investment, and this condition continued during the whole period of plaintiff's ownership. He apparently purchased purely for purposes of speculation, and, according to his testimony, at once told Clark & Bryan to put the property on the market for $15,000. No proposition of purchase or exchange that was satisfactory to him was ever made until the idea of exchanging the same for oil stock occurred to him. In the meantime oil in considerable quantities had been discovered in Los Angeles, and in January, 1900, the Westlake Oil Company was incorporated, both Clark & Bryan being among the original incorporators. Clark was the secretary. This company acquired the property in the supposed oil-bearing territory, and was successful in producing oil in paying quantities. Prior to June 1, 1901, three dividends of 2 per cent. each on the capital stock were paid. The stock was bought and sold on the market, and the property was apparently a valuable one, both in the eyes of the public and those interested in the corporation.

Plaintiff was very much disappointed in his real estate investment because of the failure of the property to appreciate in value, and desired some income producing property. He had also clearly become infected with the "oil fever." He personally commenced investigating as to the merits of Westlake oil stock. He visited the wells of the company many times, and talked to the superintendent in charge, and testified that, from his examination on the field, it looked like a good proposition. He knew that dividends were being paid. In his investigations, he did not seek any information from either Clark or Bryan, beyond asking casually on chance meetings how Westlake was getting on, and receiving the natural reply that it was getting on finely. Finally, and within a few days of the transaction in question, he had become so firmly impressed as to the merits of Westlake that he agreed to accept the offer of another stockholder, one Hughes, of 16,000 shares of the stock, for his real property. He had gone so far as to have his abstract of title continued for Hughes, and there was ample testimony to support the conclusion that he was fully convinced, solely by reason of his own investigation and observation, that the stock was a good investment. According to his statement, the Hughes transaction fell through only because his wife objected to signing the deed, being doubtful as to the advisability of the exchange. There was testimony that he at this time said to a friend: "I have been looking over this oil matter pretty thoroughly. I have spent a good deal of time at it, and I have come to the conclusion that Westlake Oil Stock is one of the best oil stocks in the market today. * * * I have been over the grounds. * * * I find a great deal of oil out there. I find that there is a great deal of land that is undeveloped in their territory, and that if the wells that they put down will prove as good as the wells they have down there is no failure in the company. I can't see where it could fail."

Under these circumstances, he went to the office of Clark & Bryan, and there saw Bryan. According to Bryan's testimony, plaintiff asked him, "What about Westlake?" and Bryan replied: "Westlake is a pretty good thing. There is only one point to be taken into consideration—if the wells continue to pump as they are now. As to that you are just as good a judge as I am." Plaintiff then asked him about trading stock for his land, and said he wanted 18,000 shares for it. Bryan testified: "I told him it was paying good dividends, and real estate was quiet, and that I didn't know whether we wanted to trade or not. Also that the stock was in Clark's exclusive control, and he would have to submit the proposition to him." According to defendants' testimony, beyond subsequently calling Spinks up on the telephone and telling him they would send Lee McConnell, a broker, to see him in the matter, this was the only personal interview of either of the defendants with plaintiff relative to the exchange of his property for stock, prior to the actual closing of the transaction on June 6th. According to defendants' evidence as to the interviews of June 6th, plaintiff came, after accepting the proposition, simply for the purpose of closing the matter up, giving his deed and accepting the stock, and no representation of any kind was made thereat, except such as may be implied from the requirement that the deed should be made to the San Francisco stockholder as grantee.

The actual negotiations for the exchange were had between plaintiff and Lee McConnell, the broker sent by Clark & Bryan to plaintiff, in pursuance of the interview between Bryan and plaintiff. The testimony of McConnell upon the subject of these negotiations is to the effect that McConnell approached plaintiff not as a confidential agent at all, but as a mere middleman. He asked him if he cared to entertain a trade of his lot for Westlake. Plaintiff replied that he would; that he had already partly agreed to make such a deed with Hughes, and his wife objected to signing the deed. McConnell told him he could offer him 16,000 shares, and plaintiff proposed to make the exchange for 18,000 shares. McConnell subsequently met him, and told him his proposition was accepted, and that the matter should be closed up at the office of Clark & Bryan, as it subsequently was. In his first interview with plaintiff it is true that he told him that he thought that the stock offered him belonged to a San Francisco stockholder, as he had been informed. He also was quite positive upon the proposition that he informed plaintiff that Clark & Bryan were both buying and selling stock.

Taking all this evidence and other evidence as to the circumstances and conduct of the parties in support thereof as true, as we must in view of the findings of the trial court, it is apparent that previous to any representation of any kind on the part of Clark or Bryan plaintiff had, as the result of his own investigations, determined to exchange his real property for stock in this company, regardless of the source from which it came; that he himself initiated the negotiations with Clark & Bryan before the Hughes proposition had been finally rejected, for the purpose of determining whether he could not obtain a better proposition from them than Hughes had made; that he then offered his land to them for 18,000 shares of their Westlake stock; that they had the right to assume, and did assume, from his conduct and declarations, that it was entirely immaterial to him whose stock was given him for his lot, theirs or another's, and adopted a somewhat elaborate method of representing that they were not disposing of their own stock in this deal, not with any design of influencing his conduct in the matter, but simply for the purpose stated in their letter of June 2, 1900, to the San Francisco stockholder, viz., to prevent the impression getting out that they were selling or trading their stock, and that such representation had not the slightest effect in the way of inducing plaintiff to consent to the carrying through of the precise deal he had himself proposed.

The finding of the court upon the issue raised by the amendment designed to show a case of constructive fraud is also attacked. From what has already been said as to the evidence, it is manifest that there was ample support therein for the conclusion that Clark & Bryan were not acting as the agents of or for plaintiff in this particular transaction; that neither plaintiff nor any one else thought that they were; that plaintiff was acting for himself upon his own judgment based upon his own investigations as to the relative merit of his real property and Westlake stock, and reposed no faith or confidence whatever in Clark & Bryan in the matter; and that he regarded McConnell not as his agent bound to obtain for him the best bargain he could, but at most as a mere middleman, coming from owners of stock with a proposition for exchange. The court was fully justified in finding, further, that Clark & Bryan had not, by reason of any transaction with plaintiff, become possessed of any information whatever as to the estimation in which he then held the real property, or his desire to dispose of the same, except as far as such information was given by his direct offer to them to exchange the same for 18,000 shares of their stock. Under these circumstances, the contention of plaintiff as to the effect of the prior alleged general agency of Clark & Bryan to sell or exchange this property would appear to be without force.

It cannot be reasonably claimed under the evidence that Clark & Bryan were ever agents of plaintiff to any greater extent than being orally authorized in January, 1897, to put his property on the market for $15,000, and in pursuance of such authorization placing and maintaining a "For Sale" sign, with their names thereon, on the property, and regarding the property as property concerning which they were authorized to receive and communicate to the owner offers of purchase, expecting to receive from him a compensation in the event of a sale, and concerning which they had submitted one or two offers which had been declined. It may be conceded, purely for the purposes of this decision, that as to any proposition submitted to plaintiff by Clark & Bryan, assuming to act under this authority, or under such circumstances as to warrant plaintiff in assuming that they were acting in his behalf, Clark & Bryan would be held to be the agents of plaintiff, and within the operation of the universally recognized equitable rule that forbids the uniting by the agent of his personal and his representative character in the same transaction.

But this concession, which is the utmost that plaintiff can reasonably claim, cannot avail him here. Clark & Bryan were not assuming to act for him in this matter, they had acquired no information as to the desire or opinion of plaintiff as to this matter by reason of their so-called agency, there was nothing in their prior dealings which created any relation of trust and confidence as to this property, and the trial court found upon sufficient evidence "that plaintiff did not in * * * any of the transactions set forth in the complaint relative to the disposition of said property * * * rely upon or believe that the said Clark & Bryan, or either of them, * * * were acting for him at all." In other words, whatever may be said as to any general agency on the part of Bryan & Clark in regard to this property, it was a thing entirely separate and apart from this transaction, which can in no way affect its validity.

The case of Burke v. Bours, 92 Cal. 108, 28 Pac. 57, relied upon by plaintiff as being "the closest akin" of California cases to this case, was a case where the property of the principal was secretly purchased by the agent or subagent in the very transaction, as well as being a case where such agent was invested with some discretion as to the price by a nonresident principal. There can be no doubt as to the correctness of the decision in that case, or as to the soundness of the views expressed in the opinion, but we cannot see the application thereof to the case at bar.

Various other reasons are advanced by counsel for defendants in support of the findings and decision of the trial court, but, in view of our conclusions upon the propositions already discussed, it is unnecessary to consider them. From what has been said, it is apparent that it must be held here that the conclusion of the trial court that there was no actionable fraud, actual or constructive, on the part of defendants, cannot be disturbed.

Certain rulings of the trial court excluding offered evidence are complained of. The plaintiff was asked what effect it would have had upon him if Mr. Clark had told him at the time of the transaction that it was Clark & Bryan who were exchanging the 18,000 shares of Westlake stock for his lot, and an objection to the question on the ground that it was incompetent, irrelevant, and immaterial, and called for a conclusion of the witness, was sustained. If it be assumed that this ruling was erroneous, we have no doubt that the error must be held to have been without prejudice. The plaintiff was immediately after this ruling asked, "State what induced you to exchange your property for this stock?" and answered, "Relying upon Mr. Bryan and Mr. Clark—both told me in reference to the production of the Westlake Oil Company and the dividends that they were then paying; and furthermore upon the statement that they made to me that they were not selling or disposing of their stock, but, on the contrary, were acquiring more stock. I reasoned—naturally reasoned—that they were in a position to know the facts in the case and were acting upon them; consequently it would be thoroughly safe for me to do likewise." By this answer, plaintiff in terms, declared that the representation that Clark & Bryan were not disposing of their stock was one of the inducements which operated to bring about his consent to the transaction. This was substantially what was called for by the question to which the objection was sustained, and all that was essential, if believed by the court, to make out plaintiff's case so far as the matter of acting under the influence of the representation was concerned. If the trial court did not, in the light of the other evidence in the case, believe the statement made by the witness as to the causes operating upon his mind to produce his consent to the transaction—and the findings of the court make it plain that it did not—it is manifest that a further statement of the plaintiff to the effect that he would not have completed this contract in the absence of such a representation could not have changed the views of the court or affected the result.

Plaintiff further complains that by the rulings of the court he was limited in the introduction of evidence as to the value of the shares of stock of the Westlake Oil Company to the market value as fixed by quotation of sales of such stock in the Los Angeles market, and was not allowed to prove the value of the property or assets of the corporation, or to introduce evidence to show that the quoted market value was greater than the intrinsic value of the stock. It clearly appeared that there was a market value for the stock of this corporation, and it was stipulated by the parties that on June 6, 1900, the market value of the realty was at least $500 in excess of the market value of the 18,000 shares of stock, which excess of value, it was further stipulated, was an amount which would justify a finding that plaintiff suffered material injury by reason of such exchange, in case the court should find for plaintiff on the ground of fraud. This stipulation, regardless of other objections to the proposed evidence, renders the rulings of the court entirely immaterial on this appeal, so far as such evidence may have been pertinent upon the question as to damage sufficient to sustain an action for rescission on the ground of fraud. The court found that the alleged representations to the effect that the quoted value of the stock upon the stock board was based upon the intrinsic value of the property of the corporation, and that the 18,000 shares of stock were legitimately and actually worth $18,000, were never made. These findings made it unnecessary, of course, to determine whether such alleged representations would have been true or false, and so far as that question is concerned the exclusion of such evidence could not have prejudiced plaintiff.

It is urged, however, that the proposed evidence was in some way, not clearly specified, relevant to the issue of fraud. Assuming that evidence as to the actual value of the assets of the corporation, as distinguished from the selling price of the stock in the market, was admissible, as bearing upon the motive and intent of Clark & Bryan in this transaction, we find no prejudicial error in any of the five rulings pointed out by plaintiff's counsel. The question asked the witness Jones as to whether the accounts of the Westlake Oil Company which had been offered in evidence showed the amount of investment of money in the works of the company had been fully answered by him in testimony previously given.

The question as to what the books of the original lessees, who sublet to the corporation, showed as to the amounts that had been expended by them upon the property in their explorations for oil, was one the determination of which could not have affected the decision. The question before the court in this connection, looking at the matter according to the theory most favorable to plaintiff, was, at the most, as to the value of the assets of the corporation at and about the time of the transaction here involved, and evidence as to the amounts expended in exploration for oil upon the lands of the corporation prior to the formation of the corporation was so remote as to throw practically no light upon that question. It should be said in this connection that, as we understand the record before us, plaintiff was allowed to introduce in evidence all the books of the corporation.

The question asked the witness McCartney on direct examination as to whether in his opinion there was any such stable, fixed, or steady market price for shares of stock in oil companies in Los Angeles that the demand would have withstood the putting upon that market on June 6, 1900, of shares of the Westlake Oil Company to the amount of 18,000 shares, was clearly subject to the objection of incompetency. It called for the opinion of the witness upon matters that were not the subject of opinion testimony.

There was certainly no prejudicial error in sustaining the objection to the question asked the witness Woolacott, on direct examination, as to whether the market quotations of Los Angeles oil stocks "would be a fair criterion upon which to value large blocks of stock, or the total capitalization of oil companies." So far as the question was applicable to the particular stock in question the witness immediately after testified, "I could not say whether the quotations of the Westlake Oil Company's stock by which the aggregated assets of the company would figure $400,000 would represent a fair valuation of its assets or not."

We cannot say that the court erred in sustaining the objection to the question asked Clark on his direct examination by plaintiff as to whether he had "any arrangement whatever with any of the other stockholders relative to the delivery of shares of stock, or the manipulation or management or sale of shares of stock, or the fixing of prices of shares of stock in that company, upon the market, prices upon the market of stock in that company." The question was very general and indefinite, and the precise object thereof not clearly apparent. The mere fact that Clark may have had some arrangement with some one or more stockholders relative to the method by which their stock should be placed on the market, or the prices at which the same should be sold, would not necessarily show a condition of affairs material to any issue in the case. Much would depend on the character of the arrangement and the acts of the parties thereunder. If plaintiff had in mind any particular kind of arrangement or action of Clark in this regard, which would have thrown light upon the questions involved, he should have asked specifically regarding the same, or at least should have stated to the trial court what he expected to show. The question not being such as to itself indicate the materiality or relevancy of the evidence sought to be elicited thereby, and plaintiff having failed to acquaint the court below with the precise object thereof, the court was justified in sustaining an objection thereto.

The judgment and order are affirmed.

We concur: SHAW, J.; VAN DYKE, J.

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147 Cal. 490

PARKE & LACY CO. v. INTER NOS OIL & DEVELOPMENT CO. et al. (L. A. 1,386.)

(Supreme Court of California. Aug. 7, 1905.)

1. Appeal—Objections—Complaint—Sufficiency.

Code Civ. Proc. § 1183, gives a lien for materials used in the construction of any well, and a complaint alleged that a lien was claimed for materials furnished a certain "oil development" company to be used in the construction and drilling of a well. *Held* that, in the absence of any objection to the complaint in the trial court, the allegations brought the case within the statute; a contention that the complaint showed that the only materials furnished were machinery for the drilling and construction of an oil well, and that the only provisions of the lien law applicable were those relating to liens on mining claims under which law no lien is given for materials, being untenable.

2. Mechanics' Liens — Enforcement — Complaint — Allegations — Time of Filing Lien.

An allegation of a complaint in an action to foreclose a mechanic's lien to the effect that the liens were filed for record within 30 days after the completion of the work was sufficient.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, § 509.]

3. Pleading—Verification.

Though Code Civ. Proc. § 1187, requires the claim of lien in an action to foreclose a mechanic's lien to be verified, it is not necessary that the complaint be verified.

4. Mechanics' Liens—Claim—Verification by Agent.

Under Code Civ. Proc. § 1187, providing that the claim of a mechanic's lien may be verified by any person who is possessed of sufficient knowledge on the subject to make the verification, one who declares in the verification that he is the "agent and manager" of the claimant may properly make the verification, section 446 relating to the verification of pleadings by the parties not being applicable to mechanic's lien cases.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, § 264.]

5. Same—Verification—Sufficiency.

The fact that the verification of a claim of mechanic's lien stated that the verification was made by the agent of the "plaintiff" did not render it insufficient, it manifestly meaning that the affiant was the agent of the claimant.

6. Same — Complaint—Allegations—Lienable Interests.

Code Civ. Proc. § 1185, declares that if the person who caused any well to be constructed owned less than a fee-simple estate in the land then only his interest therein is subject to a mechanic's lien. *Held*, that where a complaint in a suit to foreclose a mechanic's lien for the furnishing of materials to be used in the construction of a well alleged that one of defendants was the owner of the well and its appurtenances, and the owner of an interest in the land, the complaint showed a lienable interest, though the action was dismissed as to the landowner.

7. Appeal—Objections—Complaint—Sufficiency.

Where a complaint in an action to foreclose a mechanic's lien for materials furnished to be used in the construction of a well alleged that one of defendants was the owner and holder of an interest in the land, and owner of the well and of the appliances pertaining thereto, an objection that the complaint did not sufficiently indicate the nature and extent of the interest was without merit, when made for the first time on appeal.

Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the Parke & Lacy Company against the Inter Nos Oil & Development Company and another to foreclose a mechanic's lien. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Hugo D. Newhouse (Fred E. Barton, of counsel), for appellants. Reardan & Whitaker, for respondent.

ANGELLOTTI, J. This is an appeal by defendants Inter Nos Oil & Development Company and James A. Wilson from a judgment against them based on their default, they having failed to appear in the action after having been regularly served with process. The action was one to foreclose certain mechanics' liens of plaintiff and its assignors upon a "well" and certain lands alleged to be necessary for "the convenient use, occupation, and operation thereof." It was alleged both in the complaint and in the notices of lien that the "Occidental Oil Company," a corporation, a defendant herein, was "the owner and reputed owner of the land and premises," and that the defendant Inter Nos Oil & Development Company was "the owner and holder of an interest in said land, and the owner of the well herein mentioned thereon, and of all the machinery, casing, tools, implements, and appliances and structures connected therewith or appertaining thereto." It was alleged that defendant Wilson claimed some right or title therein, but that the same was subject and subordinate to plaintiff's claim of lien. The alleged liens were for "materials furnished" the Inter Nos Oil & Development Company, to be used "in the construction and drilling" of said well, and which were actually used in the "drilling, construction, and operation" of said well. The action was dismissed as to the defendant Occidental Oil Company, and judgment was thereupon entered, by default, against appellants, in accordance with the prayer of the complaint, adjudging the amounts found due to be a lien upon such well and its appurtenances, and upon the interest and estate of the defendant Inter Nos Oil & Development Company in the land upon which the same was situated, the same being 40 acres of land in section 9, T. 32 S., R. 23 E., M. D. B. & M.

1. It is contended that the complaint shows that the only materials furnished were machinery for the drilling and construction of an oil well, and that the only provisions of the lien law applicable to the case are therefore those relating to liens on mining claims, and that under those provisions no lien is given for materials.

The assumption that the complaint shows that the well in question was an oil well, or a well constructed in exploring for oil, is not warranted. From the corporate name of the appellant corporation it may be surmised that such was the case, but there is no allegation compelling such a conclusion. The allegations in regard to it refer to it simply as a "well," and it is entirely consistent with everything stated in the complaint that it was constructed simply for the purpose of obtaining water, and is only a well for water.

It is, in terms, provided in section 1183, Code Civ. Proc., that any person "performing labor or furnishing materials to be used in the construction of any * * * well, shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done or materials furnished." The allegations of the complaint bring the case within this provision, and we are not called upon to decide whether this provision or the one referring to mining claims would be applicable to an oil well, it not appearing that this was an oil well. There is, however, much force in the argument that any and all wells, for whatever purpose constructed, fall within the provision already quoted, and that when the word "well" was inserted therein by amendment in 1899 (St. 1899, p. 33, c. 35), and in section 1185, Code Civ. Proc., at the same time (St. 1899, p. 24, c. 23), it was contemplated thereby to include oil wells. The complaint does not show that the materials furnished consisted of "machinery for the drilling and construction" of the well. The allegations are consistent with the theory that the "materials" alleged to be furnished were furnished to become and did become parts of the completed well. It may be that the complaint is uncertain in regard to both of the matters here discussed, but it must be remembered that we are dealing with a complaint to which no objection was urged in the lower court. In such a case mere defects in the manner of stating facts relied on cannot be considered, and "in aid of the judgment the complaint must now receive as favorable an interpretation as its general scope will warrant." Fudickar v. East Riverside Irrigation Dist., 109 Cal. 29, 34, 41 Pac. 1024, 1025.

2. It is suggested that the complaint does not state a cause of action in that it does not show that the liens were filed for record within the statutory time. The allegation as to this, which is the same as to each of the liens, is "that on, to wit, the 3d day of May, 1902, within 30 days after the completion of the said well, * * * plaintiff filed for record" etc. This must here be held sufficient. Wood v. Oakland Transit Co., 107 Cal. 500, 502, 40 Pac. 806, 807. The allegation must also be held to refer to the actual completion.

3. It is urged that the verification of the complaint and those of the recorded claims of lien which are attached as exhibits to the complaint were insufficient. There is no law requiring the complaint in an action of this character to be verified. The statute requires that the claim of lien "must be verified by the oath of himself or of some other person." Code Civ. Proc. § 1187. The claim of plaintiff is verified by one who declares in the verification that he is "the agent and manager in Kern county of the claimant," that of assignor R. H. Herron Co. by one who declares that he is the agent and manager of such claimant, and that of assignor National Supply Company by one who declares that he is the agent and manager of the "plaintiff." The contention appears to be that these declarations do not show that the persons were authorized by law to verify the claims, and that as to the National Supply Company the statement that the party is the agent of the "plaintiff" refers to the plaintiff in this action, and not to the lien claimant whose claim was verified.

These are the only objections made to the verifications, and they are without merit. Under the only statute applicable (section 1187, Code Civ. Proc.) the claim of lien may be verified by any person who is possessed of sufficient knowledge upon the subject to make the verification, and the particular relation that he bears to the claimant is immaterial. Section 446, Code Civ. Proc., relied on by appellants, is applicable solely to pleadings in actions or proceedings, and a claim of lien is not such a pleading. Some of the cases cited by appellants upon this question relate to pleadings, and others were decided in accord with express statutory requirements.

The statement in the verification of the claim of the National Supply Company, that the person verifying is the agent of the "plaintiff," manifestly means that he is the agent of such claimant. There was then no action, and technically no "plaintiff." The further objection that the notary public failed to sufficiently set forth in his subscription of the verification of the claim of lien of plaintiff the name of the county in which he was authorized to act is without foundation in fact.

4. Upon the oral argument the appellants for the first time made the objection that the action having been dismissed as to the Occidental Oil Company, alleged to be the owner and reputed owner of the land upon which the well was constructed, no lienable interest in the appellant Inter Nos Oil & Development Company is shown by the complaint. The allegations of the complaint as to the ownership of such appellant have already been noticed, viz., that it was the owner of the well and its appurtenances, and that it was "the owner and holder of an interest" in the land. As to the well and its appurtenances, the allegations of the complaint are undoubtedly sufficient, and fully support the judgment. Any interest owned by such appellant in the land was also, under the provisions of section 1185, Code Civ. Proc., subject to the liens, and the lien was adjudged only upon such interest as the appellant had.

As against the objection that the complaint does not sufficiently indicate the nature and extent of the interest of such appellant in the land, made for the first time on appeal, the complaint is certainly sufficient to support the judgment. We do not decide the question as to whether it would have been sufficient in the face of a special demurrer.

The judgment is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

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147 Cal. 479

VINSON et al. v. LOS ANGELES PAC. R. CO. (L. A. 1,365.)

(Supreme Court of California. Aug. 7, 1905.)

1. APPEAL—DECISIONS REVIEWABLE—DISCRETIONARY RULINGS—RELIEF FROM DEFAULT.

Whether or not the circumstances of a particular case are such that a mistake or inadvertence of a party should be excused is a question for the court to which application for relief against a default is made, and the Supreme Court will not interfere with the exercise of the discretion of the lower court unless a clear abuse of discretion is apparent, especially where the discretion is exercised in favor of granting such relief.

2. DENIAL OF NEW TRIAL—PREPARATION OF STATEMENT—RELIEF FROM DEFAULT.

Defendant's motion for a new trial was submitted May 23d and denied July 21st. The order of denial appeared in a daily newspaper, which contained court news, and to which defendant's attorneys subscribed, but which the attorney having the matter in charge failed to read on the day the order appeared therein, as he was busily engaged in other matters. Neither of defendant's attorneys had actual notice that the order had been made until August 1st, and on the next day notice of motion for an order relieving defendant from its default in failing to prepare and serve its statement and for extension of time to so do was given, and on August 4th the motion was heard and granted. *Held*, that the inadvertence or neglect of defendant's attorneys was excusable, and it was not an abuse of discretion to grant the motion.

3. SAME.

Where defendant failed to prepare and serve a statement within 10 days after the denial of its motion for new trial, it was competent for the court to relieve defendant from its default if excusable; and the granting of such relief was not premature, although no "order" had been made against defendant in the matter.

4. SAME — ORDERS—FINALITY—RECONSIDERATION.

The court on August 4th entered an order relieving defendant from its default in failing to file its statement within 10 days after the denial of motion for new trial. On December 13th the engrossed statement was presented, and the court refused to settle the same for the ostensible reason that it was not served within the time prescribed by law, but the theory of the court's action was that the former order might be held premature. Thereupon defendant gave notice of a motion for relief on the ground of inadvertence and excusable neglect, and on December 15th the court granted the motion and settled the statement. *Held* that, conceding that the order of December 15th was beyond the power of the court, as it had finally disposed of the matter on the 13th, yet the order of the 13th was objectionable for the same reason in that the matter was settled by the order of August 4th, and the latter order would be regarded as finally relieving defendant from its default.

5. MASTER AND SERVANT—SUPERIORS IN SERVICE—SCOPE OF AUTHORITY.

An order of a railroad that a roadmaster should be in charge of all work in connection with handling gravel, and that trainmen on gravel trains should obey his orders, did not render a motorman on a gravel train subject to the orders of the roadmaster in moving and managing the train, where it was thoroughly understood by both the roadmaster and the motorman that the order gave the former authority over the train only in the matter of construction and repair, as to where it was to be taken, etc., and the motorman was the sole responsible party in operating the train and taking precautions against collisions with other trains.

6. SAME—INJURIES TO SERVANT—NEGLIGENCE OF MASTER—AVAILABILITY TO SERVANT.

Negligence on the part of a railroad in allowing two trains to make a trip without orders from some one knowing where all trains were, and leaving it to the motorman of one train to determine how the two trains should pass each other, the road having but a single track, was not available to support a recovery for injuries to the motorman, whose special duty it was to know the position of the other train, and to avoid collision with it.

7. SAME—CONTRIBUTORY NEGLIGENCE.

A motorman of a work train, whose duty it was to look out for another train, was guilty of contributory negligence in case of a collision with the other train, if he failed to look at the bulletin board on which the movements of the other train were posted, or, having looked, failed to remember the location of such train.

8. SAME.

The motorman of a work train, who knew, or should have known, of the proximity of another train approaching his train in an opposite direction, and who nevertheless ran his train into and through a fog so dense that he could not see more than 200 feet, without taking the precaution of ringing his gong or complying with the instructions of the railroad to send a flagman ahead of his train, in consequence of which the trains collided, was guilty of contributory negligence in law.

9. NONSUIT—WHEN GRANTED.

In an action for the death of a servant, where the evidence shows that the servant was guilty of contributory negligence in law, a nonsuit should be granted.

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Jennie Vinson and others against the Los Angeles Pacific Railroad Company.

From a judgment for plaintiffs, defendant appeals. Reversed.

See 74 Pac. 757.

John D. Pope and Bicknell, Gibson & Trask, for appellant. Waters & Wylie and William Wylie, for respondents.

ANGELLOTTI, J. This is an action brought by the widow and minor children of Elmer Vinson, deceased, for damages alleged to have been suffered by reason of his death, which was alleged to have been caused by the negligence of defendant. The action was tried by a jury, which gave a verdict in favor of plaintiffs for $5,000, and from the judgment entered thereon defendant has appealed.

A motion for a new trial was made upon the minutes of the court, and denied. No appeal was taken from such order. It is contended that the statement settled after the denial of the motion for a new trial should not be considered on this appeal for the reason that the defendant did not serve its proposed statement upon plaintiffs' attorneys within 10 days after the entry of the order denying the motion for a new trial. Upon the showing made by defendant's attorneys to the judge of the trial court defendant was finally relieved from the effect of its default, and the statement settled. It is claimed by plaintiffs that the showing made was not sufficient to authorize the trial judge to relieve defendant from such default, and their objections, the evidence in relation to the matter, and the proceedings of the judge thereon have been properly preserved and set out in the statement, so that the rulings of the court thereon are before us for review.

The motion for a new trial was submitted to the trial court on May 23, 1902, and taken under advisement. The order denying the same was made and entered on July 21, 1902. One of defendant's attorneys was absent from Los Angeles from July 20th to July 30th, and neither of defendant's attorneys had actual notice that such order had been made until August 1, 1902—11 days after the making thereof. On the next day, August 2, 1902, counsel for defendant gave notice of a motion to be made on August 4, 1902, for an order relieving defendant from its default in failing to prepare and serve its statement, and for an extension of time to so do. The ground of the motion was inadvertence and excusable neglect on the part of said attorneys, the affidavit of the attorney who had the matter specially in charge being to the effect that he was very much occupied with other matters at and about the time the order was made, and that he had inadvertently failed to notice that the order had been made. Concededly, no service of notice of the making of the order was required by the law, and it was the duty of the attorneys of the moving party to ascertain as to the entry of any such order. See Galbraith v. Lowe, 142 Cal. 295, 75 Pac. 831.

It appeared that there was a daily newspaper in Los Angeles known as the Los Angeles Daily Journal, which reported each day the proceedings of the superior court of Los Angeles county for the preceding day, and that many of the attorneys of Los Angeles, including defendant's attorneys, were subscribers of this paper, and used the same for the purpose of ascertaining as to such proceedings. In this paper, on July 22, 1902, was published in the appropriate place a statement as follows, viz.: "3775, Vinson vs. L. A. & Pacific Ry. Co. Motion for new trial denied." The attorney of defendant who had this matter in charge testified that, although he ordinarily took note of matters published in such paper relating to cases in which he was interested, he was so very much occupied with professional engagements that by inadvertence he had failed to read the publication of July 22, 1902. We cannot say that the court abused the discretion confided to it in granting defendant relief from its default in this matter. Whether or not the circumstances of a particular case are such that the mistake or inadvertence should be excused is a question the determination of which must, of necessity, be left largely to the court to which application is made; and it is well settled that this court will not interfere with the exercise of the discretion of that tribunal, except in a case where a clear abuse of discretion is apparent. Particularly is this so where the discretion is exercised in favor of the granting of the relief sought, as such action tends to bring about a conclusion on the merits, which is always to be desired. O'Brien v. Leach, 139 Cal. 220, 72 Pac. 1004, 96 Am. St. Rep. 105. It has been said by this court that where the circumstances are such as to lead the court to hesitate in such a matter it is better, as a general rule, that the doubt should be resolved in favor of the application. Watson v. S. F. & Humboldt Bay R. Co., 41 Cal. 17. The inadvertence or neglect here was one that well might occur to a reasonably careful man, there is no pretense of bad faith, and that application for relief was made so promptly after the expiration of the 10 days that no appreciable injury could have been caused to plaintiffs by the delay.

On August 4, 1902, after hearing the parties, the trial court granted defendant's application for relief, and also made an order granting defendant 20 days' further time within which to prepare and serve its statement. Subsequently, at the time fixed for settling the statement, plaintiffs objected to the settlement thereof upon various grounds, including the objection that the statement had not been served within the time allowed by law. The court overruled the objection, heard the proposed amendments, and gave directions for the engrossment of the statement. On December 13, 1902, the engrossed statement was presented, and the court refused "to settle said statement for the reason that said statement was not prepared and served within the time prescribed by law." Thereupon notice was given of a motion for relief from said order on the ground of inadvertence and excusable neglect upon the showing theretofore made. On December 15, 1902, over the objections of plaintiffs, the court granted the motion and settled the statement. The particular objection made to the granting of this relief was that the court had, by refusing to settle the statement on December 13, 1902, finally decided the matter, and was without power, especially in the absence of a further showing, to vacate its order. If there be any force in this contention of plaintiffs, it is equally applicable to the order of December 13, 1902, refusing to settle the statement upon the ground therein stated, for by its order of August 4, 1902, the court had determined the same, showing sufficient to excuse the delay in the service of the statement, and had relieved defendant from its default in regard thereto. The theory of the trial court in refusing to settle the statement on December 13th appears from the record to have been that it might be held that its prior order granting relief was premature, and that no such order could be made in advance of some order made against defendant in the matter, and that this order was made for the very purpose of allowing defendant to make its application for relief. We know of no reason why the order of August 4th should be held to have been prematurely made. The default of defendant had then occurred, and the effect thereof was to render any further proceedings in the matter of the settlement ineffectual, in the absence of an order relieving from such default. It was within the power of the court to relieve defendant therefrom within the time prescribed by statute, and this it did by its order of August 4th. We do not hold that a court would not have the power, under any circumstances, to reconsider its determination not to settle a statement, for it is not necessary to consider that question here; but we simply hold that, if the objection of plaintiffs is well taken, it is equally applicable to the order of December 13th, relied on by them as the basis of their objection, and the order of August 4th relieving defendant from its default must stand as the final order in regard thereto.

Coming to the merits of the appeal, at the conclusion of plaintiffs' case, defendant made a motion for a nonsuit upon the ground, among others, that it affirmatively appeared from the evidence introduced by plaintiffs that, if the death of deceased had been caused by any negligence, it was the negligence of the deceased himself. The answer of defendant, besides containing a denial of any negligence on its part, affirmatively alleged negligence on the part of deceased contributing directly and proximately to his death. The court denied the motion, and defendant excepted to the ruling, and has assigned such ruling as error.

We are unable to avoid the conclusion that the motion should have been granted upon the ground that plaintiffs' evidence showed contributory negligence on the part of deceased. Deceased was killed in a collision on defendant's railroad on the morning of October 11, 1901. The collision was between two trains operated by electric power, known as the "work train" and the "lemon train" and occurred at about 6:53 a. m. at a point about 4,000 feet east of Sherman station, Los Angeles county. To the east of Sherman, and about 16,800 feet therefrom, on defendant's road, is Colegrove. Between these two places defendant's road is a single-track railroad, with several turnouts or switches. About 2,000 feet east of the point of collision was a turnout leading to a gravel pit, and it was to this place that the work train was proceeding on its way from Sherman at the time of the collision. The lemon train was on its way from Colegrove to Santa Monica by way of Sherman. The deceased was motorman on the work train. Both of these trains had their headquarters at Sherman, at which place there was a train dispatcher, who went on duty about 7 a. m. The lemon train was a special train that was sent from time to time, as directed by the trainmaster, from Sherman, east to Colegrove, where there was a lemon exchange, for the purpose of carrying lemons west from Colegrove through Sherman to Santa Monica. Whenever this train was to be operated, an order to that effect was placed on the bulletin board at Sherman, stating the time of departure therefor, and on the morning of the accident the order that had been posted was as follows, viz.: "Lemon train, 6 a. m. Car 72 to Exchange." The conductors and motormen of defendant were required by the rules of the company to consult the bulletin boards daily before taking trains. It had been the practice for months for the lemon train to leave at the time stated in the order, proceed directly to the lemon exchange at Colegrove, which took some 15 or 18 minutes, obtain its load of lemons, and, without any orders as to its movements except the general order to avoid all regularly scheduled passenger cars, to go back to Sherman on its way to Santa Monica, reaching Sherman generally somewhere between 6:45 and 7 a. m. The posted order to the effect that it should leave Colegrove at a certain hour meant that, having arrived at Colegrove, it should return to Sherman in this way. This practice was known to all the employés engaged in and about the operation of the work and lemon trains. Deceased had been employed in that connection for nearly a year, and was an experienced motorman. He must be held to have known from the notice on the bulletin board on October 11, 1901, that the lemon train had gone out at 6 a. m., that it would return in the usual way, and also that it had not returned at the time he started with the work train. The work train was one used for carrying men to their work in and about the roadbed and for carrying gravel. It necessarily ran to different places, as circumstances required, and as specially directed. It was frequently used in the morning to carry defendant's workmen from Sherman to the gravel pit, and on the morning of the collision was being so used. It was the practice to start this train in time to get the men to the place where they were to work by 7 o'clock a. m., without any special order as to the precise time of leaving Sherman, and it was the duty of the employé in charge thereof to keep out of the way of all regular and bulletined trains. This the evidence shows was thoroughly understood by deceased.

On the morning of the accident, the work train was late in leaving Sherman, and did not leave earlier than 6:44 a. m., the usual time being somewhere about 6:15 a. m. The deceased was undoubtedly in charge of such train, and responsible for its movements. Some reliance is placed by plaintiffs upon the fact that the roadmaster, T. V. Reuter, was with the train, accompanying his men to the place of work; that an order had been made nearly a year before to the effect that he should thereafter "be in charge of all work in connection with handling gravel," and that "trainmen on gravel trains and other employés will obey his orders," and that on this morning he told deceased, just before they started, "We are ready. Pull out." It is claimed that this shows that deceased in moving and managing the train was acting directly under Reuter's orders. It is clear from the evidence, however, that it was thoroughly understood by both deceased and Reuter that this order gave Reuter only such authority over the work train as a roadmaster would naturally have in the matter of construction and repair, such as giving directions as to where it should be taken and what work it should do, and that the sole responsible party so far as its operations and the precautions against collision with other trains were concerned was the deceased. The case of McKune v. Cal. S. R. Co., 66 Cal. 302, 5 Pac. 482, relied on by plaintiffs, was one where a train was ordered to move by a train dispatcher, whose business it was to direct the movement of trains. At the time of leaving it was clear at Sherman, but further up the road was a dense fog. On coming to this fog, deceased proceeded with his train at the rate of about four miles an hour, without taking any precautions against accident. It appeared that deceased had been specially warned and instructed that whenever the fog was so thick that he could not see far enough ahead he must send out a man to flag until he was in a safe place. This he did not do, nor did he ring his gong. He was proceeding upgrade, when the lemon train came in sight, coming downgrade, and from 150 to 200 feet distant. Both motormen reversed their cars and applied their brakes, but it was apparently too late to avoid a collision.

There is nothing in the record which would justify the inference that there was anything in the equipment or condition of either train, or in the operation of the lemon train by those in charge thereof, that would constitute negligence on the part of defendant, or the employés in charge of the lemon train, in any degree contributing to the collision. The only basis for a claim of such negligence on the part of defendant is that it allowed these two trains to make this trip without having a train dispatcher on duty, allowed the lemon train to start on its return trip from Colegrove without orders from some one knowing where all trains were, and left it to the motorman of the work train to select as to how the two trains should pass one another on a single-track road. If it be assumed that this practice was at all negligent on the part of defendant as regards other employés than the deceased, we do not see how it can avail plaintiffs, in face of the fact that it was the special duty of the deceased, the motorman of the work train, in view of the posted orders as to the lemon train, to know of its whereabouts, and to avoid coming into collision with it. If he were negligent in the performance of this duty, and such negligence contributed directly to his injury, it is, of course, immaterial here whether the defendant was negligent in any of the respects above mentioned. Whatever negligence there was apart from this, was the negligence of the deceased. The lemon train was moving according to the bulletined order, and was on time. Those in charge thereof had no reason to expect to meet the work train on the main track, for they not only had no knowledge as to its probable location, but also had the right to assume that those in charge thereof knew as to the movements of the lemon train, and were bound to leave the lemon train a clear track. The deceased, in charge of the work train, knew that he was likely to meet the lemon train at any moment. If he did not know this, it was solely because he had failed to look at the bulletin board before leaving Sherman, or, having looked, had failed to remember; in either of which contingencies he was clearly guilty of negligence, for it was his duty to advise himself, both for his own protection and that of his train, as to the presence upon the track over which he was to go of any bulletined trains, and to move his own train with reference thereto. He alone was the responsible party in this connection, and if he failed to obtain or keep in mind the information placed before him for his guidance, and such failure contributed directly to the accident and his death, there could be no escape from the conclusion that he was guilty of contributory negligence. It must therefore be assumed that he knew that the lemon train was probably approaching him on the same track, on a downgrade, and that he also knew that the motorman thereof was in ignorance as to the fact that the work train was anywhere in the neighborhood. With this knowledge he chose to assume the risk, and carried his train into and through a fog so dense that he could not see at most more than 200 feet, without taking any precaution either by ringing the gong on his car or by complying with the instructions to send a man to flag the approaching train. Had the train been stopped when the dense fog was reached, and a flagman been sent out, there can be no question that the collision would have been averted. The situation was clearly such as to require the deceased to take every possible precaution against a collision with the train that he must be held to have known was approaching him on the same track, the operatives of which train, he further must be held to have known, were ignorant of his own whereabouts, and were relying upon him to keep out of their way. It cannot be doubted that it is negligence for an engineer or motorman, charged as he is with the duty of caring for the safety of his train, to operate it with entire disregard of a known danger, or of a danger of which he must have known if he had used the care required of him in the discharge of the duty confided to him. When, in the face of such a danger, he proceeds without observing practicable instructions given him by his employer, designed to guard against the same, the observance of which would clearly have the effect to avoid the danger, there can be no difference of opinion in the minds of reasonable men as to the character of his conduct. It is negligence per se, and, if such negligence directly contributes to his own death, as it unfortunately did in this case, it must be held to be a complete defense to any action for damages brought by his heirs or legal representatives against the employer on account of his death. In this case the undisputed facts shown by plaintiffs' witnesses were such as to make the question of the negligence of the deceased one of law for the court. But one inference could be drawn therefrom by reasonable men, viz., that the deceased was himself guilty of negligence contributing directly to the collision and his consequent death. Under these circumstances the motion for a nonsuit should have been granted.

If the evidence subsequently introduced by defendant be considered, it shows that plaintiffs' case was made no stronger thereby. That evidence but emphasized the facts shown by plaintiffs' case, namely, that deceased was in sole charge of the work train, and responsible for its safety, and that he had full knowledge of the practice as to the lemon train, and also showed that he had many times within a few weeks of the accident acted as motorman on the lemon train. In view of our conclusion as to the question discussed, it is unnecessary to consider the contention of defendant to the effect that the court erred in the matter of instructions to the jury.

The judgment is reversed, and the cause remanded for further proceedings.

We concur: SHAW, J.; VAN DYKE, J.

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147 Cal. 495

In re MOREY'S ESTATE.

MOREY et al. v. WELLS et al. (L. A. 1,721.)

(Supreme Court of California. Aug. 7, 1905.)

1. TRIAL—NONSUIT—PROPRIETY.

Under Code Civ. Proc. § 581, authorizing the dismissal of an action or rendition of judgment of nonsuit when plaintiff fails to prove a sufficient case for the jury, the refusal of the court to submit the evidence to the jury, if equivalent to a nonsuit, is justified where plaintiffs' evidence will not warrant a verdict in their favor on the issues presented, and it would be the court's duty to set aside any verdict rendered for them.

2. APPEAL—HARMLESS ERROR—FINDINGS.

Irregularity in the action of the court in making special findings after granting a nonsuit is harmless where the nonsuit was properly granted.

3. SAME—NONSUIT.

Under Code Civ. Proc. § 475, declaring that no judgment shall be reversed for error unless a different result would have been probable if the error had not occurred, irregularity in withdrawing a case from the jury, and thus practically nonsuiting plaintiffs, is not fatal to the judgment on appeal, where, under the evidence, a verdict for plaintiffs could not have been sustained, and there was no indication that any additional evidence could be produced in their favor.

4. WILLS — UNDUE INFLUENCE — PRESUMPTIONS.

Under Civ. Code, § 2235, providing that transactions between a trustee and his beneficiary to the advantage of the former are presumed to be entered into by the latter under undue influence, evidence that the residuary legatee in a will, who drew the same, had been for a long time the attorney for testator, and that testator, when he made the will, was old, feeble, and suffering intensely from disease, if taken alone, raises a technical implication or presumption of undue influence against the residuary legatee, or at least requires the proponents of the will to show the actual circumstances occurring at the time of its execution and prior thereto, determinative of the presence or absence of undue influence.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 390, 394.]

5. SAME—REBUTTAL OF PRESUMPTION.

The presumption of undue influence in the execution of a will by an old and feeble man in favor of his attorney who drew the same, is overcome by positive evidence of the persons present at the time of the execution, to the effect that such influence was not exerted, and by the express affirmance of the will by testator shortly before his death and three months after the execution of the will when free from any possibility of influence, and by other circumstances surrounding and leading up to the execution of the will showing the absence of such influence.

Department 1. Appeal from Superior Court, San Bernardino County; H. N. Conklin, Judge.

Application by William Morey and others to revoke the probate of the last will and testament of David Morey, deceased; K. C. Wells and Charles E. Truesdell, executors. From an order denying a new trial, petitioners appeal. Affirmed.

Ely & Campbell and Henry W. Nisbet, for appellants. Otis, Gregg & Surr, for respondents.

VAN DYKE, J. This is an appeal from an order denying a new trial. The proceeding is an application by the petitioner to revoke the probate of the last will and testament of David Morey, deceased. It is alleged in the petition that David Morey died in the county of San Diego, state of California, on June 21, 1902, being at the time a resident of the county of San Bernardino, in said state; that such proceedings were had in said superior court of San Bernardino county that a document dated the 31st day of March, 1902, was admitted to probate as the last will and testament of David Morey by said court on the 12th day of July, 1902, and that K. C. Wells and Charles E. Truesdell, who were named in said document as executors, were appointed as such by said court, and immediately entered upon their duties; that petitioners William Morey, Israel Morey, and Abraham Morey are brothers of said decedent; that petitioner Catharine Wollam is a sister of said decedent; that petitioner M. D. Felkner is the only child and heir at law of Esther Felkner, deceased, the sister of said decedent; that petitioners John S. Rose, Lilian F. Jaqua, Anna V. Hoot, and Mary R. Hoover are the only surviving children, and are heirs at law of Elizabeth Rose, deceased, sister of said decedent; and that Louisa Rose is the only surviving child and heir at law of Alvin Rose, deceased, a son of Elizabeth Rose, deceased; and that all said petitioners are heirs at law of said decedent, and are interested in said estate. It is further alleged that said document is not the last will and testament of said decedent, and that said decedent died intestate, and that at the time said document purports to have been executed by said decedent he was not of sound mind; that the document, if executed at all by decedent, was procured to be executed by the undue influence of Charles E. Truesdell; that said Truesdell was an attorney and counselor at law, and was at the time said document purports to have been executed, and for a long time previous thereto had been, the attorney and counselor of said decedent, and had sustained towards said decedent relations of trust and confidence; that said document was drawn by said Truesdell, as attorney of said decedent, in the course of his professional employment, and, if executed, was so executed in the law office of said Truesdell, and under his supervision, and at his instance and request; that said Truesdell is named in said document as one of the executors thereof, and as one of the residuary legatees; that the appointment of said Truesdell as executor, and his constitution as one of the residuary legatees. were procured through the exercise by said Truesdell over said deceased of undue influence arising from the relationship of trust and confidence with said decedent as his attorney and counselor. It is also alleged that said document, if executed by decedent, was procured to be executed by the menace, duress, and undue influence of K. C. Wells, who at the time was the president and chief executive officer of the Union Bank of Redlands, which bank at that time, and for a long time previous thereto, had been the holder and owner of a mortgage on all the property of said decedent, to secure his payment of a large sum of money, and the said Wells was and has been for a long time the agent of said decedent, and managing his business and monetary affairs, and had governed and controlled all his actions in business and monetary matters; that said Wells was present at the time said document was drawn and at the time it purports to have been executed, and suggested and dictated its various provisions, and procured the pretended execution thereof by the exercise of undue influence over decedent; that said Wells is named in said document as one of the executors and one of the residuary legatees of said decedent, and is claiming a portion of the estate thereunder; and that his appointment as executor and constitution as one of the residuary legatees were procured through the exercise by said Wells over decedent of menace, duress, and undue influence, arising from the relationship of trust and confidence with said decedent. It is further alleged that said decedent was deeply attached to his wife, Sarah J. Morey, in her lifetime, and allowed her to manage and control all of the property belonging to him or them, and said Sarah J. Morey was allowed by said decedent to take the title to all real estate belonging to them, or either of them, in her own name; that said Sarah J. Morey was a person of strong will power, and that her control over said decedent in her lifetime was absolute, and extended to control of his property and affairs; that said decedent was in the habit of following her directions in regard to the disposition of his property and affairs, and depended upon her advice and directions in that behalf; that said Sarah J. Morey died on the 7th day of August, 1901, leaving said David Morey surviving her; that by her last will and testament she bequeathed and devised all of her property of every kind and character to said David Morey; that a few days before her death, to wit, on the 4th day of August, 1901, said Sarah J. Morey, being then aware of her approaching death, caused to be prepared written directions to said David Morey and to certain of her friends as to what she wished them to do with said property, and signed her name thereto, or caused it to be signed by some one in her presence; that by said paper, after requesting that various articles of personal property be given to certain of her friends, she directed that the sum of $2,000 be given to one Mrs. Painter, $2,000 to one Morey Cole, and $4,000 to one Ada Hoskins, and that any money not so disposed of or used by said David Morey should be given to some children's hospital for the purpose of endowing one or more beds, to be known as the "Sarah Morey Endowment," and, if there was money sufficient to endow more than one bed, one Mrs. Moore, with the help of K. C. Wells, should decide how it should be endowed, and that said K. C. Wells should decide where it should be endowed; that it was the earnest desire and intention of said David Morey, so far as he was mentally capable of forming any intention, to carry out the wishes of his wife relating to the disposition of said property, as expressed in said paper; that said K. C. Wells obtained possession of said paper, and by the use of undue influence over said decedent, he, with said Truesdell, procured the execution by said decedent of said document purporting to be his last will and testament, wherein, instead of carrying out the wishes and directions of said Sarah J. Morey, he was induced to attempt to bequeath to Ada Hoskins the sum of $1,000 only, and to attempt to bequeath the sum of $3,000 to the First Congregational Church of Redlands, a religious organization not authorized by law to take by will, and to leave only the sum of $1,000 for the purpose of endowing a bed in some hospital to be selected by them, and to make said Wells and Truesdell his residuary legatees, they well knowing that the attempted bequests to said church and hospital were and are void, and that, if said document were allowed to stand as the last will and testament of said decedent, said bequests would revert to them as residuary legatees. It is also alleged that the bequest to Wells and Truesdell was intended to be received by them in trust for charitable uses, and that they are now claiming the said bequest as their own right, with the intention of appropriating the same to their own use. The foregoing are the material allegations of the petition for the revocation of the proof of said will.

By the answer filed on the part of the respondents the material allegations of the contestants were put in issue. This is the second trial of the case. On the first trial a verdict was rendered in favor of the contestants, which was set aside, and a new trial granted. On the case coming on again for trial on April 12, 1904, a jury was demanded on the part of contestants, and was impaneled and sworn to try the cause. After the testimony had been offered by the respective parties, the contestants moved the court to submit certain special issues to the jury. Respondents thereupon objected to the submission of said issues or any issues, on the ground that there was not sufficient evidence to warrant the court, or which would authorize a jury in finding a verdict or any special issues in favor of the contestants. The court, after having heard argument on the motion and objections thereto, sustained the objections, and declined to submit any issues to the jury, on the ground that no evidence authorizing the submission of said issue had been offered or introduced upon the trial. Thereupon the court prepared and signed certain findings of fact ordering and adjudging that the order of the court made and entered the 12th day of July, 1902, admitting to probate the document dated the 31st of March, 1902, as the last will and testament of David Morey, deceased, stand and is affirmed as such. Thereafter contestants moved the court upon a statement of the case for a new trial, which was denied, and from the order denying the motion for a new trial this appeal is taken, as heretofore stated.

In the statement on motion for new trial quite a number of exceptions are noted to the rulings of the court during the progress of the trial, and specifications of the insufficiency of the evidence to justify the findings of the court. The main points, however, presented and urged on the part of contestants and appellants on the appeal are practically reduced to two, to wit, that the decedent at the time of executing the will in question was of unsound mind, and that the will was procured and executed under the undue influence of the executors Truesdell and Wells. In this connection it is further contended that in refusing to submit the special issues to the jury and in discharging the jury without a verdict the court practically granted a nonsuit, which it was not authorized to do in this case, for the reason, as contended, that the evidence produced on behalf of the plaintiffs established a case sufficient to have the issue submitted to a jury. Conceding that the action of the court in refusing to submit the evidence to the jury was the equivalent of a nonsuit, still, if the evidence on behalf of the plaintiffs would not have justified a verdict in their favor on the issues presented, the court was justified in the action taken, for under such circumstances it would have been the duty of the court to set aside the verdict, as was done on the first trial. An action may be dismissed or a judgment of nonsuit entered upon motion of the defendant when upon the trial the plaintiff fails to prove a sufficient case for the jury. Code Civ. Proc. § 581. Upon an examination of the evidence we are satisfied that it fails to prove a sufficient case to justify a verdict or findings in favor of the contestants. It will be seen that in the petition of the contestants it is stated that David Morey desired to follow out his wife's wishes as expressed in the memorandum left by her just prior to her death, which memorandum is attached to the petition as an exhibit; but this memorandum or statement, if it had been followed literally by the decedent in his will, would not have benefited the contestants. It shows that Mrs. Morey never desired that any of the eastern relatives who constitute the contestants should ever receive a particle of the estate. A few days prior to the execution of the so-called memorandum, to wit, August 1st, Mrs. Morey had executed the will in which she bequeathed and devised all her property, real and personal, to her husband as and for his absolute estate, and appointed him the executor of the said will, which said will was filed for probate August 10, 1901. The will of Mr. Morey under contest departs in some respects from the memorandum left by Mrs. Morey, but in her memorandum she says: "I want my husband, Mr. Morey, first in all respects and plans, pleased, satisfied and always comfortably restful." But it would not benefit the contestants if the deceased whose will is being contested had literally and in every respect complied with the memorandum; and the evidence shows that subsequent to the death of his wife circumstances occurred which, to Mr. Morey at least, seemed to justify him in departing somewhat from the memorandum left by her, and the fact that he did so depart from the suggestions contained in her memorandum would seem to indicate that he exercised his own judgment in making the will under contest. The witnesses on behalf of the contestants in reference to the question of unsoundness of mind and undue influence are practically reduced to three in number—Miss Gertrude Hayes and Mr. and Mrs. Moore. The main reason assigned by these witnesses in their testimony that he was of unsound mind is that he was a great sufferer from eczema, and also at one time he had an abscess in one of his ears; but it is not an unusual thing—in fact it is rather the opposite—that one may be a great sufferer from some physical ailment and still be of sound mind, and in possession of his mental faculties, and able to transact business. Miss Gertrude Hayes, although of the opinion that he was of unsound mind, was at the same time negotiating with the deceased, Morey, for a large and valuable piece of property. It is not fair to suppose that one would be transacting business with a person of unsound mind or incapable of transacting the business in question. Mr. Moore thinks that his unsoundness of mind was the result of his ill health. His testimony shows that he had some feeling against the executors Wells and Truesdell. He said, however, he had no feeling against Truesdell, but he was very much hurt that Mr. Wells should be guilty of what he calls a breach of trust—that is, in not carrying out the suggestions of Mrs. Morey—but he says: "I endeavored to induce him to make a will, and I thought that that was the right thing to do to have the property go as it ought to go." Further: "I also knew that Mrs. Moore was mentioned conditionally as one of the persons whom Mrs. Morey wanted to be benefited by the property, and, knowing that fact, I urged Mr. Morey to make this will, which would make Mrs. Moore a beneficiary in accordance with that memorandum." The will was made in such a way that Mrs. Moore was not made a beneficiary under it. The testimony of Mrs. Moore is somewhat similar to that of her husband. It was to the effect that he was not of sound mind, yet she assisted him in disposing of a great portion of the property that had been left in the home by Mrs. Morey in accordance with the requests of Mrs. Morey, and it can hardly be presumed that at that time she supposed she was dealing with a man of unsound mind or one incapable of managing his property. Decedent was, it appears, deeply attached to his wife, and allowed her to take all the property belonging to them in her name and manage and control the same up to the time of her death; but by her last will, as already shown, it was all transferred to him. They had no children. A few days after the death of Mrs. Morey, which occurred August 7, 1901, Mr. Morey accompanied Mr. Wells, one of the respondents, to the summer house of the latter at Terminal Island, near San Pedro, in Los Angeles county, where he was expected to remain a week or two, if he so desired. There, on the 11th day of August, 1901, he caused to be prepared a will, which was executed and attested by Mr. and Mrs. Holmes. Morey put this will in his pocket, and carried it away with him the next day, when he left Terminal Island. This will and the one in contest were the same in form and effect, with the exception that the first will left $4,000 to Miss Ada Hoskins and $1,000 to the Congregational Church of Redlands and nothing to Mrs. Creighton. The second will—the one under consideration—cut down Miss Hoskins' bequest to $1,000 and added $2,000 to the bequest to the Congregational church, and left $1,000 to Mrs. Margaret Creighton; the aggregate amount of his specific bequests remaining the same in both wills, and in each Wells and Truesdell were named as executors and residuary legatees. The parties, however, affected by the changes in the second will are not among the contestants. About the middle of June following the execution of the last will Morey went to San Diego, where, on the 21st of that month, he committed suicide, caused, as he states, by his physical sufferings from eczema. He left a note addressed to Mr. Wells, with an envelope containing the keys, and says in the note: "You will find a letter addressed to you and Truesdell in a drawer of the secretary of my room at Dr. Creighton's.

It will tell you what to do with my effects in the room. Please carry out my wish in my last will. Destroy the first will. I leave many dear friends whom I love and respect. We hope to meet on the other side of the dark river. Goodbye to all." From the time of the execution of the will he had it in his possession, and had the opportunity of destroying it if it had been obtained from him by any undue influence, or if the same did not fully and fairly contain his last wish and will. Yet here we have some three months after the execution of the last will in the foregoing letter what would seem to be a most solemn ratification of the same. His estate was appraised at the sum of a little over $21,000, and the specific bequests aggregate some $10,000. Add to this the claims against the estate aggregating about $5,000, and it would leave only about $5,000 to be divided between the residuary legatees. These legatees, as shown by the evidence, were the old esteemed friends of both Mr. and Mrs. Morey. There is nothing in the evidence tending to show that it was the wish of Morey, the deceased, that any portion of the small estate should go to his eastern relatives, none of whom he had seen for over 40 years, excepting one brother who some years ago visited him in California.

The right to dispose of property in contemplation of death is as old as the right to acquire and possess property, and the laws of all civilized countries recognize and protect this right. It seems, however, to be the impression among many that if the property is not disposed of as the surviving relatives, near or remote, may think it should have been disposed of, the decedent must have been incompetent to transact business, or was acting at the time under undue influence of some kind. But as said in Re Carriger's Estate, 104 Cal. 84, 37 Pac. 786: "To set aside a will * * * is a serious matter, and a verdict having that effect should be closely scrutinized by the trial judge. The upsetting of wills is a growing evil." It is also said in Re McDevitt, 95 Cal. 33, 30 Pac. 106: "But the right to dispose of one's property by will is most solemnly assured by law, and is a most valuable incident to ownership, and does not depend upon its judicious use. The beneficiaries of a will are as much entitled to protection as any other property owners, and courts abdicate their functions when they permit the prejudices of a jury to set aside a will merely upon suspicion, or because it does not conform to their ideas of what was just or proper." And in Re Wilson's Estate, 117 Cal. 270, 49 Pac. 174, it is said: "The history of this species of litigation shows that quite a number of people have come to think that the right to dispose of property by will has but little significance, and may be legally disregarded whenever the testator has not disposed of his property in the manner which suits the views of the jury." If the issues here had been submitted to the jury under the evidence in the case, and a verdict or special finding should have been rendered in favor of the contestants, it would have been the duty of the court to set the same aside. That being so, the court was justified in refusing to submit the case to a jury. As said by this court in the Estate of Tibbett, 137 Cal. 128, 69 Pac. 980: "Where, however, there is really no substantial evidence to support a verdict, or the jury were evidently actuated by motives which they had no right to consider—as is so frequently the case in contests of wills—there this court will hold that, as a matter of law, the verdict is unwarranted, even though there be some slight pretense of evidence to support it."

It may be conceded that in withdrawing the case from the jury the court practically granted a nonsuit, as claimed by the contestants, and that the court was not justified thereafter in making special findings; but this irregularity or error is harmless, and cannot prejudice the appellant. The case is before us in substantially the same aspect as if, at the close of the evidence on both sides, the court had directed the jury to bring in a verdict against the contestants. There is, however, no material difference between the rule governing this court in the consideration of the sufficiency of the evidence where the court below has directed a verdict from that prevailing where a nonsuit is granted on motion made after the evidence for both parties has been given. Ir Lacey v. Porter, 103 Cal. 605, 37 Pac. 637 which is the only California case on the subject, the court says: "To justify the court in directing a verdict it is not necessary that there should be no conflict in the evidence; but where the evidence is such that it is clearly insufficient to support a verdict in favor of the party against whom the direction is given the instruction is proper, unless the circumstances indicate that upon another trial the evidence may be materially different, in which case the facts should be submitted to the jury in order that a new trial may be had. But in either case the decision of the court below will be sustained, unless the appellate court can clearly see that its conclusion is wrong upon the facts." There are many decisions referring, for the most part, to some particular instruction which assumes the existence of some fact in issue, where it is said that it is error to do so if there is conflicting evidence as to the fact assumed. But with regard to the granting of a motion for nonsuit made at the close of the evidence for plaintiff and defendant, the rule seems to be well established that the trial court has discretion, and that it is not error to grant the motion where, upon all the evidence, it is clear that, if a jury should bring in a verdict against the defendant, it would be the duty of the court to set it aside and order a new trial. Geary v. Simmons, 39 Cal. 224; Vanderford v. Foster, 65 Cal. 49, 2 Pac. 736; Fagundes v. C. P. R. Co., 79 Cal. 100, 21 Pac. 437, 3 L. R. A. 824; Fox v. S. P. Co., 95 Cal. 234, 30 Pac. 384; Toulouse v. Pare, 103 Cal. 251, 37 Pac. 146. The above rule, of course, does not mean that in every case where the trial court might properly grant a new trial for insufficiency of evidence for plaintiff it should grant a motion for nonsuit, if made after both parties rest their case, but only that it should do so in very clear cases, which is practically the rule which controls in directing a verdict. Courts are not instituted to enable parties who have neither a wrong to redress nor a right to enforce to persist in a groundless suit resting on the chances which arise from prejudice which sometimes influences juries. Where, after a case is all in, the court can see that no other evidence favorable to one of the parties is likely to be discovered or produced, and that upon all the evidence given a verdict in his favor would be altogether unjustifiable, and, if rendered, must be set aside on motion, and that the continuance of the litigation will probably produce no other result than injury to the party who is in the right, it is its duty to end the case by directing a proper verdict. Granting that the course pursued in this case was irregular, it does not follow that it is fatal to the judgment, even on appeal. The Code expressly declares that no judgment shall be reversed for error unless a different result would have been probable if the error had not occurred. Code Civ. Proc. § 475. In the case at bar it does not appear that a different result would have been probable. There was no indication that any additional evidence at all material could ever be produced in favor of the contestants.

It is claimed that there was a substantial conflict in the evidence regarding the issue of undue influence. There was evidence that Truesdell, one of the residuary legatees who would receive a part of the estate by the provision in his favor, drew the will, and had been for a long time before the attorney for the testator, and that the testator, when he made the will, was old, feeble, and suffering intensely from disease—circumstances which, under the rule given in Underhill on Wills, vol. 1, p. 209, Civ. Code, § 2235, Estate of Wickes, 139 Cal. 202, 72 Pac. 902, and Estate of McDevitt, 95 Cal. 33, 30 Pac. 101, would, if taken alone, raise the technical implication or presumption that the will was procured by the undue influence of Truesdell, or would at least require the proponents to show what did actually occur at the time of its execution and prior thereto, so that the presence or absence of undue influence by him could be determined. This presumption, it is claimed, is evidence, and creates a conflict, upon which it was necessary to allow the jury to decide. But all the other circumstances surrounding and leading up to the execution of the will were fully disclosed by the evidence, without conflict, and they showed that there was no undue influence. In addition to this, there is the positive evidence of the persons present, and of others who could reasonably be supposed to have any knowledge of the case, to the effect that such influence was not exerted; and the expressed affirmance of the will by the testator himself shortly before his death, as already shown, at a time when the persons charged with the exercise of the undue influence did not have an opportunity to exercise it, completely remove the imputation of undue influence, and show that the provisions of the will in favor of the residuary legatees were conceived by the testator himself, without influence or suggestion from others. This is so satisfactorily proven that a verdict for the contestants, if it had been rendered, should have been unhesitatingly set aside by the court.

There is, indeed, no real conflict in the evidence. The facts on which the asserted presumption of undue influence rests are not denied or contradicted, but are practically admitted. The other evidence given to refute the presumption consisted of additional facts, which also were not seriously disputed or contradicted, and they furnished the explanation necessary to destroy the implication of undue influence. There was, therefore, nothing upon which a verdict setting aside the will could justly be supported, and the method of proceeding, though irregular, did not cause any injustice, but ended in the judgment that should have been given. The will had previously, as shown, been admitted to probate, and, unless set aside by successful contest, would stand as the last will of the decedent. The appellants in this case upon their own evidence failed to sustain the contest, and the result to them is the same whether a nonsuit was granted or whether special findings were made by the court adverse to their contention.

We see no errors in the rulings of the court during the progress of the trial which would justify reversing the order of the court denying a new trial. The contestants now have had two trials, and it is fair to presume they have produced all the testimony they are capable of producing in support of their contention, and a new trial therefore would be entirely useless, even if there were sufficient grounds shown for granting the same.

The order appealed from is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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147 Cal. 462

RYER v. RIO LAND & IMPROVEMENT CO.

(S. F. 4,230.)

(Supreme Court of California. Aug. 5, 1905.)

1. Appeal—Settlement of Statement—Objections—Incorporation in Statement.

The rule that an objection that a proposed statement has not been presented to the judge in time must be urged when the statement is presented for settlement, and, if overruled, must be incorporated, with the matter in support thereof, in the statement, in order to be available to defeat a motion for new trial or on appeal, only applies to objections urged at the time the proposed statement comes up for settlement, and has no application to objections or motions made subsequent to the order settling the statement, and which are urged at the time the statement, as ordered settled and engrossed, is presented for certification.

2. SAME — TIME OF SETTLEMENT — ENGROSSMENT.

When matter of settlement of the statement or bill of exceptions is taken up by the judge, and it is determined by him what shall be included therein, the statement or bill is then actually settled, although the judge may direct it to be engrossed, and does not finally certify it as correct and allowed until the engrossment is made, and the only duty devolving on the court, and the only right upon which the parties can insist, at the time of the engrossment, is that the engrossed statement or bill shall embody all that the court, at the time of the actual settlement, ordered to be incorporated therein.

3. SAME—ACCURACY OF ENGROSSMENT—DETERMINATION OF JUDGE—FINALITY.

Whether a bill of exceptions or statement is correctly engrossed as settled is a matter for the determination of the judge of the lower court, and his determination thereof is final.

4. SAME—OBJECTIONS TO ENGROSSMENT.

An objection that the engrossed statement was not served on an attorney before presentation to the judge, while it may justify the court in refusing to certify the statement until examined by such attorney, does not justify an absolute refusal to certify the statement as engrossed.

5. SAME—SPECIAL BILL OF EXCEPTIONS—MOTIONS TO DENY NEW TRIAL.

Where a motion for the denial of a new trial on the ground of laches in prosecuting the motion therefor and of unreasonable delay in presenting the engrossed statement for certification is made after the actual settlement of the statement but before certification, and is denied, the party appealing from the order of denial is not entitled to have his motion, and the matters upon which it is based, incorporated in the statement on motion for a new trial, but must support his appeal by a separate bill of exceptions.

6. NEW TRIAL—MOTION FOR DENIAL—DISPOSITION.

While the usual practice in moving the denial or dismissal of a motion for a new trial on the ground of laches is to make the motion when the application for new trial comes up for disposition, yet such motion need not be postponed until that time, but may be made at any time.

In Bank. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by F. F. Ryer against the Rio Land & Improvement Company. Application by defendant to be allowed to prove certain exceptions, and have them incorporated in a bill of exceptions. Dismissed.

Platt & Bayne, for petitioner. R. H. Countryman, for respondent and substituted plaintiff.

LORIGAN, J. This is an application to this court, made by the defendant, to be allowed to prove certain exceptions, and have them incorporated in a bill of exceptions. The motion is presented here under the following state of facts: The cause was pending in the superior court of Solano county, and judgment awarded to defendant. Plaintiff gave notice of intention to move for a new trial, and in due time a proposed statement to be used on such motion, and amendments thereto, were presented to the judge for settlement, who, on the 20th of July, 1904, settled the same, and directed the statement as settled to be engrossed by the attorney for the plaintiff by September 1, 1904. Repeated orders were thereafter made by the superior judge, extending the time for engrossment until February 4, 1905, when the attorney for plaintiff delivered to said judge for certification as corrected what purported to be the engrossed statement. Before such certification was made, however, by the judge, defendant, upon notice, moved to set aside the various orders extending the time for engrossing the statement, on the ground that the superior judge had no authority to grant them; to refuse the certification of such engrossed statement on the ground that it was not a true and correct engrossment of the statement as settled by the judge, in this: that it omitted to embrace certain matters which the court had ordered inserted; to refuse such certification on the further ground that such engrossed statement had not been served on the attorney for defendant prior to presenting it for certification, as had been ordered by the court; and to dismiss all proceedings in the mattter of the presentation and certification of such statement and in said action relative to and for the purpose of obtaining a new trial on the ground that plaintiff had not used due diligence, and had been guilty of undue and unreasonable delay and gross laches in presenting such statement for certification, and in the prosecution of his motion for a new trial. The matter coming on regularly to be heard upon the various grounds urged by defendant, the objection made to the certification was overruled, and the notice to dismiss denied, to which defendant excepted. Defendant then moved that the judge of said superior court incorporate and insert in said statement presented for certification the various objections and motions made by it, together with the matter presented on the hearing thereof, which the judge refused to do, but certified the engrossed statement as presented. The motion here is to have said objections, motion, and exceptions which the judge refused to incorporate in such engrossed and certified statement settled and authenticated by this court, and made part of the record in the proceedings on motion for a new trial.

We do not think it was the duty of the court below to incorporate the objections of defendant, or its motion, or the matters pertaining thereto, in the statement presented as engrossed and ready for certification, or that it is entitled to any relief under its motion here. We are referred to no rule of practice or decision of this court sanctioning such course. While the rule is well settled that an objection that a proposed statement has not been presented to the judge in time must be urged when the statement is presented for settlement, and, if the objection is overruled, the party must have his objection in the matter in support of it incorporated in his statement, so as to avail himself of it as a reason why the motion for new trial, when it comes up for hearing in the lower court, should be denied, or in order to present the objection in this court on appeal from the order granting or refusing the motion for a new trial (Hayne on New Trial and Appeal, § 146; Henry v. Merguire, 106 Cal. 145, 39 Pac. 599; Kaltschmidt v. Weber, 136 Cal. 676, 69 Pac. 497), this only applies to objections urged at the time the proposed statement comes up for settlement. It has no application to objections or motions made subsequent to the order settling the statement, and which are urged at the time the statement, as ordered settled and engrossed, is presented for certification. It is true, as insisted by counsel, that in Houghton v. Superior Court, 128 Cal. 355, 60 Pac. 973, this court said "that the bill of exceptions is not, however, really settled until it has been certified as correct, and this cannot be done until it has been engrossed, if engrossment is necessary." But this language was used in answer to a contention made by counsel in that case that the particular bill there in question should have been engrossed before it was settled. The language used was in reply to this contention. It was not meant thereby that until actual certification by the judge no settlement of the bill of exceptions or statement has been made, and that, therefore, it is open, so as to have inserted in it any objection or motion which a party may make. On the contrary, when the matter of the settlement of a statement or a bill of exceptions is taken up by the judge, and it is determined by him what shall be included in it, it is then actually settled, notwithstanding he may direct it to be engrossed, and does not finally certify it as correct and allowed until the engrossment is made. After so being ordered settled, when it is engrossed and presented for certification, the only duty devolving upon the court, and the only right which the parties can insist on, is that the engrossed statement or bill of exceptions shall embody all that the court at the time of the actual settlement ordered should be incorporated in it. Whether it is so correctly engrossed as settled is a matter for the determination of the judge, and his determination upon the point is final. It cannot be insisted that the statement on motion for a new trial which is presented for certification, and which is found by the court to be correctly engrossed as ordered settled, shall be made by incorporating in its objections and motions which are independent of, collateral to, and subsequent to its settlement, to serve the purpose of a bill of exceptions upon which to review the action of the court in overruling such objections and motions. In the matter at bar, aside from the objection urged by the defendant that the statement was not engrossed as originally settled by the judge, the determination of which matter against defendant is final and conclusive, and the further objection that the engrossed statement was not served on the attorney for defendant before presentation to the judge—a matter which, while it might justify the court in refusing to certify the statement until counsel might examine it (as the court in this instance did), yet would not justify an absolute refusal to certify—the other objections urged were, in effect, and the motion in the case actually was, that the motion for a new trial be denied on the ground of unreasonable delay in presenting the engrossed statement for certification, and gross laches in prosecuting the motion for a new trial. The denial of this motion was a special order made after final judgment, from which the defendant had the right to appeal, and which should be supported by its own bill of exceptions, and the matters pertaining to it were not entitled to be incorporated in the statement on motion for a new trial. While the usual practice in moving the denial or dismissal of a motion for a new trial upon the ground of laches in prosecuting it is to make the motion when the application for a new trial comes up for disposition, yet a party who desires to avail himself of such a motion is not required to wait until that time. In fact it may be inadvisable to do so, and he can make his motion at any time he feels justified in doing it. When, however, the motion to deny a new trial on the ground of laches in prosecuting it is made, as in the matter at bar, after the actual settlement of the statement, but before certification, and is denied, the party intending to prosecute an appeal from such an order of denial is not entitled to have his motion, and the matters upon which it is based, incorporated in the statement itself. His appeal must be supported by its own bill of exceptions.

The motion to have the bill of exceptions settled as prayed for is denied, and the application is dismissed.

We concur: BEATTY, C. J.; SHAW, J.; ANGELLOTTI, J.; McFARLAND, J.; VAN DYKE, J.; HENSHAW, J.

147 Cal. 454

CAVE et al. v. TYLER et al. (L. A. 1,402.)

(Supreme Court of California. Aug. 5, 1905.)

1. APPEAL—REVIEW OF FACTS—CONCLUSIVENESS OF FINDINGS.

The Supreme Court cannot interfere with a decision of the trial court based on conflicting evidence.

2. WATERS AND WATER COURSES — UNDERGROUND STREAMS—CLASSIFICATION.

Evidence that the waters of a creek or a portion thereof sank into the ground and ran or seeped under the ground through a cienega and emerged again into the creek below, not as mere percolating water, but as an underground stream, is sufficient to sustain a finding that the waters of the cienega constituted a part of the flowing waters of the creek.

Department 1. Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by Ben W. Cave and others against Katie Harvey, as administratrix of Hannah S. Skinner, deceased, impleaded with George W. Tyler and others. From a judgment for plaintiff, defendant administratrix appeals. Affirmed.

T. R. Archer, for appellant. Otis, Gregg & Surr, for respondents.

SHAW, J. The plaintiffs sued the defendants to quiet title to the waters of Mill creek, in San Bernardino county, and to restrain the defendants from diverting any portion of the waters thereof to the injury of the plaintiffs. One of the defendants—Hannah S. Skinner—appeared separately, and answered, claiming a right to the water of Mountain Home creek, a tributary of Mill creek, as riparian owner thereon, and also a right by appropriation of the water derived from a cienega or marsh on her land. This cienega was situated in a side canyon known as "Snow Creek Canyon," leading into Mountain Home creek, in which there was a small stream known as "Snow Creek" flowing into Mountain Home creek. Plaintiffs claim that the water of the cienega seeped into the stream and became a part of the waters of Mill creek, to which they were entitled. The judgment was to the effect that the plaintiffs were the owners of the right to all the waters of Mill creek, including those of Mountain Home creek and Snow creek and the cienega, to the extent of 2,500 inches continuous flow under a 4-inch pressure, excepting a quantity flowing from the cienega equivalent to 2 inches flow under a 4-inch pressure. From this judgment this appeal is taken by Katie Harvey, as administratrix of the estate of Hannah S. Skinner, now deceased.

The appellant's contention is that the findings of the court to the effect that the plaintiffs are the owners of all the water of Mill creek to the extent of 2,500 inches, except the 2 inches allowed to the defendants, and the finding that the waters of the cienega constitute a part of the flowing waters of the stream known as Snow creek, are not sustained by the evidence. Mrs. Skinner's land is riparian to Mountain Home creek and also to Snow creek, and is situated some five miles above the point of diversion of the plaintiffs in Mill creek. The right of the plaintiffs is founded solely upon appropriation and prescription. Mrs. Skinner derived title to her land under a grant from the United States to the Southern Pacific Railroad Company under the act of Congress approved March 3, 1871. By the provisions of the act of July 26, 1866, this grant is subject to all water rights which had vested and accrued prior to the grant. The court found that the rights of the plaintiffs and their predecessors in interest had accrued prior to that time, and upon this finding the decree is based that the plaintiffs' rights by appropriation and diversion exercised below the lands of the appellant are paramount to her riparian rights. The law upon this subject is not disputed. The sole question to be determined by the court below was whether or not the present right of the plaintiffs had accrued and vested prior to March 3, 1871, and then included all the water to the extent of 2,500 inches. It would serve no useful purpose to enter into a discussion of the evidence for and against this finding. There was evidence to the effect that for many years prior to 1871, and continuously during the irrigating season of every year, the plaintiffs and their predecessors in interest had appropriated, diverted, and used, under a claim of right so to do, all of the water naturally flowing in Mill creek at their point of diversion, and, furthermore, that such use, and claim of right to the use, of all the water, had continued down to the time the action was begun. The only interruption of this use was that caused by the development of the two inches of water from the cienega which the court adjudged belonged to the appellant. There was evidence, and the court found, that the appellant had used 15 inches of the waters of Mountain Home creek for the irrigation of her land; but the court further found, upon sufficient evidence, that this use began after 1871, was not acquiesced in by the plaintiffs, but was interrupted, and was not of such a character as to give the appellant a right by prescription to take from the plaintiffs the water which they had appropriated prior to the grant. Under this evidence, therefore, the court was fully justified in finding that the plaintiffs had title to all the water except said two inches. It is true there was evidence to the contrary, from which a contrary conclusion might, perhaps, have been reached; but the conflict was a matter solely for the consideration of the trial court, and with its conclusion we cannot interfere. It is proper to say, however, that we think the finding of the court is in accordance with the weight of the testimony.

With respect to the waters of the cienega, there was evidence to the effect that the waters of Snow creek, or a portion thereof, sank at some point above the cienega and ran or seeped under the ground through the cienega, and emerged into the creek again below, and that it was not mere percolating water, but constituted what has been defined by this court as an underground stream. This is sufficient to sustain the finding of the court upon that point.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

147 Cal. 434

ROBERTS et al. v. HALL et al. (L. A. 1,325.)

(Supreme Court of California. Aug. 5, 1905.)

1. Trespass—Interference with Water Mains—Pleading—Sufficiency.

A complaint alleging ownership in plaintiffs of a block of land abutting on a certain street; that the property was supplied with water for domestic use by means of an iron pipe, belonging to plaintiffs, laid beneath the surface of the street, and connected with the city water supply; that defendants willfully and maliciously plowed up the street and dug up and carried away all the pipe, and threatened to disconnect and carry away all pipe that might be placed therein by plaintiffs and to plow up the street as they should see fit—sufficiently stated a cause of action as against a general demurrer, and was not subject to objections based on grounds of unintelligibility, uncertainty, and ambiguity.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trespass, §§ 80–88.]

2. Judgment—Conformity to Conclusions of Law.

A judgment given by the court becomes itself the real conclusion of law, superseding any conclusions of law embraced in the court's decision; and so long as the judgment is sufficiently supported by the findings it is immaterial that it is not warranted by the conclusions of law stated in the decision.

3. Same—Conformity to Findings.

A complaint alleged that plaintiffs were the owners of land abutting on a certain street, and supplied it with water for domestic use by means of iron pipe belonging to the plaintiffs, laid beneath the surface of the street, and connected with the city water supply; that defendants willfully and maliciously plowed up the street, and carried away the pipe, and threatened to carry away all pipe that might be placed therein by plaintiffs, and dig up the street as they should see fit. The court found that a certain plaintiff (naming him) was the owner of the block of land in question, and that the connecting water pipe was appurtenant to the land; and also found generally in favor of such plaintiff upon the other allegations of the complaint, except as to the amount of the damage which it specifically fixed. *Held*, that a judgment in favor of the designated plaintiff against defendants for the damage found, and enjoining defendants from plowing and digging up the street and from interfering with plaintiff in laying water pipes connected with the city water mains, or from taking up or interfering with any pipes so placed, was supported by the findings.

4. Same—Rendition for Single Plaintiff.

Under the express provisions of Code Civ. Proc. § 578, a judgment may be given for or against one or more of several plaintiffs.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 414, 426.]

5. Appeal—Errors Reviewable—Preservation in Record.

Under Code Civ. Proc. § 661, providing that where a motion for new trial is made on the minutes, the judgment roll and a statement to be subsequently prepared, with a copy of the order, shall constitute the record on appeal, the notice of intention to move for new trial upon the minutes, not contained in any statement or bill of exceptions, constitutes no part of the record on appeal from an order denying the motion, but the only specifications of error which may be considered are those contained in a statement prepared and settled subsequent to the order denying a new trial.

6. Trespass—Findings of Ownership—Evidence—Sufficiency.

In an action for the digging up of a water pipe laid in the street on which plaintiff's premises abutted, and connecting such premises with the city water system, evidence that the water pipe laid in the street was used solely in connection with and was appurtenant to land formerly owned by plaintiff's father and mother, which had been subsequently conveyed by the father and mother to plaintiff, who was the owner in fee thereof, authorized a finding that plaintiff was the owner of the pipe.

7. Same.

In an action for the digging up of a water pipe laid in the street on which plaintiff's premises abutted, and connecting such premises with the city water system, evidence that one defendant, who was the wife of her codefendant, was claimed by defendants to be the owner of the street in which the pipe was laid; that her codefendant had charge of the same, and had full authority from her to do anything he deemed necessary to protect her alleged interest therein; and that he did the acts complained of as such agent—was sufficient to warrant a finding that defendant wife did the acts complained of and authorized the doing thereof, although she did not personally participate in such acts, or expressly direct the commission thereof by her husband, or have knowledge thereof until after their commission.

8. Appeal—Absence of Findings—Effect.

A judgment will not be reversed or a new trial granted for want of a finding upon an issue presented by allegations showing an affirmative defense, or by way of cross-complaint, where there is no evidence in the record in relation to such issue, even where the record does not show the evidence given on the trial, and more especially where it does contain all the material evidence, and thus affirmatively discloses the absence of evidence in support of the issue.

Department 1. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by John Roberts and others against M. Hall and another. From a judgment for the plaintiff named and from an order denying a new trial, defendants appeal. Affirmed.

W. R. Andrews and H. A. Jerauld, for appellants. Wm. Humphreys and H. S. Utley, for respondents.

ANGELLOTTI, J. This is an appeal by defendants from a judgment given in favor of plaintiff John Roberts and from an order denying their motion for a new trial. The action was one for damages and an injunction. It was alleged in the complaint that the plaintiffs were the owners of a block of land (block 551 of the pueblo lands) in the city of San Diego, abutting on a street known as "Witherby Street," which street was the only convenient mode of access and egress to and from said property; that this property was supplied with water for domestic use and irrigation by means of about 400 feet of iron pipe laid about 16 inches beneath the surface of said street, and connected with the San Diego city water supply, which pipe and a meter attached thereto were the property of plaintiffs; that defendants willfully and maliciously plowed up said street in front of plaintiffs' property, and dug up and carried away all of said pipe and the meter, all to the great damage of plaintiffs, and threaten to disconnect, take up, and carry away all pipe and meters that may be placed therein by plaintiff, and also to dig up and plow said street as they see fit, which will greatly impede plaintiffs' right of ingress and egress. The trial court found that plaintiff John Roberts was the owner of the block of land mentioned, and that the connecting water pipe was appurtenant to said land. It also found generally in favor of said plaintiff upon the other allegations of the complaint, except as to the amount of damage, which it fixed at $44.50, and gave judgment in favor of said John Roberts against both defendants for $44.50, and enjoining said defendants from plowing and digging up said street, and from in any manner interfering with him in laying or maintaining water pipes therein connected with the city water main for the purpose of supplying said land with water, or from taking up or interfering with any pipes so placed for such purpose.

The complaint sufficiently stated a cause of action as against a general demurrer, and we see no force in the particular objections as to unintelligibility, uncertainty, and ambiguity made by the demurrer on those grounds. We see no reason why the findings of fact do not fully support the judgment given by the court in favor of John Roberts. Defendants' point in this connection appears to be that the "conclusions of law" as stated in the decision of the court do not warrant all the provisions of the judgment as to the terms of the injunction awarded. We think those provisions are all within the general scope of the stated conclusions of law; but, were it otherwise, the point would not be good. When judgment is given by the court, it is itself the real conclusion of law, and supersedes any conclusion of law embraced in the decision. The question, then, is as to whether it is sufficiently supported by the findings of fact (Spelling, New Trial and App. Practice, §§ 610, 611), and we think that there can be no question that it is so supported here.

We see no point in the objection that the judgment is in favor of plaintiff John Roberts only. Code Civ. Proc. § 578. According to the findings, he was the only plaintiff entitled to judgment.

Other objections are that the evidence is insufficient to sustain certain findings of the court. The only specifications of particulars in which the evidence is so insufficient, available to appellants, are those contained in the statement prepared and settled subsequent to the order denying defendants' motion for a new trial, which was made and heard upon the minutes of the court. There is no other statement or bill of exceptions in the record, and the notice of intention to move for a new trial upon the minutes of the court, which is printed in the transcript, and apparently contains many such specifications, not being contained in any statement or bill of exceptions, constitutes no part of the record on appeal. Leonard v. Shaw, 114 Cal. 69, 45 Pac. 1012; Williams v. Hawley, 144 Cal. 97, 100, 77 Pac. 762. In determining the question as to insufficiency of evidence we are therefore confined to the particulars specified in the statement, which are presumably the particulars presented to and argued before the trial court on the hearing of the motion for a new trial. Code Civ. Proc. § 661; Schneider v. Market St. Ry. Co., 134 Cal. 482, 484, 66 Pac. 734.

The finding that plaintiff John Roberts was the owner of the pipe removed by defendants is attacked, it being claimed that the evidence shows that the pipe was put in by his father, who, with his mother and coplaintiff, Emma Roberts, originally owned said block 551. The evidence showed that this pipe was used solely in connection with and as appurtenant to said land, and that the land had been subsequently conveyed by the father and mother to said John Roberts. The statement shows that such conveyance to John Roberts, dated June 19, 1901, was introduced in evidence, but a copy of the instrument is not set forth therein, so that we are not advised as to its terms. The trial court found that this pipe in place was appurtenant and belonged to said real property, and also that John Roberts is the owner in fee of said land, and these findings are not attacked. This statement sufficiently answers the objection made by defendants to this finding.

The finding of fact No. 5 is attacked in so far as it is found that the defendant Etta Hall did any of the alleged wrongful acts. The evidence showed that Etta Hall was the wife of her codefendant, M. Hall, and that she did not personally participate in any of the acts of her codefendant, or expressly direct the commission by him of the acts alleged, or have knowledge that Roberts' pipe had been taken up until some time thereafter. It did, however, appear from evidence that was admitted without objection, much of which was elicited by counsel for defendants, that defendants claimed that Etta Hall owned the land in which the pipe was laid, viz., Witherby street; that M. Hall had charge of the same for his wife, and had full authority from her to do anything and everything he deemed necessary to protect her alleged interest therein; and that he did the alleged acts as such agent, for the purpose of preventing what he considered an unwarranted use by others of what was claimed to be her property. We think this was a sufficient showing to support the finding complained of.

It is urged that finding No. 8 is unsupported by evidence, in that there is no evidence that defendant Etta Hall gave "authority to do the digging or the plowing of the street, and there is no evidence that she threatened to dig or carry away or convert the pipe to her own use." What has been said in regard to finding 5 is equally applicable to this objection.

It is urged in the brief of defendants that there is no evidence as to threats on the part of defendant M. Hall to interfere in the future with any pipes that may be placed in said street, or to continue to dig or to plow up said street. As to this there is no specification contained in the statement. The foregoing are all the particulars specified in the statement wherein the evidence is claimed to have been insufficient.

It is contended that the decision is against law, in that the court failed to find upon certain affirmative defenses alleged in the answer. In so far as these alleged affirmative defenses are not covered by the findings of the court, the answer to the objection is that it does not appear that any evidence was introduced in support thereof. It is well settled that a judgment will not be reversed, or a new trial granted, for want of a finding upon an issue proposed by allegations showing an affirmative defense, or made by way of cross-complaint, where there is no evidence in relation to such issue. Even where the record does not show the evidence given on the trial, it will not be presumed against the correctness of the judgment that any such evidence was given. Here, however, the statement purports to contain "a substantial statement of all the evidence material to the question raised on the motion for a new trial," and thus affirmatively discloses that there was no such evidence. Klokke v. Escailler, 124 Cal. 297, 300, 56 Pac. 1113; Stewart v. Hollingsworth, 129 Cal. 177, 180, 61 Pac. 936; Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504; Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098.

The judgment and order are affirmed.

We concur: SHAW, J.; VAN DYKE, J.

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147 Cal. 457

In re GARNIER'S ESTATE. (S. F. 3,889.)

(Supreme Court of California. Aug. 5, 1905.)

1. Executors and Administrators—Conveyances—Contracts of Decedent—Statutory Provisions—Constitutionality.

Code Civ. Proc. §§ 1597–1602, which in substance provide that, when the vendor in a contract to convey land dies before conveyance, the court may authorize the executor or administrator to convey the land on presentation of a verified petition by the vendee, are within the power of the Legislature to enact.

2. Same—Claims Against Estate—Specific Performance—Enforcement.

Under Code Civ. Proc. §§ 1597–1602, which in substance provide that, when the vendor in a contract to convey land dies before conveyance, the court may authorize the executor or administrator to convey the land on presentation of a verified petition by the vendee, an executor or administrator has the same right as an outside party to file a petition for, and obtain, a conveyance of property which the decedent contracted during his lifetime to convey to him, and need not first resign his position as executor or administrator, in order to have his claim enforced against the estate.

3. Vendor and Purchaser—Contracts—Imperfect Description—Supplying Omissions.

Where a contract for the sale of land, described the property from the point of beginning "northerly along said easterly line of P. street 25 feet; thence easterly, and parallel with F. street, 118 feet, 9 inches; thence at right angles westerly, parallel to F. street, 113 feet, 2 inches, more or less, to the point of beginning"—thus obviously omitting the easterly boundary of the premises, the contract was enforceable by reading the description as if there were inserted therein, immediately preceding the phrase "thence at right angles westerly," etc., the phrase "thence at right angles southerly, and parallel to P. street, 25 feet."

4. Extrinsic Evidence — Contracts — Construction—Ambiguities of Description.

Under Code Civ. Proc. § 1860, providing that, for the construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it, may be shown, testimony that the vendee had occupied the premises in question for many years, and that they were inclosed with a fence and improved with buildings, and as to the dimensions of the premises so occupied and improved, is admissible on the issue of what premises were agreed to be conveyed by a contract of sale, which was imperfect in its description of the premises subject thereto.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Frederic Garnier, deceased. From a decree directing Alexandrine Sarraille, administratrix, to execute a conveyance of real estate which deceased had agreed to convey during his lifetime, Rosalie Garnier and others, heirs of the deceased, appeal. Affirmed.

Eugene Bianchi, Jr., and Jas. F. Tevlin, for appellants. Barna McKinne, for respondent.

VAN DYKE, J. This is an appeal from the decree in the probate court directing the administratrix to execute a conveyance of real estate. The provisions of the Code of Civil Procedure on the question involved, prior to the amendment of the last session of the Legislature, are as follows:

"1597. When a person who is bound by contract in writing to convey any real estate dies before making the conveyance, and in all cases when such decedent, if living, might be compelled to make such conveyance, the court may make a decree authorizing and directing his executor or administrator to convey such real estate to the person entitled thereto.

"1598. On the presentation of a verified petition by any person claiming to be entitled to such conveyance from an executor or administrator, setting forth the facts upon which the claim is predicated, the court, or a judge thereof, must appoint a time and place for hearing the petition, and must order notice thereof to be published at least four successive weeks before such hearing, in such newspaper in this state as he may designate.

"1599. At the time and place appointed for the hearing, or at such other time to which the same may be postponed, upon satisfactory proof by affidavit or otherwise of the due publication of the notice, the court must proceed to a hearing, and all persons interested in the estate may appear and contest such petition, by filing their objections in writing, and the court may examine, on oath, the petitioner and all who may be produced before him for that purpose.

"1600. If after a full hearing upon the petition and objections, and examination of the facts and circumstances of the claim, the court is satisfied that the petitioner is entitled to a conveyance of the real estate described in the petition, a decree authorizing and directing the executor or administrator to execute a conveyance thereof to the petitioner must be made, entered on the minutes of the court and recorded.

"1601. The executor or administrator must execute the conveyance according to the directions of the decree, a certified copy of which must be recorded with the deed in the office of the recorder of the county where the lands lie, and is prima facie evidence of the correctness of the proceedings, and of the authority of the executor or administrator to make the conveyance.

"1602. If, upon hearing, as hereinbefore provided, the right of the petitioner to have a specific performance of the contract is found to be doubtful, the court must dismiss the petition without prejudice to the right of the petitioner, who may, at any time within six months thereafter, proceed by action to enforce a specific performance thereof."

The remaining sections of the chapter relate to recording the decree and conveyance and the effect thereof, etc. The amendments passed at the last session of the Legislature make these provisions of the Code apply also to the case of an agreement in writing to transfer personal property.

This special statutory remedy, conferring upon the probate court administering the estate jurisdiction to grant specific performance in cases where the right of petitioner in the premises is free from doubt (as in this case), would seem to be a wise provision. It evidently tends to save the expense and delay that would follow a separate action in equity for a specific performance. At any rate the remedy seems to be complete, and it is clearly within the power of the Legislature to prescribe such. In several of the states a summary special proceeding is allowed, by which a contract may be enforced without suit, as a step in the settlement of the deceased vendor's estate. In such case the statutory method may be followed, and the probate court having jurisdiction may authorize or order the administrator or executor of the decedent to make the conveyance which the vendor himself should have made had he been alive. Pomeroy on Specific Performance of Contracts, § 497 et seq. In this case the administratrix, Alexandrine Sarraille, a sister of the deceased, petitioned the probate court for an order directing her, as administratrix, to execute conveyance of the real estate described in the petition; the deceased in his lifetime having entered into an agreement in writing to convey the same to her. Upon the petition being filed, the court fixed a time and place for hearing the same, and ordered notice to be given by publication as directed by the Code. Publication was made, and at the time and place named in the order the appellants, Andrew Garnier, a brother, and Rosalie Garnier and Josephine Garcin, sisters, of the deceased, through their attorneys, made written objections to the petition, upon the ground, among others, that petitioner was disqualified and not allowed in law to assert her personal rights against herself as administratrix; that the estate of deceased was not represented, except by petitioner, whose interests were adverse to the estate. These objections were renewed by appellants when the matter came on for hearing, and were overruled by the court. After hearing of proofs offered on the part of petitioner, contestants offering no evidence, the court ordered the executrix to execute and deliver a deed of grant, bargain, and sale of the real estate in question.

An executor or administrator of an estate has the same right under the provisions of the Code to present a petition for conveyance of real estate (and, since the late amendment, also for a transfer of personal property) as any other party. In case of a money demand in favor of the executor or administrator, the claim is not allowed by the executor or administrator, but is presented to the judge for allowance, and, if allowed, becomes a charge against the estate, in the same manner as the claim of an outside party. In case the judge disallows the claim on a money demand, it is provided in the Code, under the settlement of estates, that the creditor may bring an action against the estate, and the summons is to be served upon the judge, who may appoint an attorney, at the expense of the estate, to defend the action. Code Civ. Proc. § 1510. By analogy in this case the judge might have appointed an attorney to represent the estate, and probably would have done so, if the heirs in question, being the only heirs of the deceased, excepting the administratrix, had not themselves appeared and contested the claim. However that may be, an executor or administrator under the law has the same right as an outside party, whether his claim be a money demand, or for the performance of a written contract to transfer property, and the law does not require that he should first resign his position as executor or administrator, in order to have his claim allowed or enforced against the estate. Thus the law is written, and it is not for the courts to say that some other course than that provided in the statute should have been pursued in this case. The judge of the probate court is the guardian of the estate, and the executor or administrator simply acts under his order and direction.

Appellants also raise the objection that the description of the land in the written contract is so defective that the contract should not be enforced. The real estate mentioned in the written agreement is as follows: "All the certain lot or parcel of land situate in the city and county of San Francisco, state of California, bounded and particularly described as follows, to wit: Commencing at a point on the easterly line of Palmer street, distance northerly seventy-nine (79) feet from the northeasterly corner of Palmer and Fairmount streets; thence northerly, along said easterly line of Palmer street, twenty-five (25) feet; thence easterly, and parallel with Fairmount street, one hundred and eighteen feet, nine inches ($118\ ^9/_{12}$); thence at right angles westerly, parallel to Fairmount street, one hundred and thirteen feet, two inches ($113\ ^2/_{12}$), more or less, to the point of beginning—being part of lot No. 2, in block 19, of the Fairmount tract, as recorded in a map in the recorder's office for the city and county of San Francisco." The first corner of the lot attempted to be described is the southwest corner; thence northerly, along the east line of Palmer street, 25 feet, which would be the northwest corner, with a frontage on the east line of Palmer street of 25 feet. The line then runs easterly, at right angles with Palmer street, and parallel with Fairmount street, 118 feet, 9 inches, which would be the northeast corner; and the description then reads, "thence at right angles westerly, parallel to Fairmount street, 113 feet, 2 inches, more or less, to the point of beginning," which is impossible. It would simply be returning on the same line to Palmer street, and necessarily could not reach the point of beginning by running parallel with Fairmount street. It clearly shows that the easterly line is omitted. It should read, after reaching the northeast corner, "thence at right angles southerly, and parallel to Palmer street, 25 feet; thence at right angles westerly, and parallel with Fairmount street, 113 feet, 2 inches, more or less, to the point of beginning." The original agreement, as admitted in evidence, shows it was drawn by the decedent himself. The court very properly admitted testimony to show that the petitioner had occupied the premises in question, which are described as commencing at a point on the easterly line of Palmer street, and fronting on Palmer street 25 feet, and running easterly, parallel with Fairmount street, 118 feet, 9 inches, and that the premises were inclosed with a fence and improved with buildings, and had been for 18 years prior to the date of the agreement, and that the rear of the lot was 25 feet, the same as the front, and that a barn stood on the rear of the lot, and that the barn was 25 feet in length and occupied the whole width of the lot; that the petitioner had lived on the premises with her family since March, 1885, and that these were the same premises mentioned in the agreement. "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret." Code Civ. Proc. § 1860. See, also, Los Angeles, etc., Co. v. Thompson, 117 Cal. 594, 49 Pac. 714, and cases therein cited; also Galbraith v. Shasta Iron Co., 143 Cal. 95, 76 Pac. 901.

The judgment and decree appealed from are affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

147 Cal. 467

OPHIR SILVER MIN. CO. et al. v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 4,229.)

(Supreme Court of California. Aug. 5, 1905.)

1. Venue—Local and Transitory Actions.

An action to recover only the value of ore or timber severed from land is transitory, and may be maintained wherever the trespasser can be served with summons, although plaintiff therein may be compelled to allege and prove ownership of the land from which the timber is cut, or the ore extracted; but, where the whole or any part of the damages claimed is for injury to the freehold, the action is local, and must, if the land is located in this state, be tried, by the express provisions of Code Civ. Proc. § 392, in the county where the land is situated, or, if the land is located in another state, it must be tried in the courts of that state.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Venue, § 9.]

2. Same—Injunction of Trespasses.

An action in which the complaint alleges that defendants unlawfully, forcibly, and without the consent of plaintiffs entered upon a mining claim belonging to plaintiffs, and extracted and removed from the premises, and converted to their own use, large quantities of mineral deposits and precious metals; that they threaten and intend to continue to prosecute the business of mining such premises for their own use and benefit, and, unless restrained by the court, will continue to intrude and trespass upon the premises, and extract ores and mineral deposits therefrom to the great and irreparable injury of plaintiffs—and praying for an injunction restraining defendants from intruding or trespassing upon the premises, or from mining or extracting ores or deposits therefrom, for an accounting from defendants of the amount and value of the ore removed and converted by them, and for judgment for the amount found to be due, is based on defendants' trespasses on plaintiffs' premises, is local in character, and is not within the jurisdiction of the courts of a state other than that in which the premises are situated.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Venue, § 9.]

3. Mines and Mining—Title to Ore—Presumptions.

The title to everything within the surface lines of a mining claim to the center of the earth is prima facie in the patentee, if a patented claim, or, if unpatented, in any qualified locator in actual possession, and engaged in mining the same, and such person's claim of ownership of any body of ore within his lines, as against the owner of another surface claim, must, when asserted, be presumed to be a claim in good faith.

4. SAME — CONVERSION OF ORE — RECOVERY— FORM OF ACTION.

There can be no recovery, in a personal or transitory action, such as trover, of ore in specie, or of its value, when it has been taken from land in possession of defendant under claim and color of title asserted in good faith.

5. PROHIBITION—REMEDY BY APPEAL — ADEQUACY.

An appeal is not such an adequate remedy as to preclude the issuance of a writ of prohibition in a case of the erroneous retention of jurisdiction by the lower court, over a local action involving lands in another state, where many of the expenses of the action, such as for the transportation of witnesses, etc., from the state where the land is located, are not recoverable as legal costs.

In Bank. Petition for writ of prohibition by the Ophir Silver Mining Company and others against the superior court of the city and county of San Francisco and Thomas F. Graham, as judge thereof. Granted.

W. E. F. Deal, for petitioners. Baggett, Jones & Sheridan, for respondents.

BEATTY, C. J. This is an original proceeding, in which the petitioners pray for the issuance of a writ of prohibition to the superior court, and the judge thereof, commanding and directing them to desist and refrain from further proceeding in an action in which petitioners are made defendants. In response to our alternative writ, the respondents have filed an answer and demurrer to the petition. The answer raises no issue, except as to the adequacy of petitioners' remedy by appeal—a question of minor importance. The question of jurisdiction arises upon the demurrer. The petitioners are a California corporation and its directors, and their petition sets out a copy of the complaint against them, which was filed in the superior court, and copies of their several demurrers thereto, based upon the ground that the court has no jurisdiction of the subject of the action. It is alleged that these demurrers were argued, submitted to the court, and by the court overruled. From this statement it will be seen that the question to be determined is whether the complaint, which the petitioners are required to answer and defend in the superior court of San Francisco, sets forth a cause of action over which that court has no jurisdiction.

It is therein alleged that the plaintiff, the Golden Gate Mill & Mining Company, and the defendants, the Ophir Silver Mining Company and the Nevada National Bank of San Francisco, are California corporations having their offices and principal places of business in San Francisco; that ever since the year 1880 the plaintiff has been, and now is, the owner of and possessed of and entitled to the possession of a certain patented mining claim, situated in Storey county, Nev., consisting of surface ground with definite boundaries, and including a vein or lode bearing gold, silver, etc., having its top or apex within the limits of the surface lines, but in its downward course departing "easterly from the perpendicular," but remaining between vertical planes conforming to the end lines of the patented claim. The remaining allegations and the prayer of the complaint are as follows:

"That on or about the 1st day of August, 1903, the said defendants, Ophir Silver Mining Company, Charles H. Fish, Charles Hirshfeld, A. W. Havens, A. F. Coffin, Nat T. Messer, H. Zadig, John W. Twiggs, John Doe, Richard Roe, and Jane Foe, and their agents, servants, and employés, unlawfully, forcibly, and willfully, against the will and without the consent of plaintiff, entered into and upon the said ground and premises hereinabove described, and commenced, and then and thereafter, for the purpose of mining the said ground and the said vein, lode, ledge, and deposit, and extracting the ores therefrom, cut, made, and excavated certain drifts, tunnels, winzes, stopes, and openings into, under, and upon the said vein, lode, ledge, and deposit, and the said ground and premises, and ever since the said last-mentioned date have intruded and trespassed upon the said ground and premises, and the said vein, lode, ledge, and deposit, and have dug up, extracted, taken out of, mined, and removed from the said ground and premises, and from the said vein, lode, ledge, and deposit, and converted to their own use, large quantities of the mineral deposits, earth, rock and ores bearing gold and silver and other precious metals, of the value, as plaintiff is informed and believes, of $400,000 and upwards. That the said defendants threaten and intend to continue to prosecute, for their own use and benefit, the business of mining in, under, and upon the said ground and premises, and the said vein, lode, ledge, and deposit, and the excavating, digging, and removal of earth, rock, and ores bearing gold, silver, and other precious metals therefrom, and the sale and conversion of the same to their own use and benefit, and will so continue unless restrained and enjoined by this honorable court. That a large quantity of the said earth, rock, and ores so taken from the said ground and premises, and the said vein, lode, ledge, and deposit, by the said defendants, has been sold and disposed of by them, and the proceeds thereof converted to their own use and benefit, and that a large part of the said proceeds so converted by them has been wasted and dissipated and expended in the payment of dividends upon the capital stock of the defendant Ophir Silver Mining Company, but that a large portion thereof, to wit, $95,000 or thereabouts, has been brought into this state by the said defendants and deposited with the defendant, the Nevada National Bank of San Francisco, at the said city and county of San

Francisco, California, to the use and benefit of the said defendant Ophir Silver Mining Company, and the said sum so deposited has been retained by and is now deposited with the defendant the Nevada National Bank of San Fracisco, to the use and benefit of the defendant Ophir Silver Mining Company, and that the said defendant, the Nevada National Bank of San Francisco, threatens and intends, and unless restrained by this honorable court will pay out and disburse the said sum upon the checks and orders of the defendant Ophir Silver Mining Company, and the said defendant Ophir Silver Mining Company threatens to and intends to, and unless restrained by this honorable court will, issue and draw checks and orders upon the defendant the Nevada National Bank of San Francisco, directing it to pay out and disburse to the use of the said defendant mining company all of the said sum so deposited with it, whereby the said sum will be wholly lost to the plaintiff to the great and irreparable injury of the plaintiff. That the said defendants, Ophir Silver Mining Company, Charles H. Fish, Charles Hirshfeld, A. W. Havens, A. F. Coffin, Nat T. Messer, H. Zadig, John W. Twiggs, John Doe, Richard Roe, and Jane Foe, threaten to and intend to, and unless restrained by this honorable court will, continue to intrude and trespass upon the said ground and premises, and the said vein, lode, ledge, and deposit, and intend to and will make further cuts, drifts, tunnels, winzes, stopes, openings, and excavations therein, for the purpose of mining the same and extracting the ores therefrom, and intend to and will continue to dig up, take out, mine, extract, and remove from the same and convert to their own use the rock and ores bearing gold and silver and other precious metals and other mineral deposits therein, of the value of $500,000 and upwards, and will thereby take from the same the entire mineral value thereof, before it will be possible to obtain a trial of this action, to the great and irreparable injury of the plaintiff. That unless the said defendants, their agents, servants, and employés, are restrained and enjoined from intruding and trespassing upon the said ground and premises, and the said vein, lode, ledge, and deposit, and making and extending cuts, drifts, tunnels, winzes, stopes, openings, and excavations therein, and from digging up, extracting, mining, removing, and carrying away from the same the said mineral deposits, rock, earth, and ores bearing gold and silver and other precious metals, the value and substance of the said ground and premises, and the said vein, lode, ledge, and deposit will be destroyed and thereby the plaintiff will suffer great and irreparable injury. That plaintiff has no plain, speedy, or adequate remedy at law against the said defendants, and can have relief only in a court of equity, where matters of this nature are properly cognizable and relievable.

"Wherefore plaintiff prays for an injunction pendente lite restraining the defendant Ophir Silver Mining Company from drawing or issuing its checks or orders upon the defendant the Nevada National Bank of San Francisco, requiring it to pay out any of the said moneys deposited with it out of the said proceeds, or from removing any of the said moneys so deposited, and restraining the defendant the Nevada National Bank of San Francisco from paying or honoring any of the said checks or orders, or from permitting the removal of any of the said funds, and that on the final hearing that the said injunction be made perpetual; for an injunction pendente lite restraining the defendants from intruding or trespassing upon the said ground and premises, and the said vein, lode, ledge, and deposit, or from mining, extracting, or removing therefrom any of the ores, rock, earth, or deposits bearing gold, silver, and other precious metals, or from converting the same to their own use, and that on the final hearing that the said injunction be made perpetual; for an accounting from the said defendants of the amount and value of the ores removed and converted by them, and that plaintiff have judgment against the defendants other than the Nevada National Bank of San Francisco for the sum of $400,000, or the amount and value of the said ores so removed by the said defendants; for a judgment requiring the defendant Nevada National Bank of San Francisco to pay to plaintiff the amount of the said moneys so deposited with it by the defendant mining company, out of the proceeds of the said ores so removed; and for general relief to which plaintiff may properly be entitled."

The contention on the part of the petitioner is that the issues tendered by this complaint determine the character of the action, and show conclusively that it is purely and simply an action of trespass quare clausum fregit, that it is therefore local, and that the jurisdiction belongs exclusively to the courts of Nevada, where the mine is situated. Respondents contend that it is purely and simply an action for the recovery of the value of personal property, trespass de bonis asportatis, or trover, that it is therefore transitory, and that the jurisdiction belongs to any court whose process will reach the persons of the trespassers. There is no doubt that the owner of land, if he chooses to waive all claim for damages to the freehold, may maintain a personal action for the value of timber or ores removed from the land by a naked trespasser, and the mere fact that in such action he may be compelled to allege, and, if denied, to prove, ownership of the land from which the timber is cut or the ore extracted, does not make the action local. There is as little doubt that, where the whole or any part of the damages claimed is for injury to the freehold, the action is local and not transitory. The basis of this distinction is stated by Chief Justice

Marshall in the course of his opinion in Livingston v. Jefferson, 1 Brock. 209, Fed. Cas. No. 8,411: "Actions are deemed transitory where the transactions upon which they are founded might have taken place anywhere, but are local when their cause is in its nature essentially local." As land can be injured only where it is situated, damages for such injuries can only be recovered where it is situated; but since timber or ores, when severed from the land by the act of a trespasser, remain the personal property of the owner, and are capable of being converted by any person anywhere, an action to recover only the value of the ore or timber after severance is transitory, and may be maintained wherever the trespasser can be served with summons. The validity of this distinction has been doubted, but the great authority of Lord Mansfield was exerted in vain to set it aside in England, and it has been enforced, not only there, but in most of the United States. In this state the rule is statutory that an action for injuries to real property must be tried in the county where the land is situated, except in those cases where a change of the place of trial may be ordered for special reasons. Code Civ. Proc. § 392. So that if an action were commenced in this state for a trespass upon land situated within this state, consisting in the cutting and removal of timber, or the digging and carrying away of ores, and any part of the damages claimed was for injury to the freehold, as distinct from the value of the timber or ores after severance, the jurisdiction of the action would belong to the superior court of the county in which the land was situated. We could not, therefore, without disregarding the law which we have made for ourselves, as well as the long course of decisions in England and the United States, hold that an action for damages to realty situated in the state of Nevada can be maintained in the courts of California. It is, however, not to be questioned that for a trespass to the person or to personal property, as for the breach of a contract, wherever committed, an action may be maintained in our courts; the venue depending in most instances upon the residence of the defendant.

The apparently conflicting decisions in cases arising out of trespasses of the character alleged in this complaint all recognize this distinction, and, if they present any real conflict, it arises solely from the varying constructions placed upon the pleadings in the several cases cited by counsel in determining what the gravamen of the action was —injury to the realty or value of the timber, earth, sand, or ore removed from the land. In Ellenwood v. Marietta Chair Co., 158 U. S. 105, 15 Sup. Ct. 771, 39 L. Ed. 913, it was held by the Supreme Court of the United States that the circuit court of Ohio had no jurisdiction of an action for damages for cutting timber from lands in West Virginia, and this upon the theory that the principal ground of the action was the trespass to the land, the alleged value of the timber being a mere incident. Upon this ground it was distinguished in the later case of Stone v. United States, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. Ed. 127, where it was held that an action could be maintained in the courts of the state of Washington for the value of timber cut by a trespasser from public lands in Idaho, and this upon the theory that the gravamen of the action was the conversion of the timber after its severance from the land. In American U. Telegraph Co. v. Middleton, 80 N. Y. 408, it was held that the courts of New York had no jurisdiction of an action for damages for cutting down telegraph poles in New Jersey. While in the case of Hoy v. Smith, 49 Barb. 360, the plaintiffs recovered in a New York court the value of ores extracted from a mine situated in Colorado. On the authority of the latter case a judgment for the value of earth removed by a trespasser was sustained in Radway v. Duffy, 79 App. Div. 116, 80 N. Y. Supp. 334, and the former case distinguished on the ground that no asportation of the telegraph poles was alleged; the action being wholly or principally for injury to the land of which the poles while standing were a part. In McGonigle v. Atchison, 33 Kan. 726, 7 Pac. 550, the jurisdiction of a Kansas court was sustained in an action to recover the value of sand dug from land situated in Missouri, because the plaintiff, while alleging the trespass upon the land, asked damages only for the value of the sand —the personal property—and waived all the wrongs and injuries to the real estate and to his possession thereof. The case of Dodge v. Colby, 108 N. Y. 445, 15 N. E. 703, involved a claim for damages to the freehold, and also for the value of the timber and turpentine removed from lands in Georgia. It was held that the allegation of value of the timber and turpentine was merely incidental and that the courts of New York had no jurisdiction. The report of the case does not show the form of the allegations, and does not aid us in construing the complaint in question here.

It would be a waste of time to pursue this analysis of the cases further. There is no real conflict upon the point of law, and the only difficulty is in determining what construction must be placed upon this complaint, the principal allegations of which I have preferred to set out in full, rather than to attempt a statement of their legal effect. It is plain that the pleader did not frame his complaint upon the present theory of the respondents; i. e., upon the theory that he was commencing a simple action at law to recover the value of ores severed from the mine by mere trespassers. Many of his allegations, and all of his prayer for relief, show that he was proceeding upon a very different theory, viz., that an action at law would afford him no adequate relief, and that it was necessary to invoke the powers of a court of equity, not only to compel an accounting, but to enjoin and restrain these petitioners from mining upon the ground of which in one part of his complaint he claims to be in possession, but which by his more specific allegations he shows to be in the possession of petitioners, who are systematically and continuously mining and appropriating the ores therein contained. Those parts of the complaint and of the prayer which look to an injunction against the Nevada Bank may be disregarded in the present discussion; that corporation not being a party to this proceeding and the questions as to the right to such an injunction not being in any event jurisdictional. But the allegations of continuing trespasses of the petitioners and their threat to continue the same, and the prayer for an injunction to restrain future trespasses pendente lite and perpetually, are more material. With respect to territorial jurisdiction there can be no difference between a suit in equity to restrain future trespasses upon real property and an action at law for past trespasses upon the same. If one is local the other is necessarily local, and for the reason which forms the basis of the distinction between local and transitory actions—for the reason, that is to say, that the injury to be redressed in one case, or prevented in the other, can only take place where the land or mine is situated. Besides, the right to an injunction in cases of this character does not merely involve incidentally the question of title to the mine, but essentially depends upon it. We are cited to no case in which the right of the courts of one state to enjoin threatened trespasses upon lands situate in another state or country has been upheld, and we are satisfied that as to so much of the relief sought against these petitioners the superior court is wholly without jurisdiction.

But the respondent contends that disregarding those parts of the prayer of his complaint to which we have referred, and the allegations to which they respond, and considering only his prayer for a judgment for the alleged value of the ores, his complaint, under our liberal rules of pleading, and for the purpose of sustaining the jurisdiction, may and should be treated as a complaint in an action of trover for conversion of the ores, and the superior court allowed to proceed upon that theory. It would, perhaps, be within our discretion in a proper case to frame an order and a writ in conformity with this suggestion; but we hardly think a simple action of trover for the value of personal property ought to be tried upon this complaint and any responsive answer. So long as the complaint contains allegations of threatened future injuries to the realty, and prays an injunction against future trespasses, the case is on a par with those cases in which a part of the damages claimed was for injury to the freehold. The complaint certainly requires amendment before the petitioners are compelled to answer, so that it may present the issues of which the superior court has jurisdiction plainly and by themselves; and it would seem to be as simple a mode as any of reaching the desired result to prohibit any further proceedings in the pending action, except to dismiss it without prejudice.

There are other considerations affecting this request of the respondents for a qualified denial of the writ. It is at least a probable inference from the allegations of the complaint which the petitioners have been required to answer that the actual case upon which the action is based is this: That the petitioners are mining in depth outside of the surface lines of the claim described in the complaint, either upon public land or within the surface lines of patented ground belonging to them or to third persons, and that the only claim of title on the part of the plaintiff is that they are extracting ore from the extralateral dip of the vein or lode which has its top or apex within the lines of its surface claim. All the allegations of the complaint are consistent with this construction, and upon any other construction the allegation as to the easterly dip of the lode included within the surface lines of plaintiff's patent is superfluous and meaningless. If this is the case, it will not support a personal and transitory action. There can be no recovery of wood or ore or hay in specie, or of its value, in an action of trover, when it has been taken from land in possession of the defendant under claim and color of title asserted in good faith. Halleck v. Mixer, 16 Cal. 574; Kimball v. Lohmas, 31 Cal. 157; Page v. Fowler, 28 Cal. 610; s. c., 37 Cal. 107, 109. The title to everything within the surface lines of a mining claim to the center of the earth is prima facie in the patentee, if a patented claim, or, if unpatented, in any qualified locator in actual possession and engaged in mining thereon; and his claim of ownership of any body of ore within his lines as against the owner of another surface claim must, when asserted, be presumed to be a claim in good faith. In such a case, the question of title is not incidental, but fundamental, and it cannot be litigated in a personal and transitory action.

Considerations more substantial than technical rules of procedure sustain this conclusion. The trial of the questions necessarily arising in such a case would call for the testimony, not only of scientific experts, but of many practical experts (miners), who had examined the ground and been through all the tunnels, drifts, etc., by means of which the alleged identity of the croppings in one claim and the ore found in the other could be supported or disproved. A somewhat extensive and varied experience in the trial of such issues in the mining litigation of

Nevada convinces me that the practical inconvenience in the way of delay and expense in trying the title to Nevada mines in the state of California would be intolerable to the litigants and equally so to the courts; and the same doctrine which would compel a Nevada miner to litigate the title to his mine in the courts of California would compel the owner of a California mine to defend his title in the courts of Maine or Florida. For the reason, therefore, that the complaint under consideration does plainly count upon threatened injury to the freehold as a ground of relief (by injunction), which the court has no power to grant, and because disregarding the allegation of threatened injury to the freehold, the more reasonable construction of the remaining allegations presents a case involving the determination of a disputed title, we think the writ of prohibition should be made absolute. If there are grounds for a personal action, the plaintiff can dismiss the present action without prejudice, and in a new complaint present its case in a form corresponding to the construction which we are asked to give to the present complaint.

The attempted denial in the answer of the great and unnecessary costs and expenses to which the petitioners would be subjected by a trial in California of the issues tendered in the complaint is wholly insufficient. That they would have a remedy by appeal is, of course, true, but this remedy would be wholly inadequate, for the reason that much the greater part of the expenses (of transporting witnesses, etc.) could not be recovered as legal costs. This fact distinguishes the case from Lindley v. Superior Court, 141 Cal. 220, 74 Pac. 765.

Let the peremptory writ of prohibition issue as prayed.

We concur: VAN DYKE, J.; McFARLAND, J.; LORIGAN, J.; ANGELLOTTI, J.; SHAW, J.

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147 Cal. 525

COFFEY v. SUPERIOR COURT OF SACRAMENTO COUNTY et al. (Sac. 1,360.)

(Supreme Court of California. Aug. 10, 1905.)

1. Officers—Misconduct — Removal — Procedure.

Pen. Code, § 758, provides that an accusation against any municipal officer for "willful or corrupt misconduct in office" may be presented by the grand jury. Section 772 provides for the summary removal of public officers on an accusation verified by the oath of any person alleging that the officer has "neglected or refused to perform the official duties pertaining to his office." Section 335 declares every public officer who refuses or neglects to inform against and prosecute persons whom he has reasonable cause to believe offenders of the chapter on gambling guilty of a misdemeanor. *Held*, that a public officer who fails to prosecute gamblers of whom he has knowledge is guilty of "willful misconduct," within the meaning of section 758, and may be accused by the grand jury thereunder.

2. Municipal Officers—Removal—Authority.

Const. art. 4, § 18, provides for the impeachment of certain state officers, and further provides that all other state officers shall be tried for misdemeanor in office in such manner as the Legislature may prescribe. Pen. Code, § 15, defines a crime, and declares that it is punished, inter alia, by removal from office. Section 333 makes it a misdemeanor for a public officer to neglect to prosecute violations of the gambling law. Sections 758 and 772 provide for the removal of public officers for misconduct in office and for neglect to perform official duties by proceedings in the superior court. Const. art. 11, § 8, declares that a freeholders' charter shall supersede inconsistent legislation. A municipal freeholders' charter embodied an incomplete scheme for the removal of certain municipal officers by the board of trustees, but nowhere conferred exclusive jurisdiction in the premises on such board. It provided generally that any official defalcation or neglect of duty should be laid by the mayor before the board of trustees, city attorney, or district attorney. *Held*, that the board of trustees did not have exclusive jurisdiction to remove a police officer who failed to prosecute gambling offenders, nor was its jurisdiction inconsistent with that conferred by the general law on the superior court, but the jurisdiction of the court was in its nature judicial, while that of the trustees was rather administrative, and the jurisdictions were concurrent, and the remedies obtainable through the exercise of either were cumulative.

3. Same—Removal Under General Laws—Interference with Municipal Charter.

Pen. Code, §§ 758, 772, which confer on the superior court jurisdiction to remove municipal officers for official misconduct and neglect, do not subordinate and control a provision of a freeholders' charter, providing for the removal of such officers by the municipal board of trustees, which they leave in full operation, prescribing merely a concurrent remedy, and are not, as so construed, displaced as to the municipality by Const. art. 11, § 6, declaring that municipal charters shall be controlled by general laws "except in municipal affairs."

In Bank. Application by M. Coffey for writ of prohibition prayed to be directed against the superior court of Sacramento county, E. C. Hart, judge, and others. On demurrer to the petition. Sustained.

Rehearing denied September 5, 1905.

Devlin & Devlin and James B. Devine, for petitioner. A. M. Seymour, for respondents.

LORIGAN, J. On August 24, 1904, the grand jury of the county of Sacramento presented and filed in the superior court of that county an accusation against M. Coffey, chief of police of the city of Sacramento, the petitioner herein. The accusation, after alleging the official character of the petitioner, that the city of Sacramento is a municipal corporation governed by a freeholders' charter, and that petitioner at all the times mentioned therein was the duly appointed, qualified, and acting chief of police of the city of Sacramento, charges that on the 22d, 23d, and 24th days of August, 1904, certain prohibited and illicit gaming, consisting of faro, roulette, klondyke, and other illegal banking and percentage games, was conducted in the city of Sacramento, specifying the several places in said city in which said illegal gaming was being conducted; that on all of said dates the said chief of police had knowledge of the fact that said illicit gambling was so being conducted in said places in an open, notorious, public, and flagrant, manner; and that, notwithstanding he had knowledge of this fact, said M. Coffey, as chief of police of said city, "willfully, unlawfully, corruptly, and intentionally failed, refused, and neglected, and does now willfully, unlawfully, corruptly, and intentionally fail, refuse, and neglect, to inform against, and diligently, or otherwise, prosecute the persons who he knew and who he had cause to believe were so dealing, playing, carrying on, opening, causing to be opened, and conducted the said illegal games; and the said M. Coffey also failed, refused, and neglected to prosecute said persons and to suppress said illegal games." It is further charged in the accusation that persons owning the buildings in which said illegal games were being carried on rented said houses and premises for the purpose of permitting such illegal games to be conducted, and that said chief of police had knowledge of that fact, but, notwithstanding such knowledge, he willfully, unlawfully, corruptly, and intentionally refused, failed, and neglected to inform against, or diligently, or otherwise, prosecute the said persons who are alleged to be the owners or renters of the buildings so used. It prays that said M. Coffey be cited to appear, and upon the due hearing of said accusation that he be removed from his office as chief of police of the city of Sacramento. The petitioner, in due course, appeared, and objected by demurrer to the legal sufficiency of the accusation and the jurisdiction of the superior court to try it, and asked that it be dismissed. The demurrer was overruled, and the petitioner pleaded not guilty. The superior court being about to proceed with the trial of the accusation, upon the application of the petitioner an alternative writ of prohibition was issued out of this court directing the respondents to show cause why they should not refrain from further proceedings under the accusation. The matter is now before us upon a demurrer to the petition for the writ of prohibition.

In order to clearly understand one of the points made by petitioner under his application for this writ, it is necessary to refer to certain sections of the Penal Code, found in the chapter thereof providing for the removal of civil officers otherwise than by impeachment. Section 758 of that Code provides that "an accusation in writing against any district, county, township, or municipal officer, for wilful or corrupt misconduct in office, may be presented by the grand jury of the county for or in which the officer accused is elected or appointed." Subsequent sections prescribe the procedure upon the trial of the accused, and, if convicted, declare that the court shall pronounce judgment removing him from office. Section 772, following, provides for summary proceedings for the removal of public officers "when an accusation in writing, verified by the oath of any person, is presented to a superior court, alleging that any officer within the jurisdiction of the court has refused or neglected to perform the official duties pertaining to his office." It will be observed from a comparison of these sections that the section first referred to provides for the initiation of proceedings for the removal of a public officer by the grand jury "for wilful or corrupt misconduct in office" on the part of such officer; the latter section for the initiation of proceedings having in view the same end, by a private individual, when the public officer "has refused or neglected" to perform official duties. This difference in the terms of the section affords the basis for the claim of petitioner that the accusation in question does not charge him with "willful or corrupt misconduct in office," but simply with neglect or refusal to perform the duties pertaining to his office, and that hence the superior court has no jurisdiction to proceed with the trial, as the proceeding should have been instituted by a private individual under section 772 of the Penal Code, instead of section 758 thereof; that the grand jury could only accuse petitioner of "willful or corrupt misconduct in office" under section 758; and that the facts alleged in the accusation do not support such a charge.

We cannot agree with petitioner's view of the effect of the charges made, or with his view of the application of the code sections to them. It is of no consequence in the consideration of the question here involved to determine for what derelictions of duty proceedings under section 772 must be had; whether that section applies only to those cases where the official dereliction is the result simply of incompetency in the officer, or springs from carelessness or inattention to his official duties. The question here is, do the charges embraced in the accusation show "willful misconduct" under section 758? This latter section provides for two classes of misconduct for which a public officer may be removed under accusation by the grand jury—willful misconduct or corrupt misconduct. The phrase "misconduct in office" is broad enough to include any willful malfeasance, misfeasance, or nonfeasance in office. State v. Slover, 113 Mo. 208, 20 S. W. 788. In Mechem on Public Officers (section 457) it is stated that: "Misconduct in office does not necessarily imply corruption or criminal intention. The official doing of a wrongful act, or official neglect to do an act which ought to have been done, will constitute the offense, although there was no corrupt or malicious motive." After defining "misconduct," Webster declares it to be synonymous with "misbehavior," "misdemeanor," "delinquency," and "offense." In the chapter on gambling in the

Penal Code which prohibits and makes penal the conducting of such games as are charged to have been conducted in the city of Sacramento with the knowledge of petitioner, it is provided by section 335 of that Code that "every * * * police officer must inform against and diligently prosecute persons whom they have reasonable cause to believe offenders against the provisions of this chapter, and every such officer refusing or neglecting to do so is guilty of a misdemeanor." The accusation in question here charges that the unlawful gaming specified was being conducted in the city of Sacramento; that the petitioner knew of it, and refused and failed to prosecute the offenders. This failure and refusal to do so, if true, was, under the circumstances, a misdemeanor on the part of petitioner—a crime of which, in his official capacity, he was guilty, and which of itself constituted a willful misconduct in office. It was not a mere neglect of duty. It was a failure to discharge his duty with knowledge of the facts calling for official action; a failure which was willful, and which evidenced a fixed purpose not to do what actual knowledge and the requirements of the law declare he shall do. Taking, then, into consideration the general definition as to what constitutes misconduct in office, coupled with the section of the statute making it a misdemeanor for a police officer to refuse or neglect to inform against or prosecute for such illicit gambling, of the existence of which it is charged the petitioner had knowledge, we entertain no doubt that the accusation sufficiently charged willful misconduct in office on the part of petitioner of such a character as, it is contemplated by the provisions of section 758 of the Penal Code, the grand jury may accuse him of before the superior court, and that the objection of the petitioner that the charges in the accusation did not bring him within the terms of that section, so as to authorize initiation of a prosecution against him by the grand jury, is untenable.

It is insisted, however, by the petitioner, that the superior court has no jurisdiction to try him. In that regard it is contended that by the freeholders' charter of the city of Sacramento the board of trustees of the said city is constituted a tribunal for the trial of city officers charged with misconduct in office or neglect of duty, and that this jurisdiction is exclusive; that the provisions of the Penal Code were superseded by the charter provisions under section 8, art. 11, of the Constitution, as being laws inconsistent with such charter. We perceive no merit in this claim. It is true that the charter of the city of Sacramento deals with the matter of removal of city officers. Under its provisions the mayor shall report any dereliction, neglect, or nonperformance of duty of an officer to the board of trustees, who may proceed to try him under the accusation, and remove him from office if they find the charges true. A trustee may be removed only for malfeasance in office. As to the mayor himself, there is no provision for his trial or removal should he be guilty of misconduct. The provisions of the charter seem to apply only to some officers, and the scheme for the removal of delinquent officials is to that extent incomplete. It is further generally provided that any official defalcation, willful neglect of duty, or official misconduct of an officer which the mayor may discover, or which is reported to him, shall be laid by him before the board of trustees, city attorney, or district attorney, "in order that the public interests may be protected, and the person in default be proceeded against according to law." There is nowhere in the charter any provision which in terms confers exclusive jurisdiction upon the board of trustees to proceed against and remove municipal officers, nor is there apparent in any of the charter provisions an intention that its provisions should supersede the provisions of the general law as found in the sections of the Penal Code relative to the removal of delinquent officials from office. In fact, taking into consideration that provision of the charter itself which requires the mayor to report official delinquencies to the board of trustees, or the city attorney, or the district attorney, in order that the public interests may be protected, and the delinquent official proceeded against according to law, it is apparent that no exclusive jurisdiction was intended to be conferred on the board of trustees, but only a jurisdiction which, as far as the charter provided causes for removal and proceedings to remove, should be concurrent with the jurisdiction of the superior court under the general law. By directing that a report of the dereliction of city officials might be made to the "district attorney" in order that proceedings against them might be taken by him "according to law," it is obvious that no exclusive jurisdiction in the board of trustees was intended to be conferred. The district attorney, having no official connection at all with the municipality, could proceed only under the general law by directing the grand jury's attention to the matter of official delinquencies which was called to his attention by the mayor, and having an accusation presented by the grand jury under section 758 of the Penal Code, such as was presented here, or inaugurating a proceeding under section 772 of the same Code at the instance of a private individual.

We have called attention to these matters simply to show that upon the face of the charter there is nothing found which, either in terms or by implication, confers exclusive jurisdiction upon the board of trustees to remove municipal officers. Neither do we perceive, as contended, any inconsistency between the power to remove delinquent officials conferred on the trustees under the charter and the jurisdiction conferred upon the superior court under the provisions of section 758 and the following sections. The power or jurisdiction conferred in either case is directed to the same subject-matter—a derelict municipal officer; and the remedy in either case is the same—his removal from office. Under either the general law or under the charter the same evil is dealt with, and the same remedy provided. The method of procedure is, it is true, different; but this does not affect the matter of consistency, and proceeds from the difference in the nature of the jurisdiction exercised by the superior court and by the board of trustees under the charter. The one is judicial, the other political or administrative, or at best quasi judicial. The power conferred under the charter is, strictly speaking, the power of expulsion or amotion of its municipal officers, lodged in its executive and legislative branches, and exercised in the discharge of an administrative duty. This power of expulsion, amotion, or quasi impeachment of delinquent municipal officers has generally been considered both at common law and in this country as an incident to corporate existence, and is exercised by the municipality as an administrative duty, springing from its political existence, and as vital thereto, to remove incompetent, unfaithful, and unworthy officers in the interest of good order and government. It is, strictly speaking, this administrative power which is conferred upon the trustees of the city of Sacramento under the charter, and the proceedings against officials provided for therein are administrative, rather than judicial. The proceedings under the Penal Code are essentially judicial, and the jurisdiction to entertain an accusation of the grand jury against a municipal officer for corrupt or willful misconduct in office is conferred upon the superior court by the Legislature under a constitutional provision directly authorizing the Legislature to so confer it. Article 4, section 18, of the Constitution, provides for the impeachment of certain state officers for misdemeanor in office, and then further provides that "all other civil officers shall be tried for misdemeanor in office in such manner as the Legislature may provide." Official misconduct at common law was an indictable offense, and the result of conviction removal from office. Brackton's Abridgment, tit. "Office and Officer." The charge against the petitioner constitutes both at common law and under the provision of the Penal Code a public offense—a misdemeanor in office—and the proceedings under which he is prosecuted are of a criminal nature. Aside from section 333 of the Penal Code, to which we have heretofore referred, which makes it a crime for a police officer to refuse or neglect to proceed against and prosecute violations of the general law against gambling, it is further provided by section 15 of the same Code that "a crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed upon conviction either of the following punishments: * * * Fourth. Removal from office." The provisions of the Penal Code constitute a general law applicable to all municipal corporations, whether created by freeholder charter, existing under special charter granted prior to the adoption of the present Constitution, or organized under the general municipal act. The judicial proceedings which are there provided for may be inaugurated by the grand jury or by a private individual. Under the charter the proceeding can be inaugurated only by the mayor. In the one instance a more general right is conferred to proceed towards the removal of such officers than in the other. Authorizing proceedings under the general law to remove municipal officers is not inconsistent with the charter provisions also empowering the board of trustees to do the same thing. There are simply provided several tribunals in which to administer the same remedy, and the remedies are cumulative. The subject-matter over which jurisdiction is conferred is common to both—official delinquency; and the same remedy is to be applied by each—removal from office. It is not at all unusual for different tribunals to have concurrent jurisdiction over the same subject-matter, the same parties, and to be empowered to grant the same relief; and, in our judgment, that is the condition here. The jurisdiction conferred upon the board of trustees is not exclusive, but concurrent with that of the superior court under the provisions of the general law. And the granting of this power to remove delinquent officers by the charter is not at all inconsistent with the existence of concurrent jurisdiction in the superior court over the same subject-matter. Nor did the charter provision in that respect supersede the general law as inconsistent with the charter under section 8, art. 11, of the Constitution.

It is insisted by counsel for petitioner that his position in this matter is supported by the ruling of this court in Croly v. Board of Trustees of Sacramento, 119 Cal. 229, 51 Pac. 323. That was a proceeding in prohibition, in which Croly, then the superintendent of streets of the city of Sacramento, sought to prohibit the board of trustees under the charter from trying him on certain charges of misconduct, on the ground that jurisdiction to remove him was exclusively vested in the superior court, to be inaugurated by a proceeding under section 758 et seq.—the general law we have been considering. This court sustained the power of the board of trustees to try him. Counsel construes the language in the opinion in that case as holding, in effect, that jurisdiction was vested in the board under the charter to do so.

We do not so understand the decision. The main question there was not whether the superior court had exclusive jurisdiction to try him, but whether the board of trustees had any jurisdiction to do so. The contention of counsel for Croly in that case was that the provision of the charter was unconstitutional, as an attempt to confer judicial power upon the board of trustees. It was held that vesting the board of trustees with power to try and remove municipal officers was rather the exercise of a power necessary to secure good governmental administration—a political and administrative power; and the right of the board of trustees to try him was sustained on that ground. It was not decided that the jurisdiction of the board was exclusive, or that jurisdiction in the superior court concurrent with that vested in the board did not exist. It is said in the decision, and the power was sustained on that ground, that "it is clear that the right of amotion is but the exercise of a police power necessary to the welfare of a city." We cannot perceive anything in the decision of the Croly Case which sustains petitioner's contention.

It is finally insisted that the removal of municipal officers is purely a "municipal affair," and that as to such matters the charter provision under section 6, art. 11, of the Constitution, cannot "be subject to and controlled by general laws." Whether the removal of petitioner is or is not a "municipal affair" has been very largely discussed by counsel upon both sides, but we do not perceive that the solution of that question is germane to the case. The general law, which confers jurisdiction on the superior court to entertain proceedings for the removal of municipal officers, does not thereby render the charter provision conferring similar jurisdiction on the board of trustees "subject to and controlled by" the general law. To be "subject to" is "to become subservient to" or "subordinate to," and to "control" is defined as "to exercise a directing, restraining, or governing influence over; to direct, to counteract, to regulate." Cent. Dict. The general law does not have this effect. That law, conceding that the removal of municipal officers is purely a "municipal affair," does not assume to subordinate or make subservient the jurisdiction conferred on the trustees by the charter to remove delinquent officers, or to control, govern, direct, or regulate it. The jurisdiction under the charter is exercised untrammeled, unrestrained, and uncontrolled by the fact that jurisdiction on the subject is also conferred on the superior court under the general law. The jurisdiction of both is consistent and concurrent.

The demurrer to the petition is sustained.

We concur: BEATTY, C. J.; SHAW, J.; VAN DYKE, J.; McFARLAND, J.; ANGELLOTTI, J.; HENSHAW, J.

(147 Cal. 336)

SMITH v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. 4,353.)

(Supreme Court of California. July 8, 1905.)

1. DIVORCE—INTERLOCUTORY DECREE.
Under Civ. Code, § 132, as amended, an interlocutory decree of divorce must be entered in the judgment book one year before a final decree can be granted.

2. SAME—APPEAL FROM INTERLOCUTORY DECREE.
By the express provisions of Civ. Code, § 131, the right to appeal from an interlocutory decree in divorce, determining that one of the parties is entitled to a decree, continues for six months after the entry.

In Bank. Mandamus by Nelita Estrada Smith to compel the superior court of the city and county of San Francisco to enter a final decree of divorce in her favor. Writ denied.

R. M. F. Soto (O. F. Meldon, of counsel), for petitioner.

PER CURIAM. This is a petition for a writ of mandate requiring the superior court to enter a final decree of divorce. In an action by petitioner against her husband, the court heard the evidence, and an order was entered in its minutes reciting the submission and consideration of the cause, and adding: "it is ordered by the court that an interlocutory decree of divorce be entered herein in favor of the plaintiff on grounds of defendant's willful neglect and desertion." Nothing further was done. No findings were filed, and no decree ever entered in the judgment book. More than a year after the entry in the court minutes, above quoted, petitioner, upon proper notice, moved the court to enter a final decree, which motion was denied.

These being the facts, the petition for the writ of mandate must be denied. We hold that upon the proper construction of section 132 of the Civil Code, as recently amended, an interlocutory decree of divorce must be entered in the judgment book one year before a final decree can be granted, and under section 131 the right to appeal from the interlocutory decree continues for six months after such entry.

Writ denied.

(146 Cal. 80)

SOUTHERN CALIFORNIA RY. CO. v. WORKMAN et al. (L. A. 1,302.)

(Supreme Court of California. April 8, 1905.)

In Bank. On application for rehearing. Denied.

For opinion in department, see 79 Pac. 586.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause by the court in bank. The principal question presented by the two appeals is new and important, and I think has been decided without sufficient consideration of the consequences involved in the precedent we are making, and without any consideration of a proposition the correct determination of which is absolutely essential to a just conclusion upon the matters in controversy.

The statement of the case in the department opinion is in some respects inaccurate and obscures the real question to be decided. The appeal from the judgment and the appeal from the order each rests upon its own separate record. The case on the appeal from the judgment is presented by the complaint and the default decree. The case on the appeal from the order granting a temporary injunction is presented by the complaint, the bill of exceptions, setting forth the evidence introduced at the hearing of the motion, and the order. The record on this latter appeal shows fully and clearly the actual state of facts out of which the controversy arises. The record on the appeal from the judgment shows only the facts alleged in the complaint and admitted by the demurrer. The assessment of the so-called "right of way" is not set out in the complaint, but does appear in full in the bill of exceptions constituting a part of the record on the appeal from the order. The opinion of the court, however, which deals exclusively with the appeal from the judgment, quotes a portion of the assessment ("being the Southern California Railway right of way," etc.), in order to show (if that is what the opinion means) that it was evidently the intention to assess the mere easement of the right of way. If, instead of the language so quoted, the whole assessment had been set out as it appears in the bill of exceptions, it would be seen that there was no attempt to assess an easement as such, but simply an assessment to unknown owners of a tract of land described rather indefinitely by boundary lines, but identified by the additional term of description: "Being the Southern California Railway right of way between Avenues 33 and 50." It may be true that this and the other evidence contained in the bill of exceptions will serve as an aid to interpretation in dealing with ambiguous phrases used in the complaint, but for this purpose the whole must be taken, and not a part; and considering the whole evidence together, in connection with the argument of plaintiff's counsel as contained in the briefs, it is very evident that the phrase "right of way," in plaintiff's mouth, means, not a mere easement of one person in the lands of another, but the strip of land over which the line extends, whether owned by the railway company or by another. It is in this untechnical sense that the expression is used by the assistant engineer of the plaintiff in his affidavit, constituting the principal evidence offered by plaintiff on the hearing of the motion. He deposes that the plaintiff acquired different portions of its "right of way" by various bargain and sale and quitclaim deeds, and as to that portion of the so-called right of way with which we are particularly concerned—the portion, that is to say, about 1,000 feet in length, which actually abuts upon Pasadena avenue—he sets out the description of the property so conveyed as follows: "Being a strip of land 30 feet wide on each side of the center line of the railroad track of the California Central Railway," etc.; "also a strip of land on the westerly side of the foregoing described strip, and adjoining the same, 40 feet wide and 900 feet long, being 450 feet north and the same distance south from the center line of Morgan Station as now located; also" other adjacent strips similarly described. In short, the evidence plainly shows that what the plaintiff calls its "right of way" is really and truly a strip of land 60 feet in width for the most part, along the center line of which its track extends, and which it owns in fee. For about 1,000 feet where it abuts on Pasadena avenue, this strip is extended back 40 feet further to accommodate a railway station, and the whole strip 100 feet in width is likewise owned by the plaintiff in full property. It has no easement. It owns the soil, but calls it nevertheless its "right of way."

The assessor, in his effort to make his description of the tract assessed definite and certain, merely used the expression "right of way" in the sense in which the plaintiff's witnesses use it—the sense in which it is often used in the records and briefs that come to this court, and the sense in which we can take judicial notice it is commonly employed by railroad men. See So. Pac. Co. v. Burr, 86 Cal. 279, 24 Pac. 1032. Looking to the assessment itself as it appears in the bill of exceptions, no other possible construction can be placed upon it than that of an assessment of a tract of land, and all the other evidence tends only to strengthen this view. It is also clear that the plaintiff was the owner in full property of all that portion of the tract abutting on Pasadena avenue. The question, therefore, which is really presented on the actual facts of the case, is whether a lot of land abutting on a public street ceases to be assessable as such for its proportion per front foot of the cost of grading, etc., when acquired and used by a railroad company for laying its track and operating its trains. But the question to be determined on the appeal from the judgment depends, not on the facts as proved at the hearing of the motion, but on the facts alleged in the complaint and confessed by the demurrer; and it is necessary to consider whether there is any material difference between the facts alleged and the real facts. I do not think that there is. It is alleged that there was an attempt to assess the right of way; but what the assessor actually did is not alleged specifically, and the assessment as it appears of record is not set forth. The allegation is rather of a conclusion of law than a matter of fact, and, construed with reference to other allegations, evidently means no more than what is in fact true that he assessed the strip of land which plaintiff calls its right of way. It is alleged, for instance, that the holder of the land demanded of the defendant Workman that he should sell the right of way to satisfy the bond, and thereupon defendant published the notice, a copy of which is incorporated in the complaint, and that, unless restrained, defendant will under said advertisement and notice attempt to sell the right of way, etc. Looking to the notice itself, we find that it says nothing about selling a right of way, but merely announces the sale of a tract of land. In short, when the phrase "right of way" is construed in the sense in which plaintiff uses it in the complaint itself, it can be seen that nothing inconsistent with the truth is alleged, and so the question is the same in both appeals: Does a lot of land abutting upon a public street become unassessable for street improvements when acquired and used by a railroad company for laying its track and operating its trains? In effect, the opinion of the court holds that it does become exempt from the burden which the law imposes upon all other property similarly situated. For, although the decision only declares in terms that there is no authority for making an assessment upon a right of way, it means, when construed with reference to the facts of the case, that you cannot assess or sell a tract of land belonging to a railroad company, if its track extends over it, without expressly exempting the right of way; that is to say, without reserving to the company in the express terms of the sale the exclusive right to use the land for all the purposes of its traffic. The proposition broadly laid down is that a part of a railroad company's right of way cannot be sold on execution or for a street assessment. Of course, it is consistent and logical to say that such property cannot be assessed if it cannot be sold; for there is no possible way of enforcing a delinquent assessment for street improvements, except by a sale of the abutting lots, and an assessment which binds no one is equivalent to no assessment at all.

But I dispute the proposition that a right of way cannot be sold on execution or for a street assessment. As to executions, the unsoundness of the proposition is easily demonstrated by a simple example: Suppose a tract of land subject to a judgment or mortgage lien to be sold by the mortgagor or judgment debtor to a railroad company and crossed by its track; or suppose, instead of a sale of the land, a grant of the mere easement of the right to lay and operate the track. Can it be pretended that the judgment creditor or mortgagee would not have the right to sell the land on execution, freed of the servitude, if necessary to satisfy the lien? I imagine his right to make the sale will scarcely be denied, and yet all the direful consequences to the public and the company—stoppage of traffic, forfeiture of franchise, etc.—would follow just as surely (or, rather, they would be just as surely avoided by a satisfaction of the debt and discharge of the lien) upon such a sale as upon a sale for a delinquent street assessment. For this reason I say the opinion is here again perfectly logical and consistent in putting sales upon execution and sales to satisfy delinquent assessments upon the same footing. All the reasons advanced against the right to make such sales have the same application to one as to the other. I go further, and say that all the reasons in favor of the right to sell on execution in the case supposed apply with equal force in favor of the right to sell in satisfaction of a delinquent street assessment. By the general laws of the state an equal burden is imposed upon all abutting lots in proportion to frontage for the purpose of improving the street. The front-foot rule being the basis of apportionment, the law would be unconstitutional if it did not have a uniform application, and an assessment upon a part only of the frontage to pay for any particular improvement would be void. Neither the Legislature by statute, nor the assessor by his assessment, can, by exempting a portion of the frontage, impose an excessive burden upon the balance. People v. Lynch, 51 Cal. 15, 21 Am. Rep. 677. And what cannot be done directly cannot be done indirectly. The Legislature could not, if it would, exempt a lot owned or used by a railway company from its liability to contribute equally with other lots similarly situated to the expense of street improvements. But there has been no attempt to confer any such exemption by the Legislature. By the law all abutting property is subjected to a uniform charge in proportion to frontage, and when an improvement is made the lien, till then merely potential, becomes fixed and definite, and there is no more reason why the property should not be sold in satisfaction of such a lien than there is for saying it could not be sold to satisfy the lien of a judgment or mortgage in the case above supposed.

The serious consequence to flow from this decision is that hereafter, when any part of the lots fronting on a public street is used by a railway company for its track, the street must remain unimproved; for the assessment cannot include the whole frontage, and, if it does not, it will be void, according to the decision in People v. Lynch, supra, and the cases in which that decision has been followed and affirmed.

1 Cal. App. 281

PACIFIC PAVING CO. v. VIZELICH et al.

(Court of Appeal, Third District. California. July 6, 1905.)

1. COMPLAINT—DEFECTS—WAIVER—STIPULATIONS.

Where, after a demurrer to a complaint had been overruled, the parties stipulated that judgment should be entered as prayed in the complaint in case the plaintiff in another suit then pending recovered, such stipulation amounted to a waiver of the defects in the complaint.

2. REVIEW—JUDGMENT BY STIPULATION.

A judgment under a stipulation is a judgment by consent, which is not reviewable on appeal.

3. JUDGMENT—CONSTRUCTION—AMOUNT.

Where the complaint demanded judgment for $51.1898, with interest thereon at 10 per cent. per annum from September 21, 1892, to rendition of judgment, also $15 attorney's fees and taxable costs, a judgment for $107.02, enumerating principal, interest, and attorney's fees, should be construed as containing the attorney's fees as a part of the $107, and was therefore not objectionable, as greater than the amount prayed.

4. TRIAL—ISSUES—FAILURE TO FIND.

Where a complaint alleged V. was sole owner of the property in controversy, but that defendant F. had or claimed some interest therein, but the action was dismissed as to him, and his interest, if any, did not appear, the court's failure to find as to F.'s interest was not fatal to the judgment.

Appeal from Superior Court, San Joaquin County; E. I. Jones, Judge.

Action by the Pacific Paving Company against Nicholas Vizelich and another. From a judgment for plaintiff, defendant Vizelich appeals. Affirmed.

See 74 Pac. 352.

Rehearing denied by Court of Appeals August 3, 1905; by Supreme Court September 2, 1905.

J. B. Webster and C. H. Fairall, for appellant. George A. Louttit and Gunnison, Booth & Bartnett, for respondent.

CHIPMAN, P. J. Appeal from a judgment in an action to foreclose a street paving lien. A general demurrer to the complaint was overruled, with leave to answer. The court found: That subsequently the parties filed the following stipulation:

"It is stipulated and agreed that the defendants in the above-entitled actions need not file an answer in said actions, but that the said actions shall abide the result of the action of the Pacific Paving Company against J. L. Mowbray, 5,163 [see 59 Pac. 205], and whatever judgment may be finally entered in said actions shall also be entered in each of the above-entitled cases, whether the same be in favor of the plaintiff or defendant; and, if in favor of the plaintiff, then in each case according to the prayer of the complaint.

"Dated April 23rd, 1897.

"Jas. A. Louttit,
"Attorney for Plaintiff.
"F. H. Gould, James H. & J. E. Budd,
"Attorneys for Defendants."

That judgment was finally entered in favor of plaintiff in the action referred to in said stipulation. And on these findings the court entered judgment for plaintiff "for the sum of $107.02, being the amount of principal and interest due on assessment against the lot in the complaint set forth, together with the further sum of $15, attorney's fees of plaintiff herein, and $14.80, costs in this action." Appellant makes two objections to the judgment: (1) That it is not supported either by the complaint or by the stipulation; and (2) that the court has failed to find all the material facts.

1. The insufficiency of the alleged facts is grounded in part upon the decision in Buckman v. Hatch, 139 Cal. 53, 72 Pac. 445. It is not contended that the court had not jurisdiction of the subject-matter and of the person. The defect in the complaint is not pointed out, but we may assume, as it seems not to be denied by respondent, that there was some defect in the complaint in some matter of substance. The record shows nothing but the complaint (filed December 2, 1893), demurrer (overruled January 29, 1894), stipulation (filed April 28, 1897), findings (filed September 12, 1900), judgment (entered September 12, 1900), and notice of appeal. We think the court was authorized to enter the judgment "according to the prayer of the complaint," in accordance with the stipulation or written agreement of the parties. This agreement was entered into more than three years after the demurrer was overruled, and manifestly to avoid a trial of this action on its merits. We think, also, it should be deemed to constitute a waiver of defects in the complaint, of which the demurrer was intended to take advantage. The plain and natural meaning of the agreement was that plaintiff should have judgment "according to the prayer of the complaint," regardless of defects in the complaint, on condition only that plaintiff recovered final judgment in the Mowbray Case presumably similar to this case. When the court found that such final judgment had been entered, and that said stipulation had been entered into by the present parties, the conclusion of law, as the court found, followed from these facts, "that plaintiff is entitled to judgment as prayed for in its complaint." See question in some particulars discussed in Cook v. Lion Fire Ins. Co., 67 Cal. 368, 7 Pac. 784. It was held in Erlanger v. S. P. R. R. Co., 109 Cal. 395, 42 Pac. 31, that judgment by consent will not be reviewed, whether or not a motion to dismiss the appeal be made; and a judgment under stipulation is a judgment by consent. See, also, Haskins v. Jordan, 123 Cal. 157, 55 Pac. 786; Spelling's New Trial and Appellate Practice, vol. 2, § 676, and notes.

But appellant suggests that, if the judgment is based upon the complaint, it is invalid, because the amount is greater than prayed for. The prayer demanded $51.1898, with interest thereon at 10 per cent. per annum from September 13, 1892, to rendition of judgment; also for $15 attorney's fees and taxable costs. The court gave judgment as hereinabove quoted. Computation shows that, by including the attorney's fees of $15 with the interest on the principal sum, we have the amount of the judgment, $107.02, and 11 cents more. If the judgment will admit of this construction, it is slightly less than prayed for. The costs are usually taxed separately, because not ascertainable when the judgment is entered. We must give the judgment such construction as will support it, if this may be done within reason and accepted rules of construction. Davis v. Lezinsky, 93 Cal. 126, 28 Pac. 811. We think it reasonably clear that the sum of $107.02 was meant to include both interest and attorney's fees with the principal, for the judgment reads, "the sum of $107.02, being the amount of," and then enumerates principal and interest, together with attorney's fees. It is true the language used does not point unmistakably to this meaning, but it is equally susceptible of this meaning as of the meaning contended for by appellant. Under such circumstances we do not think the ambiguity warrants reversal. Looking to the pleadings and findings, as we may do to ascertain the meaning of the judgment, the amount at once appears to include principal, interest, and attorney's fees allowed.

2. The complaint alleged that defendant Finkbohner has or claims some interest in the lot involved, upon which there is no finding. Appellant contends that failure to find as to Finkbohner's interest is fatal to the judgment. The action as to him was dismissed, as appears from the recitals of the judgment. What his interest in the lot was, if any, does not appear. The complaint alleged that defendant Vizelich was the sole owner, and it is the owner who is a necessary party. Robinson v. Merrill, 87 Cal. 11, 25 Pac. 162. In support of the judgment, and in view of the stipulation, we must presume that the action as to Finkbohner was properly dismissed, and hence no finding was necessary as to him.

The judgment is affirmed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

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1 Cal. App. 278

HARRINGTON v. PARDEE, Governor.

(Court of Appeal, Third District, California.
July 6, 1905.)

STATES—OFFICERS—APPOINTMENT—ADVICE OF SENATE—ISSUANCE OF COMMISSION.

Under St. 1887, p. 67, c. 57, providing for the appointment of certain trustees by the Governor "with the advice and consent of the Senate," an appointment is not completed by the transmission of the nomination by the Governor to the Senate and the confirmation of the nomination by the Senate; but it is still discretionary, after such confirmation, for the Governor to issue the commission or not, and until the commission is issued the appointment is not completed.

Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Application by John T. Harrington for a writ of mandate against George C. Pardee, as Governor of the state of California. From an order sustaining a demurrer to the petition, and from a judgment denying the writ, plaintiff appeals. Affirmed.

White & Miller, for appellant. U. S. Webb, Atty. Gen., for respondent.

BUCKLES, J. On March 16, 1901, Henry T. Gage, who was then the Governor of the state of California, nominated the plaintiff to the office of trustee of the California Home for the Care and Training of Feeble-Minded Children, and transmitted such nomination to the Senate, which was then in session, and the Senate duly advised in and consented to the nomination and appointment of said plaintiff. Gov. Gage failed to issue to plaintiff a commission as trustee of said home. George C. Pardee, being the successor of Henry T. Gage as Governor of California, was applied to to issue to plaintiff said commission, and, the Governor not complying with plaintiff's request, plaintiff filed his petition in the superior court of Sacramento county praying for a writ of mandate commanding the Governor to issue to him said commission. The defendant demurred to the petition on the ground that it did not state facts sufficient to entitle plaintiff to the relief sought. The demurrer was sustained. From the order sustaining the demurrer, and the judgment rendered thereon, this appeal is prosecuted.

The plaintiff, in his brief, assures us that: "The question presented to the court below and argued by counsel for the respective parties was this: Has the Governor a right to refuse to issue a commission after he has transmitted a nomination to the Senate and the appointment has been confirmed by the latter, or may he thereupon ignore his own action and the action of the Senate, and make a new nomination or appointment"? The trustees of said home are "appointed by the Governor with the advice and consent of the Senate." Act March 9, 1887. St. 1887, p. 69, c. 57. As to the trustees of this home, the Governor cannot appoint, when the Senate is in session, without the "advice and consent" of that body. In all such appointments the first step to be taken is the suggestion by the Governor to the Senate of the name of a person for the office, and to ask the advice of the Senate, and for its consent for him to appoint such person; the second step is the advice and consent of the Senate, which is manifested by a resolution certified to the Governor and to the Secretary of State; and the third and last step is the issuing of the commission signed by the Governor, and this is the evidence of such appointment.

Plaintiff contends that "nominate" and "appoint" are synonymous terms and mean the same thing, and that therefore, when the Governor has nominated, he has appointed. Doubtless there are some instances where these terms may be used to mean one and the same thing, but by no process of reasoning can it be true that in "nominating" to the Senate the Governor is "appointing" the person to the office, because he cannot appoint without the advice and consent of the Senate. The "appointment" is not made until the "commission" is issued, and issuing the same is the last act, and in issuing the commission the Governor is performing an executive, and not a ministerial, act, and is therefore acting under his discretionary powers, and may or may not issue the commission, although the Senate may have advised it and consented that he should make the appointment. Plaintiff has presented no authority which in our opinion tends even in the slightest degree to show that the Governor has exhausted his discretionary power when he nominates a man for office and sends the name to the Senate. Over 100 years ago it was held by the Supreme Court of the United States in Marbury v. Madison, 5 U. S. 137, 2 L. Ed. 60, that: "The last act to be done by the President is the signature to the commission. He has then acted on the advice and consent of the Senate to his own nomination. The time for deliberation has then passed, and he has decided. His judgment on the advice and consent of the Senate concurring with his nomination has been made, and the officer is appointed." Defendant has presented numerous authorities sustaining and approving this rule, and the plaintiff has brought to our notice no case holding a different rule, and we have been unable to find any. This doctrine has been cited approvingly in every case in this state which involves a like question. We think a principle established so long ago, so closely adhered to, and so unanimously sanctioned by all the courts, must be too well engrafted into our system of government to be disturbed now.

The order and judgment are affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

1 Cal. App. 275

BACON v. KEARNEY VINEYARD SYNDICATE.

(Court of Appeal, Third District, California. July 6, 1905.)

1. WATER COURSES—IRRIGATION DITCHES—OVERFLOW—NEGLIGENCE.

Where defendant permitted its irrigation ditch to overflow by failing to repair a defective headgate, and such overflow injured plaintiff's grapes, then in a condition of ripening, defendant was guilty of negligence, rendering it liable therefor.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 234.]

2. APPEAL — HEARSAY EVIDENCE — HARMLESS ERROR.

Where, in an action for injuries to plaintiff's grapes by an overflow of defendant's irrigation ditch, defendant's negligence was conclusively established by other evidence, defendant was not harmed by the admission of evidence of statements of defendant's foreman that after the overflow he had notified the ditchman to be a little more careful, and that the accident happened through his carelessness.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4161–4170.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Charles Bacon against the Kearney Vineyard Syndicate. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

M. K. Harris, for appellant. F. Kauke, for respondent.

BUCKLES, J. This is an action for damages resulting from flooding the plaintiff's vineyard, alleged to have been caused from the negligence and carelessness of defendant and its agents in keeping and operating certain water ditches, dams, and headgates therein, and the water running therein onto lands of defendant for irrigating, and which lands are near those of plaintiff. The answer specifically denies all the allegations of the complaint. The case was tried before the court without a jury, and the judgment was for the plaintiff for the sum of $378 damages, with interest thereon at 7 per cent. per annum from date until paid, and for $62.25 costs. A motion was made for a new trial and denied. The appeal is taken from the judgment and from the order denying the motion for a new trial.

The evidence is before us in the statement settled on motion for new trial, from which evidence it appears that these are undisputed facts, viz.: (1) That defendant owned an artificial ditch used for irrigating his field of alfalfa, in which ditch are several headgates and a dam, to increase or lessen the flow of the water and to prevent the escape of the water onto other lands; (2) that plaintiff owns a vineyard of 20 acres near the said ditch; (3) that the grapes in said vineyard were near ripening; (4) that grapes in a condition of ripening would be injured by allowing the water to run over the surface of the ground around the vines; (5) that the water did escape from defendant's said ditch, and did flood a part of the plaintiff's vineyard; (6) that plaintiff's grapes were damaged by reason of the vineyard being flooded by the water escaping from defendant's ditch.

There is no claim of contributory negligence, and there is no evidence tending to show that plaintiff was in any way to blame for the flooding of his said vineyard. The defendant had the right to use said ditch and to run the water therein for the purposes of irrigating his field of alfalfa. The rule in such cases, as we understand it, is well settled, and is this: The owner of an artificial ditch, through which flows water for domestic uses or for irrigation, as in this case, is bound to keep such ditch in repair, so that the water running therein will not break through or escape therefrom and damage the land or crops of another, and that if through any fault or negligence of his in not properly managing the ditch, or keeping it in repair, the water does escape therefrom, and injures the lands or crops of another, he is liable, and the law will hold him responsible for whatever damage may be done. Richardson v. Kier, 34 Cal. 75, 91 Am. Dec. 681; Shields v. Orr Ditch Co., 23 Nev. 355, 47 Pac. 194; Losee v. Buchanan, 51 N. Y. 487, 10 Am. Rep. 623. Defendant quotes numerous authorities to show that "one who does a lawful act upon his own premises cannot be held for injuries resulting, unless the act was done in a way to indicate negligence." This is so well known and so firmly a part of our system that there is no need of repeating the cases here in which the doctrine has been announced. The evidence for both plaintiff and defendant here shows that at least one of the headgates in said ditch was in a poor condition and very defective, and operated in such a defective manner that the water flowing in said ditch burst from it and ran down onto plaintiff's vineyard. The witness Harkness, the defendant's foreman, testified: "This headgate A was leaking, and that is why we put the dam in." This dam was put in, however, after the water had burst out of the ditch and overflowed a part of plaintiff's vineyard. The evidence clearly shows the headgates in said ditch were defective, and that it was by reason of their defect that the water was allowed to flow in too large a volume, thus rushing out and overflowing plaintiff's land. To allow the headgates to become leaky, and so they would not hold back the water sufficiently to keep it from escaping onto plaintiff's vineyard, was negligence. Negligence is defined to be "injury occasioned to another by want of ordinary care," etc. Had the water been permitted to break out and overflow plaintiff's vineyard at a time when no injury could have resulted from the overflow, then there would have been no negligence in a legal sense, because no injury.

Error is claimed by the court permitting the witness Grummett to testify as follows: "On one occasion * * * I met Mr. Tcherassy, the foreman of the Kearney Vineyard Syndicate. On Saturday evening I met him in town, and had a conversation with him in regard to this flooding of Mr. Bacon's vineyard." Question: "What did he say in regard to how it was done?" The defendant objected to the question on the ground that it was incompetent, irrelevant, and immaterial, because Tcherassy was not shown to be the foreman for the defendant for this particular ditch, and whatever he might say could not bind the defendant. The objection was overruled, and the witness answered: "He said he had notified the ditchman to be a little more careful, and that this happened through his carelessness." The negligence had been conclusively established by the evidence given by the testimony of the witnesses Bacon, Dow, and Lewis, the last being a witness for the defendant, and afterwards corroborated by the witness Harkness. If it was error to have admitted this evidence, it could not have injured the defendant. While it might tend to prove negligence, yet there was abundant evidence, as has been seen, which was without substantial conflict on that point, to show negligence on the defendant's part, and the error will be deemed harmless. Silvarer v. Hansen, 77 Cal. 579, 20 Pac. 136; Code Civ. Proc. § 475.

The judgment and order appealed from are sustained.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

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1 Cal. App. 266

BUHMAN et al. v. NICKELS & BROWN BROS.

(Court of Appeal, Third District, California. July 5, 1905. On Rehearing, Aug. 1, 1905.)

1. Appeal—Notice—Time of Service.

Under the express provisions of Code Civ. Proc. § 940, an appeal is ineffectual for any purpose, unless the undertaking is filed within five days after service of the notice of appeal.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 2065.]

2. Landlord and Tenant—Termination of Lease—Notice to Quit.

Where a lease provided that, in case of a sale of the demised premises, the lessee would quit and surrender the premises upon 30 days' written notice, grantees of the lessor were not required to give the 3 days' notice prescribed by Code Civ. Proc. § 1161, as a condition of rendering a defaulting tenant guilty of unlawful detainer; but the lease was terminated by the sale, and the tenant was then entitled to 30 days' notice to quit, and was required to quit pursuant to such notice.

3. Same—Unlawful Detainer—Damages.

Under Civ. Code, §§ 3334, 3345, requiring tenants holding over after notice to quit to pay treble rent, and Code Civ. Proc. § 1174, authorizing the recovery of treble rent in actions for unlawful detainer, the value of rents and profits trebled cannot be awarded as damages in an action of unlawful detainer.

4. Same—Damages—Assessment on Pleadings—Sufficiency of Pleading.

Where a tenant was required to quit in case of a sale of demised premises, but was entitled to reimbursement for expenses incurred in putting in a crop, an appellate court could not assess his damages on appeal, in an action of unlawful detainer, on an allegation of the complaint that he had put "about 40 acres" into hay and grain, and his expenses in so doing did not "exceed $400 per acre."

On Rehearing.

5. Appeal—Rehearing—Grounds.

A rehearing will not be granted to respondent on the ground of an error in a statement of fact, on which the court relied, which was contained in respondent's pleading, where the allegations of the pleading were specifically noticed in appellant's brief, which raised the question decided by the court, and respondent took no notice of the matter, and made no suggestion in its brief that there was no error, clerical or otherwise, in the allegations of its pleading.

Appeal from Superior Court, Napa County; H. C. Gesford, Judge.

Unlawful detainer by J. J. Buhman, Jr., and others against Nickels & Brown Bros., a corporation. From a judgment for defendant, plaintiffs appeal. Reversed.

Webber & Rutherford, for appellants. Bell, York & Bell, for respondent.

McLAUGHLIN, J. Unlawful detainer. The complaint contains allegations showing: That the executors of the last will of Charles Robinson, deceased, leased certain real property of the estate in Napa county to the defendant corporation, and that the defendant went into possession under said lease. That the lease contained the following covenant: "It is further mutually understood and agreed by the parties hereto that in case of a sale of the demised premises that the said second party will quit and surrender the said premises upon 30 days' written notice, and the said first parties will pay to the said second party the actual cost or expense that said second party may have been to in putting any crop of hay or grain upon said premises." That the will of Robinson, deceased, authorized and empowered the executors to sell any property of the estate, without order or notice, at public or private sale. That under said power the executors sold the leased land to plaintiffs, at private sale, on October 15, 1902. That said sale was reported to the superior court on November 26, 1902, and on December 30, 1902, an order confirming the sale was made and entered. That pursuant to said sale a deed was executed by the executors on said last-mentioned day, which deed was delivered to plaintiffs on January 29, 1903, and that ever since said date they have been the owners of the premises. That on the 4th day of February, 1903, plaintiffs served upon defendant a written notice stating that the property had been sold to plaintiffs, and demanding that said defendant quit and surrender possession of said premises within 30 days from the date of said service. That on February 12th following a notice was served by plaintiffs upon defendant, demanding that defendant furnish plaintiffs with a statement of the actual cost or expense that defendant had been put to in putting in a crop of hay and grain. That on March 6, 1903, plaintiffs served upon defendant an offer in writing to pay defendant for putting 40 acres into hay and grain, at a cost of $4 per acre. That defendant failed to furnish a statement of cost and expense as requested, or to accept the offer so made, and remained in possession and occupancy of the premises, and refused to quit or surrender possession of the same. Then followed an averment that the acreage put into hay and grain amounted "to about 40 acres, and that the actual cost or expense that defendant was or has been put to in putting in said crop of hay or grain does not exceed $4 per acre." Plaintiffs then further alleged that the value of the rents and profits was $500 per month.

The prayer was for restitution of the premises, for the value of the rents and profits trebled, and for costs. Attached to and made a part of the complaint was a copy of the lease, in which the monthly rental is fixed at $50 from January to July, and $25 for the remainder of the year. Defendant, answering, alleged in substance that the executors had sold the land to defendant, and that as such purchaser defendant had contested the confirmation of the sale to plaintiffs, and had taken an appeal from the order confirming said sale, which appeal was then pending. It appears from the averments of the answer that the notice of appeal was served on January 12, 1903, and that the undertaking on appeal was not filed until January 19, 1903, 7 days after the notice of appeal was served. The pendency of the appeal was the only defensive matter pleaded in the answer, and none of the averments of the complaint were denied therein. To such answer the plaintiffs demurred, upon the ground that it did not state facts sufficient to constitute a defense to the action. The court overruled the demurrer, and such ruling is assigned as error.

The undertaking on appeal not having been filed within 5 days after the notice of appeal was served, the appeal was ineffectual for any purpose. Code Civ. Proc. § 940; S. F. P. Co. v. State, 141 Cal, 358, 74 Pac. 1047; Hoyt v. Stark, 134 Cal. 179, 66 Pac. 223, 86 Am. St. Rep. 246; Robinson v. Templar Lodge, 114 Cal. 41, 45 Pac. 998; Reed v. Kimball, 52 Cal. 325. The order overruling the demurrer was, therefore, erroneous. The respondent, however, claims that such error was not prejudicial, and that upon the findings, which are identical with the averments of the complaint and answer, the judgment should be for defendant in any event. This contention is based upon the proposition that the notice to quit and surrender possession given pursuant to the terms of the lease merely terminated the lease, and hence a further notice, styled a "three days' notice to quit," was essential before an action in unlawful detainer would lie. The covenant in the lease was that the defendant would "quit and surrender possession upon thirty days' notice." The law neither does nor requires an idle act, and it would certainly be idle to require three days' notice to quit, in view of the express stipulation of the parties and plaintiffs' compliance therewith. The defendant could not, by any act or acts, prevent the lease from lapsing, and under such conditions no further notice was required. Code Civ. Proc. § 1161; Harloe v. Lambie, 132 Cal. 135, 64 Pac. 88; Earl Fruit Co. v. Fava, 138 Cal. 76, 70 Pac. 1073; Kelley v. Teague, 63 Cal. 68. Besides, a reasonable construction of the lease leads to the conclusion that the parties understood and intended that a sale would terminate the lease, and that in such event 30, instead of 3, days' notice to quit, would be necessary. It results that the complaint did state a cause of action, and that the findings in accordance with such complaint would not support, much less authorize, a judgment for defendant.

Appellants ask that the trial court be directed to enter judgment upon the findings according to the prayer of the complaint. This cannot be done. The lease shows the rental value, which may be trebled (Civ. Code, § 3345; Code Civ. Proc. § 1174), and the prayer is according to the general averment as to the value of rents and profits. Damages in such actions as the one at bar must be fixed in accordance with rules of law. Civ. Code, §§ 3345, 3334; Code Civ. Proc. § 1174; Jack v. Sinsheimer, 125 Cal. 566, 58 Pac. 130. And it is obvious, from an inspection of the complaint and prayer, that it would be disregarding these rules to award the amount asked in the prayer. The defendant, under the complaint, is also entitled to have his expense and cost in putting in crops of hay and grain ascertained. This cannot be done when the averment is as indefinite as it is in this case; for "about 40 acres, at a cost of not to exceed $4 per acre," would be an uncertain basis upon which to rest the measure of defendant's right.

The judgment is reversed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

On Petition for Rehearing.

CHIPMAN, P. J. The petition for a rehearing is denied. This court on July 5, 1905, reversed the judgment, which was rendered by the trial court in favor of defendant. Defendant now asks a rehearing, on the ground that its answer erroneously alleged that the notice of appeal from the order confirming the sale of the real property in question was filed on January 12, 1903, when in fact it was not filed until January 19, 1903, on which day, also, the undertaking was filed. As the record stood when the cause was submitted here, it appeared by the answer that the undertaking was not filed five days after the notice of appeal was served, and hence, as we held, the appeal was ineffectual for any purpose. In appellant's brief the point was distinctly made, and attention was specifically drawn to the allegations of the answer, and numerous cases were cited in support of the point. Respondent took no notice of the matter, and in its brief made no suggestion that there was any clerical or other error in the date given for the service of said notice of appeal, but relied wholly on its demurrer to the complaint. The Supreme Court has denied rehearing in numerous cases (but few of which are reported) where points made in the briefs have been waived or presumably confessed by failure to argue or notice them, and afterwards the losing party has sought to have the same points heard by petition for a rehearing. See Atherton v. Board of Supervisors, 48 Cal. 157; Dougherty v. Henarie, 49 Cal. 686; People v. Northey, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129. In the present case the court had every reason for assuming that the facts were as stated in the answer, and we do not think the defendant should be permitted to have a rehearing for the purpose of correcting the record after having deliberately ignored the matter when its attention was called to it. Furthermore, it is not claimed that the answer, as printed in the record, is other than the answer served and filed. The claim is that a mistake occurred in its preparation, and thus we are asked, in effect, to permit an amendment of the pleadings, which we doubt our right to do. We have less hesitancy in denying, in view of the fact that defendant still has the opportunity to fully protect its rights in the trial court. The ruling of this court, as to the appeal pleaded in the answer, will not prevent the defendant from obtaining every advantage which his appeal may give him.

Upon the remaining questions discussed in the opinion on file, we adhere to the views there expressed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

1 Cal App 320

PEOPLE v. SMALL.

(Court of Appeal, First District, California. July 18, 1905.)

1. False Pretenses—Statutes—Verdict.

Pen. Code, § 532, provides that every person who "knowingly and designedly," by false and fraudulent representations or pretenses, defrauds any other of money or property, is punishable in the same manner as for larceny of the money or property so obtained. *Held*, that where, in a prosecution under such section, the jury would have been justified in finding defendant guilty of knowingly and fraudulently depriving P. of $103, with intent to cheat and defraud by false and fraudulent representations, or guilty of knowingly and designedly, by false and fraudulent representations and pretenses, defrauding him of a less sum than $103, or less than $50, or not guilty, a verdict, "We, the jury, find defendant guilty of the crime of felony, to wit, obtaining money by false pretenses," was void.

2. Criminal Law—Jeopardy.

Where defendant was convicted under a void verdict, and made a motion to be discharged after the verdict was received and recorded, he was placed in jeopardy as provided by Pen. Code, § 1023, and was entitled to such discharge.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 372, 374.]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

William A. Small was convicted of false pretenses, and he appeals. Reversed.

Bert Schlesinger, for appellant. U. S. Webb, Atty. Gen., for the People.

COOPER, J. Judgment of imprisonment in the state prison was entered against defendant under an information charging him with having obtained possession of $103 by certain false and fraudulent representations set forth therein. He made a motion for a new trial, which was denied, and this appeal is from the judgment and order denying said motion.

His contention is that the verdict is insufficient to sustain the judgment, and hence that he should be discharged. The information charges the offense defined in section 532, Pen. Code, which provides: "Every person who knowingly and designedly, by false or fraudulent representations or pretenses, defrauds any other person of money or property, * * * is punishable in the same manner and to the same extent as for larceny of the money or property so obtained." It is not necessary to give the information in full, or to enter into an analysis of it. It is sufficient for the purposes of this case that, in our opinion, it sets forth sufficient facts to constitute the crime defined in the section. It shows that the defendant unlawfully, knowingly, fraudulently, and with intent to cheat and defraud, obtained from one Perry $103 by certain false and fraudulent representations to the effect that he was the owner, free from all incumbrances or liens, of certain household furniture, which representations were untrue. The defendant pleaded not guilty to the offense charged. The jury had the right, as the evidence might have justified, to find the defendant guilty of the offense charged in the information, or guilty of knowingly and designedly, by false and fraudulent representations or pretenses, of defrauding the said Perry of a less sum than $103, or less than $50, or not guilty. The verdict was: "We, the jury, find the defendant, William A. Small, guilty of the crime of felony, to wit, obtaining money by false pretenses."

This verdict is not responsive to the issue before the court, and is not sufficient to show that defendant ever committed any crime. The words "of the crime of felony" may be omitted, as it is not the province of the jury to say or determine the legal definition of the acts claimed to constitute a crime. People v. Holmes, 118 Cal. 448, 50 Pac. 675. We then have a verdict finding "defendant guilty of obtaining money by false pretenses." There is no section of the Penal Code making such act of itself a crime. A party must knowingly and designedly, by false or fraudulent representations or pretenses, defraud a person. It is not found or stated what the false pretenses were, and no reference is made to the information. "But no judgment of conviction can be given unless the jury expressly find against the defendant upon the issue, or judgment is given against him on a special verdict." Pen. Code, § 1162. The verdict is not a special verdict, nor is it a finding against the defendant on the issue. The issue was as to whether or not the defendant did the things charged against him in the information, or enough of them to constitute a crime. How could any one tell from this verdict how much money defendant obtained, or what he did to obtain it? If the verdict, instead of responding to the issue in the record, finds upon some other, or is silent on some element of the offense, it will not sustain a judgment. Bishop's New Cr. Proc. vol. 1, § 1005.

In People v. Cummings, 117 Cal. 497, 49 Pac. 576, the information charged defendant with the crime of obtaining the promissory note of C. Schnelle, of the value of $175, by certain false and fraudulent pretenses. The verdict found that "the defendant is guilty of defrauding C. Schnelle of the note of $175 in the indictment mentioned." It was held that the verdict was insufficient, and that there was no such crime, for the reason that the verdict did not find as to the false and fraudulent representations in the indictment charged. So in the case at bar there is no finding that defendant knowingly and designedly obtained any money, and no finding as to the amount. In People v. Tilley, 135 Cal. 62, 67 Pac. 42, the defendant was charged with the crime of receiving stolen property in the language of the statute. The verdict was: "We, the jury, in the above-entitled case, find the defendant, Chas. H. Tilley, guilty of receiving stolen property." The verdict was held insufficient. It was said that there did not appear any intent to find defendant guilty as charged in the information, and the court said: "It may be that the jury were satisfied from the evidence that the defendant was guilty of the receiving of the stolen goods, but were not satisfied either of his knowledge of their being stolen, or as to the intent of personal gain, and that they accordingly found the fact of which they were satisfied, and omitted to find the others of which they were not satisfied." In the case at bar the jury were evidently satisfied of the fact that defendant obtained money by false pretenses. They were not satisfied that he was guilty of the offense charged, because they did not say so. They were not satisfied as to the amount of money defendant obtained, nor as to the fact that he knew the pretenses were false, for they did not say so. A person might, in the utmost good faith, represent himself to be the owner of certain property, and upon such representation procure money, and yet as a fact the representation might turn out to be untrue. It is not a crime to procure money by false pretenses, unless the party making them knew, or in law would be charged with knowledge, of their falsity.

The defendant has been placed in jeopardy. Pen. Code, § 1023; People v. Terrill, 132 Cal.

500, 64 Pac. 894. He made a motion to be discharged after the verdict was received and recorded. He was entitled to such discharge under the ruling in People v. Tilley, supra.

The judgment and order are reversed, and the court directed to discharge the defendant.

We concur: HARRISON, P. J.; HALL, J.

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1 Cal. App. 311

BOARD OF EDUCATION OF CITY OF SAN DIEGO v. COMMON COUNCIL OF CITY OF SAN DIEGO.

(Court of Appeal, Second District, California. July 13, 1905.)

MANDAMUS—MOOT QUESTION.

Where a city charter required a school tax in question to have been levied on or before the second Monday of May, 1903, a petition for mandamus to compel the subsequent levy of such tax presented a mere moot question, and was therefore demurrable.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, § 48.]

Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Petition by the board of education of the city of San Diego for mandamus to compel the San Diego common council to levy a tax for school purposes. From an order sustaining a demurrer to the petition, petitioners appeal. Dismissed.

H. W. Nisbet, for appellant. R. E. Bledsoe and C. L. Allison, for respondent.

ALLEN, J. This is an appeal from an order of the superior court of San Diego county sustaining a demurrer to a petition for a writ of mandate, directing the city council of San Diego to levy a tax for school purposes upon the taxable property of said city, under the provisions of the charter thereof. The record discloses, and it is conceded by counsel, that the demand and requirement upon the part of plaintiff board for such levy, and the refusal of the council in connection therewith, was had with reference to a levy, which, by such charter, was required to have been made on or before the second Monday of May, 1903. It is apparent, therefore, that no authority now reposes in the council to make such levy, nor any jurisdiction in this or any other court to order the same; that a writ of mandate, if granted, could not be enforced and would be unavailing, and in such cases a writ will not issue. Board of Education v. Common Council, 128 Cal. 372, 60 Pac. 976. No agreement of parties can be invoked to call for a decision of what to them, or either of them, is merely a moot question, and courts should not render judgments which cannot be enforced by any process known to the law. Johnson v. Malloy, 74 Cal. 432, 16 Pac. 228. It appears that the parties to this litigation have no rights which can be affected by the reversal of the order, that the defendant possessed no right to make any levy for the fiscal year 1903 at the date of the appeal herein, and that the superior court has no authority to render any judgment in the premises. Any opinion that we might give upon the merits of plaintiffs' application to the superior court would not, therefore, be followed by any action on the part of that court, and would not have any binding authority, or constitute any adjudication of the rights of the parties. Foster v. Smith, 115 Cal. 613, 47 Pac. 591.

Without determining any of the questions involved, for the reasons above suggested, and upon the authority of Foster v. Smith, supra, the appeal in this case is dismissed.

We concur: GRAY, P. J.; SMITH, J.

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1 Cal. App. 237

RENWICK et al. v. GARLAND.

(Court of Appeal, Second District, California. July 1, 1905.)

EXECUTORS—CONTRACT FOR BENEFIT OF ESTATE—LIABILITY.

Recovery cannot be had of the estate, but only of the executor, on a contract of the executor for services for the benefit of the estate.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 410, 411, 757.]

Appeal from the Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by George Renwick and others against Margaret Garland, as executrix of Richard H. Garland, deceased. Judgment for plaintiffs, and defendant appeals. Reversed.

Rehearing denied by Court of Appeal July 31, 1905.

Otis & Gregg and Charles E. Truesdell, for appellant. Hight & Swing and Hight & Hight, for respondents.

SMITH, J. Appeal on judgment roll, with bill of exceptions, from a judgment for the plaintiffs. The suit was brought to recover the balance due on contract made by the plaintiffs with the defendant, as executrix, by which plaintiffs agreed that they "would drill a well for defendant on the property of said estate in said county," etc. The answer alleges the terms of the contract more specifically, and, perhaps, differently. But the court found that the contract was as alleged in the complaint, and that the same was fully performed according to its terms, and, as conclusions of law, that plaintiffs were entitled to recover the amount claimed in the complaint, with interest and costs "and that said amount be paid to plaintiffs from the funds of the estate of said Richard H. Garland, deceased."

It is urged by the appellant that the findings of the court are not justified by the evidence, and also that a judgment against the estate cannot be maintained. The latter point, we think, must be sustained. " 'The rule is that executors and administrators cannot, by virtue of their general powers as such, make any contract which will bind the estate and authorize a judgment de bonis decedentis. But on contracts made by them for necessary matters relating to the estate they are personally liable, and must see to it that they are reimbursed out of the assets.' Schouler on Executors and Administrators, § 256, and numerous authorities there cited." Sterrett v. Barker, 119 Cal. 495, 51 Pac. 695; Melone v. Davis, 67 Cal. 281, 282, 7 Pac. 703; Eustace v. Jahns, 38 Cal. 21; Code Civ. Proc. § 1582 et seq.; Austin v. Munro, 47 N. Y. 360. The last case is cited by the court in Sterrett v. Barker, and it is said: "This case also holds that the complaint cannot be amended so as to constitute an action against the executor individually. It would be an entire change of the party defendant and a different suit." And the same point is ruled in the case of Van Cott v. Prentice, 104 N. Y. 45, 10 N. E. 257. These authorities, or rather the California case cited, seem to be conclusive of this case. We are not, indeed, prepared to hold that the complaint is not amendable, upon a proper showing, under section 473 of the Code of Civil Procedure, nor the contrary. But it seems to be at least clear that the court has acquired no jurisdiction of Mrs. Garland in her personal capacity, and that the proceedings cannot now be amended, and a personal judgment against her entered.

For these reasons, the judgment must be reversed, and it is so ordered.

We concur: GRAY, P. J.; ALLEN, J.

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1 Cal. App. 309

ANDROS v. ANDROS.

(Court of Appeal, Second District, California. July 13, 1905.)

DIVORCE—CONDONATION—KNOWLEDGE.

Civ. Code, § 115, defines "condonation" as the conditional forgiveness of a matrimonial offense constituting a cause of divorce, and section 116 requires knowledge on the part of the condonor of the facts constituting the cause of divorce. *Held*, that though defendant's physical condition, known to plaintiff long before she ceased to cohabit with him as his wife, was such as would ordinarily be taken as proof of unfaithfulness, yet, where she testified that she believed his representations that his condition was not so occasioned, it was not error, in an action for divorce, to find that the offense had not been condoned; there being some testimony that, after being convinced of the cause of defendant's condition, she never thereafter cohabited with him.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 169–187.]

Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by Dora Andros against L. M. Andros. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

H. W. Nisbet, for appellant. R. E. Bledsoe and C. L. Allison, for respondent.

ALLEN, J. Action for divorce. Judgment in favor of plaintiff. Defendant appeals from the judgment and order denying a new trial.

It is insisted upon this appeal that the judgment was rendered in violation of section 130 of the Civil Code, which provides that no divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission, or testimony of the parties, and that if any matrimonial offense had been established the same had been completely and fully condoned. The court found in favor of the plaintiff upon all of the material issues, and, while the corroborating testimony tending to establish the marital offense was slight, there was, nevertheless, some testimony to justify the court in its finding in that regard.

As to the question of condonation, which, by section 115 of our Civil Code is declared to be the conditional forgiveness of a matrimonial offense constituting a cause of divorce, and by section 116 such condonation requires a knowledge on the part of the condonor of the facts constituting the cause of divorce, the record discloses that the defendant's physical condition, known to plaintiff long before she ceased to cohabit with him as his wife, was such as would ordinarily be taken as proof of unfaithfulness; yet it appears from the testimony, and the court accepted it as the truth, that the plaintiff believed the representations of her husband that his condition was not so occasioned. This, no doubt, upon the theory that the confidence of a wife in her husband's loyalty leads her often to accept as true that which would not be so accepted if proceeding from a stranger. There was some testimony to warrant the court in finding that, after becoming convinced of the cause of his physical condition, she never thereafter cohabited with him as his wife, and there was sufficient testimony to warrant the court in finding that his physical condition was the result of an adulterous act. We think the condonation was not established sufficiently to bar the plaintiff's right of action, and we perceive no error in the record.

Judgment and order affirmed.

We concur: GRAY, P. J.; SMITH, J.

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1 Cal. App. 294

Ex parte BOYNTON.

(Court of Appeal, Third District, California. July 7, 1905.)

1. DISTURBING THE PEACE—"LOUD AND BOISTEROUS MANNER"—COMPLAINT.

A complaint alleging that petitioner did willfully, unlawfully, and maliciously disturb the peace of D. at a certain time and place, by then and there using vulgar and profane language in the presence and hearing of D., and in the presence and hearing of women and children on the streets of a certain town, did not charge the offense of disturbing the peace "in a loud and boisterous manner," prohibited by Pen. Code, § 415.

2. SAME.

There being no allegation that the peace of D. was disturbed because of "offensive conduct," the complaint did not charge the offense of disturbing the peace by offensive conduct, consisting of the use of vulgar and profane language in the presence and hearing of D., and of women and children, within such section.

Habeas corpus on petition of Harrison Boynton. Petitioner discharged.

A. Campbell, for petitioner. T. T. C. Gregory, Dist. Atty., for the People.

BUCKLES, J. The petitioner comes before this court on a writ of habeas corpus. He was arrested in the town of Suisun City on a warrant for disturbing the peace. He was brought before the justice of the peace and pleaded guilty, and on the 9th day of June, 1905, was sentenced to 60 days' imprisonment in the county jail of Solano county. Petitioner claims the complaint on which he pleaded guilty charges no public offense. The charging part of said complaint is as follows: "Did willfully and unlawfully and maliciously disturb the peace and quiet of said Chas. H. Downing, on Solano and Main streets, in the said town of Suisun City, by then and there using vulgar and profane language in the presence and hearing of said Chas. H. Downing, and in the presence and hearing of women and children, on the said streets of the said town of Suisun City."

It was evidently intended, and the district attorney admits as much on the argument, to charge the petitioner with disturbing the peace by using "vulgar and profane language in the presence or in the hearing of women and children in a loud and boisterous manner," as provided in the latter part of section 415, Pen. Code. If such was the intention, then the complaint fails to charge a public offense, because it leaves out what seems to us to be the very necessary matter to complete the offense, to wit, "in a loud and boisterous manner." The district attorney claims, however, that the complaint states the crime of disturbing the peace by offensive conduct, which consists in using vulgar and profane language in the presence and hearing of Downing, and in the presence and hearing of women and children. But we think this view cannot be maintained, because there is no allegation in the complaint that the peace of Downing was disturbed because of offensive conduct. It may be true, and most likely is, that the vulgar and profane language used by petitioner was offensive to Downing; but he does not so charge in his complaint, and there is nothing in the complaint to connect the language used with "offensive conduct." The cases cited by the district attorney from the states of Missouri, Texas, Michigan, Arkansas, and South Carolina, whatever application they may have under the statutes in those states, do not support the contention of the district attorney, when attempted to be applied to the provisions of section 415 of the Penal Code of this state. The complaint charges no public offense, and the petitioner is entitled to his discharge.

Petitioner will be discharged.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

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1 Cal. App. 307

PECKHAM et al. v. FOX.

(Court of Appeal, Second District, California. July 13, 1905.)

1. MECHANICS' LIENS — ATTORNEY'S FEES — STATUTES—CONSTITUTIONALITY.

Code Civ. Proc. § 1195, providing for the recovery of an attorney's fee in an action to foreclose a mechanic's lien, is not in violation of or in conflict with Const. art. 20, § 15, providing that mechanics, etc., of every class, shall have a lien for the value of their labor done and materials furnished, and that the Legislature shall provide by law for the speedy and efficient enforcement of such lien.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, § 651.]

2. SAME—REPEAL.

Such constitutional provision is not to be construed as repealing existing provisions of the Code of Civil Procedure on the subject of "Liens of Mechanics and Others," among which is section 1195.

3. SAME—LIEN FOR FEES.

Code Civ. Proc. § 1195, providing that in a suit to foreclose a mechanic's lien plaintiff shall be entitled "to recover an attorney's fee," should be construed as entitling plaintiff to such fee as a part of the recovery, and therefore confers a lien for the fee, as well as for the subject-matter of the action.

Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by William M. Peckham and others against E. R. Fox. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Rehearing denied by Supreme Court September 11, 1905.

Cole & Cole, for appellant. Hugh J. Crawford, for respondents. Borden & Carhart, amici curiæ.

SMITH, J. This is an appeal from a judgment foreclosing a mechanic's lien. The only objection urged by appellant's counsel is to the attorney's fee allowed by the court and made a lien upon the property in question. The points made by the appellant are: First, that section 1195 of the Code of Civil Procedure, providing for such fees, is unconstitutional; second, that there is no provision in the act making the attorney's fees a lien upon the property foreclosed. But neither point is tenable.

As to the first, under familiar rules of construction, there is nothing in the provisions of section 15, art. 20, of the Constitution to limit the ordinary powers of the Legislature, or to take from it the specific power exercised in section 1195; nor is the constitutional provision to be construed as repealing the existing provisions of the Code of Civil Procedure on the subject of "Liens of Mechanics and Others," among which is the section in question. Sedgwick on Stat. and Const. Law, p. 123 et seq.; Germania, etc., Ass'n v. Wagner, 61 Cal. 349. On the contrary, the duty is imposed upon the Legislature to "provide by law for the speedy and efficient enforcement of such liens;" and this, we think, imposes upon it, if deemed necessary to that end, the duty of providing for the cost of recording the lien and attorney's fee "as an incident to the judgment" (Rapp v. Spring Valley Gold Co., 74 Cal. 532, 16 Pac. 325; McIntyre v. Trautner, 78 Cal. 449, 21 Pac. 15; Lumber Co. v. Neal, 94 Cal. 192, 29 Pac. 622); or, at least, empowers it to do so (Lumber Co. v. Welton, 115 Cal. 1, 46 Pac. 735, 1057; Sweeney v. Meyer, 124 Cal. 517, 57 Pac. 479). Nor are the provisions of section 1195 in conflict with section 1 of the fourteenth amendment to the federal Constitution, or with any other provision of the federal or state Constitution.

The second point is in effect disposed of by the decision in Reid v. Clay, 134 Cal. 215, 216, 66 Pac. 262. That was a case of the foreclosure of a street assessment lien, under the act governing that subject, which provided that "in all cases of recovery under the provisions of this act the plaintiff shall recover the sum of fifteen dollars, in addition to the taxable cost, as attorney's fees." St. 1889, p. 168, c. 151, § 12. And it was held that "this must be construed as entitling him to the recovery of it as part of the recovery and judgment provided for, which is exclusively for a lien"; and it was added upon the authority of cases cited that, "otherwise, it could not be recovered." The cases are substantially similar in principle. In this respect, cases coming under the provisions of section 1195, Code Civ. Proc., and similar statutes, are to be distinguished from the case of foreclosure of mortgages, where there is no statutory provision providing for attorney's fees, "in the absence of a provision in the mortgage." Monroe v. Fohl, 72 Cal. 570, 14 Pac. 514; Hotaling v. Montieth, 128 Cal. 557, 61 Pac. 95.

The judgment appealed from is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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1 Cal. App. 286

ERIE CITY IRON WORKS v. TATUM et al.

(Court of Appeal, First District, California. July 7, 1905.)

1. SALES — MERCHANTABLENESS — WARRANTY — BREACH — DAMAGES — ATTORNEY'S FEES — COSTS.

Civ. Code, § 3313, provides that the detriment caused by breach of warranty of quality of personal property is the excess of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time; and section 3314 declares that the detriment caused by breach of warranty of fitness is that which is defined by the preceding section, together with a fair compensation for loss incurred by effort and good faith to use the property for the purpose intended. *Held* that, where plaintiff sold an engine to defendants, who were its agents for resale, and defendants defended an action for breach of warranty of suitableness brought by the purchaser, without notifying plaintiff thereof, and it did not appear that the delay suffered by defendants in obtaining payment for all the machinery sold to the purchaser was caused solely by the controversy over the engine, defendants were not entitled to recover either interest on their claim against the purchaser, costs incurred in the suit against them, or their attorney's fees paid therein.

2. SAME—REMEDIES.

Where an engine was sold with a warranty of suitableness, on discovering the breach, the purchaser was entitled to retain the goods and plead a breach of the warranty as an offset to an action by the seller for the price.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1214, 1218.]

3. SAME—SETTLEMENT.

Where, after it was discovered that an engine sold under a warranty of suitableness was defective, plaintiff supplied a new governor, and granted a credit on the belief that such governor would remedy all defects in the working of the engine, which proved not to be true, the granting of such credit did not relieve plaintiff from liability for future damages resulting from an effort to use the engine.

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by the Erie City Iron Works against Henry L. Tatum and others. From an order denying plaintiff's motion for a new trial, it appeals. Reversed.

E. B. Young, for appellant. J. P. Langhorne, for respondents.

HALL, J. Plaintiff brought an action in 1895 against defendant, wherein it alleged that defendant was indebted to plaintiff in the sum of $735 for one No. 9 Economic boiler, sold to defendants by plaintiff January 25, 1895. Defendants answered, and, besides denying said indebtedness, set up a counterclaim. In the counterclaim, after alleging the copartnership of defendants, and that plaintiff was a corporation of the state of Pennsylvania, engaged in the manufacture and sale of steam engines, defendants alleged: "(3) That on or about the 31st day of August, 1888, defendants purchased of plaintiff, and plaintiff sold and delivered to defendants, a so-called automatic cut off steam engine for the sum of $857, which said purchase price defendants paid plaintiff, and defendants also paid $120 freightage on said engine at time of its purchase, from Erie, Pennsylvania, to the Pacific coast. (4) That defendants ordered said engine of plaintiff, and purchased the same as a steam engine that should be reasonably fit for the purpose of operating and running machinery, and plaintiff furnished the same to defendants as a steam engine reasonably fit for such purpose, and plaintiff did furthermore expressly warrant that said engine would properly and effectively operate machinery; and defendants purchased said engine of plaintiff, relying upon and solely by reason of said implied and express warranties that the same should be reasonably fit for operating machinery, and that it would properly and effectively operate machinery." Then follows an allegation of the breach of warranty and of damage to defendants in the sum of $977. The court made its findings, and among other things found that, by reason of the failure of the engine to perform in a proper, efficient, and reasonable manner the work of running machinery, defendants have been damaged as of date January 31, 1892, in the sum of $883, and ordered judgment for defendants for $364, "the same being the excess of the damages $883, with interest thereon at 7 per cent. per annum from the 31st day of January, 1892, to date hereof, over and above the sum of $735 claimed in plaintiff's complaint, with interest thereon from the 25th day of January, 1895, to date hereof." Plaintiff moved for a new trial, and this appeal is from the order denying its said motion.

Appellant specifies insufficiency of the evidence to justify the finding as to damages above quoted; and, as we think a new trial must be granted on this ground, we will first dispose of the question thus presented. At the trial no question was made as to the fact that defendants owed plaintiff $735 for the boiler, and the only real contention was as to the counterclaim set up by defendants against plaintiff. The engine was purchased by defendants of plaintiff in 1888, and by defendants sold, with other things, to Glenn & Handley, at Dalles City, Or., for the purpose of running an electric light and power plant, and on a warranty such as had been given them by plaintiff. It did not work satisfactorily, and plaintiff supplied a new governor, and in December, 1889, plaintiff gave defendants credit for a bill of expense of $247.55 incurred on the engine, and $27.59 freight paid by defendants on the new governor. The evidence shows, without contradiction, that the engine still did not efficiently or properly operate the electric light plant; and finally, in 1891, defendants sued Glenn & Handley for the balance alleged to be due on their original bill of upwards of $4,600 for material furnished for the electric light plant, and Glenn & Handley answered, and, besides denying any indebtedness on the claim sued on, set up a counterclaim of damages in a large sum growing out of the imperfections of the said engine. This suit was compromised in January, 1892, by an allowance or deduction of the sum of $219 made to Glenn & Handley by the defendants in this action. We think that, as to this deduction of $219, the evidence may be fairly said to show that it was made on account of damages and expenses to which Glenn & Handley had been put, subsequent to the first allowance heretofore referred to by reason of the imperfections of the engine. Shortly after this compromise defendants sent a bill to plaintiff for $319, being the $219, plus $100, paid their attorney in the matter of said suit. This bill plaintiff refused to allow or pay, and the matter was allowed to rest until the present suit.

On the trial of this case the only evidence as to the amount of damage suffered by defendants by reason of the breach of warranty as to the engine was given by Mr. Tatum, a member of the defendant firm. He said: "The damages that my firm sustained on account of defects in the engine subsequent to December 9, 1889" (the date of the first bill of expense, which had been paid) "was $319, for which we sent in a claim. That was composed of $100 for attorney's fees to Woodward & Woodward in the suit that we brought against Glenn & Handley, which was compromised; and then there was $20 court costs. There was $100 attorney's fees, and $219 allowed on our bill. That claim of $319 did not include the freight of $120 paid by us on the automatic cut-off engine, nor the $20 court costs, nor interest on our claim against Glenn & Handley in the sum of $544." The sum of $219, plus $100 attorney's fees, plus $20 court costs, plus $544 interest, amounts to $883, which, it will be observed, is the amount of damages found by the court as of date January 31, 1892. There was also read in evidence a communication, under date January 28, 1892, from the attorneys of Tatum & Bowen (defendants herein) in the suit against Glenn & Handley, purporting to show the loss of Tatum & Bowen on the compromise, in which they say:

The expenses of suit and first costs of court	$ 20 00
Attorney's fees	100 00
Discount allowed defendant on settlement	219 00
Making total	$339 00
To this sum should be added interest on principal sum for 2 years 10 months at legal rate of interest, 8 per cent. per annum, amounting to	544 00
Making total loss	$883 00

This statement of the attorneys for defendants, made to defendants, is not evidence against the plaintiff, and only serves to make clear the basis upon which the court fixed the amount of damages. The sum of $120, paid by defendants as freight on the engine, cannot be considered in fixing the damage; for it is shown that defendants sold the engine to Glenn & Handley as part of an electric plant before any defect was discovered in the engine, and undoubtedly charged for the engine such price as they thought reasonable, and, upon final settlement of their bill against Glenn & Handley the only deduction claimed to have been made from their bill on account of this engine was the sum of $219. Nevertheless the court fixed their damages at the sum of $883, evidently adding to the $219, deducted from their bill, the $100 attorney's fees, $20 court costs, and $544 interest on defendants' total claim against Glenn & Handley. The bill of defendants against Glenn & Handley included many things besides this engine, and amounted originally to upwards of $4,600, and at the time of the bringing of the suit to over $2,500.

The Civil Code (section 3313) provides that "the detriment caused by the breach of a warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time." Section 3314 provides that "the detriment caused by the breach of a warranty of the fitness of an article of personal property for a particular purpose is deemed to be that which is defined by the last section, together with a fair compensation for the loss incurred by an effort in good faith to use it for such purpose." No evidence was given as to the actual value of the engine, but all the evidence of damages was directed to consequential damages or loss incurred by an effort to use it. Speaking of consequential damages in cases of breach of warranty, the court said in Wilson v. Reedy (32 Minn. 256, 20 N. W. 153): "The rule as to this class of damages, as laid down in Hadley v. Baxendale, 9 Exch. 341, and approved in Paine v. Sherwood, 21 Minn. 225, and in Frohreich v. Gammon, 28 Minn. 476, 481, 11 N. W. 88, is that such damages are recoverable when, from the circumstances of any particular case, they may reasonably have been supposed to have been contemplated by the parties, when making the contract, as the probable result of the breach." The evidence in this case does not show that the delay in paying defendants' bill against Glenn & Handley was caused solely by controversy over the engine; but, if it did, we do not think that such loss can be reasonably supposed to have been contemplated by plaintiff and defendants when the engine was sold by plaintiff to defendants.

We have been cited to no case where attorney's fees have been allowed to swell damages in cases of breach of warranty on sale of personal property; but, on the contrary, in the case of Reggio v. Braggiotti (7 Cush. 166), cited by respondent, it was held that in no case can the attorney fee, paid by the first vendee in defending himself in suit brought by his subvendee, be allowed to swell damages against the original vendor. The syllabus in this last-mentioned case so completely fits the case at bar that we quote it in full: "The measure of damages, in an action brought for a breach of an implied warranty of the genuineness of an article sold as opium, is the value of an article corresponding to the warranty, deducting the value, if anything, of the article sold; *and if the vendor [vendee] has in the meantime sold the article with a like warranty, the sum paid on a judgment obtained against him, in an action brought by his vendee for a breach of that warranty, is prima facie evidence of the amount which he can recover of his vendor; and if he gave notice to his vendor of the commencement of that action, he may also recover his taxable costs therein; but he can in no case recover counsel fees paid for the defense thereof.*" (The italics are ours.) The same rule is laid down as to taxable costs in a similar case in Coolidge v. Brigham, 5 Metc. 68. In this case it is not shown that defendants gave plaintiff notice, either of the suit they brought against Glenn & Handley, or of the counterclaim set up by Glenn & Handley. Neither the interest on the principal of defendants' claim, nor the costs or attorney's fees, should have been included in the damages found; and the finding that defendants were damaged in the sum of $883 is, therefore, not supported by the evidence.

It is urged by appellants that, the engine having been retained after examination and trial, all defects were waived, and no action would lie in favor of defendants on account of the breach of warranty. This is not the law. On the contrary, one buying with a warranty, on discovering the breach of warranty, may either return the goods and rescind the contract, or he may retain the goods and bring an action for the breach of warranty, or plead the breach as an offset in any action brought by the vendors for the purchase money. Polhemus v. Heiman, 45 Cal. 573. Indeed, the various authorities cited by appellant concede this to be the rule.

It is also urged by plaintiff that all damages arising from the breach of warranty were paid by appellant by the credit given defendants shortly after supplying the new governor. We do not think that this contention can be sustained. It is probably true that it was believed at the time the said credit was given that the new governor had remedied all defects in the working of the engine, but this proved not to be true. Appellant, in giving the credit, made a payment which it was legally bound to make, and there is nothing in the record to sustain the proposition that there was any agreement, express or implied, that by so doing it relieved itself from liability for any future damage that might result from an effort to use the engine. On the contrary, it is quite evident that it was intended that Glenn & Handley should, after receiving the new governor, continue the use of the engine. They did so, and were put to much expense in so doing, for which defendants were liable to them, and appellant as the original warrantor to defendants.

Practically the same matter, coupled with delay in presenting claim for damages, is urged by appellant as an estoppel; but, having in mind the relation of the parties (defendants had the exclusive right to handle on this coast articles manufactured by appellant, and were charged with the duty to advance its sales and trade on the coast), we see nothing in the case to work an estoppel. Other matters urged by appellant are disposed of by what we have said on the question of damages.

Order denying motion for new trial is reversed.

We concur: HARRISON, P. J.; COOPER, J.

147 Cal. 569

In re DOLBEER'S ESTATE. (S. F. 4,366.)
SCHANDER v. GRAY et al.

(Supreme Court of California. Aug. 24, 1905.)

Bill of Exceptions — Proof in Supreme Court.

On petition to the Supreme Court, under Code, Civ. Proc. § 652, to prove exceptions which the trial judge refused to allow in accordance with the facts, it appearing that he did not allow some actually taken, and, while allowing others, did not allow them in the form proposed or in the form appearing in the reporter's notes, a bill of exceptions setting out the proceedings as they appear in such notes will be approved.

Department 1. Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

In the matter of the estate of Bertha M. Dolbeer, deceased; Adolph Schander being appellant, and Geo. D. Gray and others being respondents. Heard on petition to prove exceptions. Granted.

See 81 Pac. 1098.

Campbell, Metson & Campbell, Lippitt & Lippitt, and Thomas H. Breeze, for appellant. Edmond Tauzky, for respondent.

BEATTY, C. J. This cause having been referred to me to take testimony in reference to exceptions alleged in the affidavit of petitioner to have been reserved by him, with directions to report to this court the result of my proceedings in the premises, I hereby make the following report:

The parties appeared before me, and introduced a large amount of testimony touching the matters alleged in said affidavit. Most of this evidence was offered for the purpose of showing that the statements contained in the bill of exceptions as settled by the judge of the superior court, in connection with the exceptions which he allowed, were incorrect, either in the way of omission or inclusion of matter not proper to have been omitted or included. As to all those matters, the rulings of this court in construing section 652 of the Code of Civil Procedure show that the evidence was entirely immaterial. The parties consented that some corrections should be made by the judge of the superior court in the bill to be finally certified by him after engrossing, and but one matter was left to be passed upon by me. On the examination of the witness William Carson a number of exceptions were reserved by the petitioner herein. In proposing his bill of exceptions the petitioner did not state these various rulings, objections, and exceptions exactly as they appear in the notes of the official reporter of the superior court, and the judge did not allow them either in the form proposed, or exactly in the form in which they appear in the reporter's notes, nor were all of the several exceptions actually taken allowed. I have therefore decided to approve a separate bill which sets out these proceedings exactly as they appear in the reporter's notes, in lieu of what appears in the bill of exceptions as settled by the superior court. The parties to the proceeding waive any report of the testimony adduced before me.

The bill of exceptions approved by me is hereto attached, and will be certified in duplicate upon the approval of this report.

The above report is hereby approved: HENSHAW, J.; VAN DYKE, J.; McFARLAND, J.; LORIGAN, J.

147 Cal. 565

GRANT et al. v. CORNELL, Tax Collector.
(L. A. 1,381.)

(Supreme Court of California. Aug. 23, 1905.)

1. TAXATION — INVALID SALES — EQUITABLE RELIEF—CONDITIONS PRECEDENT—TENDER OF TAX.

Where it is claimed that a tax levy is invalid in part, but it is admitted that the residue thereof is in all respects valid, a property owner who seeks to enjoin the tax collector from executing a deed in pursuance of a sale of the property for unpaid taxes must pay or tender the valid portion of the tax, in order to be entitled to relief.

2. SAME — CERTIFICATE — EFFECT AS NOTICE —STATUS OF PURCHASER.

A tax certificate, genuine and valid on its face, imparts constructive notice to a purchaser of the land, and charges him with knowledge of the existence of the lien and of the nonpayment of the taxes, and he is in no better position than the original owner with respect to the requirement of doing equity before he can receive relief from the sale, in pursuance of which the certificate was issued, on account of illegality therein.

Department 1. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by Fannie C. Grant and another against A. F. Cornell, tax collector of the county of San Diego. From a judgment for plaintiffs, defendant appeals. Reversed.

Rehearing denied September 21, 1905.

Cassius Carter, Dist. Atty., for appellant. Nutt & Shaw, A. E. Nutt, and George H. P. Shaw, for respondents.

SHAW, J. This is an appeal by the defendant from a judgment in favor of the plaintiffs, and is taken upon the judgment roll alone.

The complaint attempts to set forth a cause of action in equity to enjoin the defendant from executing to the state of California a deed of certain lands belonging to the plaintiff Fannie C. Grant, in pursuance of a certain sale thereof for taxes of the year 1891. The basis of the complaint upon which it is claimed that the deed should not be executed is that the assessment of the taxes for the year in question was informal and irregular, particularly with respect to the description of the property, and that the levy was in part illegal. The property consisted of a block in Horton's Addition to the city of San Diego. The description in the assessment did not mention the name of the city. This is the principal defect alleged. The other irregularities, aside from the alleged illegal levy, relate to certain defective proceedings for the sale of the property. There is no allegation or showing that the plaintiffs, or either of them, at any time paid or tendered any part of the taxes for the year in question. The case in this particular is in all respects similar to the case of Couts v. Cornell (L. A. 1524) 82 Pac. 194, decided by the court in bank, and it must be decided upon the same principles. It is there held that in a case where it is not claimed that the property is not liable for taxation, or that the proportion of taxes for which it is justly chargeable has ever been paid, it is necessary, in order to maintain a bill in equity against the officers of the state to prevent the execution of a deed in pursuance of a tax sale, that the plaintiff should show that he has paid or tendered the amount of the tax justly chargeable against the land, according to the levy legally made for the year in question. It is claimed that the levy for the year 1891 was invalid as to the road tax, and bond and interest tax, composing part of the levy. It is admitted, however, that as to the remaining portion of the levy it was in all respects valid. In such cases it is necessary that the party should pay or tender the valid portion of the tax in order to enable him to enter a court of equity to ask relief concerning the portion claimed to be illegal or invalid.

The respondents make the additional point in this case that the plaintiff Fannie C. Grant became the owner of the property in October, 1899, long after the proceedings for the sale took place, and that she was an innocent purchaser for value, and the court finds the facts in accordance with this claim so far as actual notice is concerned; but finds further that she had constructive notice of the sale by reason of the record of the certificate in the recorder's office. It is claimed by the respondents that this certificate did not constitute constructive notice, because the assessment upon which it is based was void. The authorities cited, however, go no farther than to state that a deed or other instrument which upon its face is void, or which is a forgery, does not constitute constructive notice. Oglesby v. Hollister, 76 Cal. 140, 18 Pac. 146, 9 Am. St. Rep. 177; Hearst v. Egglestone, 55 Cal. 367; Hager v. Spect, 52 Cal. 584. This certificate in question gave a correct description of the property, showing the name of the town, and was not subject to the defects which, it is claimed, make the assessment invalid. We doubt if the purchaser of property can claim the benefit of the doctrine protecting innocent purchasers, for the purpose of evading any duty or burden resting upon the property for the payment of taxes to the state, in cases where the party is seeking to restrain the officers of the state from proceeding in the manner prescribed by law to enforce payment of the taxes. The lien of the tax exists by statute, and can be discharged only by payment (Pol. Code, §§ 3716, 3717), and all persons are required to take notice of that fact. But, however this may be, the certificate, being genuine and valid on its face, imparted constructive notice, and charged plaintiffs with knowledge of the fact that the tax lien existed, and that the taxes had not been paid. It was said in Couts v. Cornell, supra, that, notwithstanding the defective and irregular proceedings for the enforcement of the lien and the collection, the Legislature could authorize a reassessment of the property and subsequent proceedings for the enforcement thereof. And see San Diego v. Riverside, 125 Cal. 500, 58 Pac. 81. The tax is a charge upon the property from the first Monday in March of the year for which it accrued, and the plaintiffs, under the circumstances of this case, occupy no position different from that of the original owner with respect to the requirement that they must do equity before they can be allowed to receive relief at the hands of a court of equity. The demurrer to the complaint should have been sustained, and the judgment was therefore erroneous.

The judgment is reversed, and the cause remanded.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

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147 Cal. 560

COUTS v. CORNELL, Tax Collector. (L. A. 1,524.)

(Supreme Court of California. Aug. 23, 1905.)

1. TAXATION—ILLEGAL SALES—RELIEF—CONDITIONS—PAYMENT OF TAX.

Pol. Code, § 3817, requires an owner who seeks to redeem his land from a tax sale to pay the original tax with interest, costs, and penalties. Section 3806 enjoins the tax collector not to offer land for sale, where on account of irregular assessment, or of any other error, the same ought not to be sold. Section 3650, subd. 2, requires land to be listed in the assessment book by some description sufficient to identify it. *Held*, that where the original tax is valid in whole or in part, or the amount claimed to be due is justly due, except the penalties and costs incurred by reason of an illegal sale, a taxpayer who seeks to have the assessment and sale and certificate declared invalid, and to enjoin the tax collector from issuing any deed in pursuance thereof, on the ground of the insufficiency of the description contained in the assessment to identify the land, must pay or tender the amount of the tax which is justly due from him.

2. SAME—OBLIGATION TO PAY TAX—IRREGULAR ASSESSMENTS.

There is a legal as well as moral obligation to pay, and also a lien established by law for the general annual tax, irrespective of the regularity of the assessment.

In Bank. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by Cave J. Couts against A. F. Cornell, tax collector of San Diego county. From a judgment for plaintiff, defendant appeals. Reversed.

Cassius Carter, Dist. Atty., and W. R. Andrews, Deputy Dist. Atty., for appellant. Stearns & Sweet, for respondent.

SHAW, J. The plaintiff had judgment on a demurrer to the complaint and the defendant appealed.

The object of the action was to obtain a decree in equity, declaring invalid certain assessments for taxes and the sales and certificates made thereunder, enjoining the defendant from issuing any deed in pursuance thereof, and canceling the certificates so issued. The complaint is in two counts, alleging that the plaintiff is the owner of certain land in San Diego county, consisting of parts of the Rancho Guajome, and that in pursuance of the assessments claimed to be invalid the defendant, as tax collector of the county, is about to issue to the state of California deeds purporting to convey said land to the state, in pursuance of tax sales and certificates thereof made and issued for nonpayment of the taxes on one of said tracts of land for the year 1898 and 1899, respectively, and upon the other for the year 1895. The only defect or irregularity alleged, and the one which it is claimed makes the sales invalid, is that the descriptions of the lands in the respective assessment rolls are uncertain, and for that reason void. The appellant, for the purposes of the case, concedes that the descriptions are insufficient and uncertain, and that the sales were thereby rendered invalid, and we therefore refrain from expressing any opinion on the point.

In the consideration of the case it must be assumed as true that the land was subject to taxation; that the tax levies were regularly made, and the rates legally fixed by the proper authorities; that the plaintiff's land was fairly and legally valued at the sum stated in the assessment; and, consequently, that the plaintiff's property has been charged with no more than its fair and just proportion of the taxes levied; and, further, that all the proceedings for the assessment, collection, and sale were regular and valid, except that the descriptions of the land in the assessment, though correct as to the number of acres assessed, was technically insufficient to identify the land as required by subdivision 2, § 3650, of the Political Code. The plaintiff comes into a court of equity admitting that he should have paid, on account of this property, the exact sum originally charged against it, and that this was no more than his fair share of the public burden, which he, in common with all other taxpayers, must bear for the support of the government whose protection he enjoys. We think the case thus presented is without equity, and that on the familiar principle that he who seeks equity must do equity, the plaintiff should be denied the equitable relief which he demands. The obligation to pay his just proportion of the taxes legally levied is one of the highest civic duties of the citizen to the state. The plaintiff admits that he has not been subjected to a greater proportional charge than other citizens have paid, and he practically asks exemption from any charge on the technical ground that one of the public officers engaged in the duty of assessing the property has imperfectly described the property upon which his portion of the burden should be imposed. He claims that this just charge has become, because of an imperfect description, an injurious and oppressive cloud upon his title to the land, which a court of equity should remove. The principle justly applicable to the case is thus tersely stated in Esterbrook v. O'Brien, 98 Cal. 674, 33 Pac. 765: "So long as the moral obligation to pay any portion of the tax exists, a court of equity will not lend its aid to prevent a cloud upon the title, but will leave the party to his remedy at law." Similar views have been expressed and enforced by this court in Weber v. San Francisco, 1 Cal. 457; Hibernia S. & L. Soc. v. Ordway, 38 Cal. 682; San Jose Gas Co. v. January, 57 Cal. 614; County v. Ballerino, 99 Cal. 597, 32 Pac. 581, 34 Pac. 329; Quint v. Hoffman, 103 Cal. 508, 37 Pac. 514; Pacific P. I. Co. v. Dalton, 119 Cal. 606, 51 Pac. 1072; Ellis v. Witmer, 134 Cal. 253, 66 Pac. 301; and Hellman v. Shoulters, 114 Cal. 141, 44 Pac. 915, 45 Pac. 1057. If the description of the land had been sufficient, the plaintiff, in order to redeem his land from the tax sales, would be compelled to pay the original tax, and also interest, costs, and penalties, amounting to more than the original sum. Pol. Code, 3817. The original tax was not unjust, and if we concede that the defective descriptions were so material as to make the sales void, that consequently, under the provisions of section 3806, Pol. Code, the tax collector should not have offered the lands for sale, and hence that the penalties and costs are unjust, the plaintiff cannot ask to have the sales canceled, nor the assessments set aside, unless he shows that he has paid or offers to pay the amount, which of right he ought to pay.

The application of this rule is not confined to cases where the relief demanded is confined to the enjoining of the collection of a tax, as distinguished from suits to obtain an injunction against the issuance of a deed, or a decree removing a cloud, or some other equitable relief in regard to the proceedings taken to enforce collection. The rule is applied because of the broad principle that equity is peculiarly a forum of conscience, and it will not give relief which will enable a party to escape payment of all of a sum of money, when it can perceive that in justice he should pay a part, unless he is ready to pay, and accompanies his demand with an offer to pay, the part which is just. The particular kind of equitable relief applied for is immaterial. Weber v. San Francisco, supra; Hibernia S. & L. S. v. Ordway, supra. Nor can the rule be limited to cases where it appears that only a part of the original tax is just. If the entire tax or charge should justly be paid, the complainant would have no standing at all in equity, and he is allowed relief in any case solely because he offers to pay all that is just. Besides, this case does not present the question; for, by the forms of law, the plaintiff's lands are now chargeable, by reason of the added penalties, with more than twice the amount of the original tax, and it is strictly a case where part of the charge sought to be evaded is just and part unjust. The fact that the assessment is imperfect as to the description does not, in view of the circumstances here appearing, destroy the moral obligation to pay the tax. The moral obligation to pay the amount justly chargeable as taxes is as great where the defect arises from an imperfect description of property as where it is caused by a valuation fraudulently made excessive, as in Pacific P. I. C. Co. v. Dalton, supra, and County v. Ballerino, supra, or by a higher levy than the board had power to make, as in Quint v. Hoffman, supra, or by a levy improperly made, or a street assessment upon an illegally enhanced value, as in Esterbrook v. O'Brien, supra, in each of which cases the rule here invoked was applied. Similar and much stronger applications of the rule are found in National Bank v. Kimball, 103 U. S, 733, 26 L. Ed. 469; Huntington v. Palmer, (C. C.) 8 Fed. 449, 7 Sawy. 358; State R. R. Tax Cases, 92 U. S. 616, 23 L. Ed. 663; and Hunt v. Easterday, 10 Neb. 165, 4 N. W. 952.

Furthermore, in the case of a general annual tax, such as that here involved, there is an obligation to pay, in a sense legal as well as moral, and also a lien therefor, each established by law, irrespective of the regularity of the assessment. There can be no doubt that the Legislature could authorize an amendment of the assessment, so as to make it correctly describe the land, and, if that were done, the payment of the tax already levied could be enforced. An instance of the exercise of this power is shown by the act of March 23, 1893 (St. 1893, p. 290, c. 207). In regard to such general taxes this court has said: "The assessment does not create the lien. It is merely one of the steps for its enforcement. * * * The lien for the taxes justly leviable upon property, * * * attaches on the first Monday of March in each year, and the obligation to pay necessarily accrues at the same time, if not earlier." San Diego v. Riverside, 125 Cal. 500, 58 Pac. 81. The payment, it is said, is not due until a legal assessment is made; but when that is done there is no new obligation created, but a mere step toward the enforcement of the original one. Id. It follows that there is a valid existing obligation upon the plaintiff to pay the tax, and one capable of enforcement at law. Therefore the argument that the rule of equity here invoked by defendant cannot be applied, unless there is an enforceable obligation on the plaintiff to pay, falls to the ground. There are some expressions in the opinion of Commissioner Smith in the recent case of Palomares Land Co. v. County of Los Angeles, 80 Pac. 931, which, if considered apart from the context and the question there involved, seem to state positively that until a valid assessment is made there exists no obligation, legal or moral, to pay the tax levied; but the court is there speaking of the right of the state to impose on the taxpayer an additional penalty for a failure to pay the tax when due, and the word "obligation" is obviously used in reference to a perfected and matured obligation, one of which immediate payment is due. What is meant is that until an assessment is made there is no such obligation of immediate payment as would justify punishment for a failure to perform within the time prescribed. The doctrine of that case is not inconsistent with the views here expressed.

The respondent has not made any argument. The appellant calls our attention to the case of Grant v. Cornell (L. A. 1381) 82 Pac. 193, now pending in department 1, involving the questions here discussed, in which the respondent has filed a brief in answer to the points made by the appellant in this case, and upon the consideration of this case we have availed ourselves of the argument of the respondent in that case, so far as applicable. For the reasons here given, the demurrer to the complaint should have been sustained.

The judgment is reversed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; VAN DYKE, J.; HENSHAW, LORIGAN, J.

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147 Cal. 546

PEOPLE v. WARNER. (Cr. 1,208.)

(Supreme Court of California. Aug. 17, 1905.)

1. Criminal Law—Commitment by Magistrate—Effect—Cure of Errors.

Where a charge has been examined by a magistrate, and the evidence has been taken, and the examination warrants holding accused to answer, imperfections in the complaint are cured, and the commitment is legal.

2. Same—Presumptions.

It will be presumed, in the absence of a showing to the contrary, that proceedings leading up to a commitment by a magistrate were regularly conducted.

[Ed. Note.—For cases in point see vol. 14, Cent. Dig. Criminal Law, § 728.]

3. Jury—Competency of Jurors—Property Qualification.

Under Code Civ. Proc. §§ 198, 199, declaring a person not assessed on the last assessment roll of the county incompetent to act as a juror, a juror who was not assessed on the assessment roll was incompetent, although he was an heir of a decedent whose estate had real property assessed against it, where it did not appear that any of such property belonged to the juror, or would become his upon final settlement of the estate.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 255–257.]

4. Same—Mutual Challenges—Allowance—Absence of Prejudice.

Accused is not prejudiced by the excuse of a juror whom he has challenged, although the prosecution has concurred in the challenge.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3114–3116.]

5. Same—Prejudice against Death Penalty.

In homicide, a juror who was not willing to find a verdict of guilty on circumstantial evidence, if the effect thereof would be punishment by death, was properly excused.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 487.]

6. Same—Bias or Prejudice.

Under Pen. Code, § 1076, declaring that no person shall be disqualified as a juror by reason of having formed or expressed an opinion founded on public rumor, statements in the public journals, or common notoriety, provided it appears to the court that he will, notwithstanding such opinion, act impartially and fairly, jurors, who stated in effect that the fact that defendant had been held to answer would raise a presumption against him in their minds, were not disqualified, where they stated, further, that they knew nothing about the facts except what they had read in the papers, had formed no opinion regarding the merits, did not know defendant, had no bias or prejudice regarding the case, could try the case fairly and impartially, and could give to defendant the benefit of any reasonable doubt.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig Jury, §§ 461–463.]

7. Same—Examination of Jurors—Questions as to Testimony.

While a juror may be asked if he will consider all the evidence fairly and impartially, and give to each part of it such weight as he deems it entitled to, it is improper to ask him whether, if accused should himself testify on some material point, and his testimony was reasonable and not contradicted, he would give it weight.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 568–582.]

8. Criminal Law—Trial—Argument of Counsel—Absence of Predjudice.

Pen. Code, § 1258, declares that on hearing an appeal the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties. In homicide, the district attorney in closing commented on the testimony of a certain witness as to statements made to her by defendant, and stated that she was not contradicted, and that no witness had testified that defendant did not make the statements to her. Defendant's counsel excepted on the ground that "there were but two persons present at the conversation," but did not request the court to disregard the comment, nor request the district attorney to withdraw the same, and nothing further was done. *Held*, that there was no such impropriety in the comments of the district attorney, or prejudice to defendant, as to necessitate a reversal.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3127.]

In Bank. Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Walter Warner was convicted of murder in the first degree, and appeals. Affirmed.

Rehearing denied September 14, 1905.

H. C. Booth and S. E. Crow, for appellant.
U. S. Webb, Atty. Gen., for the People.

VAN DYKE, J. Defendant was accused by the district attorney of Santa Barbara county by information of the crime of murder. He was tried and convicted of murder in the first degree, and sentenced to death. The evidence shows that about midnight on June 10, 1904, at the house of Lizzie O'Brien, in Santa Barbara, one Maria Tamayo was called to the door by defendant, who demanded money of her, and, it being refused, he shot her dead. The appeal is taken from the judgment upon a bill of exceptions. On behalf of the appellant the following points are made: (1) Error in the refusal of the court to set aside the information; (2) error committed during the impanelment of the jury; (3) error in the admission and rejection of testimony; (4) misconduct of the district attorney in his closing argument.

1. The main ground that seems to have been relied upon in support of the motion to set aside the information was that there was nothing to show the year in which the crime was committed, or that the testimony before the committing magistrate was reduced to writing under his direction, and that the transcript of the proceedings before the committing magistrate was filed with the clerk of the superior court, together with the complaint, subpœnas, and warrant, without any other verification than the signature of one Henry A. Dewing, without any evidence showing who Henry A. Dewing was. It is stated in the bill of exceptions that Joseph J. Price was at all times mentioned a justice of the peace in the Second township of Santa Barbara county, Cal. The complaint in this case was signed and sworn to by Nat Stewart before said Price as justice of the peace of said township, charging the defendant with the crime of murder, upon which complaint a warrant was properly issued and returned on June 10, 1904, with the defendant, by the officer who made the arrest, to the justice of the peace issuing it. The examination that followed, as shown by the bill of exceptions, indicates that the examination was conducted according to the forms of the law, by questions and answers, and there seems to be no question as to the jurisdiction of the committing magistrate in the premises, nor as to the form of the commitment by said magistrate which followed the examination. It is not contended that the stenographic reporter was not appointed by the court, but it is urged that it does not appear from the transcript that he was so appointed. There is, however, nothing to show that the defendant was deprived of any substantial right. When a charge has been examined by a magistrate, and the evidence taken, and the examination warrants an order holding the defendant to answer, the imperfections of the complaint are cured, and the commitment is legal. People v. Cole, 127 Cal. 545, 59 Pac. 984. In the late case of People v. Lee Look, 143 Cal. 216, 76 Pac. 1028, in considering the point made by appellant in support of his motion to set aside the information on various grounds antecedent to the commitment by the examining magistrate, this court said: "The object of the statute in providing for the issuance of a warrant of arrest is that the defendant may appear before a committing magistrate, and when he is once there, and an examination of the case is had in pursuance of the terms of the statute, and the defendant is held to answer, a foundation is laid for the filing of an information by the district attorney. The regularity of the proceeding by information did not, therefore, depend in any manner upon the affidavit on which the warrant of arrest was issued, and had no connection with it"—referring to the case of People v. Velarde, 59 Cal. 457. And, continuing: "If there be anything inconsistent with these views in the two department cases of People v. Christian, 101 Cal. 471, 35 Pac. 1043, and People v. Howard, 111 Cal. 655, 44 Pac. 342, cited by appellant, they must be considered, so far as they are thus inconsistent, as overruled by the other cases above cited"—citing several cases. The presumptions are that the proceedings leading up to the commitment of the defendant by the magistrate were regularly conducted, and it is necessary, therefore, for the appellant to produce some showing to the contrary, which has not been done in this case.

2. It is claimed certain errors occurred during the impanelment of the jury. On the examination of juror A. C. Greenwell, in reply to the district attorney as to whether he was on the assessment roll of the county, he answered, "No, sir." He was asked by the court whether he was on the last assessment roll for property in his own name, and he said, "No; it is in the estate." And in answer to the defendant's attorney he said he was one of the heirs of W. A. Greenwell, deceased, and that the estate has real property in the county on the assessment roll. He stated again that he had no property assessed in his own name, whereupon the court granted the challenge of the district attorney and excused the juror. "A person is competent to act as a juror, if he be * * * (4) assessed on the last assessment roll of the county or city and county on property belonging to him. A person is not competent who is not so assessed." Code Civ. Proc. §§ 198, 199. This is not like the case of People v. Owens, 123

Cal. 487, 56 Pac. 251, cited by appellant. The challenge to the juror in that case was based upon the evidence that the property of a firm of which he was a member was upon the assessment roll in the name of the firm. The interest of each member of the copartnership extends to every portion of his property (Civ. Code, § 2402), and the facts of that case met the requirements of the Code. Here it does not appear that any property of the W. A. Greenwell estate that was upon the assessment roll of that county belonged to the juror in question, or that he would, upon the final settlement of the estate, become the owner of any of said property. We think there was no error in the court excusing Mr. Greenwell from acting as a juror in the case.

The examination of Daniel Maloney does not show a state of mind indicating any bias in any degree, and the same is true of the examination of Grant Dewlaney, and the court did not err in refusing to excuse them on motion of the defendant. And the examination of juror Hart shows him to be without bias which would prevent him from giving the defendant a fair and impartial trial on the evidence in the case, and the same may be said with reference to jurors Bates and Haynes.

The juror C. L. Donohoe was challenged by both the defendant and prosecution, and the court remarked: "It seems that both parties have challenged this juror on the same grounds. I think the challenge is sufficient." It is difficult to see how the defendant can be prejudiced where the juror against whom he makes an objection is excused by the court, although the prosecution may have concurred in the challenge.

There was no error in excusing juror Eddy on motion of the prosecution, on the ground that he was not willing to find a verdict of guilty, if the effect would be punishment by death, on circumstantial evidence. Under the evidence such a verdict might be required in this case, as appears was so found. There was no error, therefore, in excusing the juror.

In reference to the alleged disqualifications of jurors Burt More, James P. Donahue, W. W. Dunn, and W. C. Smith, they all brought themselves within the provisions of the Code, which declares that "no person shall be disqualified as a juror by reason of having formed or expressed an opinion in the matters or cause to be submitted to such jury, founded upon public rumor, statements in the public journals, or common notoriety; provided it appears to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him." Pen. Code, 1076. The following is a sample of the examination of the jurors in question touching their qualifications: After stating that he had read in the paper of the examination and commitment, he was asked by defendant's attorney: "And does the fact that the defendant has been held to answer by a justice of the peace raise any presumption of guilt in your mind? A. Why, I think so. I presume he would not have been held, unless there was some evidence against him, or any other defendant. Q. The fact that the defendant is held, that is to some extent to throw the burden upon the defendant to show that the justice was in error when he held him? A. Well, they don't usually hold a man unless there is some evidence against him. I believe, if there was no evidence at all against him, I think he would have been discharged, not him in particular, but any person so held. Q. That is an opinion of yours in regard to criminal cases? A. Yes; I think it is a presumption that there must have been some evidence, or the officers would not have arrested him and the magistrate would not have held him. Q. When a defendant comes to the superior court from the justice's court, that is to your mind a presumption that there is some evidence against him? A. I take it for granted that the officers of the law must have held him for some reason, or else they were incompetent—one or the other. It does not bias or prejudice me in the least, so far as the guilt or innocence of the defendant is concerned, any more than the officers would not have arrested or the magistrate have held him, if there was not some evidence connecting him with the crime." After the defendant had challenged the juror, upon an examination by the district attorney, the following occurred: "Q. Do you know anything about the facts of this case? A. Nothing but what I read in the paper. Q. Have you formed any opinion regarding the merits of the case? A. No; I can't say that I have. Q. Do you know the defendant? A. I do not. Q. Ever seen him before? A. No; not to know him. Q. Have you any bias or prejudice regarding the case? A. Not at all. Q. If you were accepted and sworn as a juror, can you try the case fairly and impartially? A. I think I can. Q. And give to this defendant the benefit of any reasonable doubt? A. Yes, sir." On the oral argument of defendant's counsel, in support of this point as to the disqualification of the jurors, he was asked by a member of the court how he could get an intelligent jury, if the rule he contended for was adopted, and he answered; "I think the whole tendency of our law is to deprive the prosecution of an intelligent jury. That is my candid belief on it, but we claim the decisions support our contention in this respect." We do not agree with counsel that a fair construction of the law as it exists would lead to the absurdity suggested, and we think that the jurymen in question, notwithstanding what they had read in the papers with reference to the matter, showed themselves to be entirely qualified to act and give the defendant a fair and impartial trial. Pen. Code, § 1076.

In the examination of several of the

jurors, after each had stated that he would consider the testimony of the defendant, if given, and would not reject it simply because he was the defendant, the court refused to allow the following question: "If the defendant should himself testify on some material point, and his testimony was reasonable, not contradicted, and not impeached, would you give it weight?" The question was clearly incompetent, and the ruling was correct. A juror may be asked if he will consider all the testimony and evidence fairly and impartially, and give to each part of it such weight as, in his best judgment under all the circumstances of the case, he deems it entitled to. It is his duty to do this. But it is highly improper, under any circumstances, to ask him, as this question in effect does, to promise in advance to give weight to any particular part of the testimony either for or against the defendant.

3. We have examined the record with reference to the admission and rejection of testimony during the progress of the trial, and can see no error or irregularity which could have tended to the prejudice of the defendant, or prevent him from having a fair and impartial trial.

4. In the closing argument the district attorney stated as follows to the jury: "Another fact in the case, gentlemen, is that the revolver had been recently cleaned. His statement was true that it was clean. An examination made of it immediately after it was taken from him showed that it had recently been fired twice. Now those are facts. Arkley's testimony sustains the testimony as to that fact. Mr. Stewart's testimony shows that it is true. This revolver, which we have produced here, is the weapon which was taken from him, is the weapon he had there that night, the only weapon connected with him, and it had been fired twice. Now let us look at the testimony of Mrs. Ritchie, which counsel speaks so much about—her testimony that the defendant told her that the revolver was clean; he told her that at night. Her husband testified to that, and the defendant told her that the next morning, when he took out the revolver and opened it and told her it was clean. Why should he take out his revolver and tell her that? He did it. He took it out, and in connection with that it was very natural for him to say what he had done. He had shot a woman. She asked him why he cleaned it. He cleaned it so the officers, if they saw it, wouldn't mistrust anything. Was not that reasonable? Will you, gentlemen of the jury, as reasonable men, question the testimony of that little woman as to those statements? She is not contradicted. No witness has been called to testify that the defendant didn't tell her that." At this point defendant's counsel excepted to that remark of the district attorney, on the ground that it is shown by the testimony that there were but two persons present at the conversation. The court was not requested to instruct the jury to disregard the comment, nor was the district attorney requested to withdraw the same, and nothing further was done. For the protection of the innocent, who may be accused of crime, the law very properly has prescribed certain rules of practice in the trial of the accused, which are to be observed as well in the case of the guilty as of the innocent. In carrying out these humane and wise provisions of the law, it becomes the duty of the court, however, not to allow the ends of justice to be defeated by any refined technicalities. In this connection something must be allowed to the zeal of counsel on either side in discussing the case before the jury, and we cannot see that the comments of the district attorney on the testimony of this case transcended the bounds of propriety, or had a tendency to prejudice the defendant. People v. Kelly (decided Jan. 30, 1905; Cr. No. 1,186) 79 Pac. 846. The Code declares: "After hearing the appeal, the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties." Pen. Code, § 1258.

The judgment appealed from is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

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147 Cal. 544

BALLERINO v. BALLERINO. (L. A. 1,345.)

(Supreme Court of California. Aug. 15, 1905.)

CONTRACTS—SERVICES IN VIOLATION OF LAW—COMPENSATION.

Under Pen. Code, § 316, declaring any person who knowingly lets an apartment or tenement for purposes of prostitution guilty of a misdemeanor, services rendered by a tenant in common in letting the common premises from day to day to lewd women for purposes of prostitution, and collecting the rents, cannot be made the basis of a claim for compensation against the co-tenant.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 681–693.]

Department 2. Appeal from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Action by Maria A. Ballerino against Bartolo Ballerino. From the judgment rendered, defendant appeals. Affirmed.

McNutt & Hannon, for appellant. James Burdett, for respondent.

LORIGAN, J. This action was to obtain a partition of certain lands owned by the parties as tenants in common. During the pendency of the suit, and until final partition should be had, it was agreed between them that plaintiff should collect and receive the rents from certain business buildings in the city of Los Angeles, and the defendant the rents from certain tenements therein, both to render accounts to each other from time to time of their receipts and necessary disbursements in the care and management of the property. When the time for final partition arrived, the parties being unable to agree among themselves as to the settlement of their accounts, the matter was submitted to the court for determination. The account of plaintiff showed a balance of $1,002.37 in her hands, and the account of defendant showed a balance in his hands of $342.68. The rents collected by defendant aggregated a large amount, which, save this balance, had been properly disbursed for the benefit of the Los Angeles city property and other property owned by the parties as tenants in common. In settling his accounts defendant claimed a compensation for his services in the care of the tenement property and collection of the rents thereof of $150 per month, which, for the period claimed, would amount to $1,725. The evidence showed that the tenements of which he had charge—some 20 or 30—were let from day to day to women for temporary occupancy, and the rents thereof were collected by him daily; that said tenements were let and used by lewd women for purposes of prostitution, of which defendant was at all times aware, and to which he consented; that, in order to collect such rents, it was necessary that the defendant should be present on the premises during the day and a considerable portion of the night. The court refused to allow him any compensation, holding that he was not entitled thereto, for the reason that the purposes for which the said tenements were let by him were illegal and immoral. Thereupon the court adjudged that the account between plaintiff and defendant should be balanced, and that neither should recover from the other, and from that portion of the judgment the defendant prosecutes this appeal.

The refusal of the court to allow the defendant any compensation for his services in the care of the property under his control and the collection of its rents was clearly right. The only care he gave it was to see that it was let for the purposes of prostitution, and that the rents due from its inmates were daily paid. It is declared by section 316 of the Penal Code that any person who lets any apartment or tenement, knowing that it is to be used for the purposes of prostitution, is guilty of a misdemeanor. The services for which the defendant asked the court to award him compensation consisted in devoting the premises under his control to persistent violations of the penal law. His conduct in that regard was criminal, contrary to the provisions of the Penal Code, and against good morals. It is a familiar rule of law, which needs no citation of authorities to support it, that one will not be afforded the aid of either a court of law or equity to obtain compensation for services rendered in doing what the law expressly prohibits him from doing. Aid will never be given by any court to a person who bases his cause of action or claim upon illegal or immoral acts or conduct. The general and comprehensive rule upon this subject supporting the refusal of the superior court to allow the defendant any compensation is stated by this court in Chateau v. Singla, 114 Cal. 93, 45 Pac. 1015, 33 L. R. A. 750, 55 Am. St. Rep. 63.

The judgment appealed from is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

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147 Cal. 541

WADLEIGH et al. v. PHELPS. (Sac. 1,155.)

(Supreme Court of California. Aug. 15, 1905.)

1. VENUE—CHANGE—DEMAND—TIME OF APPLICATION.

A demand for a change of venue on the ground that the county of suit is not the county of defendant's residence must be made at the time of defendant's first appearance, either by answer or demurrer, and a failure to make the same until after appearance and demurrer is a waiver of the right to a change.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Venue, §§ 94–99.]

2. APPEAL—CHANGE OF VENUE—RULING OF LOWER COURT—CONCLUSIVENESS.

The ruling of the lower court denying a motion for a change of venue on the ground of convenience of witnesses cannot be reversed where all the facts urged by the applicant in support of the motion are denied by counter affidavits of his opponent.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3836.]

3. SAME—OBJECTIONS—WAIVER.

An objection that an affidavit in opposition to a motion for a change of venue is not properly verified must be made in the court below, and, if not so made, will not be considered on appeal.

4. VENUE—CHANGE—AFFIDAVITS — VERIFICATION—SUFFICIENCY.

A verification of an affidavit in opposition to a motion for change of venue, stating that affiant, "being first duly sworn, deposes and says, that he is personally familiar with the matter stated in the foregoing affidavit, and that such affidavit is true," signed by affiant, and duly sworn to before a notary public, is sufficient.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Venue, § 112.]

Department 1. Appeal from Superior Court, Nevada County; F. T. Nilon, Judge.

Action by W. I. Wadleigh and others against Josephine A. Phelps, as executrix of Timothy Guy Phelps. From an order denying a motion for a change of venue, defendant appeals. Affirmed.

Rehearing denied September 14, 1905.

George F. Witter, Jr. (D. M. Delmas, of counsel), for appellant. C. W. Cross, for respondents.

SHAW J. This is an appeal from an order denying the defendant's motion for a change of place of trial from Nevada county to San Mateo county. The action was begun in Nevada county, and the motion was made upon two grounds: First, that Nevada county was not the proper county for the trial, because of the fact that the defendant resided in the county of San Mateo; second, that the convenience of witnesses would be promoted by a change of the place of trial to San Mateo county.

1. With reference to the first ground, the motion was properly denied because of the fact that it was made too late. The original complaint was filed February 8, 1902. A demurrer thereto was filed and served March 29, 1902. On May 7th an amended complaint was filed, and on May 29th a demurrer thereto was filed. On June 9th there was a substitution of attorneys for the defendant. Various motions were made thereafter, but no demand, notice, or affidavit for a change of place of trial was made until August 14, 1902. Where a party claims the right to a change of place of trial upon the ground that the county in which the action is begun is not the county of his residence, and fails to make the demand for a change until after he has appeared and demurred, he thereby waives his right. Such demand and application must be made at the time of his first appearance, either by answer or demurrer. Cook v. Pendergast, 61 Cal. 72.

2. With respect to the second ground of the motion, it is sufficient to say that the counter affidavit filed on behalf of the plaintiffs sufficiently controverted all the facts relating to the convenience of witnesses, and was sufficient to justify the court below in concluding that the convenience of witnesses would not be promoted by the proposed change. Under these circumstances this court cannot reverse the ruling of the court below.

The defendant's contention that the counter affidavit filed on behalf of the plaintiffs is not properly verified is untenable for two reasons: First, because the record shows that the affidavit was read and considered by the court below, and that no objection to the form of the verification thereof was made to that court; second, because, as matter of law, the verification is sufficient. Where it is claimed that an affidavit offered in opposition to a motion is not properly verified, the objection should be made in the court below. This is obvious from the general principle that a technical objection, which can be removed if seasonably made, will not be considered where it is not made when it could be obviated, but is reserved until the proceedings have passed to a stage when the defect cannot be remedied. The affidavit in question was made by C. W. Cross, and the verification, omitting certain portions thereof not material to the question, was as follows: "C. W. Cross being first duly sworn, deposes and says that he is personally familiar with the matters stated in the foregoing affidavit and that said affidavit is true." This statement was signed by him, and was duly sworn to before a notary public. This is a sufficient verification of the facts stated in the affidavit.

The order is affirmed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

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147 Cal. 568

ROBERTS et al. v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 4,258.)

(Supreme Court of California. Aug. 23, 1905.)

ELECTIONS — OFFICERS — REMOVAL — JURISDICTION.

The charter of the city and county of San Francisco does not vest in the mayor of said city and county exclusive jurisdiction to remove election commissioners of the city and county for willful, unlawful, and corrupt misconduct in office, but the superior court also has jurisdiction to remove such commissioners on the accusation of the grand jury.

In Bank. Original petition by Robert W. Roberts and others for a writ of prohibition against the superior court of the city and county of San Francisco and William P. Lawlor, judge thereof. Writ denied, and proceeding dismissed.

Thomas V. Cator and Hiram W. Johnson, for petitioners. Lewis F. Byington, Wright & Wright, and John A. Hosmer, for respondents.

McFARLAND, J. This is an original petition in this court for a writ of prohibition. An alternative writ was issued, and upon the return thereof the petition was heard and submitted. The petitioners are election commissioners of the city and county of San Francisco, and there is pending in the court of respondents an accusation by the grand jury charging them with willful, unlawful, and corrupt misconduct as such commissioners, and asking for their removal from their said offices. It is averred that respondents are about to hear, try, and determine said accusation, and the purpose of this proceeding is to prohibit them from so doing and from taking any further action therein. The whole point of the petition is that the respondents have no jurisdiction to consider said application, because the exclusive power of removing petitioners from their offices is vested by the charter of the city and county of San Francisco in the mayor of said city and county. But this point was directly determined against the contention of petitioners by the recent case of Coffey v. Superior Court of Sacramento County (Sac. No. 1,360) 82 Pac. 75, in which the opinion was filed August 10, 1905. The grounds presented in the case at bar for the writ of prohibition are, to say the least, no stronger than those presented by the petitioner in the Coffey Case. It would be useless to repeat here the views expressed in the opinion delivered in that case; and for the reasons therein stated the prayer of the petitioners in the case at bar for a final writ is denied, and the proceeding is dismissed.

We concur: BEATTY, C. J.; VAN DYKE, J.; LORIGAN, J.; HENSHAW, J.

147 Cal. 554

PRYOR et al. v. WINTER. (Sac. 1,187.)

(Supreme Court of California. Aug. 22, 1905.)

1. Wills — Construction — Estates Created—Remainder Interest.

Where a husband and father devised his real property to his surviving wife "for and during the term of her natural life," provided that she should not marry again, and further willed that after her death the property should go to the children who should then be alive, and, in case of their death without issue, then to his own brothers and sisters, the undivided half of community property belonging to the husband and wife at the former's death went to the wife in fee as survivor of the community, and the other undivided half went to her for life, she not marrying again, with remainder to the children who survived her death.

2. Limitations — Construction of Statute.

All statutory provisions on the subject of limitations are to be considered in determining whether an action is barred, and are to be construed in view of the presumption that legislators are acquainted with well-settled principles of law and legislate with reference thereto.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 13, 14.]

3. Ejectment—Who May Bring—Persons Not Entitled to Possession—Remaindermen.

Code Civ. Proc. § 1452, providing that the heirs or devisees may maintain an action for the recovery of real estate against any one except the administrator, means only those heirs and devisees who have a present right of possession and a present cause of action as against every one except the administrator, and has no application to a remainderman, although he may have acquired his estate through a devise.

4. Remainders — Action Against Remaindermen—Limitations.

Code Civ. Proc. § 312, declares that civil actions can only be commenced within the prescribed period "after the cause of action shall have accrued." Section 318 provides that no action for the recovery of real property, or the possession thereof, can be maintained unless plaintiff or his predecessor was seised or possessed of the property in question within five years before the commencement of the action. *Held* that, since a remainderman has no right of possession and consequently no cause of action touching the possession until the death of the life tenant, the five-year period of limitations does not run against him during the life of the life tenant.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, § 231; vol. 42, Cent. Dig. Remainders, § 16.]

5. Mortgages — Foreclosure — Effect on Paramount Title.

Where a widow to whom land was left for life, with remainder to her children, mortgaged the land, the title of the children was not subject to the mortgage, and their rights to the property were not affected by a foreclosure of the mortgage, although they were made defendants to the foreclosure suit.

6. Judgments—Res Judicata—Persons Concluded.

Civ. Code, § 741, declares that no future interest can be defeated or barred by any alienation or other act of the owner of the intermediate or particular interest. An administrator of the estate of a decedent, who had devised a remainder interest in property to plaintiffs, prosecuted an action of ejectment to recover possession of such property. Judgment was rendered for defendant in the action. *Held*, that such judgment was not binding on the remaindermen in a subsequent suit to quiet title instituted by them against the same defendant.

Department 2. Appeal from Superior Court, Tehama County; E. A. Davis, Judge.

Action by Flora C. Pryor and another against Mary Winter. From a part of the judgment rendered, and from an order denying a new trial, plaintiffs appeal. Reversed.

Rehearing denied September 21, 1905.

J. J. Wells and Earll H. Webb, for appellants. H. P. Andrews, for respondent.

McFARLAND, J. The plaintiffs are the children of John E. Church, deceased, and they brought this action to quiet their title to undivided interests in certain lots of land in the town of Red Bluff, in Tehama county, including the undivided half of a lot described as lot 22 in block 12. The court below, sitting without a jury, gave judgment to plaintiffs for the other property involved, but held that plaintiffs are not the owners of or entitled to the possession of any part of lot 22, and that defendant is the owner of all of said last-mentioned lot by adverse possession, and rendered judgment accordingly. From that part of the judgment which decrees that defendant is the sole owner of the whole of lot 22, and from an order denying their motion for a new trial, plaintiffs appeal.

The said John E. Church, father of plaintiffs, died testate on January 13, 1886. At that time lot 22 was the community property of the deceased and his wife, Elizabeth Church. By his will he devised all his real property to his surviving wife, Elizabeth, "for and during the term of her natural life," provided that she should not marry again; and it is provided by the will that after her death the property should go to all of his children who should be then alive, share and share alike as tenants in common, and in case of their death without issue then to go to his brothers and sisters, and it was to go in the same way upon her marriage. The wife was made executrix and acted as such until her death. She did not marry again, and at her death, which occurred on the 22d day of December, 1898, the children, plaintiffs herein, were both alive. Therefore the references in the will to the contingencies of her marriage and of the death of the children without issue are of no consequence, except, perhaps, as touching upon the argument by counsel whether the remainder to plaintiffs was vested or contingent; and under our views of the case that question is immaterial. Therefore the undivided half of lot 22 went to the widow in fee as survivor of the community; and under the will she took a life interest in the other half, with the remainder of that half to plaintiffs. The only question in the case, therefore, is whether the plaintiffs' right as remaindermen to the undivided half of the lot was barred by the statute of limitations.

Defendant's claim under the statute of limitations rests upon these facts: In

March, 1894, the surviving wife, Elizabeth, in her individual capacity, executed two mortgages on property including lot 22—one to the defendant herein to secure a loan of $2,500, and the other to the husband of defendant to secure a like amount. Afterwards the defendant became the owner of both the mortgages, and brought an action to foreclose them. She made the plaintiffs herein defendants in the foreclosure suit, upon the allegation that they claimed some interest in the property which was subject to the mortgages; and plaintiffs herein, defendants there, made default. Afterwards she obtained a decree of foreclosure, and purchased the property at the foreclosure sale, and obtained a commissioner's deed. On March 30, 1898, she dispossessed the executrix and entered upon the said lot 22, and since then has held possession of the same, claiming to have held it adversely to the whole world. When the present action was commenced the defendant had been thus in possession of the lot in contest for more than five years from the time of her first entry; but this action was brought within less than five years after the death of Elizabeth, the life tenant. Under the above facts the action was not barred; for the cause of action did not accrue until after the death of the life tenant, and it was brought within the statutory period of limitation after it had thus accrued. Before that time the plaintiffs had no right of possession of the lot, and had no cause of action touching such possession. It has been universally held that the estate of a remainderman is distinct from that of a tenant of a preceding particular estate, and cannot be in any way affected by any act of the particular tenant or his grantee. The rule is stated by Chief Justice Kent in Jackson v. Schoonmaker, 4 Johns. 402, as follows: "Neither a descent cast nor the statute of limitations will affect a right, if a particular estate existed at the time of the disseisin, or when the adverse possession began, because a right of entry in the remainderman cannot exist during the existence of the particular estate; and the laches of a tenant for life will not affect the party entitled. An entry to avoid the statute must be an entry for the purpose of taking possession, and such an entry cannot be made during the existence of the life estate [citing cases]." And in Tiedeman on Real Property, par. 400, it is said: "The tenant cannot do anything to defeat a vested remainder. A disseisin of the tenant affects the remainder in no manner. Nor can the possession of the tenant be deemed adverse to the remainderman, either for the purpose of preventing the latter from conveying his interest, or with a view to defeat it under the statute of limitations, unless the possession be continued after the termination of the particular estate. The statute of limitations does not begin to run until the remainder takes effect in possession." The citation of further authorities to the point is unnecessary. The principle is elementary, and we have been referred to no cases holding otherwise.

The conclusion of the lower court seems to have been arrived at by the process of looking only at section 318, Code Civ. Proc., and considering nothing else. That section provides that no action for the recovery of real property or the possession thereof can be maintained, unless the plaintiff or his predecessor was seised or possessed of the property in question within five years before the commencement of the action. But all the law on a wide subject like that of limitation of actions is not to be found in one section. All the statutory provisions on the subject are to be considered, and they are to be construed in view of the presumption that the legislators are acquainted with well-settled principles of law and legislate with reference thereto. For instance, in section 1452, Code Civ. Proc., it is provided that the heirs or devisees may maintain an action for the recovery of the real estate against any one except the administrator or executor; but surely that provision could not be considered as applicable to a remainderman, although he may have received his estate through a devise, and therefore is literally in the general category of "devisees." It means only those heirs and devisees who have a present right of possession, and therefore a present cause of action, as against every one except the administrator. And so it cannot be held that the Legislature intended by section 318 to abrogate or overlook the principle, declared in jurisdictions where statutes of limitations include provisions similar to that of section 318, that the statute does not commence to run against a cause of action before such cause of action shall have accrued, unless otherwise expressly provided. Our Code itself expressly declares this rule in section 312, Code Civ. Proc., where it is enacted that civil actions "can only be commenced within the period prescribed in this title after the cause of action shall have accrued, unless where in special cases a different limitation is prescribed by statute"; and there is, to our knowledge, no statutory provision prescribing a different rule, except section 359, Code Civ. Proc., which refers solely to actions against directors or stockholders of corporations. The question here involved has not to our knowledge been directly decided by this court, probably because no one has heretofore contended that the statute of limitations would run against a remainderman during the life of the particular tenant. But in Le Roy v. Rogers, 30 Cal. 230, 89 Am. Dec. 88, Justice Rhodes, in delivering the opinion of the court, expressly declared the rule as above stated. In that case the purchaser at a foreclosure sale undertook to maintain that by his purchase he took a new title, and that the statute commenced to run against him only from the date of his purchase; but the court held against this contention, saying that "his estate in the land is the estate that the mortgagor had." And in the discussion of the question the learned justice, after referring to other instances where a new title might start a new running of the statute, said: "And the remainderman, upon the expiration of the particular estate, does not come in under it, but claims through an independent source of title, and he has his action, though the particular estate man may have been cut off from a recovery against the adverse possessor." And at the time of that decision the provision of said section 318 was part of the law of this state, as it has always been since 1850. See Hittell's Gen. Laws Cal. vol. 2, p. 633. It would be strange indeed if during the life of the particular tenant a remainderman could be compelled to lose his estate on account of another's possession which he would be utterly helpless to interrupt.

Plaintiffs' rights were not affected by the fact that they were made defendants in the foreclosure suit. Their title was not subject to the mortgage, but was an independent paramount title, and not a subject of litigation in that suit.

It appears that one Webb was appointed administrator of the estate of John E. Church, deceased, as successor of the executrix, and commenced an action of ejectment against the present defendant, Winter, to recover possession of the property here in contest. The defendant in that action pleaded the statute of limitations. The trial court gave judgment for her. Webb appealed, and this court affirmed the judgment. See Webb v. Winter, 135 Cal. 455, 67 Pac. 691. But that judgment did not in any way bind the plaintiffs herein. An administrator is not a trustee for a remainderman, and the latter is not estopped by anything the former may do or suffer to be done. In that case the court said: "In this litigation the court is not concerned as to the individual legal status of the two adult children. If they have rights above and beyond that of the administrator, those rights are not in litigation here." Section 741, Civ. Code, expressly declares—what was always the law—that "no future interest can be defeated or barred by any alienation or other act of the owner of the intermediate or particular interest."

That part of the judgment appealed from, and the order denying the new trial, are reversed.

We concur: LORIGAN, J.; HENSHAW, J.

147 Cal. 274

JOYCE v. LOS ANGELES RY. CO. (L. A. 1,373.)

(Supreme Court of California. July 3, 1905.)

1. CARRIERS—STREET CAR—DUTY TO STOP FOR PASSENGER.

Where a passenger on a street car arose from her seat and stepped onto the step while the car was standing still, and either the motorman or conductor observed such act, it was sufficient notice of her desire to alight.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1228½.]

2. SAME—CONTRIBUTORY NEGLIGENCE.

Where, while a street car was standing, a passenger stepped onto the step of the car, and while there it moved suddenly forward, owing to the negligence of the conductor, whereby the passenger was injured, she was not guilty of contributory negligence, unless an ordinarily prudent person would not so have done.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1385.]

3. SAME—BURDEN OF PROOF.

Where a passenger on a street car, while it was standing, stepped down onto the step, with a view of leaving the car, and while in the act of alighting the operatives caused the car to start, so as to injure her, the facts showed a prima facie case of negligence.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1286.]

4. SAME—CONTRIBUTORY NEGLIGENCE.

A passenger on a street car cannot recover for injuries sustained in consequence of her voluntarily alighting from the car when it was in motion.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1391-1393.]

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Annie Joyce against the Los Angeles Railway Company. Judgment was rendered in favor of defendant, and plaintiff appeals from an order denying her a new trial. Affirmed.

Wm. Wylie and Waters & Wylie, for appellant. Bicknell, Gibson & Trask, for respondent.

VAN DYKE, J. The action is to recover damages for personal injuries alleged to have been sustained by the plaintiff in alighting from a car of the defendant company, in consequence of the sudden starting of the car when in such act of alighting therefrom. The case was tried before a jury, and, upon a verdict in favor of the defendant, judgment was rendered accordingly. The appeal is taken from the order denying plaintiff's motion for a new trial.

The appellant urges two points on the appeal, to wit: First, that the evidence is insufficient to justify the verdict; second, error in modifying certain instructions asked by the plaintiff, and in giving certain instructions asked by the defendant.

The testimony shows that the car upon

which plaintiff was riding left Main street, in Los Angeles, on its journey to the easterly boundary of the city, on First street, and that it stopped at the westerly line of Alameda street; and plaintiff claims that while she was making her exit therefrom, and in the act of stepping from the steps of the car to the street, the employé operating the car, without warning, and knowing her dangerous position, caused the car to be suddenly jerked, thereby throwing her from the step to the ground.

1. The evidence on the part of the defendant shows that the plaintiff asked the conductor to stop at Hewitt street, and he told her that he would. Thereafter, when the car reached Vine street, a lady passenger alighted from the car, and the plaintiff asked the conductor, "Is this Hewitt street?" and he replied, "No; it is three blocks further." The next crossing going easterly is Alameda street, on which the Southern Pacific Company operates its steam railroad. It is the custom before crossing the steam railroad track for the conductor to go forward and ascertain whether the car can safely cross, and in obedience to this custom the conductor of this car, when it approached the west line of Alameda street, left the car and went forward to ascertain whether any trains were approaching the crossing of First and Alameda streets. He left on the right side of the car and went forward, and, finding it safe to proceed, looked back to see whether there was anyone in the act of alighting from the car, and gave the motorman the signal to go ahead, whereupon the motorman rang the bell and started the car. Thereafter, while the car was in motion, the plaintiff, without any notice to or knowledge of either the conductor or the motorman that she intended to leave said car at that point, alighted therefrom on the left-hand side, and, in consequence thereof, was injured. It further appears from the evidence that before she attempted to alight she was warned by one of the passengers not to do so. He testifies: "I thought maybe she was going to get off before the car stopped, and I said to her, 'Wait a minute.' The car was in motion, and she didn't pay any attention to me, but got off. I stayed on the car. The conductor went back to assist her in getting up." It also appears from the evidence that her intended destination was Hewitt street, a distance of two blocks east of Alameda street. She, however, gives as an excuse for alighting at Alameda street, that she had concluded to walk the remainder of the distance, although it was some 8 o'clock in the evening at the time of the accident. Without going further into the particulars in reference to the testimony given, it is sufficient to say that, so far from the evidence failing to support the verdict, as contended by the appellant, it appears that the defendant's version as to how the accident occurred is supported by a preponderance of the evidence.

2. It is contended on the part of the appellant that the court erred in modifying instruction No. 5 requested by the plaintiff. Plaintiff's instruction No. 5, as modified by the court, is as follows; the insertions being indicated by the portions in parentheses:

"If the jury find from the evidence that the plaintiff arose from her seat and stepped down onto the step with intent of alighting while the car was standing still (and that such act was observed by the motorman or conductor), such act was a sufficient notice to the employés in charge of said car of her desire to alight therefrom; and if the jury (further) believe that, while she was in the act of alighting, the car was suddenly started through the negligent act of the employé in charge of said car, (and) the plaintiff was thereby thrown to the ground and injured, she is entitled to recover."

In plaintiff's instruction No. 6, as modified by the court, the insertions also appear in parentheses, while the omitted portions are indicated by italics, as follows:

"If the jury believe from the evidence that the car came to a stop, and that while it was standing still the plaintiff stepped down onto the step of the car with the intent of alighting therefrom, and that while on said step the car moved suddenly forward in consequence of the negligent act of the conductor or motorman, and she was thereby thrown off and injured, and if they further believe that (the conduct of) the plaintiff *did* under the circumstances *what an ordinarily prudent woman would have done* (was that of an ordinarily prudent person), then she was not guilty of contributory negligence, and would be entitled to recover."

Instructions Nos. 1, 2, and 3, requested by the plaintiff and given by the court, are as follows:

"(1) If the jury believe from the evidence that the plaintiff exercised ordinary care, and that the defendant failed to exercise the utmost care and diligence of a very cautious person, and that, by reason of the failure to exercise such utmost care and diligence of a very cautious person, the plaintiff was injured, then the plaintiff would be entitled to recover.

"(2) If the jury believe from the evidence that the plaintiff was a passenger and had paid her fare on the car in question, and that she exercised that degree of care which a person of ordinary care and prudence would have exercised under the circumstances, and that the defendant failed to exercise the utmost care and diligence of a very cautious person, and that, by reason of the failure to exercise such utmost care and diligence of a very cautious person, plaintiff was injured, then the plaintiff would be entitled to recover.

"(3) If the jury find from the evidence that the plaintiff was a passenger and had paid her fare on the car in question, and that while the car was standing still she arose from her seat and stepped down onto the step, with a view of leaving the car, and while in the act of alighting the defendant's servants caused the car to start forward with a jerk, which caused her to fall, whereby she was injured, she has established a prima facie case of negligence in the management of the car, and the burden of proof, which primarily rested on her, was uplifted, and the burden of disproof thrown upon the defendant."

No. 4 is in reference to the measure of damages in case a verdict should be rendered for the plaintiff.

The appellant also contends that the court erred in giving the first instruction requested by the defendant, to wit:

"(1) The court instructs the jury that, to entitle the plaintiff to recover in this action, it must appear from the evidence that the injuries sustained by the plaintiff were occasioned by the carelessness or negligence on the part of defendant or its servants or employés as charged in the complaint, and were not the result of the plaintiff's own fault; and if you believe from the evidence that the plaintiff was injured in consequence of her voluntary alighting from the car of defendant, at the time of the accident, when it was in motion, then your verdict should be for defendant."

Also in giving the second instruction as modified by the court (the modification appearing by italics) as follows:

"(2) No presumption of negligence on the part of defendant's employés arises from the fact that the plaintiff was injured by alighting from the car of the defendant. *If you find that she did so alight, voluntarily, while the car was in motion.*"

We think the instructions as a whole fairly presented the case to the jury upon the evidence introduced at the trial, and fully guarded the rights of the plaintiff and appellant. The preponderance of the evidence shows, and the jury evidently so found, that the injury to the plaintiff was caused by her own negligence in attempting to alight from the car while it was in motion, and, this being so, she could not properly recover. In Campbell v. Los Angeles Ry. Co., 135 Cal. 137, 67 Pac. 50, it is said: "The court found 'that plaintiff's injury was due wholly to his stepping off the car while it was still in motion, and such injury was not occasioned by the negligence of defendant.' * * * We think the plaintiff is not entitled to recover on the above facts. The defendant did not commit any breach or omission of legal duty. Donovan v. Ferris, 128 Cal. 54, 60 Pac. 519, 79 Am. St. Rep. 25. The motorman quickly and promptly stopped the car when last requested by plaintiff. It was stopped in a safe place. Plaintiff was warned not to get off until it had stopped. It is difficult to imagine what greater care could have been exercised by defendant." It is said in Booth on Street Railway Law, § 337: "But it has been held to be negligence per se, which justifies a nonsuit, to step off the car while it is being slowed up, in order to stop in response to a passenger's request, or when incumbered by a load or bundle." In a late case before the Supreme Court of New York (Saffer v. Dry Dock, etc., R. Co. [Sup.] 5 N. Y. Supp. 701), the defendant had requested the lower court to give the following instruction, which was refused: "If the jury believe that, while the car was being slowed up in order to stop in response to the plaintiff's request, the plaintiff, without waiting for the car to be stopped, stepped off the car while in motion, and thereby sustained his alleged injury, then the plaintiff was guilty of contributory negligence, and the defendant is entitled to a verdict on that ground." The court on the appeal held that the instruction stated the law correctly, and should have been given. In the opinion of the court it is said: "If he got off while the car was in this rapid motion, then it was negligence; and, if he did anything in the way of getting off the car which helped or contributed to bring about the injury, then there was contributory negligence on his part, and he was not entitled to recover." It is said in Schouler on Bailments & Carriers (3d Ed.) § 662: "Thus a railway passenger is not justified in jumping from the train while it is in motion, even though the carrier was negligent, whether in carrying him past the station, or in starting before he had due opportunity to land." In Craven v. Central Pac. R. Co., 72 Cal. 347, 13 Pac. 878, this court said: "Did the plaintiff, at the very time of the accident, negligently jump off the train while it was moving, and thus cause or contribute to the injury? If she did not, then the verdict should have been for plaintiff. If she did, then there can be no doubt that her negligence contributed proximately to the injury. It was the very thing which then and there directly and immediately caused it."

Under the circumstances the court below was justified in denying plaintiff's motion for a new trial.

Order appealed from affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

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1 Cal. App. 333

MUNROE v. FETTE et al.

(Court of Appeal, Second District, California. Aug. 16, 1905.)

PRINCIPAL AND AGENT — RATIFICATION — KNOWLEDGE.

A party cannot be held to have ratified a transaction by acts without knowledge, or the equivalent, of the facts concerning the transaction.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 627–633.]

Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by Squire Munroe against Margaret M. Fette and others. From an order granting plaintiff a new trial, defendants appeal. Affirmed.

J. G. Rossiter and Flint & Barker, for appellants. D. Allen, Trusten P. Dyer, and Hunsaker & Britt, for respondent.

ALLEN, J. Appeal from an order granting the plaintiff's motion for a new trial. The suit was in replevin, and there was a verdict and judgment for the defendants.

Without noticing the many other assignments of error raised by the bill of exceptions, and on consideration of which the court granted a new trial, it is sufficient upon this appeal to call attention to instruction No. 10, which reads as follows: "You are instructed that if you find that certain of the property in question was held by Mrs. Stella Munroe under the lease from Barker Bros., with the privilege of purchasing the same, and that defendants furnished money as a part of the purchase price of said property described in the complaint to pay the balance to be paid thereon to said Barker Bros. necessary to secure the title to said property, and that plaintiff claims title to said property so purchased from said Barker Bros., or any interest therein, by reason of such payment by Mrs. Stella Munroe to them from moneys so furnished by defendants, or either of them, without offering to refund said moneys, then said plaintiff, by so doing, ratified the sale to defendants by which said money was derived." This instruction proceeds upon the theory that the fact of part payment by plaintiff's wife from the proceeds of the sale to defendants precluded plaintiff from claiming the property as community property, without offering to refund to defendants the amount so paid and applied by the wife to the purchase price, omitting therefrom all question as to the knowledge of plaintiff in relation to the transaction. That plaintiff may be held to the ratification of an act, it is essential that he have knowledge, or the equivalent, of the facts concerning the transaction. A ratification supposes a knowledge of the thing ratified. Blen v. Bear River, etc., Co., 20 Cal. 602, 81 Am. Dec. 132. "It is an inherent element of ratification that the party to be charged with it must have fully known what he was doing." Brown v. Rouse, 104 Cal. 676, 38 Pac. 507.

The fact of defendant Fette's withholding possession was an issue. The whole testimony does not purport to appear in the bill of exceptions, and we cannot say that the new trial was improperly granted as to her.

The court did not err in granting a new trial, and the order is affirmed.

We concur: GRAY, P. J.; SMITH, J.

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1 Cal. App. 335

THOMAS et al. v. BOLSA LAND CO. et al.

(Court of Appeal, Second District, California. July 20, 1905.)

1. WATERS AND WATER COURSES—OBSTRUCTION OF DRAINAGE SYSTEM—ACTIONS—PRESUMPTIONS.

In an action to recover damages for injury to a crop caused by defendants' obstruction of the water course into which plaintiffs' lands were drained, where the evidence showed that the obstructed water course was the natural conduit of the drainage from plaintiffs' land, and that the land must of necessity have been drained into such water course, and no part of plaintiffs' drainage system was upon defendants' lands, and there was nothing to show that plaintiffs were not strictly within their rights in draining the land and planting the crop, it would be presumed that plaintiffs had title and a right to maintain their ditches and drainage system.

2. SAME—LIABILITY OF OBSTRUCTER.

Under Civ. Code § 3514, requiring one to so use his own rights as not to infringe upon the rights of another, a riparian proprieter is liable in damages for damming the stream and thereby obstructing a drainage system lawfully maintained by other landed proprietors, and destroying a crop previously rightfully brought into existence by such other proprietors.

3. SAME—ACTIONS—PARTIES.

Parties to a contract for cropping land on shares, each of whom owns an interest in the growing crop, are properly joined as plaintiffs in an action for the destruction of their crop, caused by interference with the drainage of the land on which the crop is grown.

Appeal from Superior Court, Orange County; J. W. Ballard, Judge.

Action by D. H. Thomas and another against the Bolsa Land Company and another. From a judgment for plaintiffs, and from an order denying a new trial, defendants appeal. Affirmed.

Dunn & Crutcher and Scarborough & Forgy, for appellants. F. O. Daniel and Victor Montgomery, for respondents.

GRAY, P. J. This action is brought to recover damages suffered by reason of a dam constructed by defendants, which had the effect to back up and cause certain waters to subirrigate and injure and destroy the celery crop of plaintiffs. On a trial without a jury the plaintiffs had judgment for $982 and costs. The defendants appeal from the judgment, and from an order denying them a new trial.

The plaintiff Thomas owns a certain 40 acres of land in Orange county, upon which the plaintiffs, under an agreement between them for cropping the land on shares, had growing some 11 acres of celery. The story of injuries complained of is aptly told in the findings of the court, the important parts of which are as follows: "That the said land is situated about two miles from and above the dam described in said complaint, and therein alleged to have been built by the Bolsa Land Company; that said land of the plaintiff

Thomas was, as early as the year 1892, to some extent drained by the construction of ditches along and through it, and prior to the construction of said dam had been drained to such an extent as to render it tillable, and susceptible of raising, and had raised, good crops of celery and other farm products; that prior to the building of said dam the ditches used in the drainage of the lands of the plaintiffs and other lands contiguous thereto emptied into a natural stream known as 'Freeman's River,' and from thence into Bolsa Chica Bay, and from said bay through a natural channel and outlet into the Pacific Ocean; that prior to the 1st day of October, 1899, the plaintiff D. H. Thomas had expended money in draining said land, and in preparing for and in reducing the same to cultivation, and in cultivating said land, and in digging and keeping open ditches for the purpose of draining said land into said Bolsa Chica Bay, and had, prior to the building of said dam, drained said land and kept the water off and from under the same by running said water into the Bolsa Chica Bay, from which bay it flowed out into the Pacific Ocean by a natural channel, carrying away the surplus water from said lands by means of said ditches, river, and bay, and natural channel, into the Pacific Ocean; that during the year 1899 the plaintiffs planted the land described in the complaint as belonging to the plaintiff Thomas with celery and other crops; that 11 acres of said land were planted with celery, and that plaintiffs were the owners of said crop of celery; that before said celery was planted the land was properly prepared and put in a fit state of cultivation for the planting of celery, and said land was cultivated in the usual and customary way; that the said crop of celery was growing and maturing up to about the 15th day of December, 1899, and was then worth in the field the sum of $1,100, and was worth said sum when it was damaged and destroyed, as herein stated, and had it not been for the building of said dam and the consequent backing of the water in said bay and ditches, said celery could have been sold at the time in the field and at harvest time for the sum of $1,100; that said dam was constructed by the defendants at and in said Bolsa Chica Bay, and at the place alleged in said complaint, and was an obstruction in and to the channel of said bay, and prevented the water of said bay from flowing through the natural channel and outlet, and out of the bay into the Pacific Ocean, and, as maintained by the defendants, the waters of the bay were dammed up and rose in said bay and in said ditches, and filled up the drainage ditches, and prevented the waters from said ditches and from the land of the plaintiffs from flowing away from said land into the Pacific Ocean, and caused said land to become subirrigated, and the celery to become wet, damaged, decayed, and destroyed, and to become unfit for market and unsalable, and the said crop of celery was lost to the plaintiffs, except a small portion thereof, which was sold for the sum of $118, which was all of said crop that could be sold, and was all that could be realized therefor; that about the 1st day of November. 1899, and after said crop of celery had been planted, and while it was growing on the lands of the plaintiffs, the said defendants built, erected, and maintained in and across said Bolsa Chica Bay, and across the channel thereof running into the Pacific Ocean, a dam extending above the high tide of the said ocean, which was maintained and kept above high tide up to the month of March, 1900; that for more than two years next prior to the building of said dam the land of the plaintiff Thomas had been cultivated and planted with celery, and good celery crops had been grown thereon and were matured and harvested, and said crops kept in good condition and were fit for market, and were marketed and sold for from $100 to $125 per acre in the field; that the ditches constructed for the purpose of draining the land of the plaintiff Thomas had not been used continuously and adversely for the period of five years before the commencement of this action."

The first and main contention of appellants is that "plaintiffs showed no right to maintain their ditches and to drain water into the Freeman river and the bay through their ditches, and hence cannot complain of the obstruction to the flow of water therein." In considering this question, it may be well to notice in the beginning that this is not an action in equity to restrain defendants from maintaining their dam. It is an action to recover only for an actual loss and injury to property, suffered by plaintiffs because of this dam. The property injured consisted of a growing and nearly matured crop of celery. The soil upon which this celery was maturing had been cultivated, drained, and made fit for the growth of the crop at a time anterior to the construction of the dam, and the celery had been planted and was rapidly maturing at the time the dam was built. There is nothing to show that plaintiffs were not in every respect acting strictly within their rights at every step they took in the draining and further preparation of this land, as well as in planting and bringing into existence the property destroyed by the subsequent acts of defendants. So far as the drainage ditches are concerned, the map in evidence shows that the river and Bolsa Bay were the natural conduits of the drainage from this land, and that, if the land was drained at all, it must have been by ditches, either into the river or into the bay direct, or into some other slough or stream connecting with the bay, and of necessity the dam would have affected disastrously any system of drainage that the plaintiffs could have reasonably adopted. The plaintiffs were in possession of a drainage system to the river. No part of this system was upon the lands of defendants, and it connected with a natural water course. From this possession a presumption of title and right of possession arises. It cannot be said that the use of this drainage system invaded any right of the defendants,—at least, not up to the time of the construction of the dam.

Now, then, the question is: After this crop of celery had been by plaintiffs' efforts brought into existence, presumably without invading the rights of any other person, are the defendants entitled, by reason of being riparian owners on the river and bay, to so use the waters of the same as to destroy property which has been brought into existence as above indicated? There is a principle in law, which finds expression in section 3514 of the Civil Code, as follows: "One must so use his own rights as not to infringe upon the rights of another." This principle has often been applied so as to restrain a lower riparian owner from damming up the stream in such a manner as to back the water upon the lands of an upper owner on the stream, to the injury of the land of the latter and the destruction of his crops growing thereon. The same rule has sometimes been applied to injuries arising on lands not riparian to the stream, but which found a convenient and natural outlet for the drainage of such lands when aided by artificial ditches. Krause v. Oregon Iron & Steel Co., 77 Pac. 833. This case was recently decided by the Supreme Court of Oregon. The plaintiff in it was the owner of a tract of 25 acres of land near the Tualitin river, which he alleges was drained by it and Rock Creek, a small tributary thereto, and that by reason of the obstruction caused by defendant's dam the water was cast upon his land, and the drainage so impeded and retarded as to hinder and delay him in planting his crops until too late in the season for them to mature properly. This land was once of a swampy character, but had been redeemed by drainage, and was very valuable for gardening and farming purposes. The court held that plaintiff was entitled to an injunction restricting the dam to a height that would not result in injury to plaintiff's land. In the opinion it is said: "The defendant owes to the plaintiff and other land owners, whose crops are dependent upon the proper drainage of the soil in which they are produced, a duty to see that it does not trespass upon their prior acquired rights and privileges; and it can proceed with its obstruction of the stream just so far only as not to impinge upon these rights and privileges." No question of the statute of limitations is discussed, or even mentioned; but the opinion proceeds upon the theory that, the plaintiff having devoted this stream to drainage purposes before the construction of the dam, therefore the dam should be so regulated as not to interfere with such drainage. If a person can be restricted in the use of his dam in the manner indicated in the above case, it is clear that damages ought to be given plaintiffs herein under the circumstances disclosed by the quoted findings.

We are of opinion that defendants had not the right to back up or retard the waters of the bay and stream to the injury and destruction of the crops of the plaintiffs. The principle governing the case is analogous to that which gives to the owner of land an easement in the lower lands adjoining for the discharge of rain and surface water falling upon his own land. The owner of the lower lands is liable in damages, if he dams up and backs and holds the water upon the higher lands. So here the defendants are liable for not permitting the waters to proceed on their way to the ocean, and for interfering with the established drainage system of plaintiffs. The language of the findings will not admit of any other reasonable construction than that the crop was injured and destroyed by the act of the defendants in damming up and preventing the water from flowing away. The findings of the court find ample support in the evidence. It would serve no useful purpose to attempt to state or analyze the evidence here. The contract between the plaintiffs was for cropping the land on shares, and each of them owned an interest in the growing crop, and there was no misjoinder of parties plaintiff.

Other objections are urged by appellants, but after a careful examination of them we are of opinion that they are not of sufficient importance to warrant further discussion.

Judgment and order are affirmed.

We concur: SMITH, J.; ALLEN, J.

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1 Cal. App. 326

McRAE v. ERICKSON et al.

(Court of Appeal, Second District, California. July 20, 1905.)

1. MASTER AND SERVANT—PLACES TO WORK—SUBSTANTIALLY COMPLETED STRUCTURES—TUNNELS.

The excavation of a tunnel and its completion to a temporary grade, over which is laid a temporary track, which is but a few inches from the level of the regular grade, the tunnel being completed, except for timbering and completing the excavation to the regular grade, is a substantial completion of the portion of the tunnel so excavated, within the rule making the completed portion of the tunnel an appliance and means to prosecute the work, furnished by the master, which he is bound to use ordinary care to render a safe place in which to work.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 209, 212, 218.]

2. NEGLIGENCE — PERILOUS SITUATIONS—DEGREE OF CARE REQUIRED—INSTRUCTIONS.

An instruction on the degree of prudence required of a person in imminent danger need not be qualified by a proviso on the contributory negligence of such person in bringing about the dangerous situation, where there is no evidence showing that he did bring about such situation.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 384-391.]

3. SAME.

An instruction on the degree of care required of a person in imminent danger need not be qualified with the proviso that he acted in the emergency as any ordinarily prudent man would have been likely to act under the same circumstances.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 14, 99, 388.]

4. SAME—QUESTIONS FOR JURY.

Negligence is usually a question for the jury, and its verdict can be disregarded by an appellate court only in extreme cases.

5. CONTRIBUTORY NEGLIGENCE — DANGEROUS SITUATIONS.

A servant who is placed in a position of imminent danger from falling rock is not chargeable with contributory negligence in attempting to escape in the wrong direction.

6. WITNESSES—PRIVILIGED COMMUNICATIONS—STATEMENTS OF PHYSICIANS.

A physician in charge of a railroad hospital, whose services are compensated by assessments upon the wages of the railroad employés, acts in a professional employment, within the rule excluding communications made by a patient to his physician. in the course of professional employment in examining an injured employé who is sent to the hospital, and in eliciting information as to his injuries on the day of the examination.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 772.]

7. SAME.

Under the statute forbidding a physician to be examined as to any information acquired in attending his patient, the acquisition of which is necessary in order to enable him to prescribe or act for the patient, all statements made by a patient to his physician while the latter is attending the former in that capacity, for the purpose of determining his condition, are privileged, although they have nothing to do with the patient's treatment, or the determination of his injuries, but relate to the way in which the injuries occurred.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 773–776.]

Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by Alexander McRae against Charles Erickson and others. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Bicknell, Gibson & Trask, for appellants. Edwin A. Meserve and Fred E. Burlew, for respondents.

SMITH, J. Appeal from a judgment for the plaintiff, and from an order denying the defendants' motion for a new trial. The suit is for damages for injuries received by plaintiff while working for defendants in the construction of a tunnel for the Southern Pacific Railroad Company on the line between Los Angeles and Ventura counties. The general course of the tunnel is eastward from the portal, or entrance to it. The work had been completed, and permanently timbered some distance into the mountain, and for some distance beyond that—variously stated, but which we may call about 50 feet—the tunnel had been completed, with exception of timbering, down to what may be called the "temporary grade." Over this there was laid a temporary track, reaching to the end or "toe" of what is called by the witnesses the "muck pile"—a point distant about 18 feet from the face of the tunnel—by which is meant the cross-section of the tunnel at the end of the part above described. The precise difference of level between the regular grade and the temporary grade is not stated, but was probably a few inches only; and, in the language of one of the witnesses, this portion of the tunnel had been completed, except for the timbering, and "taking up the grade," by which is meant completing the excavation to the regular grade. At the time of the accident the plaintiff was engaged on the south side of the tunnel in loading a car from the muck heap, and was injured by a rock falling from the side of the tunnel between him and the portal as he attempted to escape in that direction.

The jury were instructed (among other instructions), in effect, that where a permanent tunnel is being driven into a mountain to furnish a permanent bed for a railroad, the completed portion of the tunnel, as fast as completed, becomes an appliance and means furnished by the master by which the remaining work is to be prosecuted, and that, if the jury found that any portion of the tunnel was this completed, the employés of defendants were obligated to use ordinary care to render such completed portion a safe place in which to work, and to keep such completed portion in a condition reasonably safe, etc. And, in definition of the terms used, it is added by the court: "When I say 'completed,' I desire to be understood as saying, when substantially all the work of excavation is performed, in order to render the tunnel of the size and capacity provided for by the plans and specifications." This instruction was based upon the decision in Hanley v. California Co., 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597, and one of the points urged by the appellants is that "the tunnel at the point from where the rock fell was uncompleted," within the sense of the term used in the instruction, and in the case cited; but we are of the opinion that the excavation of the tunnel to the temporary grade was a substantial completion of that portion of the tunnel, within the meaning of the instruction and within the reason of the decision.

Another objection urged by the appellants was to the following instruction: "When a person is in imminent danger, he is not called upon to exercise that intelligence and judgment he would be expected to exercise were he not in danger. So, if a party in imminent danger has two ways open to him, but has not the time to stop and investigate, and determine which is the right or safe way, and which is the wrong or unsafe way, his choosing the latter is not, under the circumstances, negligence on his part. So, if you should find from the evidence in the case that McRae found himself in imminent danger, or had reasonable ground to believe that he was in such danger, and had not time to stop and consider and determine the better course to pursue, then you are instructed that his choosing to run out towards the portal, instead of back toward the bench, was not negligence on his part, even though in so doing he may have run right under the falling rock, instead of away from it." The objections urged to this instruction are that it should be qualified with the provisos that plaintiff acted in the emergency as any ordinarily prudent man would have been likely to act under the same circumstances, and that the dangerous situation was brought about by the plaintiff's negligence. But, with regard to the latter qualification, there was no evidence in the case tending to show that the plaintiff was brought into his dangerous position by any negligence of his own, and from the evidence and the verdict it must be assumed that the situation was the result of the negligence of the defendants; nor are we prepared to hold, in the absence of negligence on the part of the plaintiff, that it is a material question whether the dangerous situation of plaintiff was the result of defendants' negligence or otherwise. We are also of the opinion that the other qualification contended for by appellants is equally untenable. The principle expressed in the instruction is based upon the familiar and well-known fact that in circumstances of imminent danger the ordinarily prudent man commonly acts without prudence, and that it is only the exceptional man who can be relied upon, under such circumstances, to retain his presence of mind, or, in other words, the rule is based on an almost universal human infirmity.

It is objected, also, that the evidence was insufficient to justify the verdict, in that it affirmatively appears that the defendants were not guilty of negligence, and that the plaintiff was guilty of contributory negligence; but the question of negligence is commonly a question for the jury, and it is only in extreme cases (of which this is not one), that this court would be justified in disregarding the verdict. It may be added that the only claim of contributory negligence is that, when the imminence of the danger from the falling rock became apparent, the plaintiff like the other employés present, attempted to escape in the wrong direction.

The remaining point urged is that the court erred in excluding the testimony of Dr. Hitt as to a statement made to him by the plaintiff at the defendants' hospital, where he had been taken for treatment; and this is objected to on the two grounds: That there is nothing in the record to indicate that the witness was acting professionally, or with a view to treating plaintiff, or that the information was obtained with a view to treatment, and that the information was, in fact, not "necessary to enable him to prescribe or act for the patient." But the former point, we think, is obviously untenable. The witness was a physician and surgeon, and as such was in charge of the defendants' hospital, and his services were remunerated by assessments upon the wages of the men, so that he was, in effect, employed by the plaintiff. He examined the plaintiff as a physician, and the plaintiff knew that he was examining him as such, and the information sought was obtained from the plaintiff at the time he was examining him, or sometime during the day. The court below, we think, was right in holding that the communication was made to the witness in the course of professional employment.

As to the remaining objection: The question asked the witness was: "If Mr. McRae made any statement to you, explaining how the rock fell, and how it hit him," to which he answered: "He did." The witness was then asked: "Now, state whether he told you how the rock came down and from whence it came," and, the question being objected to, the witness testified that the statement referred to "had nothing to do with his [the plaintiff's] treatment, nor with the examination of him for the purpose of determining his physical injuries"; that "it had no relation whatever to his treatment"; that "it was customary in the hospital to get a record from the patients as to how these things occurred." The witness was then asked by the court: "Was it a part of the history of the case?" etc. To which he answered: "Why, I simply asked him how it occurred. 'How did you get this injury?' No matter if it is a scalp wound, or mashed finger, or whatever it may be, it is natural to inquire how it ocurred; and in connection with that he reported to me." The objection to the question was thereupon sustained, and the appellants excepted. The court was not informed as to the effect of the statement sought, otherwise than by the questions quoted above; and from these it cannot be very clearly determined what the statement would have been. If it was as indicated by the first question, the information sought was apparently of a character necessary to the proper treatment of the patient; but information as to the direction or point whence the rock came would seem to have been unnecessary for such purpose, and to this extent, if we have regard to the most obvious sense of the provision of the statute under consideration, the objection of the respondent would seem to have been well taken. But to give to the statute this narrow construction would equally exclude from its application many, if not most, of the answers to questions usually put, and properly and necessarily put, by competent physicians to patients in cases of this kind, in order to enable them to act for their patients. This, we think, would be to defeat the obvious purpose of the act, which, it is said, "is to facilitate and make safe, full, and confidential disclosure by patient to physician of all facts, circumstances, and symptoms, untrammeled by apprehension of their subsequent and enforced disclosure and publication on the witness stand, to the end that the physician may form a correct opinion, and be enabled safely and efficaciously to treat his patient." Will of Bruendl, 102 Wis. 47, 78 N. W. 169. Hence it is said in the case cited (which is also cited by the appellants): "The seal placed on the lips of the physician only relates to 'information necessary to enable him to prescribe for such patient as a physician.' The tendency of all courts has been and should be toward liberal construction of these words to effectuate the purpose of the statute. Thus it has been held that the word 'necessary' should not be so restricted as to permit testimony of statements or information in good faith asked for or given to enable intelligent treatment, although it may appear that the physician might have diagnosed the disease and prescribed for it without certain of the information, so that it was not strictly necessary. Sloan v. N. Y. C. R. Co., 45 N. Y. 125; Grattan v. Metropolitan L. Ins. Co., 80 N. Y. 281, 36 Am. Rep. 617; Renihan v. Dennin, 103 N. Y. 573, 9 N. E. 320, 57 Am. Rep. 770." In the case cited, under this liberal construction of the act, the testimony of physicians was admitted upon the ground that the examination of the patient was not made for the purpose of prescribing for her, the court saying: "We hold, therefore, that the information obtained by the physicians at the interview of September 18, 1896, was not necessary, and was not obtained for the purpose of enabling them to prescribe for the testatrix as physicians." Though the precise question has not been determined by the Supreme Court of this state, the same view seems to have been commonly taken. Thus, in the case of Freel v. Market St. Cable Ry. Co., 97 Cal. 46, 47, 31 Pac. 730, the testimony of a medical witness as to "information acquired by him * * * while visiting and prescribing for" plaintiff, was excluded. So, in Harrison v. Sutter St. Ry. Co., 116 Cal. 166, 47 Pac. 1019, the opinion of the physicians, "based upon facts ascertained by them during such medical attendance," was excluded; and so, in Estate of Nelson, 132 Cal. 187, 64 Pac. 294, there is a like ruling as to information of a physician "acquired by him from the decedent, and from observing him while he was in attendance upon him for the purpose of prescribing for him as his physician

We are therefore of the opinion that the view of the court below in this case was correct, and that the intention of the statute is to exclude all statements made by a patient to his physician while attending him in that capacity for the purpose of determining his condition; nor does this construction do violence to the language of the act liberally construed, which we think is to be understood as forbidding a physician to be examined "as to any information acquired in attending the patient, the acquisition of which was necessary (or which it was necessary for him to acquire) in order to enable him to prescribe or act for the patient." Of this necessity, from the nature of the case, the physician must commonly be regarded as the sole judge; for it would be obviously unreasonable to require of the patient the exercise of any judgment with reference to the propriety of the questions asked by his physician, except, possibly, in cases where the materiality of the question is obviously apparent.

We are of the opinion that the judgment and order appealed from should be affirmed, and it is so ordered.

We concur: GRAY, P. J.; ALLEN, J.

1 Cal. App. 324

NILES v. GONZALES et al.

(Court of Appeal, Second District, California. July 20, 1905.)

1. LANDLORD AND TENANT—ACTION FOR RENT—ISSUES.

Where, in an action for rent, the answer admitted the execution of the lease, but averred that plaintiff, as agent for T., the owner of the premises, executed the lease for her and in her behalf, denied that plaintiff was the owner, and alleged that the rent had been paid to T. until she sold the premises to defendant's wife, whether the lease was made by plaintiff in his own behalf or as agent for T. was within the issues.

2. SAME—PAROL EVIDENCE—LANDLORD'S TITLE—DISPUTE.

Where, in an action for rent, defendant claimed that the lease was executed by plaintiff as agent for T., and that the rent had been paid to her, the lease of T. formerly made, her receipt for the rent, and a deed made by her to defendant's wife, together with the contract between plaintiff and T., were admissible, as tending to establish plaintiff's alleged agency, T.'s authority to create the same, and plaintiff's exercise thereof, and was not objectionable as constituting an attempt on the part of a tenant to dispute the landlord's title.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 152–157.]

3. ESTOPPEL.

In an action by plaintiff to recover rent on a written lease, the contract between plaintiff and T., with reference to a sale of the property, containing a general authority to plaintiff to lease and assign the same and to cause all the rents to be paid to T., and plaintiff's act in representing himself as agent only, having the rents paid to T., his concealment of his own interest in the premises, and his declaration that he was executing the lease for T., estopped him to deny that he executed the lease in his own behalf.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Estoppel, §§ 189, 190; vol. 40, Cent. Dig. Principal and Agent, § 43.]

4. SAME.

Where the owner of certain property authorized plaintiff to lease the same, and such owner received rent therefor, she was estopped to deny the execution of the lease on her own behalf.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by William Niles against M. G. Gonzales and others. From a judgment for defendants, plaintiff appeals. Affirmed.

A. B. McCutchen and Ward Chapman, for appellant. J. Wiseman McDonald, for respondents.

ALLEN, J. This action to recover rent was originally commenced in a justice's court and certified to the superior court, upon a verified answer being filed showing that questions of title and possession to real property were involved. Judgment in superior court went for defendant. This appeal is from an order denying a new trial, and is based upon a statement.

Plaintiff's action was upon a written lease alleged to have been entered into between plaintiff and defendant. The answer admits the execution of a lease as set out in the complaint, but avers that as agent of Mrs. Tarr, the owner of the premises, plaintiff executed said lease for her and in her behalf, and denies that plaintiff was ever the owner of the premises, and alleges, further, that the rent had been paid to the said Mrs. Tarr up until the date when said owner sold said premises to the wife of defendant. The finding of the court that the lease was made between the defendant and Mrs. Tarr was within the issues, and ample evidence appears in the statement to support such finding. It is insisted, however, that this evidence was improperly admitted, and that it was in furtherance of an attempt of a tenant to dispute a landlord's title. We do not so understand the object of such proof. The lease of Mrs. Tarr formerly made, her receipt for the rent, the deed to Mrs. Gonzales, the contract between plaintiff and Mrs. Tarr, each and all were competent as tending to establish the alleged agency, the authority of Mrs. Tarr to create the same, and its exercise by plaintiff. While as a general rule those only are bound by a written contract who sign it, and others cannot be held whose names do not appear therein, yet an exception to this rule exists, when evidence is admitted to show that it also binds another who has authorized its signing, because the act of the agent in signing an agreement in pursuance of the authority is in law the act of the principal. Estrella Vineyard Co. v. Butler, 125 Cal. 238, 57 Pac. 980. The contract between plaintiff and Mrs. Tarr in reference to the sale contains a general authority to plaintiff to lease and assign same, and to cause all rents to be paid to Mrs. Tarr. The act of plaintiff in representing himself as agent only, having the rental paid to Mrs. Tarr, his concealment of his own interest in the premises, and declaring that he was executing the same for Mrs. Tarr, certainly ought to estop him from denying that the contract was that of Mrs. Tarr, and that his intention in its execution was to bind her. Her authority for him to lease and the receipt of the rent should estop her to deny an execution in her behalf, were she even seeking to avoid the same, which she is not. Plaintiff had no interest in the property at the date of the sale to Mrs. Gonzales, and seeks to establish none, had no authority at any time to receive the rents, and nothing appears in the record indicating any right of the plaintiff to maintain an action for any part of the claim sued upon.

We find no error in the record, and the order appealed from is affirmed.

We concur: GRAY, P. J.; SMITH, J.

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1 Cal. App. 315

KELLAM v. BRODE et al.

(Court of Appeal, Second District, California. July 17, 1905.)

1. NOTES—EXTENSION OF TIME—INTEREST IN ADVANCE.

The acceptance of interest in advance on a note, while prima facie evidence of a contract to forbear and delay the time of payment, is not conclusive, and, unless it was agreed that such payment should have such effect, it does not suspend the holder's right of action on the note.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 336.]

2. APPEAL — EVIDENCE — ORDER OF PROOF— HARMLESS ERROR.

Error in the exclusion of evidence on the examination of a witness in chief was cured by the admission thereof on cross-examination.

3. NOTES—EVIDENCE.

Where defendant claimed that the note sued on was a part of the indebtedness of a corporation which plaintiff had agreed to assume, and plaintiff admitted an agreement to pay $7,800 of such indebtedness, it was error for the court to exclude evidence with reference to the character, payment, and consideration of certain other notes, for the purpose of determining whether or not the note sued on was included within the obligations assumed.

4. ESTOPPEL.

Where several months elapsed after the execution of a note sued on by one of the signers before it was signed by B., and before he signed the same, and as an inducement to procure his signature, plaintiff represented that the note evidenced a firm indebtedness, on which B. relied, plaintiff, having assumed all the obligations of the firm, was estopped as against B. to deny that the note was a part of the liability so assumed.

Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by M. Y. Kellam against A. W. Brode and others. From a judgment in favor of plaintiff, and from an order denying defendants' motion for a new trial, they appeal. Reversed.

Rehearing denied by Court of Appeal August 18, 1905; by Supreme Court September 14, 1905.

Jones & Weller and J. F. Conroy, for appellants. R. L. Horton, for respondent.

ALLEN, J. Defendants appeal from a judgment and order denying a new trial. The complaint was filed March 19, 1902, declaring upon a promissory note, payable to plaintiff and signed by defendants, dated June 15, 1899, due in one year, for $1200, with interest at 7 per cent. per annum, payable semiannually. Upon the note appeared the following indorsements: "Six months Int.

paid on within note; $42.00. M. Y. Kellam." "March 19, 1900. Paid two hundred dollars on within note. M. Y. Kellam." "March 19, 1900. Int. paid in advance, $140.00; amount for two years from date. M. Y. Kellam." In an amended complaint it is alleged that the last indorsement was entered through mistake, which defendants knew or suspected at the time; that the payment of interest was only up to December 15, 1901, and not later—and a reformation of the indorsement to that effect was asked. The answer denies any mistake, and alleges that on March 19, 1900, in consideration of the payment of $200, and the sum of $140 advanced as interest, plaintiff agreed to extend the time of payment two years from and after March 19, 1900. By way of further answer, the defendants allege that the note sued on was given in consideration of a debt of the Electric Supply & Fixture Company, a corporation, of which plaintiff had notice; that on the 19th of March, 1900, the plaintiff, for a valuable consideration, assumed and agreed to pay all the indebtedness of said Electric Supply & Fixture Company, including the note. The court found such indorsement of March 19, 1900, was not improperly indorsed by mistake, that the same does truly express the intention of said party, and that the interest was paid in advance to March 19, 1902. The court further finds that there was no agreement to any extension of time for the payment of said note, and the same was not then and never has been extended. Judgment was entered in favor of the plaintiff and against defendants for $1000, with interest from December 15, 1901.

Appellants' first point discussed is that the action was prematurely brought; that the receipt of interest to March 19, 1902, amounted to an agreement to extend the time of payment to that date; and, that being established, the defendants had the whole of that day within which to pay the note, and were not in default when the action was commenced. The trial court, however, has found, and there was some testimony upon which such findings are supported, that while the interest was actually received and paid in advance to March 19th, there was no agreement to extend time of payment on account thereof. The general rule is "that the reception of interest in advance upon a note is prima facie evidence of a binding contract to forbear and delay the time of payment." Shelly v. Bristol Sav. Bank (Conn.) 26 Atl. 474, 19 L. R. A. 599, 38 Am. St. Rep. 340. "The inference is irresistible that, where a creditor receives interest in advance, there is a contract to extend the time of payment during the period for which interest is paid." Woodburn v. Carter, 50 Ind. 376. In these and many other decisions the inference to be derived is declared, while in others a prima facie case is said to be established by the proof of such facts. But such inferences and prima facie evidence may be overcome by proof that the facts are otherwise. It is entirely competent for parties to actually pay and receive money by way of interest in advance, upon an understanding that it should not affect the right to sue upon the original promise. This, in effect, is what the court below found, when it found that, notwithstanding the payment, there was no agreement to extend time. These findings were in line with plaintiff's testimony that the credit of $200 was a gift, and that "when I struck off the $200 I gave him that, and he suggested then that he would pay me two years' interest in advance, and I said, 'all right,' and set it down on the note that way." The court appears to have accepted plaintiff's testimony as to the incidents of the transaction, and to have determined that the consideration of the payment of interest in advance was based upon the gift of $200, and not a consideration for a new contract extending time of payment. In Hellier v. Russell, 136 Cal. 144, 68 Pac. 581, the principle is determined that the mere payment of interest in advance, pursuant to a stipulation in the original obligation so to do, is not even prima facie evidence of an intent to create a new contract.

It is further insisted by appellants that the court erred in excluding testimony of A. W. Brode, tending to show that the note set out in the complaint was given on account of the indebtedness of the Electric Supply & Fixture Company, which testimony was in support of the allegation of the answer. This was error; but it was cured by the admission of the same testimony upon cross-examination of the witness, and we are unable to see any prejudice resulting from its exclusion in the examination in chief. Error is claimed by reason of the refusal of the court to admit testimony with reference to the character, payment, and consideration of certain other notes presented to the witness, A. W. Brode. It was certainly material, in determining whether or not the note sued on was an obligation assumed by the plaintiff, to receive and consider evidence as to what notes or indebtedness were in fact paid under such assumption, and in discharge of what plaintiff admits was an agreement to pay about $7,800. While some of the notes about which inquiry was sought were admitted to be individual obligations of the makers, yet they formed a part of the notes claimed by plaintiff to have been paid pursuant to the assumption of the firm indebtedness. We are unable to see how the court could determine the vital question in this case, which was with reference to the assumption by plaintiff of the note in suit, without going into an inquiry as to what was actually paid, and the character of the notes so paid, together with the amount. The refusal of the court to admit the evidence with relation to these notes was error, nor was it cured by subsequent statements in relation thereto.

It is insisted, further, by appellants that the finding of the trial court that the note set out in the complaint was not the indebtedness of the Electric Supply & Fixture Company is unsupported by the evidence. This is true, in so far as defendant L. D. Brode is concerned. While the answer admitted the execution of the note at its apparent date, the testimony, without contradiction, shows that more than two months elapsed after its execution by A. W. Brode before it was signed by L. D. Brode; and, further, the uncontradicted testimony is that when it was signed by L. D. Brode, and as an inducement to procure his signature thereto, plaintiff represented that the note did represent a debt of the Electric Supply & Fixture Company, of which firm defendant was to become a member, and that such representations were believed and were the sole consideration for its execution by L. D. Brode. This being true, as between plaintiff and defendant L. D. Brode, the note became a firm obligation. Plaintiff having asserted that it was a firm debt, and defendant having acted upon his belief in the truth thereof, plaintiff is estopped to deny that it was and is a firm debt; and having, for a good consideration, assumed in his contract with L. D. Brode to pay all obligations of the Electric Supply & Fixture Company, this note became a part of the liability so assumed, and defendant L. D. Brode ceased to be bound thereby.

Judgment and order reversed, and cause remanded for a new trial.

I concur: GRAY, P. J.

I concur in the judgment: SMITH, J.

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7 Cal. Unrep. 219

ADAMS v. THORNTON.

(Court of Appeal, Third District, California. July 25, 1905.)

1. LANDLORD AND TENANT—CROPPING CONTRACT—CONSTRUCTION.

Where plaintiff, the owner of certain orchards, contracted to let defendant a house and furnish implements, horses, wagons, feed, spraying materials, boxes, and trays for curing and marketing the fruit, furnish new trees to replace missing ones, pay for one-half of boxing materials when shipped, and, when dried, to pay for the expenses of cutting, drying, and sacking his share, and in consideration of defendant's labor in raising, harvesting, shipping, and marketing the fruit, the latter was to have one-half of the crop, the contract was a mere cropping contract, and not a lease, and plaintiff and defendant were therefore tenants in common of the crop.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 1349, 1355.]

2. SAME—POSSESSION.

Where plaintiff and defendant were tenants in common of a crop raised by defendant under a cropping contract, plaintiff was not entitled to maintain replevin against defendant for a portion of the crop alleged to have been wrongfully taken from plaintiff's premises.

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by W. H. Adams against Arthur Thornton. From a judgment for plaintiff, defendant appeals. Reversed.

Rehearing denied August 23, 1905.

Louttit & Middlecoff, for appellant. Nicol & Orr and J. M. C. Murphy, for respondent.

BUCKLES, J. The complaint in this action was claim and delivery. The defendant set up by way of answer a contract, and alleged that under it he and plaintiff were copartners in carrying on the business of fruit growing and dividing the profits between them, and asked for a dissolution and an accounting. Judgment was for the plaintiff and for the return to him of all the property mentioned in his complaint, and for $4, damage and costs. Numerous errors are alleged in the bill of exceptions in the ruling of the trial court in the introduction of evidence, but in the briefs of counsel before us these matters are not touched upon at all, and only two points are presented for our consideration, viz.: (1) Were the plaintiff and defendant co-tenants in the fruit in controversy? and (2) if co-tenants, could the plaintiff maintain replevin against the defendant for the common chattels?

For the better understanding of the matter it is necessary to set out the contract under which the parties were operating, or, at least, so much of it as will assist in determining the questions involved, and it is as follows:

"New Hope, Cal., Nov. 1, 1899.

"This indenture, made this 1st day of November, 1899, between Arthur Thornton, of New Hope, county of San Joaquin, and state of California, as party of the first part, and W. H. Adams, as party of the second part, witnesseth: That the said Arthur Thornton, party of the first part, for and in consideration of the covenants hereinafter stated, hath let, and by these presents doth grant, demise, and let, unto the said party of the second part, W. H. Adams, all that parcel or parcels of orchard lands situated in the county of San Joaquin, near New Hope, and described as follows: [Then follows the description of a 50-acre orchard and a 10-acre orchard]—for the term of one year from above date. The said party of the first part does agree with the party of the second part that he will let him a house, that he will furnish implements, horses, wagons, feed, also spraying materials, also boxes and trays necessary for the curing and marketing of the fruit. The party of the second part does agree with the party of the first part that he will in due season prune the trees of said orchard in a workmanlike manner; that he will remove all brush and replant all trees needed to fill vacancies (said Thornton to furnish trees);

that he will thoroughly spray said trees and plow and cultivate said lands; that he will properly thin fruit, will pick and deliver to railroad or steamer landing when shipping to cannery, and share and share alike, or, if for Eastern market, will pack all fruit for shipment, furnishing crates or boxes for same, the said party of the first part to pay for one-half of boxing materials and packing, and share and share alike, or, if dried, the party of the second part agrees to cure the fruit properly and to deliver one-half of the dried fruit to the party of the first part, the said party of the first part to pay for the expense of cutting, drying and sacks for his share of the fruit." Signed by both parties.

This contract was continued in force to November 1, 1902. A settlement had been made for the crop of each year up to November, 1902. There remained on hand of the crop of 1902 373½ sacks of dried apricots, which were in the possession of the plaintiff. On October 9, 1902, during the absence of plaintiff, the defendant came and carried said dried apricots away, and the plaintiff now seeks by his suit to have them returned to him. While the agreement set out and under which the parties were operating is called therein a lease, yet under the authority of Bernal v. Hovius, 17 Cal. 542, 79 Am. Dec. 149, it must be deemed only a cropping contract, and the parties are co-tenants in the fruits raised during the time of the contract, and each has an equal right with the other to the possession of the whole of said fruit, and, under the general rule, neither can maintain a suit against the other for the possession of the fruit. In Walls v. Preston, 25 Cal., at page 62, the court says: "It is the general rule that, where a term is created, the possession given to the occupant, and the produce agreed to be paid is to be paid as rent, then the instrument is to be regarded as a lease. It is also a general rule that, where the occupant covenants to deliver to the owner a portion of the crops, the agreement is held to be a cropping contract—a letting upon shares—and the owner and occupant are tenants in common of the crop."

Plaintiff relies upon Clark v. Cobb, 121 Cal. 596, 54 Pac. 74, as furnishing a different doctrine. In that case Justice Garoutte, who wrote the opinion, says: "The parties entered into contracts whereby one Cobb agreed to farm and cultivate certain lands to grapes and grain for a term of ten years. * * * It was provided therein that the lands were demised and let to said Cobb, he agreeing to give annually for the use thereof a certain portion of the crops of grain and other products grown thereon." There was a mortgage on the land, which was foreclosed, and the land sold while Cobb's contracts were in force. The justice continues: "Crops of various kinds were cultivated upon these lands by Cobb under his contracts during the cropping season of 1895–96; and subsequent to the aforesaid sales of the land, and during the period of time allowed by law for redemption, these crops were gathered and harvested by Cobb. As provided in his contract, he set aside the portion thereof to be given for the use of the land." The question in that case was as to whether the purchaser or redemptioner was entitled to these rents. Justice Garoutte further says: "That these contracts were leases, that the conventional relation of landlord and tenant existed between the parties, and that the grains and fruits to be delivered to the landlord when gathered and harvested were rent, we are entirely satisfied. * * * The authorities of this state recognize that such conditions may exist," such as cropping contract and co-tenancy in the crops raised. "When it is established that a certain contract is a lease, and that the relation of landlord and tenant exists between the parties, there must be some appropriate words in the contract to indicate that the crops raised on the lands are to be held in co-tenancy, or such will not be the conclusion reached. If there is nothing in the language to indicate that intention, then the products to be delivered to the landlord after harvest, by the tenant, will be deemed the property of the tenant until that time, and treated as rent to be then paid."

The contract in this case is vastly different from a contract where the landlord is to furnish the land and do nothing more but receive a stipulated part of the crop as rent, as was the case in Clark v. Cobb. In the case at bar, Arthur Thornton agrees that he will let Adams a house, that he will furnish implements, horses, wagons, feed, also spraying materials, also boxes and trays for the curing and marketing of the fruit, furnish new trees to replace missing ones, also to pay for one-half of boxing materials when shipping, and, when fruit is to be dried, to pay for the expense of cutting, drying, and sacks for his share. His labor, and his capital, other than the land, went into the crops in raising, harvesting, shipping, and marketing. It seems to me they could not have made a clearer cropping contract, even though they had used the words, "We hereby enter into a cropping contract." It appears very plainly what the intention of the parties was. Thornton put up his land, his materials, his feed, his horses, and furnishings against the labor and skill of Adams, and they were to "share and share alike." Fruit was shipped in boxes, marked "Thornton & Adams." I presume, when the fruit was shipped to the Eastern market, they stood "share and share alike" on losses, which sometimes do happen. Under the view taken by us the motion for nonsuit should have been granted.

Judgment is reversed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J

1 Cal. App. 357

OGLE et al. v. HUBBEL.

(Court of Appeal, Third District, California. July 25, 1905.)

1. LANDLORD AND TENANT—UNLAWFUL DETAINER—DEFENSES—FRAUD.

In unlawful detainer, defendant may show that the lease, while not originally fraudulent, is held by plaintiffs by virtue of a fraudulent and fictitious deed from the original lessor, executed solely to deprive defendant of his rights under the lease.

2. APPEAL—CREDIBILITY OF WITNESSES—DECISION OF LOWER COURT—CONCLUSIVENESS.

The discretion of the trial court in accepting or rejecting the statements of witnesses cannot be interfered with on appeal.

3. LANDLORD AND TENANT—UNLAWFUL DETAINER—DEFENSES—FRAUD.

In unlawful detainer, evidence *held* sufficient to support findings that the transaction by which the original lessor conveyed the premises to plaintiffs was fictitious and collusive in character, and was concocted solely to deprive defendant of his rights under the lease.

4. SAME—OPTION TO PURCHASE—RIGHTS OF LESSEE.

Where a lease provided that the lessor might sell the premises, either subject to the terms of the lease or thereby terminating the same, but further provided that the lessee should have the preference as purchaser in case of sale, the lessee could only be deprived of his rights under the lease by a bona fide sale. He could not be ousted on refusal to pay the lessor a sum fictitiously or fraudulently named as offered by another person for the premises, nor could his rights be affected by a gift by the lessor to her son.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 290-295.]

5. SAME—CONVEYANCE BY LESSOR—PREJUDICE TO LESSEE.

A fictitious and fraudulent sale by a lessor in a lease, which gave the lessee a preference right to purchase in case of sale, was prejudicial to the lessee, in that it deprived him of his privilege of purchase.

6. SAME—PREFERENCE IN PURCHASE—AVAILABILITY TO LESSEE.

The fact that a lease giving the lessee a preference right to purchase in case of sale does not constitute an enforceable contract for the sale of the premises in favor of the lessee does not effect the lessee's right to rely thereon to defeat a fictitious conveyance, executed solely to fraudulently deprive him of his rights under the lease.

7. SAME—FINDINGS—PROPRIETY.

In unlawful detainer, where it appeared and was found that the conveyance to plaintiffs by the original lessor was executed for the sole purpose of fraudulently depriving the defendant of his rights under the lease, the court was justified in further finding that plaintiffs were not damaged.

8. SAME.

Nor was it necessary, under the circumstances, to find that defendant refused to pay rent to plaintiff.

9. SAME—CONTRADICTION IN FINDINGS.

Nor, under the circumstances, were the findings contradictory, in that the court found that the property was conveyed to plaintiffs by the original lessor, and further found that plaintiffs had no title.

10. SAME—EVIDENCE.

In unlawful detainer, where the defense was that the conveyance of the demised premises to plaintiffs by the original lessor was collusive and fictitious, and was intended merely to defraud defendant of his preference right to purchase, it was competent for defendant to show his ability and willingness to purchase the property at its fair market value.

11. APPEAL—HARMLESS ERROR.

Further evidence that defendant had offered to pay rent to the original lessor, who was not a party, and that she had refused to accept it, was, while perhaps unnecessary, harmless.

12. LANDLORD AND TENANT—UNLAWFUL DETAINER—EVIDENCE—COMPETENCY.

Evidence of plaintiff's financial irresponsibility was also competent.

Appeal from Superior Court, Stanislaus County; W. O. Minor, Judge.

Unlawful detainer by H. W. Ogle and another against John Hubbel. From a judgment in favor of defendant, and from an order denying a new trial, plaintiffs appeal. Affirmed.

Rehearing denied by Court of Appeal August 22, 1905; by Supreme Court September 23, 1905, Beatty, C. J., dissenting.

Nicol, Orr & Nutter and Dennell & Walthall, for appellants. P. H. Griffin, for respondent.

CHIPMAN, P. J. One Barbara Hubbel, mother of C. F. Hubbel, was the owner of the demised premises, and on October 18, 1899, leased the same to the defendant. The lease was for five years, with right of renewal for five years, the term to commence on the day of its execution; the rental being $25 per month, payable monthly in advance on the 1st day of each month. It was further provided that the lessor "may sell said premises during the continuance of this lease, either subject to the terms hereof or that such sale may terminate and determine this lease within one year after notice of said sale; but it is understood that said party of the second part [lessee] may always have the preference as purchaser in case of sale." Defendant entered under the lease, and paid rent agreeably thereto, until and including the month of April, 1902. On April 29, 1902, Barbara Hubbel executed a conveyance of the premises to plaintiffs by bargain and sale deed, which was duly recorded April 30, 1902, and on that day they served written notice on defendant that they had purchased the premises and that they "wish to obtain possession of said premises as soon as they can be vacated by you." On May 22, 1902, plaintiffs served upon defendant written notice requiring him to pay rent to them, being $25, for the month of May, 1902, "or deliver to us the possession of all of said premises in three days from the time of service upon you of this notice." Defendant failing to pay rent, plaintiffs filed their verified complaint June 13, 1902, alleging, among other things, that they had purchased the property and were now the owners thereof. Defendant answered, admitting the execution of the lease and his possession under it. He also admitted the execution of an instrument by said Barbara Hubbel purporting to convey said premises, but alleged "that said purported deed was made to defraud defendant of his legal rights under and by virtue of said written lease, * * * denies that the plaintiffs are the owners of the lots described in the complaint," denies that he has refused or neglected to pay the rent required by said lease, alleges that he has offered to pay the rent to his lessor, Barbara Hubbel, and to plaintiffs, but that plaintiffs have refused such payment, and also alleges willingness and ability "to pay said rent to the persons whom the court may determine to be the proper persons to receive said rent, and here with the filing of this answer deposits the money in court." By way of an equitable defense to said action and as a cross-complaint defendant alleges the execution of the lease and his performance of all the conditions thereof on his part to be performed; that his lessor, "in order to oust defendant from said premises, fraudulently and without consideration transferred said property to * * * plaintiffs herein on or about the 29th day of April, 1902"; that plaintiffs took said deed with full knowledge of defendant's rights under said lease, and his right to purchase said property, and well knew that said deed was made "to oust defendant from said premises"; that defendant "has always been able, willing, and anxious to buy said property from said Barbara Hubbel"; "that she has refused to place a cash price upon said premises, so that defendant could purchase the same, and she still refuses and neglects to do the same."

There was no demurrer to the answer or cross-complaint, and the trial proceeded, the court sitting as a jury. The court found that the lease was executed as above stated; that defendant entered into possession, and has ever since been in possession, under it; that he has never refused to pay rent to said Barbara Hubbel; that she refused to accept rent after April 29, 1902, and that ever since that time defendant has been able, ready, and willing to pay said rent to said Barbara Hubbel, "and has proffered the same to her, but she has refused to accept the same or any part thereof;" that on April 29, 1902, she "by an instrument in writing conveyed said premises to plaintiffs herein"; that prior thereto she had notified defendant "that she intended to sell the same, and the terms of such sale," but refused to place a cash value upon the property upon defendant's request, and so notified him; "that said Barbara Hubbel, for the purpose of ousting defendant from said premises and to avoid the terms of said lease, conveyed said premises to plaintiffs; that plaintiffs at the time of said sale were in collusion with said Barbara Hubbel to defraud defendant of all rights under said lease, and to oust defendant from said premises, and to terminate said lease;" that defendant has performed all the conditions of said lease by him to be performed, and he always has been willing and able to buy said property, but said Barbara Hubbel refused to place a price upon the same; that, when plaintiffs received said deed, "they had actual notice of defendant's equity and interest in the land"; that plaintiffs have not been damaged. As conclusions of law the court found that plaintiffs are not the owners of the demised premises, that they are not entitled to rents, that defendant is rightfully in possession, that he has not broken the terms of the lease, and that neither of plaintiffs has any right, title, or interest in the premises. Judgment passed against plaintiffs, and each of them, "that all adverse claims of the plaintiffs, and each of them, to said premises or any part thereof, are invalid and groundless; that defendant be, and he is, hereby declared and adjudged to be entitled to the lawful and peaceful possession of said premises and every part thereof." From this judgment, and the order denying plaintiffs' motion for a new trial, they appeal.

Plaintiffs claim that their title was not an issue and could not be tried in this form of action, and that the evidence is insufficient to justify the decision, for the reason that there is no evidence that defendant either paid or offered to pay any rent to plaintiffs after April 29, 1902, the date of their alleged purchase of the premises. Defendant does not deny that he paid no rent to plaintiffs. He not only refused to attorn to plaintiffs, but denied their right to demand or receive rent, and denied their alleged ownership of the pemises demised. His contention was and is that the conveyance to plaintiffs by his lessor was fictitious and fraudulent, and therefore void, and was made for the express purpose of depriving him of his lease and of his right to purchase the property. The court found for the defendant upon these issues, and, if defendant had the right in this action to make this defense, and did in fact support it by sufficient evidence, it was not essential to defendant's recovery that he should show an offer to pay or a payment of rent to plaintiffs. The correctness of the decision rests mainly upon the right solution of the questions thus raised. We think that the decisions of the Supreme Court of this state show that the rule contended for by appellants is not applicable, where fraud is shown to have entered into the procurement of the lease, but that, under such circumstances, the tenant may dispute the title of his landlord.

In Mason v. Wolff, 40 Cal. 246, it was said that "the consequences of entering into the contract can only be avoided by showing some fraud or mistake which would have been sufficient to set aside the lease itself." In Johnson v. Chely, 43 Cal. 299, the action was unlawful detainer under the act of 1863 (St. 1863, p. 652, c. 411), to recover premises from a tenant holding over after demand of rent due and failure to pay for the space of three days. Defendant, among other defenses, alleged that the lease sued upon was procured through fraud. The trial court refused to permit defendant to prove that he was already in posession of the premises when he agreed to become the tenant of the plaintiffs, and that they induced him to assume the relation of tenant to them by their fraudulent misrepresentations that they were the owners of the premises. After showing that in ejectment the defendant is permitted to show fraud, and is not estopped to dispute his landlord's title where he did not enter under the lease, and that the landlord cannot throw him out by mere force of such a lease, the court said: "That the same result must follow so far as the defendant is concerned in an action of unlawful detainer, in which a lease, relied upon to establish the relation of landlord and tenant, is shown to have been obtained under such circumstances as would not have estopped the tenant from disputing the title of the landlord in a court in which the title could be tried."

In Knowles v. Murphy, 107 Cal. 107, 40 Pac. 111, one of the issues presented by the defendants was that they were induced to enter into the lease by reason of certain false and fraudulent representations. This defense seems to have been recognized as properly made, and failed only because of insufficient evidence to support it. In the case of Davis v. Schweikert, 130 Cal. 143, 62 Pac. 411, the lease provided that the lessee would surrender possession "in case the said party of the first part should sell the property herein described at any time during the term of the lease." The tenant's lessor made a conveyance of the premises to defendant, who represented to plaintiff (the tenant) that she had purchased and paid for the property, and, relying on the truthfulness of these representations, plaintiff surrendered possession. He afterwards learned that the sale was fictitious and fraudulent, and made for the purpose of regaining possession from him. He brought the action for damages, and recovered. The court, in affirming the judgment, said: "The lease conveyed to plaintiff the premises for the term of five years, subject to the condition, expressly written in the lease, that it should terminate upon the property being sold by the lessor. The covenant must be understood as meaning an actual bona fide sale, and not a fraudulent one. It was not contemplated—or, at least, the law does not contemplate—that the lessor could, by a pretended fraudulent sale, made for the very purpose of defeating his lessee of his estate, avoid the lease, and then take advantage of his own wrong." We cannot doubt that, had the action been unlawful detainer to dispossess the tenant under pretense of sale, he could have successfully defeated it by showing the sale to have been fraudulent and for the purpose of ousting him.

In the case of Newman Co. v. Lassing, 141 Cal. 174, 74 Pac. 761 the action was unlawful detainer. Defendant conveyed the property to plaintiffs, and subsequently gave plaintiffs a note for $936, in consideration of which plaintiff agreed that defendant might remain in possession one year. To plaintiff's complaint defendant answered that the deed was executed and the agreement for possession was made through the false and fraudulent representations of plaintiff. At the trial defendant had the verdict, and the trial court, on plaintiff's motion, granted a new trial. In the course of the opinion on appeal, the court said: "Respondent contends, as we understand the brief of counsel, that defendant is estopped to deny his landlord's title, under the general rule that a lessee cannot, in an action involving possession or right of possession, question the title of his landlord; that defendant must first go into the equity court and have the deed set aside, if made through fraud or undue influence. While desiring to avoid the discussion of questions that may not hereafter arise, it is proper, perhaps, to say that, in our opinion, the defendant may show, as part of the transaction leading up to the lease, and as evidence bearing upon the question of fraud and undue influence in the execution of the lease, that the deed as well as the lease, was so executed, and to show the relation of each to the other as one transaction. Defendant is not seeking rescission, nor is he asking to have the deed set aside as void. He is simply defending against plaintiff's action on the ground of fraud and undue influence, and asks no affirmative relief. We think he may do this without rescinding. [Citing cases.] The answer is intended to set forth what in Toby v. Oregon R. R. Co., 98 Cal. 490, 33 Pac. 550, is termed 'defensive relief, whereby fraud is set up by way of defense to defeat an action brought to enforce an apparent liability.'"

In the case now here the lease was not originally procured by fraud, but the effect of the findings is that plaintiffs now hold it in fraud of defendant's rights, through the acts of defendant's lessor and her grantees, and that they are seeking to enforce it to his detriment. So far as plaintiffs are concerned, the lease in their hands is found to be tainted with fraud, because the deed, by force of which alone the plaintiffs claim under the lease, was fraudulent and void. That evidence was admissible to establish the facts found, we entertain no doubt, in view of the principles enunciated in the foregoing cases. The remaining question, then, is, was the evidence sufficient to justify the findings?

Mrs. Hubbel, on February 14, 1902, wrote defendant, informing him that she had an opportunity to sell the premises for $1,900 cash and $4,500 payable in four years, with interest at 8 per cent. compounded yearly, and secured by mortgage on the land, and, unless she received from him the above or a better offer before March 1, 1902, she would accept the offer above mentioned, and sell the property upon the said terms. On February 26, 1902, defendant replied: "I have reason to know that said pretended sale is for the sole purpose of ousting me from said property.'

He stated, further: "If you intend to make a bona fide sale of the leased premises, kindly state the amount you will take in cash upon the delivery of the deed to me." And he also added: "By the terms and agreements and covenants of your lease to me, a cash and real value must be placed upon the premises and bona fide purchaser." To this letter Mrs. Hubbel replied March 3, 1902, informing defendant that he was not entitled to any better or different terms than those upon which she could dispose of the property to other parties, and added: "Of course, I understand from your letter that you are not desiring to purchase the property in good faith, and so it will receive no further attention from me, and I will proceed to complete the sale already agreed upon." Without further notice to defendant, she executed the deed to plaintiffs above mentioned. Plaintiff Ogle testified that for his half interest he paid $1,000 in cash and delivered his note, secured by mortgage on the premises, for $2,250, payable four years after date, at 8 per cent. interest. Plaintiff Hubbel testified that he gave his note to Mrs. Hubbel for $2,250, payable one year after date at 8 per cent. interest, without security. He testified that at various times in previous years he had deposited with his mother $400, which she allowed as a payment on the purchase, and that she made him a present of $500, and that he had paid about $100 on the note since the transaction. These items aggregate $6,500. The undisputed evidence was that the market value of the premises was not to exceed $3,000, some witnesses placing it at $2,500; that defendant was able and willing to purchase the property at its reasonable or market value; that plaintiff Hubbel was without means, and that his expectations to meet his note were that he would earn the money or obtain renewal of the note. Mrs. Hubbel did not testify, and the court had only the testimony of plaintiff Hubbel as to what he paid for his interest in the property. Some facts were brought out from which the court was no doubt led to discredit the testimony of plaintiff Hubbel, and which tended to show that the sale, if meant to be binding at all, was for about half the amount Mrs. Hubbel informed defendant she was offered for it. The trial court had the witnesses before it, and with its discretion in accepting or rejecting the statements of witnesses, under the circumstances disclosed, we cannot interfere. There was sufficient evidence to support the findings of the court as to the fictitious character of the transaction.

The contention of appellants that Mrs. Hubbel had the right to give away a half interest in the property to her son, if she wished to do so, is not consistent with respondent's rights under the lease. The lease contemplated a bona fide sale before defendant could be deprived of his rights under the lease. It may be that the lessor had the right to make a sale to some one willing to give more than the market value, and that defendant would be obliged to pay this sum, if he wished to purchase; but in any event the sale would have to be "an actual bona fide sale, and not a fraudulent one." Davis v. Schweikert, supra. It may also be that the lessor had the right to convey the property by gift to her son; but such a conveyance would not have terminated the lease, or have affected defendant's rights under it. He would still have the right of purchase in case of a sale during the life of the lease. But the court found that the conveyance here was a fraudulent one, and in effect found that the consideration to be paid by plaintiff Hubbel was pretended and fictitious, and was designed to so increase the price to defendant that he would not buy, while Mrs. Hubbel was at the same time receiving all the property was worth in the market. The undisputed fact, on plaintiff's own showing, was that she did not dispose of the property upon the terms she wrote defendant she was offered for it.

Plaintiffs contend that defendant's rights were not prejudiced by the conveyance, because he had the same remedies against them, as grantees, as he had against his lessor. This might be true, had defendant declined to purchase after notice of a bona fide offer of purchase by some other person. But he was deprived by this pretended sale of the important privilege to purchase which the lease gave him. He could not attorn to plaintiffs without recognizing the validity of their purchase and their right to terminate the lease and deprive him of the balance of his term.

Appellants further contend that the provisions of the lease were not such as to constitute a valid or enforceable contract for the sale of the leased land, because they were indefinite, uncertain, and incomplete. Under the terms of the lease, defendant could not compel his lessor to sell to him at any price. But this is not an action to specifically enforce the contract. Defendant does not seek affirmative relief. He seeks merely to prevent the perpetration of a fraud upon his rights. Simon Newman Co. v. Lassing, supra. If, as was found by the court, the deed was made for the fraudulent purpose shown, the court was justified in finding that plaintiffs were not damaged. It was not necessary for the court to find that defendant refused to pay rent to plaintiffs, in view of its findings as to the fraudulent nature of the transaction.

Nor do we think the findings contradictory, in that the court found that the property was conveyed to plaintiffs by Mrs. Hubbel, and elsewhere that plaintiffs had no title. The findings plainly show that the court did not regard the conveyance as valid, though in fact executed. Under the issues it was competent for defendant to show ability and willingness to purchase the property at its fair market value. He was not bound to pay her a sum fictitiously or fraudulently named to him as offered by another person. It was not prejudicial error for defendant to show that he had offered to pay rent to his lessor and that she had refused to accept it. Under the circumstances of the case, and his lessor not being a party, it was, perhaps, unnecessary for him to show an offer to pay his lessor. If plaintiffs had shown themselves to have been bona fide owners of the property, an offer to pay rent to their grantor would have been no defense. This, however, was not the case, and the evidence was harmless.

It was not error to allow proof of plaintiff Hubbel's financial condition, as bearing upon the issues presented, and as tending to contradict his testimony.

The judgment and order are affirmed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

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1 Cal. App. 312

GAY v. THORPE, Justice of the Peace.

(Court of Appeal, Second District, California. July 14, 1905.)

1. Depositions—Witnesses—Refusal to Attend—Contempt.

One who, as a witness, is summoned to attend and give his deposition in an action, is a person connected with a judicial proceeding before a court, and his refusal or failure to obey the subpœna is punishable as for a contempt; the taking of the deposition to be used on the trial of the cause being a proceeding in the case.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Depositions, § 132.]

2. Same—Justices of the Peace—Jurisdiction.

The jurisdiction of courts of equity having been given to the superior court by the Constitution, a justice of the peace before whom a witness' deposition was sought to be taken in a case pending in the superior court had no jurisdiction to punish the witness for contempt in refusing to appear and testify.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Depositions, § 132.]

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Application by John H. Gay for writ of prohibition against M. R. Thorpe, as justice of the peace, to restrain defendant from proceeding to punish petitioner for contempt in refusing to obey a subpœna issued by such justice. From an order denying the application, petitioner appeals. Reversed.

L. L. Boone and Oscar A. Trippett, for appellant. Valentine & Newby and Victor E. Shaw, for respondent.

ALLEN, J. This is an appeal from an order of the superior court of San Diego county denying appellant's application for a writ of prohibition against respondent. The record discloses that on March 20, 1903, there was an action pending in said superior court, in which case notice was duly served upon the defendant, properly supported by affidavit, to take his deposition. This notice and affidavit were filed with respondent, as justice of the peace for said county, and he issued a subpœna requiring defendant to appear on a day specified and give his deposition. The defendant disobeyed such subpœna. Upon an affidavit being filed, a warrant of arrest was issued by the justice, directing the defendant to be brought into the presence of said justice to answer the charge of contempt. Appellant thereupon applied to the superior court of San Diego county for a writ of prohibition, commanding the respondent justice to appear before such court and show cause why he should not be restrained from further proceedings in said matter. Upon the hearing of this application, the same was denied. This was error.

The taking of a deposition is a part of the proceedings in the court for whose use the evidence is sought to be taken. One who is a witness summoned to attend and give his deposition in an action is certainly a person connected with a judicial proceeding before a court. His conduct in failing to attend in obedience to a subpœna is, therefore, a matter which can be controlled by the court; and, if so, the control can be made effective only by the existence of the power to punish the disobedience. Burns v. Superior Court, 140 Cal. 11, 73 Pac. 597. The taking of a deposition to be used on the trial of the cause is a proceeding in the cause. Crocker v. Conrey, 140 Cal. 217, 73 Pac. 1006. The jurisdiction of courts of equity having been given to the superior court by the Constitution, it cannot be taken away by statute. Tulare v. Hevren, 126 Cal. 228, 58 Pac. 530; Burns v. Superior Court, supra. The same rule would seem to apply to the powers necessary to the exercise of this jurisdiction. Burns v. Superior Court, supra. The refusal of a witness in a proper case to attend and give his deposition before a notary is one of the contempts of court defined by section 1209, Code Civ. Proc. Crocker v. Conrey, 140 Cal. 215, 73 Pac. 1006. Every court of general jurisdiction has inherent power to punish for contempt persons who obstruct or interfere with its proceedings. Ex parte Terry, 128 U. S. 303, 9 Sup. Ct. 77, 32 L. Ed. 405. That one may not be put in jeopardy a second time for the same offense is a right guarantied by the Constitution. Were the statutes to be so construed as to give to a justice of the peace, acting for the superior court in the matter of taking depositions, power to punish for contempt the disobedience of a subpœna issued in such proceedings by the justice, it would be to say that the justice of the peace was given a power, the exercise of which would be to defeat and destroy the power reposing in the superior court in the first instance. We are of opinion that the statutes do not contemplate that the superior court should be shorn of any of its inherent power, and therefore no jurisdiction rests within the justice of the peace to punish for contempt the disobedience of the subpœna issued by respondent, and the writ should have been granted.

The order and judgment of the superior court denying the writ are reversed.

We concur: GRAY, P. J.; SMITH, J.

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1 Cal. App. 295

PERRIN v. CARBONE.

(Court of Appeal, Third District, California. July 11, 1905.)

1. APPEAL—RECORD—EVIDENCE — OBJECTIONS.

Where a question to which an objection was overruled did not appear from the record to have been answered, the objection could not be reviewed on appeal.

2. MONEY LENT—EVIDENCE—RELEVANCY.

Where plaintiff sued to recover money loaned under an alleged agreement to repay the same absolutely, while defendant claimed that the loan was not to be repaid, except from commissions on insurance secured by him, evidence that plaintiff had employed at least a dozen insurance agents during the preceding five years, whose commissions had not covered the amount of loans made to them, but that he had not sued them, was relevant.

3. WITNESSES—CROSS-EXAMINATION.

Such evidence was admissible on plaintiff's cross-examination to discredit his testimony that the loan was payable absolutely, and not out of commissions, as claimed by defendant.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 936, 969.]

Appeal from Superior Court, Napa County; H. C. Gesford, Judge.

Action by Howard Perrin against Charles L. Carbone. From a judgment in favor of defendant, and from an order denying plaintiff's motion for a new trial, he appeals. Affirmed.

Weber & Rutherford, for appellant. Bell, York & Bell, for respondent.

BUCKLES, J. This is an action to recover the sum of $320, money loaned. The answer denies the loan as plaintiff pleads it, and sets up the defense that the money was advanced to defendant by plaintiff, as the agent of the Washington Life Insurance Company of New York, for the purpose of defraying the expenses of defendant, who was acting as soliciting agent for said insurance company, and that such moneys were not to be repaid, except out of the commissions he (the defendant) should earn, when the same should be sufficient. The case was tried by a jury. There were but two witnesses, the plaintiff and the defendant, and the verdict was for the defendant, and judgment was rendered accordingly for defendant for his costs, amounting to $39.65. A motion was made for a new trial, and denied. The appeal is from the judgment and from the order denying the motion for a new trial.

The evidence shows no difference between the parties as to the amount of money advanced or the date when loaned, but there is a marked and substantial difference as to the repayment of the $320; plaintiff saying it was to be repaid without any condition, and the defendant that it was to be repaid only in case he should make it in the way of commissions in selling insurance for the company. With this very substantial conflict in the evidence, the judgment could not be disturbed, unless there was some reversible error committed at the trial. Several errors are complained of in the bill of exceptions, but only two seem to have been taken as at all serious, for appellant has mentioned but these two in his argument. The first alleged error our attention is called to is the ruling of the lower court in overruling appellant's objection to the question asked Perrin on cross-examination, which is as follows: "Why did you make an exception in Charlie Carbone's case?" The court overruled the objection, and the record fails to show that the witness answered it at all, unless the answer can be found in the answer to some other question to which there was no objection interposed. The question not having been answered, there was no prejudicial error. People v. Dennis, 39 Cal. 625–635.

The next point to which our attention is called is the alleged error of the trial court in overruling plaintiff's objection to the following question, asked by defendant of the witness Perrin on cross-examination: "How many agents have you employed during the last five years that have received loans from you whose commissions have not covered the amount of loans, and whom you have not sued and brought an action against?" Objection was made on the ground that it was irrelevant, immaterial, and incompetent, and not cross-examination, and had nothing to do with the case at issue. The objection was overruled, and the witness answered, "At least a dozen." We think there was a relevancy. The plaintiff claims there was no condition attached to the loan. If the plaintiff had advanced money to 12 other agents whose commissions had not amounted to enough to repay the loans, and no effort was made to collect the money so advanced, this fact would tend, in some small way, at least, to discredit plaintiff's theory that he loaned the money to defendant to be repaid irrespective of commissions earned. And, then, it is cross-examination, because plaintiff bases his right to recover upon the theory that the money advanced was a loan without any conditions as to payment, and, while he does not specifically so state on his direct examination, yet every intendment of his testimony is to that effect; and everything which will tend to rebut the fact testified to by a party to an action, or dispute an inference that may be drawn from his direct testimony, is admissible on cross-examination. It must be borne in mind that Perrin was the plaintiff, and claiming to recover on a contract, on a theory disputed by the defendant; and surely the plaintiff in a case like this would come under the general rule that a witness may be asked on his cross-examination any question which tends to test his accuracy, veracity, or credibility. There was no error in this ruling.

Judgment and order appealed from are affirmed.

We concur: CHIPMAN, P. J; McLAUGHLIN, J.

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1 Cal. App. 374

HUMPHREY v. POPE.

(Court of Appeal, Third District, California. July 25, 1905.)

1. Appeal — Questions Reviewable — Matters not Discussed.

An appellate court will notice only such assignments of error as are discussed in appellant's briefs, and will not prosecute an independent inquiry to find out reasons for or against the correctness of the lower court's rulings.

2. Same—Conclusiveness of Verdict.

A verdict sustained by evidence will not be disturbed on appeal.

3. Husband and Wife—Alienation of Affections—Instructions.

In an action for the alienation of a husband's affections, a charge for plaintiff, hypothesized on "any act of another woman" by which a wife is deprived of her marital rights, was not misleading, where other instructions reiterated the proposition that plaintiff could not recover, unless defendant willfully, etc., alienated and destroyed the affection of plaintiff's husband for plaintiff, and maliciously caused the separation between them.

4. Trial—Instructions—Burden of Proof.

The omission of the word "preponderance" in referring to the evidence in an instruction given at plaintiff's request was not prejudicial, where the law relating to the burden of proof was otherwise fully and repeatedly called to the attention of the jury.

5. Husband and Wife—Alienation of Affections—Instructions.

An instruction confining the damages recoverable for the alienation of a husband's affections to "what shall fairly seem the pecuniary loss of plaintiff" is proper.

6. Witnesses — Examination—Objections—Scope.

An objection to a question as "wholly incompetent, irrelevant, and immaterial" is sufficient to invoke the inhibition of Code Civ. Proc. § 1881, prohibiting the examination of a husband or wife as to any communication made by one to the other during marriage.

7. Same—Privileged Communications—Communications during Coverture.

Under Code Civ. Proc. § 1881, prohibiting the examination of a husband or wife without the consent of the other as to any communication made by one to the other during marriage, all communications so made during marriage are, unless consent is shown, absolutely incompetent, when offered to be shown by testimony of one of the spouses.

8. Evidence—Hearsay.

In an action for alienation of the affections of plaintiff's husband, testimony of plaintiff to narrations by her husband, in the absence of defendant, of declarations made by defendant to plaintiff's husband, is hearsay.

9. Same—Oral Admissions—Character of Evidence.

Under the express provisions of Code Civ. Proc. § 2061, evidence of oral admissions of a party is to be received with caution.

10. Appeal—Presumptions—Correctness of Ruling.

It is presumed, in the absence of an affirmative showing of error, that a ruling of the trial court excluding evidence was correct.

11. Husband and Wife—Alienation of Affections—Evidence.

In an action for the alienation of affections, testimony tending to show that the separation or alienation resulted from other causes than those alleged is admissible on the issue as to whether the loss of consortium was due to defendant's conduct.

12. Same—Mitigation of Damages.

In an action for alienation of affections, evidence tending to show unhappy relations and want of affection between the spouses prior to defendant's interference between them is admissible in mitigation of damages.

Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Action by Mary L. Humphrey against Louisa C. Pope. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Rehearing denied by Supreme Court September 23, 1905.

A. L. Levinsky and W. M. Gibson, for appellant. Jas. A. Louttit and Louttit & Middlecoff, for respondent.

McLAUGHLIN, J. This is an action for damages caused by the acts of defendant in alienating the affection of plaintiff's husband, and abducting, persuading, and enticing said husband from plaintiff, and causing him to live separate and apart from her. The facts stated in the complaint are set forth in the decision on a former appeal (122 Cal. 255, 54 Pac. 847), and hence it is deemed unnecessary to repeat them here. The defendant, answering the complaint, denied each material averment thereof. The cause was tried before a jury, and upon the verdict of the jury a judgment was entered against defendant for damages in the sum of $2,000. From this judgment and an order denying her motion for a new trial, defendant appeals.

The bill of exceptions specifies particulars in which the evidence is insufficient to justify the verdict, and contains many assignments of error. We will notice only those assignments deemed worthy of discussion in appellant's briefs, for we cannot be expected to "prosecute an independent inquiry in order to find out reasons for or against the correctness of the rulings." People v. Woon Tuck Wo, 120 Cal. 297, 52 Pac. 833; Banister v. Campbell, 138 Cal. 460, 71 Pac. 504, 703; Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661; Whyte v. Rosencrantz, 123 Cal. 634, 56 Pac. 436, 69 Am. St. Rep. 90; Taylor v. Bell, 128 Cal. 306, 60 Pac. 853; City v. Enos, 135 Cal. 167, 67 Pac. 52. There was sufficient evidence to warrant the verdict of the jury. The testimony of plaintiff and defendant, aside from the letter written by the latter, sustains the conclusion reached by the jury, and hence such verdict cannot be disturbed. Iburg v.

Suanet, 47 Cal. 265; Brock v. Pearson, 87 Cal. 581, 25 Pac. 963; Bradford v. Woodworth, 108 Cal. 684, 41 Pac. 797; Shafer v. Willis, 124 Cal. 36, 56 Pac. 635.

Instruction No. 8, given at the request of plaintiff, was not erroneous. Instructions must be considered as a whole, and in the light of evidence introduced before the jury. While, therefore, an instruction that "any act of another woman," by which a wife is deprived of her marital rights, would, standing alone, be erroneous, we do not think the jury could have been misled in this instance.

In instructions numbered 5, 6, 7, 9, 11, and 12, requested by defendant, the proposition was reiterated that the plaintiff could not recover unless it was shown, by a preponderance of the evidence, that the "defendant, contrivingly, willfully, wrongfully, and with the intent to injure the plaintiff, did maliciously alienate and destroy the affection of W. G. Humphrey for plaintiff," and that she "maliciously and intentionally" caused the separation by means of "malicious, contriving, willful, or wrongful conduct" intended to alienate the husband's affection from his wife. This certainly made it plain to the jury that innocent or thoughtless acts, without any design to entice the husband from his wife, could not justify a verdict against defendant.

The word "preponderance" was omitted in another instruction given at plaintiff's request; but what has just been said shows that the law relating to the burden of proof was fully and repeatedly called to the attention of the jury, and hence the omission, in a single instance, was not prejudicial. People v. Jackson, 138 Cal. 465, 71 Pac. 566; People v. Morine, 61 Cal. 372.

We think the appellant has no reason to complain of the instruction relating to the measure of damages, which carefully confines damages recoverable to "what shall fairly seem the pecuniary loss of plaintiff." It contains no mention of children, gifts, or allowances, and is, therefore, not subject to the objection urged.

During the examination of plaintiff, she was permitted to testify as to what her husband said to her, with reference to the defendant, during the existence of the marriage relation, as follows: "Q. Mrs. Humphrey, coming down to the time of the second marriage with Mr. Humphrey, I will ask you what he said, if anything, with reference to the defendant during the period of that marriage, giving us any conversation you had with him in reference to it, commencing with the first event you recall. The first conversation you had with him in reference to the defendant? (Counsel for defendant objected to the question as wholly incompetent, irrelevant, and immaterial, and not binding upon the defendant unless in her presence, and the court overruled said objection. To which ruling counsel for defendant then and there duly excepted.) A. Well, the first was, I objected to his going at her beck and call; and he told me that she had plenty of money, and she wanted him, and it seemed as if he couldn't resist her." In response to similar questions, to which the same objection was interposed, the same ruling had, and exceptions reserved, the plaintiff was further allowed to testify: (1) "He came home with, both of his coat pockets, silver in them; seemed to be about half full; and he said the money was hers, and she had gave it to him to spend just as he pleased, and she said he shouldn't work any more." (2) "And he thought of giving up—that is, he was going to give up his business in town and take charge of the ranch—and he would have to get a divorce from me, as she demanded him to marry her, as it was not right for him to stay out there without they were married. He had been going out there; and he did afterwards. On these trips, he told me he was going to the ranch, he remained away from home one, two, and three nights at a time." (3) "Well, he told me that he could not get a divorce; but he asked me if I would, so that he could marry her. He said she wanted to be one of the 400, and she thought, by marrying him, they could be." (4) "Well, he said he wanted me to go ahead and get a divorce; give him a chance; that he would stop our income and starve me out; compel me to leave the house." These and other rulings touching the same line of evidence are assigned as error; appellant contending that the evidence was purely hearsay and was also inadmissible under section 1881, Code of Civil Procedure. Respondent, however, contends that this evidence was a part of the res gestæ and admissible under exceptions to the rule excluding hearsay evidence, and also urges that the objection was not specific enough to invoke the inhibition contained in section 1881. The latter contention rests on the proposition that the objection should have extended to the competency of the witness. It has been repeatedly held that, where evidence objected to is absolutely incompetent, the general objection is sufficient. Nightingale v. Scannell, 18 Cal. 324; Swan v. Thompson, 124 Cal. 196, 56 Pac. 878; Spelling on New Trial, § 288. And the solution of the question now under consideration depends upon whether the plaintiff's evidence falls within this rule. We can readily see why an objection to the competency of experts, children under 10 years of age, ar persons of unsound mind, as witnesses, would be necessary. We can also understand why the specific objection, that particular communications between attorney and client, physician and patient, priest and penitent, were privileged, must be urged. But the lips of both husband and wife are forever sealed as to all communications between them during the marital relation, unless consent is shown or the cause of action falls within the exceptions. Neither spouse can be examined as to such communications without the consent of the other, and in our opinion the evidence is incompetent unless this consent is shown. In People v. Mullings, 83 Cal. 144, 23 Pac. 229, 17 Am. St. Rep. 223, this precise question was passed upon by our Supreme Court, and it was there said: "Other objections were made to similar questions which did not expressly state the ground of 'privilege,' but which did state, among other things, that the question was 'not in cross-examination, and incompetent.' The word 'incompetent,' under the circumstances, was sufficiently broad to include the ground of objection under review. Such questions were 'incompetent'—that is, apart from the consideration of relevancy and materiality, they were incompetent, because prohibited by law." And in another part of the same decision the court repeats that "the questions themselves were incompetent." In People v. Warner, 117 Cal. 638, 49 Pac. 841, the objection was "that the matter was incompetent, and not in cross-examination," and the court there say: "Nor is there anything in the suggestion that the objection was insufficient in form to include the ground now urged. People v. Mullings, supra." In other cases the evidence is spoken of as competent or incompetent. Harrison v. Sutter St. Ry. Co., 116 Cal. 166, 47 Pac. 1019; In re Mullin, 110 Cal. 254, 42 Pac. 645. In a Michigan case, almost identical with the one at bar, it was said: "Plaintiff was allowed to testify to conversations between himself and his wife, which did not occur in the presence of defendant; the record not showing that the wife consented to his testifying. This was contrary to section 7546, 3 How. Ann. St., as repeatedly construed by this court." The statute referred to contains only the general prohibition found in the first two sentences of section 1881, and that case is therefore exactly in point. The reason of the rule requiring specific objections, in certain cases, is entirely wanting here. The relation being shown, the law absolutely prohibited the examination of the wife touching communications during coverture. Jones on Evidence, §§ 751, 754, 764. The questions were, therefore, objectionable from every standpoint, and in such cases specific objection is not demanded. "There is no reason for it; and, where the reason is not present, the rule fails." Swan v. Thompson, supra.

But, aside from the objectionable feature of this evidence above discussed, we are satisfied that, as far as it was calculated to prove declarations by defendant to plaintiff's husband, it was hearsay pure and simple. There can be no doubt that the conduct and declarations of defendant, material to the issue, could be shown. But we cannot subscribe to the doctrine that the exigencies of this or any kindred case could justify a radical departure from well-settled rules, excluding hearsay evidence of the character under consideration. The doctrine of res gestæ does not dispense with cardinal rules of evidence, requiring the best evidence in degree touching declarations or any other relevant fact. Declarations and admissions, whether part of the res gestæ, or admissible under other exceptions to the rule excluding that character of evidence, are hearsay, and to permit them to be proven, by one other than the person hearing the statements from the lips of the declarant, would be to prove hearsay by hearsay, and this is not permissible. Estate of James, 124 Cal. 658, 57 Pac. 578, 1008; In re Calkins, 112 Cal. 296, 44 Pac. 577; Estate of Gregory, 133 Cal. 138, 65 Pac. 315; Code Civ. Proc. §§ 1823, 1825, 1829, 1845, 1846, 1848, 1850, 1870; Jones on Evidence, §§ 197, 207, 216, 237, 297, 299, 347, 348, 351, 353; Greenleaf on Evidence, §§ 82, 108, 110, note 2, 124. Yet that would be the effect of permitting plaintiff to testify as to what her husband told her touching defendant's declarations and acts. "Evidence of the oral admissions of a party" must be received with caution. Code Civ. Proc. § 2061; Jones on Evidence, § 297. And it would be throwing caution to the winds to permit a class of evidence so fraught with danger and temptation, and so liable to errors and mistakes due to human forgetfulness and infallibility. Jones, Ev. § 297.

It is but fair to counsel for respondent, and to the trial court to say that authorities cited fully sustain the opposite view. Edgell v. Francis, 66 Mich. 303, 33 N. W. 501; Williams v. Williams, 20 Colo. 51, 37 Pac. 614, and cases therein cited. As the point is new in this state, we have endeavored to reach a conclusion in consonance with sound reason believing that good law is always supported by good logic; and, with all deference to the courts enunciating a rule favorable to the admissibility of such evidence, we are constrained to say that the reasoning upon which such rule is based is far from convincing, and we cannot concur in their view. We think the correct rule was laid down by the supreme court of Ohio in the following terse language: "The words and acts of the defendant Griffin, repeated by the wife to the husband and detailed by him in evidence to the jury, were nothing but hearsay, and in themselves clearly inadmissible." Preston v. Bowers, 13 Ohio St. 1, 82 Am. Dec. 430; Westlake v. Westlake, 34 Ohio St. 634, 32 Am. Rep. 397; Huling v. Huling, 32 Ill. App. 521; Higham v. Vanosdol, 101 Ind. 164. It follows that the rulings were erroneous.

We cannot say what the judgment roll excluded by the court may have contained, and, as appellant must show error affirmatively, the presumption is that the ruling was correct. As the case must go back for a new trial, it may be remarked that any evidence tending to show that the separation or alienation of affection resulted from other causes than those alleged is admissible as bearing on the necessary averment that the loss of consortium was due to defendant's conduct. Evidence tending to show unhappy relations and want of affection between the spouses prior to defendant's interference or intrigues would also be admissible in mitigation of damages. Hadley v. Heywood, 121 Mass. 239; Waldron v. Waldron (C. C.) 45 Fed. 315; Rudd v. Rounds, 64 Vt. 440, 25 Atl. 438; Fratini v. Caslini, 66 Vt. 275, 29 Atl. 252, 44 Am. St. Rep. 843. The judgment and order are reversed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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1 Cal. App. 343

WIELAND v. SOUTHERN PAC. CO.

(Court of Appeal, Third District, California. July 24, 1905.)

1. EVIDENCE—RES GESTÆ.

In an action for ejection of a passenger from a freight train, a statement, made by the conductor to a witness on the next day, that the passenger had ridden with him the day before, that he had been put off at a certain place because the train did not stop at his destination, and that he was not drunk and had paid his fare, was inadmissible.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 351-362.]

2. APPEAL—HARMLESS ERROR.

Plaintiff's condition as to being drunk or sober at the time having an important bearing on the degree of credit to be given to his testimony as to what occurred, and also on the cause of his remaining out all night, and the conductor having testified that he thought plaintiff was under the influence of liquor, the evidence was prejudicial.

3. RAILROADS—FREIGHT TRAINS—EJECTION OF TRESPASSERS—CUSTOM.

Where defendant carried passengers on a certain freight train having no regular schedule, and which did not always stop at R., and in case a stop was not to be made there it was the custom either to lock the caboose or to announce the fact before leaving F., a passenger with knowledge of such custom was entitled to assume its continuance, and that he would again be given transportation on the same terms as before, unless notified to the contrary according to the custom.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 982, 1098; vol. 41, Cent. Dig. Railroads, § 887.]

4. SAME—SPECIAL INQUIRY—PERMIT.

Where defendant railroad company customarily accepted passengers on a certain freight train, plaintiff, desiring transportation with knowledge of such custom, was not bound to make special and independent inquiry with reference to whether the train would stop at its destination, in the absence of notice to the contrary, or to obtain a special permit from the superintendent.

5. SAME—RULES.

Where a carrier customarily accepted passengers on a certain freight train for stations at which it made stops necessary for the handling of freight, the carrier was not bound absolutely to furnish such transportation, and, on notifying passengers that the train would not stop at a certain station, it was their duty to leave the same, and, if they did not do so, they could be lawfully ejected, as authorized by Civ. Code, §§ 484, 487.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 982, 1098; vol. 41, Cent. Dig. Railroads, § 887.]

6. SAME—PAYMENT OF FARE—BRAKEMEN.

Under Civ. Code, § 488, declaring that no collector or conductor without a badge provided for is authorized to demand or receive from any passenger any fare, etc., a passenger paying his fare to a brakeman, instead of the conductor of the train, is bound to show that the brakeman had authority to receive the same.

Appeal from Superior Court, Fresno County; W. B. Wallace, Judge.

Action by Henry Wieland against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Reversed.

Henry Brickley and Geo. Cosgrave, for appellant. L. L. Cory, for respondent.

McLAUGHLIN, J. This is an action for damages caused by wrongfully ejecting plaintiff from one of defendant's trains. The pertinent facts may be summarized as follows: For several months prior to June 18, 1902, passengers had been carried to and fro between Fresno and Rolinda in the caboose of a freight train. The custom, as shown by the evidence, was for passengers to board the train at either point and pay the fare to the conductor, who always collected such fare from passengers in the caboose. On the date mentioned, respondent and other passengers entered the caboose, to be carried to different points along the route; plaintiff's destination being Rolinda. Rolinda is a flag station, where this train stops on signal, and it was the custom to let passengers on and off at this point. Kearney's Spur is a switch about 2⅓ miles from Rolinda, at which there are no houses. There are, however, three houses within a distance of 1¼ miles. The brakeman testified that before leaving Fresno he entered the caboose, and in a tone loud enough to be heard by any one therein announced that the train would not stop at Rolinda that night, and that thereupon some men left the caboose. In this he is corroborated by the witnesses who were present, and contradicted by none save respondent, who testified that he heard no such announcement, and saw no person leave the caboose, although he boarded the train quite a while before it left Fresno. The brakeman is not absolutely certain that respondent was present when the announcement was made, but two passengers say that he was and must certainly have heard it. The brakeman, conductor, and passengers, who were witnesses, agree in saying that respondent was intoxicated when he boarded the train and when he got off. This he denied, and considerable evidence touching his condition before and after his ejection, and relating to his habits in this regard, was introduced by both parties to the action. Respondent paid his fare to the brakeman before reaching Kearney, and at this point was told that he would have to leave the train, as no stop would be made at Rolinda. He himself says that no force was used, that he got off the train, and the brakeman handed him his satchel. He was next seen the following morning, lying near the railroad track at a point about one mile from Kearney, and close to a dwelling known as the "Saier Place." Later in the day he called at this house, obtained something to eat, and made himself obnoxious to Mrs. Saier, who turned the hose on him. That lady and her daughter both say he was intoxicated and drank some while at their house; but respondent again champions his sobriety, and says he was not drunk, but was sick. In fact, he says he went to Fresno for medicine, and was ailing during the whole trip. He admits that he had one bottle of wine with him when he left the train, but other witnesses say that he had four or five bottles in the satchel, which was so heavy that it caused him to stumble and fall when it was handed to him by the brakeman at Kearney. The conductor first saw the respondent at Kearney, heard his complaints about being put off the train, and offered to carry his satchel to Collis and leave it at Rolinda the following night, which offer was declined. The evidence shows without conflict that this was the only occasion when the brakeman collected fare from a passenger, and it is also clear that he had no authority to do so then. There is no evidence to show that the brakeman turned the fare over to the conductor or to the company, and the only evidence that the conductor knew that respondent had paid any fare is found in his declarations as narrated in the testimony of Mr. Kennedy, which narration will be considered later. The brakeman testified that he told the respondent that they would take him to Collis, a station beyond Rolinda, but respondent said he would prefer to get off at Kearney, as it would be a shorter walk from Kearney than from Collis. The respondent, however, says that he asked to be taken to Collis, but his request was refused.

It is apparent from the foregoing that there is a sharp conflict between respondent and other witnesses, and the importance of testimony bearing upon his capacity to realize and remember what transpired, and tending to show that he was less likely to be correct in his statements than other witnesses, is manifest. The theory of plaintiff, as disclosed by the evidence, was that sickness prevented his reaching Rolinda or any of the dwellings nearest to Kearney, and that as a consequence he was compelled to remain out all night, thereby contracting a cold, which, in time, resulted in severe and permanent injury. On the other hand, the theory of defendant was that, but for his continued drinking from the bottles he had with him, respondent could easily have reached Rolinda, or at least found shelter in one of the dwellings mentioned. Under these circumstances, J. W. Kennedy, a witness called by respondent, was, notwithstanding appellant's timely and sufficient objection, permitted to testify to certain declarations of Speake, the conductor, made the next evening at Rolinda, as follows: "I asked Mr. Speake if Mr. Wieland got on the train the evening before. At this time Mr. Wieland had not got home. The next evening, when train came along, I flagged the train, and asked Mr. Speake if Mr. Wieland got aboard the train at Fresno He said he did. I asked him what he did with him. He said, 'I put him off at Kearney's Spur.' I says, 'Was Wieland drunk?' He said, 'No.' I said, 'Didn't he have money enough to pay his fare?' He says, 'Yes, he paid his fare.' I said, 'What did you put him off for?' He said, 'Because I didn't intend to stop at Rolinda.'" This was error. Williams v. S. P. Co., 133 Cal. 550, 65 Pac. 1100; Heckle v. S. P. Co., 123 Cal. 441, 56 Pac. 56; Luman v. Golden Ancient Mining Co., 140 Cal. 709, 74 Pac. 307. Counsel for respondent, however, contends that the error is not prejudicial, because the evidence could have little bearing on the case, and in any event was substantially corroborated by the conductor. This contention cannot be sustained. We have seen that the condition of plaintiff, as to being drunk or sober, had an important bearing on the degree of credit to be given his testimony, and also on the cause of his remaining out all night. The conductor testified that he thought plaintiff was under the influence of liquor, and the evidence of Kennedy shows a contrary statement at another time. To hold that such evidence could be harmless would be to ignore its bearing on the testimony of plaintiff and on vital issues in the case, and sanction the impeachment of a witness, not only in an improper and illegal manner, but at a time antedating the testimony of the witness impeached. Moreover, the declaration as to the payment of fare was important; for, aside from this, there is nothing in the record to show that the conductor had any knowledge of such payment. The error was, therefore, very prejudicial.

This seems to be the pioneer case in this state touching some questions of law which must necessarily arise on a retrial of the cause, and hence we deem it our duty to pass upon such questions. The law of this state provides that, when fare is taken for transporting passengers on a freight train, the same care must be taken and the same responsibility is assumed by the corporation as for passengers on passenger cars. Civ. Code, § 483. This is the only statute we have touching the relative rights of passengers and company, under such circumstances as are disclosed in the case at bar. Nor can much aid be derived from a study of the few authorities bearing upon cases somewhat analogous. But law is reason, and reason points to principles of law which must control in the solution of questions presented. This particular train, under the regulations of the company, carried passengers whenever the train was to stop at Rolinda. Aside from these regulations there was strong evidence to show that it always stopped for passengers desiring transportation between the two points. The train did not always stop there, and there was no regular schedule, as stops, according to regulations, depended upon the necessity for handling freight at Rolinda. The custom, according to the conductor, was to lock the caboose when no passengers were to be taken, or to announce the fact before leaving Fresno, when no stop was to be made at Rolinda. This being the custom, respondent, who had traveled on this train before, had a right to assume its continuance, and that he would again be given transportation on the same terms as before, unless he was notified in the usual manner and according to the custom mentioned. Therefore he was not bound to make special and independent inquiry, nor to obtain a special permit from the superintendent. There can be no doubt that, if the company permitted the inauguration and continuance of this custom and accepted the fares collected, it would be bound by it; for "he who can and does not forbid that which is done in his behalf is deemed to have bidden it." It could not wink at a violation of its rules as long as benefits accrued, and then hide behind such rules and regulations when liability was threatened; for "he who takes the benefit must bear the burden."

But, on the other hand, the mere fact that passengers had been carried on this train did not give respondent an absolute right to transportation. The company could at any time suspend or discontinue this permissive use, and passengers notified, either under this undoubted right or under the custom mentioned, that the train would not stop at Rolinda, were in duty bound to leave the train; and, if they did not do so, they could lawfully be ejected. Civ. Code, §§ 484, 487. The respondent may not have heard the announcement; but, if he did, he could not here have an advantage growing out of his own wrong in thereafter remaining on the train. It is a matter of common knowledge that brakemen are not authorized to receive fares from passengers on any train, and as a matter of law passengers should not pay fare to any person, unless his badge indicates his authority to receive it. Civ. Code, § 488; Cox v. Los Angeles Terminal Ry. Co., 109 Cal. 105, 41 Pac. 794. Respondent having paid his fare to the brakeman, a person not generally authorized to receive it, the burden was upon him to show authority in this instance. This he utterly failed to do. The evidence affirmatively shows a total absence of such authority, and we think it was error to refuse defendant's instruction bearing on this branch of the case.

We believe the foregoing sufficiently indicates our view touching disputed questions of law. The judgment is reversed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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1 Cal. App. 340

HIGHLAND PARK OIL CO. v. WESTERN MINERALS CO. et al.

(Court of Appeal, Second District, California. July 21, 1905.)

1. FORCIBLE ENTRY AND DETAINER—PEACEABLE POSSESSION.

It is not essential to the maintenance of an action for forcible entry and for forcible detainer that plaintiff shall have had actual possession for any definite length of time, so long as it in fact had peaceable and quiet possession at all.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Forcible Entry and Detainer, §§ 37–44.]

2. SAME—FORCE—EVIDENCE.

In an action for forcible entry, evidence that a man armed with a deadly weapon approached plaintiff's agents and servants, and, flourishing the weapon, directed them to vacate the premises, supplementing the demand with a statement that "jumpers have been known to lose a leg," was sufficient to sustain a finding that plaintiff's vacation of the premises, in apprehension of danger therefrom, was forcible and with a strong hand.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Forcible Entry and Detainer, §§ 6, 11, 15.]

3. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where, in an action for forcible entry and forcible detainer, the evidence was sufficient to show that plaintiff had been compelled by force to vacate the premises of which it had peaceable possession, defendant was not prejudiced by the introduction of evidence showing plaintiff's title, right of possession, and good faith.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the Highland Park Oil Company against the Western Minerals Company and others. From an order denying a new trial, defendants appeal. Affirmed.

Laird & Packard, for appellants. Reardan & Whitaker, for respondent.

ALLEN, J. Action for forcible entry and for forcible detainer. Judgment went for plaintiff. Defendants appeal from an order denying a new trial. Plaintiff in its complaint alleges that on February 1, 1902, it was in peaceable and actual possession of the S. ½ of the N. ½ of section 28, township 11 N., range 23 W., San Bernardino base and meridian, Kern County, Cal., and was engaged in erecting upon said land a cabin; that on said date the defendants by force and violence entered on said premises, and in a forcible manner ejected plaintiff therefrom, tore down and destroyed the cabin, and carried away the materials used in its construction. As a second cause of action, plaintiff repeated all the matters stated in the first cause of action, and alleged, further, that defendants still forcibly keep and hold possession of said premises. The answer in effect denies all the material allegations of the complaint, and upon the trial the court found the allegations in the complaint to be true.

The principal contention of defendants on this appeal is that the finding that plaintiff was in the peaceable possession of said premises at the date of the entry has no support in the evidence. There is some testimony tending to show the actual possession of plaintiff for the greater portion of one day. It is not made an essential in the statute that actual possession should have existed for any definite length of time. The mere fact of peaceable and quiet possession is all that is material for plaintiff to establish.

It is insisted, further, that there is no support in the testimony for the finding of the court that defendants, with strong hand and with force and violence, ejected plaintiff from the premises. There is ample testimony in the record to show that the servants and agents of plaintiff were by force driven off the premises by defendants' agents. Where one man, who is armed with and flourishing a deadly weapon, approaches another and directs him to vacate premises, supplementing the demand with the statement that "jumpers have been known to lose a leg," and the other, apprehending danger, vacates, there should be no difficulty in determining that such vacation was forcible and with a strong hand.

It is further contended that the rulings of the court in admitting the deed to plaintiff of the premises was error. While it is true that in proceedings under the forcible entry act neither title, right of possession, nor good faith on the part of plaintiff are essential to a maintenance of the action, yet it is difficult to see the prejudice which would result to the defendants by the proof of all or either of them.

Many other exceptions and objections were made as to the ruling of the court in the introduction of testimony, in none of which are we able to discover any prejudicial error.

The order denying a new trial is affirmed.

We concur: GRAY, P. J.; SMITH, J.

147 Cal. 609

Ex parte KELSO. (Cr. 1,259.)

(Supreme Court of California. Sept. 1, 1905.)

1. MUNICIPAL CORPORATIONS—ORDINANCES—ROCK QUARRIES—PROHIBITION — STATUTES.

The San Francisco city ordinance prohibiting the maintenance or operation of a rock quarry within prescribed limits in the city did not prohibit the making of reasonable excavations for construction purposes on land to be improved, and was therefore not in conflict with Civ. Code, § 832, confirming the right of every landowner to make proper and usual excavations on the same for the purposes of construction, etc.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1330–1332.]

2. SAME — CONSTITUTIONAL LAW — POLICE POWER—DEPRIVATION OF PROPERTY.

The San Francisco city ordinance prohibiting the maintenance or operation of any rock or stone quarries within a prescribed portion of the city was not a proper exercise of police power, but was void as an unlawful interference with property rights.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1330–1332.]

In Bank. Application for a writ of habeas corpus by one Kelso to review his incarceration for violation of an ordinance of the city of San Francisco prohibiting the operation of a rock or stone quarry within certain limits in the city. Petitioner discharged.

J. C. Bates, for petitioner. Lewis F. Byington, Dist. Atty., and James M. Hanley, Asst. Dist. Atty., for respondent.

ANGELLOTTI, J. Petitioner seeks his discharge from the custody of the sheriff of the city and county of San Francisco, by whom he is held under a commitment issued upon a judgment pronounced against him upon conviction of a violation of an ordinance of said city and county. The prohibitory portion of said ordinance is as follows, viz.: "No person, company or association shall maintain or operate any rock or stone quarry within that portion of the city and county of San Francisco bounded as follows." Then follows a description of a large portion of such city. The complaint filed against petitioner simply charged him in the language of the ordinance with willfully and unlawfully maintaining and operating a certain stone and rock quarry within the limits designated, and undoubtedly alleged a public offense if the ordinance is valid. In this proceeding, we cannot, of course, consider the evidence given upon the trial of petitioner, or determine whether or not that evidence showed that he committed the acts charged against him. The adjudication of the trial court, and the affirmance of the judgment by the superior court, are conclusive upon that question here. The only question presented for our determination is as to the validity of the ordinance.

We do not think that the ordinance can reasonably be construed as prohibiting an owner of land containing stone or rock from making thereon such "proper and usual excavations * * * for purposes of construction" as may be necessary. What is prohibited is the maintenance or operation of a "rock or stone quarry." The term "quarry" is not properly applicable to the comparatively slight excavations on land made primarily for purposes of construction thereon, and not primarily for the purpose of disposing of the rock, or stone, or other material taken out. As defined by the lexicographers, it is similar to a mine, in the sense that the material removed, be it mere rock, or stone, or valuable marble, is removed because of its value for some other purposes, and in the sense that it is not removed for the purpose of improving the property from which it is taken. It is distinguished from a mine in the fact that it is usually open at the top and front (see Century and Standard Dictionaries), and, in the ordinary acceptation of the term, in the character of the material extracted, but these distinctions are not material here. Webster defines a quarry as "a place, cavern, or pit where stone is taken from the rock or ledge, or dug from the earth, for building or other purposes; a stone pit," and in March's Dictionary, we find it defined as "a stone mine." In its proper significance, this is what it really is. It is a place, generally open at top and front, from which rock or stone is extracted solely because of its value for use elsewhere, just as gold or other precious metals are removed from a mine; and "proper and usual excavations" made for construction purposes on the land to be improved do not fall within the term "quarry." There is, therefore, nothing in the contention that the ordinance is in conflict with the provisions of section 832 of the Civil Code, confirming the right of the owner of land "to make proper and usual excavations on the same for purposes of construction, on using ordinary care and skill, and taking reasonable precautions to sustain the land of the other, and giving previous reasonable notice to the other of his intention to make such excavations," and subject to which right the coterminous owner is entitled to the lateral and subjacent support which his land receives from the adjoining land.

The case, however, presents a much more serious question. The effect of the ordinance absolutely prohibiting the maintenance or operation of a rock or stone quarry within certain designated limits of the city and county of San Francisco is to absolutely deprive the owners of real property within such limits of a valuable right incident to their ownership, viz., the right to extract therefrom such rock and stone as they may find it to their advantage to dispose of. While the use to which a man may put his property may be restricted or regulated by the state, in the exercise of its police power, so far as may be necessary to protect others from injury from such use, it is, of course, elementary, that the enjoyment of one's property cannot be interfered with or limited arbitrarily. As is said in Tiedeman's Limitations of Police Power, the next thing to depriving a man of his property is to circumscribe him in its use. A limitation of the use pro tanto deprives him of the enjoyment thereof, and any arbitrary action in this regard is a taking of private property without due process of law. Sections 122 and 122a. While in the exercise of its police power the state may limit or regulate the use, any such limitation or regulation must find its justification in the necessity for the protection of the legal rights of others. If it does not, it is an unwarrantable invasion of property rights, against which the courts will protect. Whether or not a certain limitation or regulation is essential is largely a question for the legislative department, to be determined with reference to all the existing circumstances; and the courts will not ordinarily interfere, where it can be seen that the regulation has some proper relation to an object within the domain of the police power of the state, which, as stated by Mr. Cooley, includes all regulations having reference to "the comfort, safety, or welfare of society." But regulations which transcend these objects cannot be upheld by the courts as legitimate police regulations. See Ex parte Dickey, 144 Cal. 234, 236, 77 Pac. 924, 66 L. R. A. 928, 103 Am. St. Rep. 82. Applying these well-recognized principles to the ordinance before us, we are unable to perceive any ground upon which it may be sustained as a legitimate exercise of the police power. It is in no sense a mere regulation as to the manner in which rock or stone may be removed from the land by the owner thereof, but is an absolute prohibition of any such removal. However valuable the rock or stone may be if removed, and however valueless if not removed, the owner must allow it to remain in its place of deposit. Such a prohibition might be justified, if the removal could not be effected without improperly invading the rights of others; but it cannot be doubted that rock and stone may, under some circumstances, be so severed from the land and removed as not in the slightest degree to inflict any injury which the law will recognize. So far as such use of one's property may be had without injury to others, it is a lawful use, which cannot be absolutely prohibited by the legislative department under the guise of the exercise of the police power.

It may freely be conceded that rock or stone quarrying may be done in such a way and under such circumstances as to occasion injury to others, or to make it a public nuisance (see Queen v. Mutter, 10 Cox, C. R. 6), and that the state has the power to impose such limitations as are necessary to prevent this. For instance, an ordinary method of loosening rock or stone is blasting with powder, dynamite, etc.; and respondent urges this as one of the reasons why the operation of a quarry is dangerous to the public safety. This objection goes, however, only to the way in which the work is done, and not to the work itself. Rock or stone may be extracted without blasting, not so easily, perhaps, and therefore not so profitably, but still blasting is not absolutely essential to the extraction of the rock. It has been properly recognized that the matter of blasting in a densely populated community is one for police regulation, and the circumstances may be such that blasting may be absolutely prohibited. It was so held by the Supreme Court of Massachusetts in Commonwealth v. Parks, 155 Mass. 531, 30 N. E. 174, where an ordinance prohibiting the blasting of rock and stone with gunpowder, etc., without written consent from the board of aldermen, was upheld. Doubtless the city and county of San Francisco may enact all needful regulations as to blasting, and such other regulations as to the manner in which and extent to which quarrying work may be done, as may be necessary to the protection of those rights which may be guarded by the state by the exercise of its police power. It may also be suggested that in so far as any work of the character here attempted to be prohibited, by reason of the place or manner in which it is being done, or the extent to which excavations are being made, constitutes an unauthorized invasion of the property rights of adjoining owners, such adjoining owners have their remedy by civil action. We can see no valid objection to the work of removing from one's own land valuable deposits of rock or stone that may not be entirely met by regulations as to the manner in which such work shall be done; and, this being so, we are satisfied that an absolute prohibition of such removal, under all circumstances, cannot be upheld. It may be that such regulations of the work as will be upheld as a proper exercise of the police power will entail such cost as will in many cases make it unprofitable to remove the rock or stone, or the rock or stone may be so situated as to make it impossible to extract it at all without violating the regulations; but, if this be the effect of proper regulations, the property owner cannot complain, for he holds his property subject to the proper exercise of the police power of the state.

It is unnecessary to discuss other objections made to said ordinance. The ordinance being invalid, the petitioner must be discharged from custody; and it is so ordered.

We concur: BEATTY, C. J.; HENSHAW, J.; LORIGAN, J.; McFARLAND, J.; VAN DYKE, J.; SHAW, J.

146 Cal. 323

McCARTHY v. WILSON. (Sac. 1,283.)

(Supreme Court of California. Feb. 23, 1905.)

1. ELECTIONS—CONTEST—APPEAL — TIME FOR TAKING.

Code Civ. Proc. § 939, subd. 1, providing that an exception to a decision on the ground that it is not supported by the evidence cannot be reviewed on appeal from the judgment unless the appeal is taken within 60 days thereafter, is applicable to election contests; section 1126 providing, in relation to election contests, that either party aggrieved by the judgment of the court may appeal as in other cases of appeal.

2. SAME—ERRORS OF LAW.

On appeal in an election contest, appellant's complaint that the court had refused to consider certain ballots voted for him, and had erroneously considered other ballots purporting to be for his adversary, presents questions of law as to whether the court erred in the admission and rejection of evidence, and does not involve a review of the findings to determine whether they were sustained by the evidence, and hence the review of such questions is not prevented because the appeal was not taken within 60 days under section 939, subd. 1.

3. SAME—EXCEPTIONS IN TRIAL COURT.

The Supreme Court will not review the ruling of the trial court on any particular ballot in an election contest, in the absence of an exception reserved thereto by the party complaining.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Elections, § 320.]

4. SAME—OBJECTIONS NOT MADE BELOW.

On an appeal in an election contest, no objection to a ballot will be considered by the Supreme Court unless it has been specifically made in the trial court.

5. SAME—QUESTIONS CONSIDERED.

The ruling of the court on an objection to each particular ballot in an election contest, when excepted to by the injured party, is reviewable on appeal from the judgment.

6. SAME—BALLOTS.

On an election contest, ballots containing the printed words "No Nomination," in the absence of a nominee for a particular office, upon which the voter had stamped a cross after the words "No Nomination," were void.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Elections, § 167.]

7. SAME.

On an election contest, ballots on which the voter had written a name in the blank column on the ballot and had stamped a cross after such written name were void.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Elections, § 156.]

8. SAME.

On an election contest, a ballot having two or more distinct crosses after the name of a single candidate was void.

[Ed Note.—For cases in point, see vol. 18, Cent. Dig. Elections, § 167.]

9. SAME.

On an election contest, a ballot having pencil writing in an improper place on the face of the ballot was void.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Elections, §§ 166, 167.]

10. SAME—ELECTION BOARD—INELIGIBILITY—EFFECT ON VALIDITY OF BALLOTS.

Pol. Code, § 1142, providing for the appointment of boards of election by the boards of supervisors or other board having control of elections, declares that no person shall be eligible to act as an officer of election at any precinct who has been employed in any official capacity in the county, or city and county, within 90 days preceding the election. *Held* that, though certain members of an election board were ineligible under the statute, yet, having acted, their acts were valid, in the absence of fraud, and their ineligibility did not affect the validity of the ballots cast by the voters of the precinct.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Elections, §§ 47, 48.]

11. SAME—OBJECTIONS TO BALLOTS — NAMES OF OFFICERS ON SEAL.

On an election contest, an objection to the ballots from a certain precinct on the ground that the election officers had not written their names across the seal of the envelope as required by Pol. Code, § 1259, was of no avail, there being no pretense that the ballots were not the original ballots delivered to the county clerk by the election board, and retained safely in his possession, or that the packages were not in precisely the same condition when produced in court as when received by the county clerk.

12. SAME—FINDINGS.

On an election contest, it having been found that one of the parties did not receive a majority of the votes, a failure to find that he was eligible to the office was not material.

13. SAME—ADMISSIONS IN ANSWER.

On an election contest it was not necessary for the court to find on such allegations in the statement as were admitted by the answer either by specific statement or failure to deny.

14. SAME — FINDING AS TO ELIGIBILITY OF CANDIDATE.

On an election contest it was not necessary that the court should find as to the successful party's eligibility, no question having been made under the pleadings.

15. SAME—STATEMENT BY CONTESTANT—SUFFICIENCY.

Code Civ. Proc. § 1111, subd. 2, gives a right to contest an election on the ground that the contestee was not eligible, and section 1115 provides that on an election contest the statement filed by the contestant shall state, among other things, the particular grounds of contest. *Held* that, where ineligibility is relied on, it must be alleged in the statement.

In Bank. Appeal from Superior Court, El Dorado County; J. E. Prewett, Judge.

Election contest by T. E. McCarthy against S. B. Wilson over the office of superintendent of schools of El Dorado county. From a judgment confirming the election of the contestee, the contestant appeals. Reversed.

Rehearing denied March 22, 1905.

Chas. A. Swisler, Abe Darlington, and Clarke Howard, for appellant. W. C. Burgess, W. F. Bray, and C. E. Peters, for respondent.

ANGELLOTTI, J. This is an appeal from a judgment given in an election contest. The office in question is that of superintendent of schools of El Dorado county, and the appellant and respondent were the candidates for said office at the general election held on November 4, 1902. Upon the canvass by the board of supervisors respondent was declared elected, and this contest was thereupon instituted by appellant. The ground of the contest was malconduct on the part of the election officers in the matter of counting the votes, appellant claiming that he had received the highest number of legal votes, and that such fact would be ascertained by a recount. At the trial all of the ballots cast at the election were recanvassed by the court, with the result that the court found that appellant had received 1,050 votes and respondent 1,115 votes. Judgment was thereupon, on March 20, 1903, entered, confirming the election of respondent.

1. The appeal herein was not taken until September 18, 1903, and it is urged by respondent that, as the appeal was not taken within 60 days after the rendition of judgment, the rulings of the trial court upon the various ballots to which objections were made during the progress of the recount cannot be reviewed.

Admittedly, subdivision 1 of section 939, Code Civ. Proc., providing that an exception to the decision on the ground that it is not supported by the evidence cannot be reviewed on an appeal from the judgment unless the appeal is taken within 60 days after the rendition of the judgment, is applicable to election contests. Section 1126, Code Civ. Proc.; Packard v. Craig, 114 Cal. 95, 98, 45 Pac. 1033. The theory of the respondent is that, inasmuch as the trial court counted the ballots, and found that appellant received a certain number of votes and respondent a larger number, any review of the rulings of the court upon individual ballots in the making of the count would be a review of the findings of the court for the purpose of determining whether the same were sustained by the evidence. It is said by respondent that the fact which appellant endeavors to show is that a count of the ballots received by the court in evidence shows a majority for appellant, which, as held in Packard v. Craig, supra, cannot be done where the appeal is taken more than 60 days after rendition of judgment. There is nothing in this contention. What appellant complains of is, not that the trial court reached a conclusion that is not sustained by the evidence actually, admitted and taken into consideration, but that it expressly refused to admit and take into consideration certain proper evidence, consisting of ballots legally voted for him, and erroneously admitted, and took into consideration certain other evidence, consisting of ballots purporting to be for respondent, which, by reason of their illegality, should not have been admitted. This presents questions as to whether the court erred in the admission and rejection of evidence, questions of law which are not foreclosed by the failure to appeal within 60 days. It is well settled that this court will not review the ruling of the trial court upon any particular ballot in the absence of exception reserved thereto by the party complaining (Lay v. Parsons, 104 Cal. 661, 38 Pac. 447), and that no objection to a ballot will be considered by this court unless it has been specifically made in the trial court (People v. Campbell, 138 Cal. 11, 22, 70 Pac. 918; Langley v. Head, 142 Cal. 368, 371, 75 Pac. 1088). Each particular ballot is regarded as a piece of evidence, and the ruling of the court on an objection thereto, when excepted to by the injured party, is reviewable by the appellate court on an appeal from the judgment to the same extent as any other ruling in the matter of the admission or rejection of offered evidence. Such rulings can be reviewed in no other way. If they are erroneous and sufficient in number to materially affect the judgment, the judgment must be reversed. There is nothing in Packard v. Craig, supra, inconsistent with these views. The record of that case shows that it was not sought therein to review the ruling of the trial court upon any particular ballot, and this court expressly said that questions as to whether or not the court erred in admitting certain evidence were properly before them on that appeal.

2. There were 96 ballots, commonly known as "No Nomination Ballots," i. e., ballots containing the printed words "No Nomination" in the absence of a nominee for a particular office—upon which the voter had stamped a cross after the words "No Nomination." Eighty-seven of these contained a vote for respondent, and nine contained a vote for appellant. The trial court originally sustained objections to all of these ballots, but subsequently reconsidered its rulings, overruled the objections thereto, and admitted them in evidence. The appellant duly excepted to this ruling.

That these ballots were void, and should have been rejected, cannot now be doubted, in view of the many decisions of this court upon the subject of "No Nomination Ballots." See Maddux v. Walthall, 141 Cal. 412, 414, 74 Pac. 1026, and cases there cited; Kincaid v. Reid, 142 Cal. 88, 75 Pac. 657; Merkley v. Trainor, 142 Cal. 265, 75 Pac. 656; McMenomy v. Ruch. 142 Cal. 77, 75 Pac. 661; Treanor v. Williams (Cal.) 78 Pac. 884. The trial court, therefore, erred in overruling the objections to these ballots. As 87 of these were counted for respondent and only 9 for appellant, the net loss to appellant by reason of these erroneous rulings was 78.

The trial court also overruled the objections of appellant to 7 ballots containing a vote for respondent, on each of which the voter had written a name in the blank column on the ballot, and had stamped a cross after such written name. The objections to these ballots should have been sustained, and the ballots rejected. Salcido v. Roberts, 136 Cal. 670, 672, 69 Pac. 431. The loss to appellant by reason of these erroneous rulings was 7, which makes his total loss 85, or 19 more than is necessary to overcome the majority of 65 found by the court for the respondent.

The prejudicial effect of these errors is therefore apparent, unless it appears that there were other errors against respondent, sufficient in number to overcome the apparent majority of appellant. For the purpose of ascertaining the condition in this regard, we have examined all the other rulings of the court in the matter of the ballots, so far as such rulings were made the subject-matter of exceptions. Such examination discloses that there were eight errors against respondent and eight against appellant. Ballot 658, 868, 960, 1,100, 1,805, 2,142, and 2,153, all respondent's ballots, should have been counted for him. In no case was the mark thereon serving as the basis of an objection that the ballot bore a distinguishing mark of such a character that it should have been held to invalidate the ballot. Ballot 360, counted for appellant, should have been excluded, the voter having placed two distinct crosses thereon after the name of one candidate. On the other hand, ballots 70, 217, 551, 564, and 1,192, all for appellant, should have been counted for him, the alleged distinguishing mark in no case being such as to invalidate the ballot. Ballots 221, 950, and 959, counted for respondent, should have been excluded, two of these because of two or more distinct crosses after the name of a single candidate, and the other because of pencil writing in an improper place upon the face of the ballot. These are the only other errors found, and they simply balance each other.

Objections were made by respondent to the counting of the ballots from four precincts of the county, upon the ground that in each of said precincts one or more of the members of the election board was ineligible to act thereon for the reason that he had been a county or a township officer within 90 days next preceding the election. The basis of this objection is section 1142, Pol. Code, which, providing for the appointment of boards of election by the board of supervisors or other board having control of elections, declares that "no person shall be eligible to act as an officer of election at any precinct who has been employed in any official capacity in the county, or city and county, in the state, within ninety days next preceding any election." The objections were properly overruled. Conceding that the evidence showed that certain members of these boards came within the inhibition of section 1142, Pol. Code, and were therefore ineligible, they nevertheless did act, and were at least de facto officers of election, and as such their acts were valid in the absence of fraud, even though they did not possess all the qualifications requisite for the office. Certainly no principle of law would warrant the disfranchisement of the voters of a precinct on any such ground as the one relied on as the basis of this objection. See Whipley v. McKune, 12 Cal. 352; People v. Prewett, 124 Cal. 13, 56 Pac. 619.

Objections were made by respondent to the ballots from two precincts, upon the ground that the election officers had not written their names across the seal of the envelope, as required by section 1259, Pol. Code, and that there was nothing to show by whom the envelopes had been sealed, or whether they had been opened after being sealed. The record does not show that the names of the members of the board had not, as a matter of fact, been written across the seal; but assuming such to have been the condition, the ballots should not have been excluded. There was no pretense that these were not the original ballots from these precincts, delivered by the election boards thereof to the county clerk, and retained safely in his possession continuously thereafter, or that the packages were not in precisely the same condition when produced in court as when received by the county clerk. Of course, the members of the election boards should have complied with the law, and written their names across the seal of the envelope containing the ballots, but their failure to so do cannot warrant the disfranchisement of all the voters of those precincts, where it is manifest that no injury resulted therefrom. The objections were properly overruled.

This disposes of all the points made by respondent, and shows that the errors in regard to the no nomination ballots and the seven ballots whereon a cross was stamped after a written name, substantially prejudiced appellant's cause, and necessitate a reversal.

Appellant makes certain other points for a reversal of the judgment, none of which is tenable. The findings fully covered all issues material to the conclusion reached. It being found that appellant did not receive a majority of the votes, the failure to find that he was eligible to the office is not material. It was, of course, not necessary to find upon such allegations in the statement as were admitted by the answer, either by specific statement or failure to deny. The failure to find upon the matters stated as a "further and separate defense" by respondent is a matter concerning which appellant has no ground of complaint, for it could not prejudice him. It was not necessary that the court should find as to the respondent's eligibility, for there was no question, under the pleadings, as to his eligibility. The Code of Civil Procedure specifies various grounds of contest, one of which is that the person whose right to the office is contested was not, at the time of the election, eligible to such office. Section 1111, subd. 2. Where this ground is relied on, it should be alleged in the statement. Section 1115, Code Civ. Proc.

The judgment is reversed, and the cause remanded for further poceedings.

We concur: VAN DYKE, J.; McFARLAND, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.

147 Cal. 604

ROTH v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (L. A. 1,755.)

(Supreme Court of California. Aug. 31, 1905.)

DISMISSAL—APPEARANCE—STIPULATION.

A stipulation, signed by the attorneys for both parties, extending time to answer, is an appearance, though not filed, within Code Civ. Proc. § 581, subd. 7, excepting from actions which shall be dismissed, where summons has not been served and returned within three years, those in which an appearance has been made by defendants.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appearance, §§ 29, 37; vol. 17, Cent. Dig. Dismissal and Nonsuit, § 152.]

In Bank. Application by Jules F. Roth for writ of prohibition to the superior court of Los Angeles county and Waldo M. York, judge thereof. Writ denied.

H. C. Millsap, for petitioner. Lawler, Allen & Van Dyke, for respondent.

BEATTY, C. J. On October 11, 1901, the State Bank & Trust Company commenced an action against this petitioner to recover the amount of a promissory note. Summons and copy of the complaint were served the same day, and on the following day the parties by their respective attorneys entered into the following stipulation:

"In the Superior Court of Los Angeles County, State of California.

"State Bank & Trust Company, a Corporation, "Plaintiff, v. Jules F. Roth, Defendant.

"It is hereby stipulated by and between the parties hereto that the above-named defendant may have to and including the twelfth (12th) day of November in which to plead in the above-entitled action.

"Dated this 12th day of October, 1901.

"Lawler & Allen,
"Attorneys for Plaintiff.
"Walter Rose and
"Ross T. Hickox,
"Attorneys for Defendant."

Nothing further was done until February, 1905, except that through the attorneys time to answer was extended by verbal stipulation, at request of the petitioner. The summons was never returned, and in February, 1905, petitioner gave notice of a motion to dismiss the action, upon the ground that more than three years had elapsed since its commencement without return of summons. After notice of this motion, and before the hearing, the attorneys for the plaintiff in that action filed the stipulation above quoted. The superior court denied the motion, and threatens to proceed in the action. Petitioner asks that all further proceedings be stayed, and bases his claim to the writ upon the provisions of subdivision 7, § 581, Code Civ. Proc. We think the writ should be denied. The stipulation, signed as it was by petitioner's attorneys in the action, was a virtual appearance, and none the less so because it was not filed. The case comes fully within the reasoning and principle of the decision of Cooper v. Gordon, 125 Cal. 296, 57 Pac. 1006, and is distinguished from the case of Vrooman v. Li Po Tai, 113 Cal. 302, 45 Pac. 470, by the fact that in that case no stipulation was signed by any one as attorney for the defendant, while here a stipulation is signed by attorneys representing the defendant, and empowered to bind him in all proceedings in the action.

Writ denied, and proceeding dismissed.

We concur: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.; SHAW, J.; ANGELLOTTI, J.

147 Cal. 606

In re PIPER'S ESTATE.

PIPER et al. v. PEOPLE. (L. A. 1,693.)

(Supreme Court of California. Aug. 31, 1905.)

APPEAL—PARTIES AGGRIEVED.

In a proceeding for distribution of the estate of a decedent, parties whose right to distribution depends on the property being community property, not having attacked the sufficiency of the evidence to sustain the finding that the property was the separate property of deceased, are not parties aggrieved, within Code Civ. Proc. § 938, so as to be entitled to appeal, making the point only that the court was without jurisdiction to make the decree distributing the estate to the state.

Department 2. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

In the matter of the estate of Eva Agnes Piper, deceased. From the decree, Arthur L. Piper, administrator, and others, appeal. Affirmed.

Hendrick, Wright & Schoonover, for appellants. U. S. Webb, Atty. Gen., Geo. A. Sturtevant, Dep. Atty. Gen., and Cassius Carter, Dist. Atty., for the People.

HENSHAW, J. Eva Agnes Piper at the time of her death was a childless widow. In the petition for distribution the administrator of the estate set forth that the estate left by the deceased was the proceeds of community property of the deceased and of her husband, A. Dana Piper, who had died before her. The petition contains no allegation touching the relatives of the deceased wife, but alleges that there was no surviving father, mother, brother, or sister of A. Dana Piper; that A. Dana Piper had one brother, who was dead, and who was the father of the petitioner and of certain other children, who had assigned to petitioner their claims upon the estate of the deceased. The petitioner asserted a right to distribution in the children of the deceased brother of A. Dana Piper, under section 1386, subd. 9, Civ. Code, and prayed the court for such distribution. Issue was joined by the state of California upon all these matters, and in its answer to the petition the state affirmatively alleged that the property of the deceased, Eva Agnes Piper, was separate property, and that the decedent died intestate, leaving no husband or kindred and no heirs to take her estate, or any portion thereof, under section 1386 of the Civil Code. It alleged that the state was therefore entitled to the whole of the property of deceased by escheat for the benefit of the common schools, and prayed distribution accordingly. Civ. Code, § 1386, subd. 10. The court, after hearing, found "for the people of the state of California upon the issues joined," and directed the payment of the moneys of the estate to the Treasurer of the state of California. From this decree Arthur L. Piper as administrator, Arthur L. Piper in his personal capacity, and the other children of Jerome Piper, deceased, brother of A. Dana Piper, take this appeal.

It is urged by respondent that the appellants have no standing in this court, in that they do not show themselves to be parties aggrieved, and the contention of respondent in this regard must be sustained. The only point presented by the appellants upon their appeal is that the court had no jurisdiction to enter the decree, under the authority of People v. Roach, 76 Cal. 296, 18 Pac. 407; Estate of Porter, 129 Cal. 90, 61 Pac. 659, 79 Am. St. Rep. 78; and Martinovich v. Marsicano, 137 Cal. 356, 70 Pac. 459. But, unless these appellants are parties aggrieved, within the meaning of section 938, Code Civ. Proc., it cannot matter to them what decree the court may have entered, and the proposition which they present for consideration, not affecting any interest of their own, is but a moot question. The findings of the court are conclusive against them as to the character of the property left by the deceased, and as to their alleged relationship. While by section 648, Code Civ. Proc., no particular form of exception is required, yet there must be some exception to the decision, when the exception is based upon the ground of insufficiency of evidence to justify the verdict or decision, and the objection must specify the particulars in which such evidence is alleged to be insufficient. The bill here presented contains no specifications of error, no objections for the insufficiency of the evidence. The findings of the court deny to them their asserted right of succession, and these are not objected to. Such being the case, it cannot matter to them what may be the form of the decree which the court has entered. They are not parties aggrieved. A similar question was presented in Blythe v. Ayres, 102 Cal. 254, 36 Pac. 522. There the court found the plaintiff to be the daughter and sole heir of the deceased, and that certain claimants were in no way related to the deceased. These findings not being assailed and overcome, it was here held that the appellants were not aggrieved, and could not be prejudiced or aggrieved by any ruling made by the court in favor of plaintiff, and had no standing as appellants from the decision and judgment in her favor. The administrator in his representative capacity, of course, cannot prosecute the appeal. Estate of Williams, 122 Cal. 76, 54 Pac. 386.

For the foregoing reasons, the court declines to consider the proposition presented by appellants upon their appeal, and the decree appealed from is affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

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147 Cal. 581

NAVAJO MINING & DEVELOPMENT CO. v. CURRY, Secretary of State. (S. F. 4,254.)

(Supreme Court of California. Aug. 29, 1905.)

CORPORATIONS—CAPITAL STOCK—INCREASE—NOTICE OF MEETING.

Under Const. art. 1, § 22, declaring that the provisions of the Constitution are mandatory and prohibitory, unless expressly declared otherwise, article 12, § 11, prohibiting any increase of the capital stock of the corporation without the consent of the holders of the majority of the stock, at a meeting called for that purpose giving 60 days' public notice, as well as Civ. Code, § 359, making substantially the same requirement, must be construed as prohibiting an increase in capital stock without the 60 days' notice, even though all the stockholders are present at the meeting and consent to the change.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 176.]

In Bank. Mandamus by the Navajo Mining & Development Company against Charles F. Curry, Secretary of State. Writ denied.

Chas. H. Braynard, for petitioner. U. S. Webb, Atty. Gen., for respondent.

BEATTY, C. J. This is an original proceeding in which a California corporation seeks to compel the respondent to file and issue certificates of increase of its capital stock. An alternative writ of mandate was issued upon the filing of the petition, and the respondent submits the controversy upon his general demurrer thereto for want of facts to justify the issuance of the writ. The facts are that the petitioner, having been originally organized with a capital stock of only $75,000, became desirous of increasing the amount to $1,000,000. To carry out this object a meeting of the stockholders was convened at the offices of the company, in pursuance of a resolution of the directors, for the purpose of considering the expediency of the proposed increase, and at said meeting the holders of all the issued stock were present in person or by proxy, as well as all subscribers for stock; and they all signed a written consent to the proposed increase on the record of the meeting. In short, the proceedings required for effecting an increase of the stock of a corporation were regularly pursued in every respect as prescribed by section 359 of the Civil Code, except that the public notice therein specified was not given. A certificate in proper form of what was done was delivered to the respondent, and the fees for filing were duly tendered; but he refused to file the certificate, upon the ground that it appeared therefrom that the whole proceeding was invalid for want of the statutory notice by publication in a newspaper of the call for the stockholders' meeting.

The contention of the petitioner is that the actual attendance and consent of all the holders of and subscribers for its stock rendered the failure to publish notice of the meeting immaterial, that the statutory and constitutional requirement of published notice in such cases is wholly for the benefit and protection of the stockholders, and that, when the sole object of the notice has been accomplished by the voluntary attendance of all interested parties, the statutory provision for published notice should be held directory and not imperative. There is both reason and authority to sustain this contention as applied to a statute; but in this state we have not only a statute to construe, but a constitutional provision which in express terms prohibits any increase of the capital stock of a corporation, "without the consent of the persons holding the larger amount in value of the stock at a meeting called for that purpose, giving sixty days' public notice, as may be provided by law." Article 12, § 11. A provision of the Constitution of Missouri substantially identical was held by the Supreme Court of that state to be directory. Riesterer et al. v. Horton Land & Lumber Co., 160 Mo. 141, 61 S. W. 238. But we could not place the same construction upon the above-quoted provision of our Constitution, without disregarding, not only its expressly prohibitory terms, but also the rule prescribed by the Constitution itself for the effect to be given to its provisions. Article 1, § 22.

If it be conceded that the requirement is unduly rigorous we are, nevertheless, not at liberty to hold it directory merely. As a part of the Constitution prohibitory in terms, it is necessarily prohibitory in effect, and the failure of petitioner to observe its requirements rendered the attempted increase of its capital stock absolutely void. It would, therefore, have been a vain act to file the certificate, and, since mandate will not issue to compel the performance of a vain act, the writ must be denied and the proceeding dismissed.

It is accordingly so ordered.

We concur: HENSHAW, J.; McFARLAND, J.; VAN DYKE J.; SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.

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147 Cal. 571

WELCH v. GILLELEN. (L. A. 1,394.)

(Supreme Court of California. Aug. 28, 1905.)

1. Corporations—Stockholders—Names on Books.

Civ. Code, § 322, declaring one to be a stockholder whose name appears on the books of the corporation as such, applies only to one who knowingly or voluntarily permits his name to so appear.

2. Same—Ratification.

Where the secretary of a corporation, on being directed by the pledgee of stock to issue a certificate to him as such, entered his name on the books as a stockholder, and issued a certificate to him as such, he did not ratify the act of the secretary, so as to make himself a stockholder as to creditors of the corporation, by retaining the certificate; he having offered it to the secretary to correct, and having retained it temporarily only on the repeated refusal to correct it till return of the vice president to sign a new certificate.

3. Same—Laches—Estoppel.

It is not laches, estopping one to deny his liability as a stockholder to creditors of a corporation, who became such after his name appeared as a stockholder on the books of the corporation, but without knowledge of that fact, that there was a delay of four weeks in having the entry corrected; he having, on the day after the secretary erroneously issued a certificate of stock to him as a stockholder, instead of as a pledgee of stock, applied to the secretary for correction of the mistake, and the secretary having promised this as soon as the vice president returned, so that he could sign a new certificate, which they supposed necessary before correction could be made on the books.

Department 2. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by G. S. Welch against Warren Gillelen. Judgment for defendant. Plaintiff appeals. Affirmed.

Oscar A. Trippet, Lawler & Allen, and Graves, O'Melvey & Shankland, for appellant. Borden & Carhart, for respondent.

LORIGAN, J. This action is brought by a creditor of the Ivanpah Smelting Company, a California corporation, to recover from the defendant his proportionate liability as a stockholder of said corporation under section 322 of the Civil Code. Judgment was rendered in favor of defendant, and from said judgment and the order denying his motion for a new trial plaintiff appeals.

The evidence shows that Blasdel and Sisson purchased certain stock of the Ivanpah Smelting Company, and to make payment therefor borrowed from defendant, the president of the Broadway Bank & Trust Company of Los Angeles, moneys sufficient to meet the purchase price, and, as collateral security for the loan, the certificates of stock in said corporation, representing in all 908 shares, were indorsed by him to defendant. Blasdel subsequently died, and Sisson, being interested in the stock indorsed by Blasdel to defendant as collateral, insisted that defendant should return said certificates to the corporation, and have reissued to him in place thereof a certificate showing the true nature of the transaction under which he held them, namely, that he held them in pledge. In conformity with this request defendant on February 27, 1902, called at the office of the Ivanpah Smelting Company in Los Angeles city, and presented to and left with the secretary of the company the various certificates indorsed to him by Blasdel, and requested the secretary to make out a new certificate in his name as pledgee. On the evening of that day he told the cashier of the bank to call at the company's office and bring back the new certificate, which he had asked the secretary to issue. The secretary of the company, in violation of the instructions defendant had given him and without any authority, issued a certificate in the ordinary form in favor of the defendant individually, without it showing that he held the stock as pledgee, and upon the record books required by law to be kept the secretary made an entry showing the issuance of such an individual certificate. Neither the certificate nor any of the books recited or indicated the true character under which he held the stock. The cashier of the bank, having no knowledge of the directions given by the defendant to the secretary as to the kind of certificate he desired issued, receipted for the form of certificate delivered to him by the secretary and returned with it to defendant. Defendant, discovering the error in the certificate, went the next day to the secretary, called his attention to the error, and asked him to correct it by inserting in the certificate the word "pledgee," as he had in the first instance requested him to do. The secretary said he could not make the change, on account of the other officers of the corporation not being present. Within a week afterwards defendant again called on the secretary to have a new certificate issued showing the true nature of the transaction, and was again told that, owing to the absence of the vice president of the company (the president being dead), he could not issue it until the vice president was present to sign it. At this visit the defendent tendered the secretary the erroneous certificate for correction, but, on his statement that he could not correct it until the vice president came to the office (which the evidence shows was at uncertain intervals), defendant retained the certificate and placed it with his papers in the bank. He spoke to the secretary several times upon the subject of issuing a new certificate to correct the old one, receiving the same assurance that it would be done when an officer came in. Nothing was in fact done to that end till May 15, 1902, when the secretary canceled the erroneous certificate, issued to the defendant another certificate showing the true character in which he held the stock—as pledgee—and made the proper entry upon the books of the corporation. The defendant never subscribed for any stock in the Ivanpah Smelting Company, nor did he in fact own any stock in it. He attended no meetings of the board of directors of the corporation, participated in no transactions in which the corporation was involved, received no dividends, nor did any act asserting a stockholder's right in the corporation. There is no question in the case but that upon his first visit to the secretary of the corporation the defendant requested him to make out the certificate which he desired issued to him, so as to show that he held the stock as a pledge. The failure of the secretary to do so is doubtless attributable to the fact that he was hard of hearing and did not understand the directions of defendant, and, as the certificates indorsed by Blasdel to the defendant indicated on their face an absolute transfer of the stock to him, the secretary, in issuing a certificate upon surrender thereof, assumed that it was to be made in favor of the defendant individually, and so issued it. The credit extended to the Ivanpah Smelting Company sued upon in this action was given between March 1 and March 24, 1902, a considerable portion within 16 days after the issuance of the erroneous certificate to the defendant by the secretary, and all of it within four weeks thereafter. These constitute the material facts in the case.

It is first insisted by appellant, notwithstanding the evidence without contradiction shows that respondent never was in fact the owner of any stock in the Ivanpah Smelting Company, and his name was entered on the books of the corporation and the certificate made out in his name as a stockholder without authority and against his express directions, that nevertheless he was in law a stockholder under section 322, Civil Code, of this state, which declares one to be a stockholder whose name appears upon the books of the corporation as such. And in this connection it is insisted that the mere appearance of his name on the books as a stockholder is conclusive of his liability. There is, however, nothing in the section which makes the entry on the books conclusive on the subject. It simply says that one shall be deemed a stockholder whose name appears on the books as such. While this language is quite broad, it must be interpreted in harmony with justice, and in accord with the rule, which universally applies, as to the effect which is to be given to entries in corporate books purporting to show who are the stockholders of a corporation. When the section declares that one shall be liable as a stockholder who appears upon the books to be such, it means one who knowingly or voluntarily permits his name to appear thereon as a stockholder. When it so appears, the presumption is that he occupies the relation to the corporation which the books indicate. The entry is, however, not conclusive, but presumptive merely. This is the general rule, and there is nothing in the terms of our section to take this case out of it. The general construction of the section in question contended for by appellant, if it were sustained, would necessarily preclude one from showing that, while upon the face of the corporate books he appeared to be a stockholder, yet in fact he was not; that he had never owned or subscribed for any stock, or authorized the issuance of any to him by the corporation. A construction which would lead to this result cannot seriously be considered. The relation of stockholder to a corporation is one of contract, either express or implied. It only exists when a party has either expressly consented to become a stockholder, or his conduct is such that in law his consent will be implied. He cannot be made a stockholder, and liable to the creditors of a corporation, without his consent, simply because an officer of the corporation has without authority, or in direct violation of his instructions, entered his name upon the books of the corporation as a stockholder and caused stock to be issued in his name as such. Nor does the entry of his name in the books as a stockholder preclude him from showing that in fact he was not a stockholder, and that the issuance of stock in his name was unauthorized. Mudgett v. Horrell, 33 Cal. 25; O'Connor v. Witherby, 111 Cal. 529, 44 Pac. 227; Hunt v. Seeger, 91 Minn. 264, 98 N. W. 91; May v. Genesee Bank, 120 Mich. 330, 79 N. W. 630; Glenn v. Garth, 133 N. Y. 18, 30 N. E. 649; 31 N. E. 344; Foote v. Anderson, 123 Fed. 659, 61 C. C. A. 5; Clark & Marshall on Private Corp. §§ 795, 816, 819. Now, within this rule, as the evidence conclusively shows that there was no express consent on the part of respondent to become a stockholder, that he intended merely to have the books of the corporation show the true condition under which he held the stock (as pledgee), and that the issuance to him individually of the certificate and the entry of his name on the corporate books as a stockholder, were without authority on the part of the secretary, and against his express instructions, the judgment of the lower court was right, unless the further point made by appellant can be sustained.

In that regard he insists that, notwithstanding the want of authority in the secretary to enter the name of respondent in the corporate books as a stockholder or to issue the certificate to him individually, and that these things were done against his express instructions, yet by accepting and retaining the certificate he ratified the action of the secretary, and by failing to use ordinary diligence to have his apparent relation as stockholder to the corporation effaced on the corporate books and changed in the certificate, he is estopped as against creditors from disclaiming that he is a stockholder. The legal propositions suggested by appellant in this contention are sound, but the evidence does not warrant their application. There is no evidence in the case tending to show ratification. The retention by respondent of the erroneous certificate did not have that effect. It was offered to the secretary for correction, and, upon his refusal to correct it until the vice president came in, the respondent temporarily retained it. This retention had no significance as evidence of ratification, in view of its production at all times to the secretary for correction, and the persistent disavowal and repudiation of it by respondent, as not being the certificate which he had requested to have issued, and which he at all times insisted on having corrected. Nor is there anything showing the respondent guilty of laches in failing to have a change of the entries in the books of the corporation made after discovery of the error committed by the secretary in issuing the certificate. We speak of changes in the entries on the books as something distinct from the change in the erroneous certificate, because the case of Spreckels v. Nevada Bank, 113 Cal. 272, 45 Pac. 329, 33 L. R. A. 459, 54 Am. St. Rep. 348, indicates quite clearly that all a pledgee is entitled to demand of the corporation is an entry upon its books showing the true character under which he holds the stock, and that he is not entitled to the issuance of a certificate of stock indicating that character. In the case at bar both the respondent and the secretary thought that the proper method to pursue was to issue a new certificate on surrender of the old one. This belief, however, is not of much importance. When the respondent presented the old certificate, and requested the secretary to issue him a new certificate as pledgee, it was the duty of the secretary, under the rule laid down in Spreckels v. Nevada Bank, supra, notwithstanding he thought it proper to issue a new certificate, to have made, in addition to such issuance, proper entries on the transfer and stock books showing that the stock was held by respondent as collateral security. No matter in what form he might have issued the new certificate to the respondent, it was the duty of the secretary to have made the proper entries in the corporate book, so as to show the true relation of respondent to the stock, which was the declared purpose respondent had in view when he called on him to issue the new certificate. If this had been done, this trouble could not have arisen. The true nature of the transaction would then have properly appeared upon the corporate books, and the form of the certificate would have been immaterial.

Now, to return to the matter of laches: The respondent certainly made prompt effort to have the error committed by the secretary in the issuance of the certificate corrected, and was persistent in his efforts in that behalf from the date of the discovery of the error up to the time of correction. If he had permitted any unreasonable time to elapse after the discovery of the error before he sought to have the mistake rectified, there would be some excuse for the claim that he was negligent; but the evidence discloses nothing of the kind. He seems to have been actively insistent during the whole time in having his true relation to the stock correctly appear upon the books of the company. It is apparent, as a fact, that respondent never held himself out as a stockholder, or that he had any intention of doing so. The most that can be urged against him is that, relying upon the assurance of the secretary of the corporation that the error which had been made would be corrected when the vice president came in and the proper certificate could be signed by him, he for the period in March during which credit was extended by appellant to the corporation permitted the secretary to erroneously hold him out as a stockholder. This, however, was not respondent's fault. He promptly disavowed ownership in the stock, and was continually seeking to have the error corrected, and his true status disclosed upon the books, as he was promised it should be.

It is insisted by appellant that respondent should have applied to the court for a writ of mandate to compel the secretary to perform his duty; but, in making such an application, it would have been necessary to aver that the secretary had refused on demand to make the proper entry. This the secretary never did refuse to do. Both of the parties, it is true, were honestly in error as to what was necessary to be done in order to effect the change. They assumed that the issuance of a new certificate was required, when all that was in fact necessary was for the secretary to make the proper entries in the books. But whatever was necessary the secretary had not refused to do. On the contrary, he promised to have the correction made, as it was believed it should be, by having a new certificate issued when the vice president was present to sign it. The respondent had a right to rely upon this promise and the apparent willingness on the part of the secretary to have the error corrected, without being driven to the necessity and expense of appealing to the courts for redress. It was expected by both parties that this error would be corrected more speedily than it was; but the simple fact that it was delayed somewhat longer than was anticipated we do not think, under all the circumstances disclosed in the case, would warrant holding that there was an unreasonable delay in accomplishing it. It is not pretended that appellant had any knowledge that respondent appeared on the books as a stockholder, or that in fact credit was extended to the corporation on the faith of his appearance on the books as such. Nearly one-half of the indebtedness against the corporation was created the next day after the respondent discovered the error committed by the secretary in the issuance of the new certificate, and the rest of the indebtedness within 25 days thereafter. Certainly no laches could be charged against respondent in not having brought an action before the earlier part of the indebtedness was created, and if brought at any later period in March it would have been hardly possible to have obtained an alternative writ, a hearing, and the award of a peremptory writ between the discovery of the commission of the error in issuing the certificate and the creation of the indebtedness sued on. Under such circumstances the appellant could hardly be heard to say that he was injured by the delay, even if it was not otherwise excusable. Whether laches exists or not is to be determined from the facts and circumstances surrounding each particular case. There can be no inflexible rule laid down. One whose name is placed upon the corporate books as a stockholder without authority must be extended reasonable time within which to have the erroneous entry corrected, and it cannot be said in the case at bar that the delay of four weeks in accomplishing that result was unreasonable so as to constitute laches.

The authorities cited by appellant to sustain his general contention in this case have no application. In those cases the party asserting that he was not a stockholder and so endeavoring to avoid liability to creditors of the corporation had either knowingly and voluntarily assumed that position upon the books of the corporation, or, if he had not originally done so, yet from his conduct in dealing with the stock certificates issued to him, or with the corporation after the knowledge of the issuance of the stock to him, was estopped from repudiating that relationship. In Baines v. Babcock, 95 Cal. 593, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158, and Hurlburt v. Arthur, 140 Cal. 103, 73 Pac. 734, 98 Am. St. Rep. 17, relied on by appellant, it appears that the defendants there were within the class of those who knowingly and voluntarily assumed the relationship. In the one case, Babcock was not an owner as to part of the stock standing in his name, but held it for the accommodation of others; and in the other case, Miller, while the books showed that he was an individual stockholder, in fact held the stock as collateral security. In O'Connor v. Witherby, 111 Cal. 529, 44 Pac. 227, and Abbott v. Jack, 136 Cal. 510, 69 Pac. 257, while the defendants claimed that they had never authorized the issuance of any stock in their names, they were nevertheless held estopped, by their conduct in dealing with the certificates issued, from asserting as against the creditors of the corporation that they were not stockholders.

It will be readily seen upon an examination of those cases that they have no application here. Respondent in the case at bar, as we have seen, neither authorized the issuance of the stock in question to him individually, nor did any act after it was erroneously issued which would estop him from showing that its issuance was unauthorized, and that in fact he never was a stockholder, or liable to the creditors of the corporation as such.

The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

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147 Cal. 583

In re ARNOLD'S ESTATE. (L. A. 1,719.)

(Supreme Court of California. Aug. 30, 1905.)

1. WILLS—CONTEST—DEMURRER TO EVIDENCE.

In determining whether the evidence of contestants in a will contest is sufficient to require submission to the jury, the same rule applies as in ordinary civil cases, so that all the evidence in favor of contestants must be taken as true, and all contradictory evidence disregarded, and, if there is any substantial evidence tending to prove contestants' case, it must be submitted to the jury.

2. SAME—SUFFICIENCY OF EVIDENCE.

In a will contest, evidence of undue influence *held* sufficient to require submission of the case to the jury.

3. SAME—UNDUE INFLUENCE—FALSE REPRESENTATIONS—IGNORANCE OF FALSITY.

Where false representations were made to induce the cancellation of will and the making of a new one more favorable to the person making the representations, the fact that he believed some of the representations to be true did not render the will so procured valid.

4. APPEAL—QUESTIONS REVIEWABLE—EVIDENCE NOT OBJECTED TO.

On appeal the admissibility of evidence admitted without objection will not be considered.

5. WILLS—CONTEST—EVIDENCE.

Where, in a will contest, it was claimed that the execution of the will and the revocation of a former one was induced by false representations that one of contestants who was the general business manager and trustee for testatrix had abused the trust reposed in him, evidence by contestants of the extent and character of testatrix's estate in charge of contestant, of the general nature of the business transacted by him for her, and of the causes which led her to give him a power of attorney, was admissible.

6. SAME.

Evidence that the contestant in question had told the person who made the alleged false representations of the state of the business affairs of testatrix and of contestants' doings as her agent was also admissible.

7. SAME—MENTAL CAPACITY.

Evidence as to the reasons for testatrix's custom of having contestant as attorney in fact sign her checks was admissible to show her mental or business capacity.

8. SAME—PHYSICAL CONDITION.

Evidence of complaints by testatrix of failing eyesight and other bodily ailments, made as long as three years before the will was executed, was not too remote, but was admissible to show her physical condition and her dependence on others.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 382, 414–416.]

9. SAME—MOTIVE OF PERSON EXERCISING UNDUE INFLUENCE.

Evidence of the feelings of the person alleged to have made the false representations toward the contestant, and other facts and circumstances tending to show a motive inducing a desire for a new will, was relevant on the issue of fraud and undue influence.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 406, 410.]

10. SAME—FORMER WILLS.

Evidence that two former wills were substantially the same, and that shortly before the execution of the contested will testatrix had an unabated interest in two charitable institutions, for which she had provided in the two former wills and which she disregarded in the last one, was proper.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 407.]

11. SAME—DECLARATIONS OF TESTATOR.

Whenever the declarations of the testator constitute narratives of the exercise of the undue influence, or of the effect of such influence upon him, they are inadmissible for that purpose, whether made before or after the execution of the will, but, if made at the time of its execution, they may be admissible, if they are so made as to constitute part of the res gestæ; and, if they are of such character that they also reveal his condition of mind, they may be admissible for that purpose, though not of the res gestæ, but their effect must be carefully limited to the question of his condition of mind, and they must not be considered as narrations of the exercise or effect of the undue influence.

12. EVIDENCE—STATEMENTS OF DEPONENT.

Where the stenographer who took a deposition was called to testify to deponent's statements, it was error to refuse to allow her to testify to the questions in answer to which the statements of deponent were made.

13. SAME—EVIDENCE OF CONVERSATION.

Where, in a will contest, a witness testified to a conversation between himself and testatrix, it was error to refuse to allow him to give the statements made by him, and to confine him to what was said by testatrix.

14. SAME—DEPOSITIONS—PAROL PROOF—EFFECT.

Where the declarations made by a deponent, who was a party to the suit and was examined by the opposite party, were proved by the testimony of the stenographer who took the deposition, which was not itself introduced, the statements of deponent did not have the effect of testimony, but merely of declarations against interest.

15. WILLS—CONTESTS—FALSE REPRESENTATIONS TO TESTATRIX—PROOF.

Where, in a will contest, it was claimed that the execution of the will and the revocation of a former one were induced by false representations that one of contestants, who was the general business manager and trustee for testatrix, had abused the trust reposed in him, evidence by contestants that a deed to certain property from testatrix to contestant was made absolute in form because a person negotiating for the purchase of the property objected to a deed from a trustee was admissible to show the good faith of contestant.

16. SAME—KNOWLEDGE OF FALSITY.

There having been evidence that the person making the alleged false representations had told testatrix that a third person had stated that testatrix could not get the trust deed to contestant revoked without contestant's consent, testimony that the third person had made no such statement was admissible.

Department 1. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Proceedings by William H. Leonard and others to probate the will of Harriet M. Arnold, deceased, in which Alfred F. Rosenheim and others appeared as contestants. From a judgment granting a nonsuit and dismissing the proceedings in opposition to the probate of a will, contestants appeal. Reversed.

Rehearing denied September 29, 1905.

C. H. Rippey, Daney & Lewis, and Hunsaker & Britt, for appellants. Stearns & Sweet and W. J. Mossholder, for respondents.

SHAW, J. The contestants of the will of Harriet M. Arnold, deceased, appeal from a judgment of the court below granting a nonsuit and dismissing the proceedings in opposition to the probate of the will of the deceased executed April 25, 1903, and from the subsequent orders admitting said will to probate and appointing executors. The appellants assign as errors the granting of the motion for nonsuit and a number of rulings excluding and admitting evidence.

We think the judgment of nonsuit was erroneous. In determining whether or not, in a proceeding to contest a will, the evidence produced by the contestants is sufficient to require the submission of the case to the jury, the same rules apply as in civil cases. Every favorable influence fairly deducible and every favorable presumption fairly arising from the evidence produced must be considered as facts proved in favor of the contestants. Where evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the contestants. All the evidence in favor of the contestants must be taken as true, and if contradictory evidence has been given it must be disregarded. If there is any substantial evidence tending to prove in favor of the contestants all the facts necessary to make out their case, they are entitled to have the case go to the jury for a verdict on the merits. Vermont, etc., Co. v. Declez, 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143; Freese v. H. S. & L. Soc. 139 Cal. 392, 73 Pac. 172; Hanley v. California, etc., Co., 127 Cal. 237, 59 Pac. 577, 47 L. R. A. 597; Ferris v. Baker, 127 Cal. 522, 59 Pac. 937; Goldstone v. Merchants', etc., Co., 123 Cal. 625, 56 Pac. 776; Zilmer v. Gerichten, 111 Cal. 73, 43 Pac. 408; Pac. M. L. I. Co. v. Fisher, 109 Cal. 566, 42 Pac. 154; O'Connor v. Hooper, 102 Cal. 528, 36 Pac. 939; 2 Deering's Dig. p. 2105.

The petition for the probate of the will and for letters testamentary was filed by Wm. H. Leonard, Charles W. Buker, and C. A. Scott, who are the persons named in the will as executors. The testatrix died childless at the age of over 80 years, leaving surviving as her next of kin her sisters, Mrs. Buker, aged 78 years, Mrs. Wetterson, aged 75 years, and Mrs. Wheelock, aged 68 years, and two children of a deceased brother, namely, Wm. H. Leonard and Frank T. Leonard. Mrs. Wetterson has no child. Mrs. Buker has but one child, namely, the proponent Charles W. Buker. Mrs. Wheelock has two children, Frances W. Rosenheim and Benjamin A. Wheelock. Alfred F. Rosenheim is the husband of Frances W. Rosenheim. The estate of the deceased testatrix is conceded to be worth at least $140,000, and practically all of it was derived by her from the estate of her deceased husband, Benjamin R. Arnold, who died in 1898, a resident of San Diego county. The proposed will left seven-eighths of the stock in Pratt, Read & Company, a corporation, which comprised the principal part of the estate, to William H. Leonard, as sole trustee, in trust for the use of the three sisters and a nephew, Frank T. Leonard, during their respective lives, with remainder absolutely to certain named relatives. Under a former will, executed on April 7, 1902, similar trusts had been declared, but the property was to be converted into money and Alfred F. Rosenheim named as trustee and as coexecutor and co-trustee with Charles W. Buker. The former will also gave small specific bequests to Alfred F. Rosenheim and a legacy of $1000 to Alice C. Westgate in trust for charitable uses. A contest of the proposed will was filed by Alfred F. Rosenheim, Frances W. Rosenheim, and Louise A. Wheelock jointly, and Alice C. Westgate intervened and filed a separate contest. The principal grounds of opposition to the probate of the will were that its execution was procured by means of the undue influence of William H. Leonard, exercised over the testatrix for that purpose, and by means of fraud practiced on her by him.

It is not necessary to state at length the various circumstances tending to prove the undue influence and fraud charged. The direct and circumstantial evidence, together with the inferences and presumptions arising therefrom in favor of the contestants, tended to prove that the contestant Alfred F. Rosenheim, after the death of Mrs. Arnold's husband, and until the visit to her by Leonard in February, 1903, had been her trusted business manager, in charge of her affairs, and had possession of and title to nearly all her property, in trust for her use and for the purpose of carrying out the provisions of her last will after her death; that he was consulted about the making of the will of 1900, and the later will, dated April 7, 1902, above mentioned, which, in addition to the provisions above stated, also gave a legacy of $1,000 to the Young Men's Christian Association; that her feelings toward Rosenheim and his wife were very cordial and friendly, and she reposed in him the utmost confidence, and that he was entirely worthy of her trust and confidence, and faithful to her interests in all his dealings with her property in his charge; that Mr. Leonard, during his visit to her, extending from February 4, 1903, to early in May of that year, upon discovering the existence of the trusts committed to Rosenheim and the will of 1902, immediately began to instill into her mind suspicions of the good faith and trustworthiness of Rosenheim, and false impressions as to the legal effect of the several instruments creating the trusts under which Rosenheim held the property, finally causing her to believe that Rosenheim had actually deprived her of all her property, that she had nothing left of all the large estate received from the estate of her deceased husband, that he was dishonest and had deceived her, and was unworthy of her trust or confidence; and that under the influence of this unfounded belief she had executed the will of April 24, 1903, in which she did not mention Mr. Rosenheim at all, and by which she made Leonard an executor and sole trustee, and practically substituted him in the position of trust that by the former will was to be occupied by Rosenheim and Buker, and also omitted the charitable legacies to Alice C. Westgate and the Young Men's Christian Association contained in the prior will. There were circumstances from which it might have been inferred that Leonard had by these means obtained great control over the mind and actions of the testatrix, and that he was acting in bad faith for the purpose of procuring the new will to be made, in order to supplant Rosenheim and promote his own advantage. Some of the evidence, it is true, was capable of a different construction, and there was little, if any, direct evidence as to the motives of Leonard, or as to the actual operation of the undue influence. If a jury, upon the evidence given, had found in favor of the disputed will, we might not be disposed to disturb the verdict. Questions involving motives and inferences to be deduced from circumstances are, within reasonable bounds, exclusively within the province of the jury, or the trial court when sitting without a jury, and under the rules regarding the granting of a nonsuit they must all be resolved, so far as possible, in favor of the contestants. It would not be unreasonable to conclude, upon all the facts and evidence before the jury, that the will in question was not the natural result of the uncontrolled will of Mrs. Arnold, but the direct result of the fears exerted, false beliefs engendered, and sinister influence exercised over her to that end by William H. Leonard. Upon such a case it is error to grant a nonsuit.

It is asserted that Leonard himself believed that the legal effect of the instruments creating the trusts in Rosenheim was as he represented it to be. Even if he did believe this to be the true construction, it would not necessarily alter the case. If he was acting in bad faith for the purpose of procuring the execution of the new will, the fact that he actually believed to be true some of the false representations by which he obtained the undue influence required would not make the transaction an innocent one, nor render a will so procured valid.

Before the trial the contestants caused the deposition of William H. Leonard to be taken in the cause before a notary public in San Diego, who was also a stenographer and took down the deposition in shorthand, afterwards transcribing it into typewriting. At the time of the trial Leonard was present, and the deposition was duly signed, certified, and on file. The contestants did not call him as a witness, nor read the deposition, or any part thereof, in evidence. They pursued the somewhat unusual course of producing the notary as a witness and causing her to testify before the jury to certain parts of the testimony of Leonard contained in the deposition, refreshing her memory from her shorthand manuscript. Counsel for the proponents insist that such evidence is incompetent; that upon a proceeding to contest a will the several proponents, or one of several legatees or devisees, are not jointly interested, so as to make the declarations or admissions of one competent evidence against the others; and that one named as executor, who also petitions for the probate of the will, does not represent the legatees or devisees to the extent that his declarations can be proven to show that the will was procured by undue influence or fraud, although he is also the party charged with the fraud and undue influence, and to some extent benefited by the disputed will. The question is argued by both parties, and counsel for contestants especially urge a decision thereon, because it will arise upon another trial of the case. The authorities are very conflicting on the question, and many of the decisions seem to have been not well considered. Mr. Underhill says that the majority of the cases reject such evidence. 2 Underhill on Wills, § 163. There is some doubt as to the accuracy of this statement. See 49 Cent. Dig. cols. 488–490. It is not necessary for us to decide the question, and we express no opinion concerning it. Proponents did not object to the testimony, and it was allowed to go to the jury, and was considered by the court in deciding the motion for a nonsuit. If timely objection had been made at the trial, the contestants, upon a decision against them, could have introduced in evidence the deposition, or such parts thereof as they deemed material, or could have called Leonard as a witness. The admission of the testimony made it unnecessary for them to do so. Under such circumstances, upon an appeal from the judgment of nonsuit, the proponents cannot be heard to say that the evidence was incompetent, and should not be considered by this court in determining whether or not the nonsuit was properly granted. Wright v. Roseberry, 81 Cal. 91, 22 Pac. 336. Upon another trial, if similar testimony is not permitted, and the contestants are unwilling to risk their case upon the proposition that such testimony is admissible, they may either examine Leonard as a witness or resort to the deposition on file.

Complaint is made of the exclusion by the court, upon objections by the proponents, of evidence of a number of other facts and circumstances which it is claimed would also tend to prove the undue influence and fraud alleged. In many instances these complaints are well founded, and in view of the probability of another trial it becomes necessary to notice these exceptions and point out the proper course to be pursued in the further progress of the case. We do not mean to be understood to declare with respect to some of these rulings that, if taken alone, they would be so injurious as to justify a reversal.

The court should have allowed the testimony offered by the contestants to show the extent and character of the estate of Mrs. Arnold, committed to the charge of Mr. Rosenheim, as agent and trustee, prior to the making of the disputed will, together with the causes which led her to give him the power of attorney, and the general nature and character of the business done by him for her after her husband's death and prior to the revocation of the power in April, 1903, including her consultations with him as late as March, 1903. The decision of the questions at issue depended largely on the degree of confidence and trust reposed in Rosenheim by Mrs. Arnold prior to the advent of Mr. Leonard, and upon the faithfulness and good faith of Rosenheim as steward of her affairs, and whether or not he was deserving of her confidence and trust, or was "crooked," as Leonard suggested to her, and also whether or not she was accustomed to attend to her business herself, or was capable of it without assistance, and on her affection and disposition toward Rosenheim. This evidence would have assisted in arriving at the truth on these subjects, and, if favorable to Rosenheim, would have been material to the case of the contestants; and after the court permitted the proponents, apparently for the purpose of showing Rosenheim's bad faith in receiving more than his services were worth, to introduce evidence that she had given him a large amount of valuable stock as compensation for his services aforesaid, the evidence of the character and value of the property and of the services named became proper to rebut the imputation of bad faith and dishonesty on his part. Too much detail need not have been allowed, but the court should have permitted sufficient evidence on the subject to put the jury in a position to judge fairly of the previously existing conditions. These propositions embrace a large number of the rulings complained of.

The evidence that Rosenheim, in the fall of 1902 and on previous occasions, informed Leonard of the state of Mrs. Arnold's affairs and of his doings as her agent, should have been admitted. It would tend in some degree to show Leonard's knowledge of the conditions existing when he arrived at her residence in 1903, and enable the jury to judge more intelligently concerning his actions and motives.

The reasons for Mrs. Arnold's custom, of having Rosenheim prepare and sign, as her attorney in fact, the checks used by her to pay her current bills, as stated by her at the time she began the custom, would tend to prove her mental condition or business capacity at the time, and proof of such statements by her should have been allowed. Evidence of her complaints of failing eyesight and other bodily ailments as far back as the year 1900 was not too remote, and should have been admitted to show her physical condition and dependence on others. Donnelly v. Rees, 141 Cal. 63, 74 Pac. 433.

The feelings of Leonard toward Rosenheim and the testatrix, and other facts and circumstances tending to show a motive inducing him to desire the execution of the new will, or that he was acting in bad faith in creating suspicion of Rosenheim in the mind of the testatrix, were relevant on the issue of fraud and undue influence, although such motive and bad faith would not of themselves be sufficient proof thereof. Estate of Betts, 113 Iowa, 111, 84 N. W. 975; Coghill v. Kennedy, 119 Ala. 657, 24 South. 459; McLaughlin v. McDevitt, 63 N. Y. 219; 1 Wigmore on Ev. § 396. For these reasons the court should not have stricken out the evidence that Leonard knew that Mr. Rippey had been Mrs. Arnold's legal advisor at the time he called in another attorney, and should have allowed the testimony showing his refusal to answer the question whether or not, after he had obtained control of Mrs. Arnold's money, he had appropriated $400 of it to his own use by her direction, and his statements in regard to the monthly allowance made to him by the testatrix, his issuings of checks upon her account in favor of his own family, after he became her attorney in fact, his activity in instituting proceedings against Rosenheim, immediately after the last will was made, his declarations to his sister-in-law that he would break any will of Mrs. Arnold that did not provide for him, and the evidence that in 1901 Mrs. Arnold made a gift to him of $4,000, and that at Rosenheim's suggestion she made Leonard a monthly allowance of $75, beginning in 1901 and continuing up to April 1903, in connection with the letter written by Rosenheim in December, 1902, informing Leonard of the fact of his agency in the matter. The evidence of his use of her funds soon after the new will was made would also tend to prove his influence over her, if made with her knowledge, and his intentions if she was not informed thereof.

It was proper to show that the will of 1900 was substantially the same as that of 1902, and to explain the changes made by the latter. This would tend to show a more permanent and fixed state of mind of the testatrix with regard to her general plan for the disposition and administration of her estate as declared by those wills, prior to the execution of the disputed will, and bring out in a stronger light the significance of any changes therefrom in the will of 1903 in controversy, and to raise a greater probability that the latter was the product of fraud and undue influence. For the same purpose the contestants should have been permitted to show that shortly before the time of making the last will the testatrix was still as much interested and as favorably disposed as formerly toward the children's home carried on by Mrs. Westgate, and toward the Young Men's Christian Association. Both of these institutions were given legacies by the will of 1902, and neither was mentioned in the will in dispute.

It is claimed by the proponents that the declarations and acts of the testatrix, not constituting a part of the res gestæ and not made at the very time of the execution of the will in dispute, are not admissible to prove the exercise of the undue influence or the fraud charged. This proposition may be conceded to be correct. There is, however, a distinction between the effect of such declarations and acts to prove the undue influence and fraud and their effect to prove the state of mind of the testatrix. The distinction is clearly stated in the case of In re Calkins, 112 Cal. 301, 44 Pac. 577. The court say: "The external facts constituting the exercise of undue influence must be established by other evidence than the declarations of the testator. His declarations are incompetent to show either that the influence was exercised, or that it affected his actions, and are inadmissible, except as they may illustrate his mental state and give a picture of the condition of his mind contemporaneous with the declarations themselves. Whenever the condition of the mind is a fact which it is desirable to prove, it may be established by such evidence as is competent for that purpose. The mental condition of the individual is made manifest to others by his statements, declarations, conversations, as well as by his conduct, and, when the state of a testator's mind at the time of executing the will is the fact to be shown, his contemporaneous declarations or statements furnish the most satisfactory evidence of that fact." The question is also carefully considered by Mr. Wigmore in his work on Evidence (volume 1, § 230; volume 3, § 1738). Whenever the declarations of the testator constitute narratives of the exercise of the undue influence or of the effect of such influence upon him, they are inadmissible for that purpose, whether made before or after the execution of the will. If made at the time of its execution, they may be admissible, if they are so made as to constitute a part of the res gestæ; but, if not, although made at the time, they are no more competent than if made subsequently. If they are of such character that they also reveal his condition of mind, they may be admissible for that purpose, though not of the res gestæ; but their effect must be carefully limited to the question of his condition of mind, and they must not be considered as narrations of the exercise or effect of the undue influence. In re McDevitt, 95 Cal. 26, 30 Pac. 101; Estate of Donovan, 140 Cal. 396, 73 Pac. 1081; Estate of James, 124 Cal. 653, 57 Pac. 578, 1008; Estate of Gregory, 133 Cal. 137, 65 Pac. 315; Haines v. Hayden, 95 Mich. 347, 54 N. W. 911, 35 Am. St. Rep. 566; Coghill v. Kennedy, 119 Ala. 664, 24 South. 459; Tyler v. Gardiner, 35 N. Y. 576.

Minnie Schaffnett, the stenographer who testified to portions of the examination of Leonard at the time he gave his deposition before referred to, was not allowed to testify to the questions put to Leonard by the attorney who conducted the examination, but was required to confine her testimony to the answers made by Leonard. C. H. Rippey also testified as a witness concerning the conversations between himself and Mrs. Arnold, the testatrix. He was not allowed to give the statements made by him to Mrs. Arnold in the course of the conversation, and his testimony was confined to the replies made by Mrs. Arnold. These rulings were erroneous. Occasionally it may happen, in a conversation or upon the examination of a witness, that a declaration by one party to the conversation, or the answer to a question put to a witness, may be so complete in itself that its full meaning can be understood without the aid of the remarks or of the question, as the case may be, to which it is addressed; but this is not usually the case, and the question or previous remarks should always be admitted in evidence, unless the court, having knowledge not disclosed to the jury, can see that the answer alone shows its full meaning.

The declarations of Leonard, made in his answers to the questions put to him in taking the deposition above mentioned, were, as we have stated, not introduced in the form of a deposition, but were proven by secondary evidence, consisting of the testimony of the stenographer who took them down in shorthand. Therefore, though they were made under oath, they did not have effect and were not admitted as the testimony of Leonard, but as his mere declarations or admissions against his interest. Consequently they were incompetent evidence of statements made by Mrs. Buker in regard to the execution of a trust deed by Mrs. Arnold and Rosenheim, or of any independent facts in his own favor, brought out in his cross-examination of Miss Schaffnett or afterward, and not connected with his declarations introduced by the contestants on her examination in chief. The objections of the contestants to the evidence of such declarations should have been sustained.

The evidence that the deed of Mrs. Arnold to Rosenheim and his declaration of trust in her favor were read over to her at the time they were executed on April 14, 1902, and her statements at that time as to their purpose and effect, were competent and relevant to show her failing memory and weakness of intellect in April, 1903, when she seemed to have forgotten them entirely and appeared to be unable to comprehend them when they were again read to her.

The contestants should have been allowed to prove, if they could, that the deed to Rosenheim was made absolute in form because of the fact that a person negotiating with Mr. Scott for the purchase of some of the San Diego real estate had expressed an objection to accepting a deed executed by an attorney in fact. This circumstance was pertinent to show the good faith of Rosenheim, and to repel any inference of an improper motive on his part with respect to the execution of the deed to her absolute in form. They should also have been allowed to show that Mr. Rippey had not told Leonard or Mrs. Arnold that she could not get the trust deed revoked without Rosenheim's consent. Testimony had been given to the effect that Leonard had indirectly stated to Mrs. Arnold that Mr. Rippey had declared this to be the law with respect to the deed. Evidence to the contrary would have shown that Leonard was making false statements to her concerning the effect of the deed.

A number of other rulings are complained of upon which we express no opinion. They may not occur upon another trial, and the evidence excluded or admitted thereby was not of serious importance.

The judgment and orders appealed from are reversed, and the cause remanded for a new trial.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

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147 Cal. 596

KENNEDY v. LEE. (S. F. 2,848.)

(Supreme Court of California. Aug. 30, 1905.)

1. SALES—CONSTRUCTION—CONSIDERATION OF INSTRUMENT AS A WHOLE.

Where a contract of sale is not in form a unilateral bill of sale, but an agreement executed by the two parties, and containing covenants by each, the meaning of the parties and the legal effect of the contract are such as are disclosed by the whole instrument.

2. CORPORATIONS — SALES OF STOCK—CONDITIONAL SALE—NONPERFORMANCE OF CONDITIONS.

A contract for the sale of corporate stock, which recites that the seller sells to the buyer, on the condition that the latter shall pay a specified sum therefor, on the happening of the conditions that the buyer shall obtain control of the corporation and shall within four years realize, by a sale of the property or earnings from a mine thereon, a designated sum, is a contract for the conditional sale of the stock, and on the failure of the buyer to obtain control of the corporation, or to realize the sum designated within four years, the contract will cease, and the ownership of the stock will remain in the seller.

3. SAME—NEW AGREEMENT—CONSIDERATION.

Where a contract for the sale of corporate stock was made on the condition that the buyer should obtain control of the corporation, and realize from the property or from a mine thereon a specified sum within four years, the execution of a new agreement, before the expiration of the four years, whereby the buyer agreed to pay for the stock whenever he secured the specified sum from a sale of the property, or from the mine thereon, was supported by a sufficient consideration, as it gave the buyer the right to continue to possess the stock, and the right to extend his opportunity to make a sale of the property or work the mine thereon.

4. CONTRACTS—CONSTRUCTION GIVEN BY PARTIES—EFFECT.

The construction which the parties give to a contract prevails, where the language used will reasonably allow such construction.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, 753.]

5. SAME — CONSIDERATION — PRESUMPTION — BURDEN OF PROOF.

Under the express provisions of Civ. Code, § 1614, a written contract is presumptively supported by a consideration, and hence the party asserting a want of consideration has the burden of proving it.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 404-407.]

6. WITNESSES—IMPEACHMENT—CONVICTION OF CRIME—FOREIGN JUDGMENT.

A foreign judgment, properly authenticated, is inadmissible to impeach a witness, where it does not show a conviction of the witness of a felony.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1161, 1162.]

7. CONTRACT—ACTION ON—CONSTRUCTION BY PARTIES.

In an action on a written agreement, evidence that defendant construed the agreement as plaintiff did was admissible.

8. SALE — CORPORATE STOCK — CONDITIONS — BUYER'S USE OF STOCK.

The right of a seller of corporate stock, under contract stipulating that the sale was made on condition that the buyer should obtain control of the corporation, to recover the purchase price, was unaffected by the manner in which the buyer used the stock or manipulated other stock to obtain control of the corporation, where the rights of third persons were not involved.

Beatty, C. J., and Shaw and Angellotti, JJ., dissenting.

In Bank. Appeal from Superior Court, El Dorado County; John Hunt, Judge.

Action by Louise G. Kennedy against John Lee. From a judgment for plaintiff, defendant appeals. Affirmed.

Rehearing denied September 29, 1905.

Jesse W. Lilienthal and Garret W. McEnerney, for appellant. Campbell, Metson & Campbell, for respondent.

McFARLAND, J. This is an action brought by the plaintiff, Mrs. Louise G. Kennedy, to recover of defendant $10,000 alleged to be due her upon two certain written agreements. The verdict and judgment were for the plaintiff in the trial court for the amount claimed, and defendant appeals from the judgment and from an order denying his motion for a new trial.

On February 2, 1889, the plaintiff was the owner of 25,000 shares of the capital stock of the corporation called the Big Canyon Gold Mining & Milling Company, being one-fourth of the entire capital stock of said corporation. On that day the plaintiff and defendant executed the first agreement here involved; plaintiff being the party of the first part and the defendant the party of the second part. In this instrument it is stated that plaintiff is the owner of said stock, and has "agreed to sell" the same to the defendant, and that defendant has "agreed to buy" the same from plaintiff "upon the conditions following: that the party of the second part shall pay to the party of the first part the sum of $10,000 in United States gold coin therefor, upon the happening of the following conditions." Then follow two main conditions, which are repeated in the latter part of the instrument, and are hereinafter quoted. The instrument then proceeds to state that for the consideration before mentioned, and $1, the party of the first part "sells to the party of the second part all her right, title, and interest in" the said 25,000 shares of stock, upon condition "that defendant shall pay to plaintiff $10,000," upon the happening of the following conditions: "First. That the party of the second part shall obtain control of the majority of the capital stock of said corporation, either by holding certificates of the shares of the capital stock of said corporation in his own name, or by holding proxies from the owners of any certificates of stock of said corporation, from the owners thereof, or by having the support of any of its stockholders of said corporation in obtaining a control of the majority of the shares of said corporation and controlling its management. Second. That the mining property of said corporation shall, within four years from the date of the execution of this agreement, realize, either by sale of said property, or by the earnings from the mine upon said property after the payment of all expenses and debts incurred in the working and development of said property and the mines therein, the sum of $45,000 in United States gold coin, and that said sum of $10,000 shall be payable to the party of the first part by the party of the second part only upon the happening of the two conditions last mentioned."

The certificate of the said stock went into the possession of defendant at the time of the agreement, and he did obtain control of a majority of the capital stock. But during the four years after the date of the agreement the said mining property did not realize, either by sale or by its earnings, the said sum of $45,000; but it is averred in the complaint that in January, 1893—before the expiration of the four years mentioned in said first agreement—the said parties entered into a second written agreement, by which the terms and conditions of the first contract concerning the time of the payment of said $10,000 were changed, and by which defendant agreed that he would pay said sum of money whenever he secured the $45,000 from operating said mine, or from the sale thereof or of the capital stock of said corporation, notwithstanding anything in the first contract to the contrary as to the time he should get said $45,000. This averment is denied by defendant; but the evidence on that issue, although to some extent conflicting, was clearly sufficient to warrant the jury in finding that such written contract was made as alleged. It is averred and admitted that afterwards defendant did sell the said mine and receive as the purchase price therefor $75,000, and that at the time of the commencement of this action he had received of said purchase money at least more than $45,000. If this second contract was a valid one, plaintiff has clearly the right to recover the $10,000, and the judgment is right.

But appellant contends that there was no consideration whatever for the second contract, and that therefore it was void. This contention rests upon the propositions that by the first agreement the whole title to the stock passed absolutely and unconditionally from respondent to appellant; that thereafter she had no further interest in it to transfer, or which could be the subject of a contract, or in relation to which appellant could receive from respondent any benefit which he did not already possess; that if appellant during the four years mentioned in the first contract should, by working the mine or by selling it, realize $45,000, respondent would be entitled to receive the $10,000, and if he did not, although he might have done so the next day, then respondent was to get nothing; that, in any event, appellant continued to be the absolute owner of the stock after the expiration of the four years; and that, therefore, there was no consideration for the second contract, and his promise therein was wholly gratuitous. In support of this view, appellant asked the court to instruct the jury "that by virtue of the agreement of February 2, 1889, the defendant in this case became the absolute owner of all the right, title, and interest that the plaintiff, Louise G. Kennedy had in the 25,000 shares"; and counsel for appellant say in their brief that "the said agreement as to the ownership of the shares constituted a present sale." We do not think that these propositions can be maintained.

If the contention above stated is maintainable, it must be upon the ground that the word "sells," used in the first agreement, does itself, by virtue of its technical legal significance, necessarily operate to completely and absolutely transfer the whole legal title to the property, and that this inevitable result is beyond the reach of any modification by any other language of the instrument; but the effect of an instrument is not always determined by any one of its words or phrases. The document in question here is not, in form, a unilateral conveyance, or assignment, or bill of sale. It is—as designated on its face—an "agreement" executed by two parties, and containing covenants by each; and in such case the meaning of the parties and the legal effect of the instrument are such as are disclosed by the whole instrument. Perkins v. Mettler, 126 Cal. 105, 58 Pac. 384; Rodgers v. Bachman, 109 Cal. 552, 42 Pac. 448. This rule of construction is well illustrated in Herryford v. Davis, 102 U. S. 235, 26 L. Ed. 160. In that case the question was whether, by the written instrument there involved, certain railroad cars were merely leased to a railroad company, or whether the title to the cars passed to the latter; and it was held that, considering the whole instrument, the title passed, the court saying: "Although the instrument industriously and repeatedly spoke of loaning the cars for hire, for four months, and delivering them for use for hire, it is manifest that no mere bailment for hire was intended." And in answer to the question what the true construction of the contract is the court said: "The answer to the question is not to be found in any name which the parties may give to the instrument, and not alone in any particular provision it contains disconnected from all others, but in the ruling intention of the parties, gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account." And so in the case at bar the answer to the question whether by the instrument here involved there was an absolute or only a conditional sale the intention of the parties "must be gathered from all the language they have used."

In Benj. Sales (7th Ed.) par. 320, the third rule for determining whether or not a sale is only conditional is stated as follows: "Where the buyer is bound by the contract to do anything as a condition either precedent or concurrent on which the passing of the property depends, the property will not pass until the condition is fulfilled, even though the goods may have been actually delivered into the possession of the buyer." In the case at bar the buyer was certainly to do something before the title would pass. The language is that the party of the first part "sells" to the appellant "upon condition that the party of the first part shall pay," etc. The sale was therefore upon condition, clearly a conditional, and not an absolute, sale; and the title did not pass, and was not to pass, until the fulfillment of the conditions. And what were the conditions? Considering the contract as a whole, we think that the intentions of the parties, as expressed therein, were that the appellant was to have possession of the stock to assist him in getting control of the corporation and the mine; that, if he should succeed in doing so, then within four years he should realize out of the property by mining or by selling it $45,000, if he could accomplish that result, and pay to respondent $10,000, in which event the title to the stock would pass to him; and that, if he should fail to accomplish these results, or either of them, within the four years, then the contract would end, and the ownership of the stock would be where it was before the contract was made. It was based on the probability of these results being accomplished. The contract was executory and conditional, and the general rule as to such a contract is that the parties have the right to change it at any time during its life. But at all events in the case at bar there was clearly a consideration for the second contract in the fact that by it appellant was given the right to continue to possess and control the stock, and to extend his opportunity to make a profitable sale of the property, or to succeed in profitably working the mine. Moreover, this was the construction which the parties themselves evidently put on the first contract, for, in addition to the fact of the making of the second one, the preponderance of evidence shows that after the second contract appellant continued to recognize the interests of respondent in the stock; and the construction which the parties give to a contract prevails where the language used will reasonably allow such construction. Keith v. Electrical En. Co., 136 Cal. 181, 68 Pac. 598. Again, a consideration is presumed from the fact that a contract is in form a "written instrument" (Civ. Code, § 1614); and, while such presumption is often easily overcome, still the burden of doing so in the case at bar was on appellant, and we do not think that he has shown a want of consideration.

If the foregoing views are right—that is, if our construction as above stated of the first contract is correct—then the numerous exceptions of appellant to rulings of the court in the matters of instructing the jury, passing upon admissibility of evidence, etc., are easily disposed of. The court fully instructed the jury that plaintiff could not recover unless the second contract was in writing, and no error was committed in instructing or refusing to instruct on that subject.

There was no error in refusing to admit in evidence a record of a certain judgment rendered in a court of the state of New York, which was offered by appellant for the purpose of impeaching respondent's witness J. P. Kennedy. Conceding, for the purposes of this case, that the judgment was properly authenticated, it was inadmissible because it did not show a conviction of a felony.

The other objections were mainly to questions asked by respondent of witnesses bearing upon the issue of the execution of the second contract; and we think that the questions objected to were pertinent to that issue, and therefore admissible. It was proper for respondent to show the conduct of appellant, both before and after the second contract, as evidence that he understood that respondent had an interest in the stock under the first contract, which he could secure by the second contract, and that, after the date of the alleged second contract, he recognized her rights. All this tended to show that he construed the first contract as respondent did, and increased the probability that he executed the second contract. Neither are respondent's rights in the premises lessened or affected by the manner in which appellant used her stock, or manipulated other stock, in order to get control of the corporation. She gave him possession of her stock for the intended purpose, and there are no rights of third parties involved. There are no other points calling for special notice.

The judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.; VAN DYKE, J.

We dissent: BEATTY, C. J.; SHAW, J.; ANGELLOTTI, J.

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1 Cal. App. 367

BUTLER v. DELAFIELD et al.

(Court of Appeal, Third District, California. July 25, 1905.)

1. PLEADING—ANSWER — INCONSISTENT DEFENSES.

The answer in an action on contract may deny the making of it as alleged, and in separate defenses admit its execution.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 189.]

2. PARTNERSHIP—ACTION AGAINST PARTNERS —DESIGNATION AS "DEFENDANTS."

Where the complaint in its caption designates the parties defendant by their individual names, describing them also as copartners under the firm name given, and in its body alleges they are copartners, but thereafter refers to them as defendants, and the answer pursues the same course, the word "defendants" will be understood to refer to the parties defendant in their alleged relation to each other.

3. APPEAL—HARMLESS ERROR—DEMURRER.

The improper overruling of demurrers to the answer for uncertainty and ambiguity, not having prejudiced any substantial right of plaintiff, is not ground for reversal of the judgment for defendants.

4. SAME—CONFLICT IN FINDINGS—HARMLESS ERROR.

There being no conflict in the findings as to the counterclaim on which defendants were given judgment, it is not ground for reversal that there was conflict in findings, by reason of the court finding certain paragraphs of the complaint untrue and certain paragraphs of the separate defenses to be true; the plaintiff having offered no evidence, so that it was the court's duty to find against him, and findings as to the defenses interposed as a bar being unnecessary after plaintiff's failure to offer proof of his allegations.

5. COUNTERCLAIM — CLAIM IN PARTNERSHIP CAPACITY.

Defendants, sued as partners, are properly allowed their counterclaim, a judgment against plaintiff in an action on a cause of action accruing to them in their partnership capacity, though in that action the individual members of the firm were plaintiffs.

6. JUDGMENT—PAYMENT—BURDEN OF PROOF —HARMLESS ERROR.

In a suit on a judgment, there being no evidence to rebut the presumption of nonpayment, so that proof of nonpayment is unnecessary, admission of improper evidence to prove nonpayment is harmless.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by A. B. Butler against Richard Delafield and others, copartners doing business under the firm name and style of Delafield, McGovern & Co. From an adverse judgment, plaintiff appeals. Affirmed.

Rehearing denied August 22, 1905.

Stanton L. Carter, for appellant. Carter & Pomeroy and M. K. Harris, for respondents.

CHIPMAN, J. Appeal from a judgment of the superior court of Fresno county in favor of defendants, and from an order denying plaintiff's motion for a new trial.

The complaint demands damages for the breach of a contract to take 30 car loads of dried prunes and advance thereon 75 per cent. of their market value, and to sell the same for a commission of 2½ per cent., and account for the proceeds received from the sale of the prunes, less advances, expenses, and commissions. It is alleged that plaintiff shipped the 30 car loads of dried prunes to defendants, and that defendants received and made the agreed advances on 15 car loads, but refused to receive or sell or make advances on the remaining 15 car loads, but left them uncared for, whereby they deteriorated in value, and plaintiff was compelled to employ other persons to sell the same, to his damage in the sum of $5,500.

In their supplemental and amended answer defendants deny making any agreement "that they would take and receive, or take or receive, 30 car loads of dried prunes on commission, or advance to the plaintiff 75 per cent. of the market value thereof, or care for or sell said prunes at the best or any market prices obtainable therefor, * * * less any actual expenses, * * * and the advances made to plaintiff on account thereof, and a commission of 2½ per cent. of the amount received therefor, and deny that said 2½ per cent. was to be retained by said defendants as full or any compensation for the services of said defendants in caring for and selling said prunes"; deny that plaintiff shipped to defendants "the 30 car loads of dried prunes in accordance with the contract set forth in said complaint," and that "as to the other 15 car loads of said prunes" deny that defendants refused to honor or accept or pay plaintiff's drafts for advances of "75 per cent. of the market value thereof," or that defendants refused "to receive or take, or accept or care for or sell the same, or permitted or allowed said 15 car loads of prunes" to remain uncared for until they were damaged, or that plaintiff suffered damage thereby. For a second defense, and in bar of the action, the answer alleges that defendants sued plaintiff in New York for $1,351.31, being the balance alleged to be due them for moneys advanced and paid for services performed by them for plaintiff, "under and in pursuance of the contract set forth in the complaint in this action," and that in the New York action plaintiff set up as a counterclaim "the same cause of action" against the defendants herein "as is alleged against them in the complaint in the present action," and that judgment was rendered in the New York action in favor of defendants herein (plaintiffs therein) and that said judgment has become final. For a "third defense" the answer sets up as a counterclaim the judgment in the New York action, and alleges that "no part thereof has been paid." The pleadings are verified.

The present plaintiff demurred generally to the answer, and to certain portions thereof he demurred on the further grounds of ambiguity and uncertainty. The demurrer was overruled, and the cause was tried by the court without a jury. Plaintiff offered no evidence in support of his complaint, whereupon defendants introduced in evidence an authenticated copy of the judgment roll and the judgment rendered in their favor in the New York action, and the deposition of the defendant McGovern as to the nonpayment of the New York judgment. The court gave judgment in favor of the present defendants for the amount of the New York judgment set up in the counterclaim. To the New York judgment, or to its validity, no objection was made when introduced, and no attack is made upon it in plaintiff's brief. Objection to McGovern's deposition was made, as will be hereafter noticed.

In its findings the court found the true name of John Doe Carey to be Frederick F., and that defendants "are, and at all and singular the times mentioned in the pleadings herein have been, copartners, doing business under the firm name and style of Delafield, McGovern & Co.," as alleged in the complaint and the answer; that "all and singular the allegations contained in paragraph 2 and 3 of the plaintiff's complaint are, and each of them is, untrue"; "that all and singular the allegations contained in paragraphs 4, 5, 6, 7, 8, and 9 of the defendants' supplemental and amended answer are, and each of them is, true." As conclusions of law the court found that defendants were entitled to judgment for the sum of $2,160.40, and costs, and that judgment be entered accordingly.

1. It is claimed that the demurrer should have been sustained, because the answer was ambiguous and uncertain, as it did not deny all of the specific averments of the verified complaint, but was only a denial of their literal truth. In some particulars this is true, but in others the denials were sufficiently specific. It was permissible to deny the making of the contract as alleged, and in the separate defenses admit its execution; for inconsistent defenses may be made, even where the pleadings are verified. Banta v. Siller, 121 Cal. 414, 53 Pac. 935. There is no ambiguity in respect of the parties defendant. The complaint, in its caption, designates them by their individual names, describing them also as copartners under the firm name given, and the complaint contains an allegation that these individuals were copartners, but thereafter refers to them as defendants. The answer pursues the same course. The word "defendants" must be understood to refer to their alleged relation to each other. Hawley Bros. Hardware Co. v. Brownstone, 123 Cal. 643, 56 Pac. 468, cited by appellant, does not sustain their contention. In that case it was held that, where several defendants are sued by their individual names, and described as partners, they may be referred to as defendants. But the court held that in such case an allegation that "the defendant" had not paid certain notes sued on was an insufficient allegation of nonpayment as to all the defendants. Demurrers for uncertainty and ambiguity, when improperly overruled, do not always work a reversal of the judgment, and will not do so when it appears that the matters complained of by demurrer have not affected any substantial right of the demurrant. Gassen v. Bower, 72 Cal. 555, 14 Pac. 206; Alexander v. Central L. & M. Co., 104 Cal. 532, 38 Pac. 410; Hawley Bros. Hardware Co. v. Brownstone, 123 Cal. 643, 56 Pac. 468; Stephenson v. Deuel, 125 Cal. 656, 58 Pac. 258; Williams v. Casebeer, 126 Cal. 77, 58 Pac. 380. In Stephenson v. Deuel, the court said: "The ruling upon demurrer to defendant's amended answer on the ground of uncertainty and ambiguity cannot now avail plaintiff. The pleadings are verified, and defendants' answer is deemed controverted. Where there is an answer and trial on the merits, the court will not reverse the judgment for ambiguity and uncertainty, unless it clearly appears that demurrant was prejudiced by the alleged infirmity in the pleading." In the present case plaintiff could not have been misled by the denials in the answer, and as to the affirmative defenses pleaded, which were independent of and separate from, and might well be inconsistent with, the denials of plaintiff's complaint, the allegations were free from ambiguity or uncertainty. Plaintiff made no attempt by evidence either to support his complaint or to controvert the evidence in support of the separate defenses. Conceding more or less ambiguity in the denials of the answer, it is quite clear that plaintiff was not prejudiced by the overruling of his demurrer.

2. It is also contended that the findings are conflicting and uncertain. This contention arises from the fact that the court found certain paragraphs of the complaint to be untrue, and certain paragraphs of the separate defenses set forth in the answer to be true. Remembering that the plaintiff offered no evidence in support of his complaint, it was the duty of the court to find against him. The second defense was interposed as a bar to plaintiff's action, and no finding was necessary thereon after plaintiff's failure to offer any proof of his allegations. Coming to the findings on the counterclaim, arising out of the New York judgment, there is no claim of any conflict. Conceding certain conflict, as claimed by plaintiff, in respect of other findings, the findings sustain the judgment as rendered; for it rests on the counterclaim. Looking to the findings in their entirety, as we may do to support the judgment, we think them sufficient.

3. It is also contended that the findings are contrary to and not sustained by the evidence, because the court found that the firm of Delafield, McGovern & Co. was given judgment upon the New York judgment, while the judgment offered in evidence was in an action wherein the individual members of the firm were plaintiffs. The evidence shows that the cause of action sued upon in New York accrued in the partnership capacity of the then plaintiffs. They, as defendants in the present action, are sued in like capacity, and judgment is likewise given. There is no mistaking the fact that the defendants here and the plaintiffs in New York were the same.

4. Proof of nonpayment of the judgment, after the judgment had been duly proved, was not necessary. The burden of proof of payment was then upon plaintiff. 1 Jones on Evidence, §§ 52, 53, 176; Melone v. Ruffino, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127; Stuart v. Lord, 138 Cal. 672, 72 Pac. 142. The deposition of defendant McGovern was taken at Seattle and was admitted and read over the objection of plaintiff. His evidence was taken for the single purpose of proving nonpayment of the New York judgment. He testified that up to the time he left New York, in August, 1902 (long after the present action was brought), the judgment pleaded had not been paid. His testimony was competent as far as it went, but, of course, was insufficient to show nonpayment at any subsequent date. His statements that the judgment had not been paid since he left New York were hearsay and inadmissible. But nonpayment, we have seen, was presumed, and no evidence was offered to rebut that presumption. The error in admitting McGovern's deposition, if error, was harmless.

The judgment and order are affirmed.

We concur: **McLAUGHLIN, J.; BUCKLES, J.**

1 Cal. App. 381

ALBERY v. GEIS.

(Court of Appeal, Third District, California. July 25, 1905.)

PARTNERSHIP—ACCOUNTING.

The judgment for plaintiff, in a suit between partners for an accounting, cannot be sustained because of failure to show a complete winding up of the firm's affairs; the finding merely being that plaintiff has received from moneys due the firm, in excess of expenditures made for it, a certain sum, and that defendant has received a certain greater sum, and there being no showing as to outstanding indebtedness of the firm, or as to any other claims or assets of the firm.

Appeal from Superior Court, Glenn County; Chas. M. Head, Judge.

Action by K. Albery against Ben F. Geis. Judgment for plaintiff. Defendant appeals. Reversed.

Wm. M. Finch, for appellant. Donohoe & Freeman, for respondent.

BUCKLES, J. These parties are lawyers residing at the town of Willows, and on January 1, 1899, entered into a copartnership to practice law. The said copartnership was mutually dissolved January 1, 1903. The complaint herein alleges that the defendant has collected sums of money belonging to the late firm which he has not paid over. At the time of the dissolution there was no accounting nor disposition made of the assets of the firm, nor of the debts due the firm; but the parties did enter into an agreement whereby each should collect the debts due the firm, make statements thereof, and pay over to the other what might be due him. The complaint further alleges that the defendant has collected about $3,500, which he has not accounted for, and has not paid over to plaintiff his share, and then demands an accounting and judgment for whatever may be found due. The defendant admits, alleges, and also demands an accounting and judgment for whatever may be found due him from plaintiff. The judgment was a personal judgment in favor of the plaintiff for $200.39, and this appeal comes here upon the judgment roll alone.

Findings were made, and the only finding that there was any kind of an accounting of the partnership affairs is found in finding No. 4, as follows: "That during the term of said copartnership, and since the dissolution thereof, plaintiff has received from moneys due said firm the sum of $1,358.83, and has paid out on account of expenses of said firm the sum of $5.87, being $1,352.76 over and above what he has expended; that during said time the defendant has received from moneys due said firm the sum of $2,253.55, and paid out on account of expenses of said firm the sum of $500, being $1,753.55 over and above what he has expended, and being $400.79 in excess of that received by plaintiff." As conclusion of law the court finds that plaintiff is entitled to a decree, first, "for an accounting between plaintiff and defendant, which has now been had in the action." If anything is due either party in this action, it must be determined after a full and complete accounting of the copartnership affairs. The recitals of the finding do not show that any account has been taken of outstanding indebtedness the firm might be owing to any other person, nor of any claims the firm may have had against any person, nor of any firm assets, other than those mentioned in said finding, and no statement or finding that all the assets had been exhausted. An accounting means that there is to be a complete winding up of the affairs of the partnership.

Upon the authority of Clark v. Hewitt, 136 Cal. 77, 68 Pac. 303, the judgment herein must be reversed; and it is so ordered.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

1 Cal. App. 383

GRANT et al. v. JUSTICE'S COURT OF SECOND TP., TUOLUMNE COUNTY, et al.

(Court of Appeal, Third District, California. July 25, 1905.)

1. Justices of the Peace—Notice of Trial.
A defendant, who has been served with summons and who has appeared by attorney, is sufficiently notified by the justice of the time and place of trial, as required by Code Civ. Proc. § 850, where the notice is given his attorney as such and the attorney notifies him.

2. Writ of Review.
Even if notice of trial served on a defendant in a justice suit is technically insufficient, he, having known of the judgment within two days of its rendition, so that he could have appealed, is not entitled to writ of review allowed by Code Civ. Proc. § 1068, when there is no appeal, nor any plain, speedy, and adequate remedy.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Writ of review by William Grant and another against the justice's court of Second township, county of Tuolumne, and James G. Fallon, justice of said court. From a judgment dismissing the writ as to said William Grant, he appeals. Affirmed.

John B. Carlin and O. K. Cushing, for appellant. J. C. Webster, for respondents.

BUCKLES, J. This is an appeal from the judgment of the superior court of Tuolumne county dismissing a writ of review sued out in said court to review the judgment of the justice's court of Second township, of said county. There is no bill or statement, and the appeal will be heard on the judgment roll alone. The writ of certiorari was issued, and when the matter came on to be heard on the return the defendant moved to dismiss the writ, on the ground that the petition or record does not show facts sufficient to entitle plaintiff to the writ. It was thereupon stipulated in open court by the respective parties that the said motion to dismiss and the said cause be heard and submitted together.

The court found, among other things: "(2) That on or about the 27th day of June, 1903, an action was commenced by one Louis Lepape against the above-named plaintiffs and one Chas. E. Grant in the said justice's court, which said action is entitled 'Louis Lepape, Plaintiff, v. William Grant, George F. Grant, and Charles E. Grant, Defendants,' * * * brought to recover the sum of $106 and costs," for services performed, etc. In the fourth finding is the following: "That on the 22d day of July, 1903, a legal summons therein was duly served on said defendant William Grant in said county of Tuolumne; that thereafter, on July 30, 1903, Charles E. Grant, one of said defendants, appeared in court before the said justice, and on behalf of himself and William Grant and George F. Grant, his brothers and codefendants, made a verbal answer denying generally and specifically each and every allegation contained in said complaint of plaintiff; that said defendant William Grant had orally requested said Charles E. Grant to so appear and answer for him, and the said Charles E. Grant, in pursuance of said oral request and not otherwise, did appear and enter said answer as aforesaid, but said defendant George F. Grant had not authorized said Charles E. Grant to appear for him, nor had said George F. Grant been served with summons in said action." In the fifth finding is the following: "That on October 20, 1903, the cause was duly set for trial by the court for October 31, 1903, at 10 o'clock a. m., and notice of the time and place of trial issued in due form as required by section 850 of the Code of Civil Procedure, directed to the defendants above named and to Charles E. Grant, their attorney, which said notice of the time set for said trial was duly served upon Charles E. Grant as attorney for said defendants, and the proper return of service made thereon on October 20, 1903," by the constable. In the sixth finding there is the following: "That said William Grant, prior to the date of the trial of said action, received information from Charles E. Grant by telephone of the date fixed by said court for the trial of said action, and on October 27, 1903, said William Grant wrote a letter to said justice of the peace, and which said letter was received by said justice," wherein he calls attention to the fact of the said suit pending, that his brother Charles had been legally notified that the case was set for trial, and that he and his brother George F. knew it only by hearsay, calling the justice's attention to section 850, Code of Civil Procedure, and declared the case was set without consulting his convenience, and, as that date was not convenient to him, he would stand on his legal rights, and informing the justice, "I will be in Tuolumne county next week, and will then see counsel and arrange for a day of hearing that will be mutually satisfactory." It is further found by the court "that no request was made by defendant William Grant for a continuance of the trial of said action from October

31, 1903, to any other date." Finding seventh: "That on the 31st day of October, 1903, after receiving said letter, said cause came regularly on for trial, J. C. Webster, Esq., appearing as attorney for plaintiff, and Charles E. Grant, who had made answer for the defendants, as aforesaid, appeared and announced that he did not consider himself the attorney for the defendants, William Grant or George F. Grant; that no other appearance was made at said trial for said William Grant or George F. Grant, whose default for not appearing at the trial of said cause was entered. Evidence was adduced on behalf of the plaintiff, and, upon the evidence adduced, the court rendered its judgment therein in favor of said plaintiff, Louis Lepape, and against defendants William Grant and George F. Grant, for the sum of $106 and costs of suit, allowed at $6.50. The said Charles E. Grant testified and was dismissed as a defendant in said action." The eighth finding is that the said William Grant had notice of said judgment, and on the 2d day of November, 1903, telegraphed the said justice that "the judgment against me and my brother George is void, and you and your bondsmen are liable if same is enforced. See Elder v. Justice's Court, 136 Cal. 364, 68 Pac. 1022." The justice probably did see Elder's Case, but, if he did, must have concluded it had no application, for he proceeded to enforce said judgment by issuing execution, notwithstanding William's threat. I have quoted enough of the findings to determine whether the findings would warrant the judgment which the court made. It might be well to state, further, that the court found that the said judgment rendered by said justice was an appealable judgment, and that neither William Grant nor George F. Grant had appealed from the same nor any part thereof, and that more than 30 days had elapsed since the rendition and entry of said judgment, and before the filing of the petition for the writ of review herein.

As conclusions of law the court found: "That the petitioners are entitled to a judgment annulling the judgment entered by the justice of the peace of the Second township of Tuolumne county in favor of Louis Lepape and against Geo. F. Grant, and all subsequent proceedings upon said judgment as against said Geo. F. Grant; that all the proceedings had and taken in said justice's court in said action in favor of said Louis Lepape against said William Grant are hereby affirmed, and judgment accordingly so ordered; that the facts are not sufficient to support the writ of certiorari heretofore issued, as to William Grant, and defendants are entitled to a dismissal of the said writ, as to said William Grant." The superior court thereupon rendered its judgment annulling the judgment and subsequent proceedings of the justice as to the said George F. Grant, and affirming the judgment of said justice in said action in favor of said Louis Lepape and against said William Grant, and dismissing the said writ of review.

We think the findings support the judgment. The only question in the case of any importance is whether William Grant's notice that the case was set for trial in the justice's court was sufficient. and we think it was. While not a resident of Tuolumne county, he was served with a summons in that county, directed his brother to appear and answer for him, which his brother did, his brother was served as his attorney with the notice required under section 850, Code of Civil Procedure, stating the time and place of trial of the action, and his said brother notified him. If his notice was technically insufficient, he did know the trial was set to take place on a certain day, and he did know within two days after the judgment was rendered that it had been rendered, and he could have appealed, and we think that was his remedy for any error he complains of.

It is suggested that no presumption be indulged in in favor of the justice's court. There is no occasion to indulge in any presumptions in this case, for the record of the justice is before us in one of the findings of the court. We think, under all the circumstances of this case and appearing in the court's findings, the notice the appellant had of the time set for the trial in the justice's court was sufficient. In Jones v. Justice's Court, 97 Cal. 524, 32 Pac. 575, cited by appellant, the defendants had no notice that the case pending in the justice's court had been set for trial. In Elder v. Justice's Court, 136 Cal. 366, 68 Pac. 1022, relied on by the appellant, the party seeking the writ had no notice, or, in other words, the justice called his attorney up on the 'phone and stated to him that the attorneys on the other side desired to have the case set for trial on May 3, 1899, at 10 a. m. The attorney had but little recollection of the case, as the answer had been filed four years before, but replied that he did not know where the defendant was, but it was all right—to go ahead. Neither attorney nor defendant appeared at the trial. There was no showing, and no return of notice having been served. In Los Angeles v. Young, 118 Cal. 296, 50 Pac. 534, 62 Am. St. Rep. 234, there was a return made that the service was made on the attorney; but the attorney was permitted before the superior court to testify that he did not know who signed the acknowledgment of service, and, in fact, he had never received notice of the time set for hearing, and upon this the lower court, on a writ of review, annulled the judgment of the justice's court. The supreme court reversed this judgment, holding that Dunn could not testify in a proceeding of this kind to impeach the service, and held there was evidence of notice having been served, just as there was in this case. So far as we have been able to ascertain, in all these cases where the writ of review has been held to be the remedy, it has been where there was no power of appeal, or where the time for appeal had gone by without fault of the petitioner. In fact, looking at the statute, we find the writ may issue where there can be no appeal, or when, in the judgment of the court, there is no plain, speedy, and adequate remedy. Section 1068, Code Civ. Proc.

In this case the justice did not proceed to try the case without having first set the case for trial and notified the parties, and his record, which was certified up to the superior court, shows that notice of the time and place of trial was served upon the attorney of appellant, and it shows the evidence on which the justice acted in holding that notice was served as required under section 850, Code of Civil Procedure. There is no question but William Grant could have taken an appeal; for, as has appeared, he knew of the justice's judgment within two days after it was rendered. No litigant should be permitted the use of the writ of review where he has the right of appeal. Nor should he be allowed the writ where he slumbers on his right of appeal until the time in which he might take such appeal has gone by.

The judgment of the lower court is affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

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1 Cal. App. 349

W. & P. NICHOLLS v. MAPES.

(Court of Appeal, Third District, California. July 25, 1905.)

1. PROPERTY—TITLE.

Where H., being indebted to plaintiff, contracted to deliver to it 186 head of cattle on or before a certain date, and thereafter he purchased cattle for plaintiff with money advanced by it as plaintiff's agent on a salary of $50 per month, and that any profits made on the resale of such cattle should be credited on the balance due plaintiff on H.'s indebtedness, and that after payment of such indebtedness in full, with interest, the contract should terminate, cattle purchased by H. after the date for the delivery of the 186 head, and which were not a part of such amount, belonged to plaintiff as against the creditors of H., though he held possession and did not disclose his agency at the time he purchased the cattle.

2. CONVERSION—DAMAGES.

Civ. Code, § 2336, providing that the detriment caused by the wrongful conversion of personal property is presumed to be, among other things, a fair compensation for the time and money properly expended in the pursuit of the property, does not authorize the recovery of attorney's fees, either as damages or as costs in the action.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trover and Conversion, § 258.]

3. SAME—DEPOSITIONS—DISBURSEMENTS.

An expenditure for depositions forms no part of the damages as such, but should be allowed in the cost bill.

Appeal from Superior Court, Lassen County; F. A. Kelly, Judge.

Action by W. & P. Nicholls, a corporation, against G. W. Mapes. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Garoutte & Goodwin, for appellant. N. J. Barry, for respondent.

CHIPMAN, P. J. This is an action to recover the value of certain six head of cows alleged to have been wrongfully converted by defendant on April 26, 1901, at the county of Lassen. The cause was tried by the court without a jury, and plaintiff had judgment for the value of the cattle, with interest from the date of conversion, and for $25 "as compensation for the time and money expended by plaintiff in the pursuit of the property." Defendant appeals from the judgment on bill of exceptions.

The court found as facts: That plaintiffs are copartners, doing business as bankers, in the town of Dutch Flat, Placer county; that on the date above named "plaintiff was the owner of and entitled to the possession of the six cows described in the complaint," and said defendant wrongfully converted them to his own use; that plaintiff has expended $25 in pursuit of said property.

1. Appellant challenges the sufficiency of the evidence to support the finding that plaintiff was the owner of the property, and thus presents the principal question in the case. It appears that the cattle in question were in the possession of one E. H. Hamlin, and were attached at the suit of the present defendant against said Hamlin, and were purchased at execution sale by said Mapes, who now claims title through such purchase. Plaintiff claims that Hamlin was acting as its agent when he purchased the cattle, and hence its claim of ownership. Hamlin testified: "I was working for W. & P. Nicholls under a written contract." Again he testified: "Whatever purchase I made of those cattle was made in accordance with this contract—supposed to be." We think there is sufficient evidence to show that this contract was in force when the cattle were purchased by Hamlin, and the question of ownership must be determined from an examination of its terms and from such surrounding circumstances as may properly be considered in arriving at the intention of the parties to it. It is dated May 16, 1900, and reads as follows:

"This agreement, made this 16th day of May, nineteen hundred, between W. & P. Nicholls, parties of the first part, and E. H. Hamlin, Jr., party of the second part, is as follows: Whereas, the parties of the first part have advanced to the party of the second part divers sums of money from time to time to purchase cattle and pay the expenses of keeping the same, and for other purposes, and thereby the party of the second part has become indebted to the parties of the first part, and by a statement this day made, the party of the second part should have on hand 186 head of cattle: Now, for the purpose of paying said indebtedness, the party of the second part does hereby assign, sell, and transfer to the parties of the first part all accounts and demands of every kind which may be due him at this date, and also all live stock which he may now own, or may have the right to the possession of, or may have pledged for debt, or may have contracted to buy. The party of the second part hereby agrees and promises to deliver to the parties of the first part 186 head of cattle on or before January 1st, 1901, and the same, when delivered, shall be the property of the parties of the first part, and the proceeds arising from the sale of the same shall be paid to the parties of the first part, and credited to the accounts of the party of the second part, and applied upon the said indebtedness. And the parties of the first part shall have the right to collect all book accounts now due the said party of the second part, and the same, when collected, shall be applied upon said indebtedness. And for the purpose of paying said indebtedness, the party of the second part agrees to devote his undivided time, skill, and labor to the buying and selling of cattle, and for that purpose the parties of the first part will advance to him from time to time such sums as may seem to them reasonable for the purpose of buying stock and paying expenses connected with the keeping and selling of the same.

"The parties of the first part hereby employ the party of the second part to act as their agent and employé, and not otherwise, in the buying and selling of cattle, and agree to pay to him for said services the sum of fifty dollars ($50) per month, and his reasonable personal expenses; such employment to be continued for such length of time as may be agreeable to the parties of the first part. A statement shall be kept of all accounts from this date, and for that purpose a new account shall be opened between the parties hereto, and the amount of indebtedness existing at this date shall be charged on said account to the second party, and the amount realized from the sale of said 186 head of stock and the collection of book accounts now due him shall be charged against the same, and, if there shall remain a balance due the said parties of the first part, all the profits arising from the conduct of said business from this time forward shall be applied upon the payment of the amount due, and interest thereon at nine per cent. per annum, payable semiannually, and, if not so paid, to be added to the principal and bear a like rate of interest, until the same is fully paid, and when the same is fully paid this contract shall cease. All stock shall be purchased and sold in the name of the parties of the first part, and the expenses of caring for, purchasing, driving, transporting, and selling of said stock, and the personal expenses of second party, and his said wages of fifty dollars ($50) per month, and interest at the rate of nine per cent. per annum, payable June 30th and December 31st of each year, and, if not so paid, to be added to the principal and bear a like rate of interest, on all advances, shall be first deducted from the proceeds of sales, and the balance, if any, shall be applied upon the said indebtedness.

"E. H. Hamlin, Jr.
"W. & P. Nicholls."

It appears that Hamlin had been engaged in the business of buying cattle in Lassen county and became indebted to plaintiff for advances of money. Hamlin had some cattle, and the contract recites that he "should have on hand 186 head." It was "for the purpose of paying" his "indebtedness" to plaintiff that the contract was entered into. Hamlin transferred to plaintiff all his interest in the cattle he then (May 16, 1900) owned and all accounts due him at that time, and undertook to deliver these 186 head of cattle to plaintiff on or before January 1, 1901, to be plaintiff's property when delivered; but the proceeds of their sale and of the book accounts were to be applied to Hamlin's indebtedness existing at that time. It may be inferred from the contract, as well as from the testimony, that these cattle and the book accounts were not deemed sufficient to pay the indebtedness of Hamlin to plaintiff, and it was therefore further agreed that Hamlin should continue the purchase of cattle, devoting his time exclusively to that business, and "for that purpose the parties of the first part will advance to him from time to time such sums as may to them seem reasonable for the purpose of buying stock and selling of the same." And to fix the relation the parties were to sustain to each other in this future business the contract next provides: "The parties of the first part hereby employ the party of the second part to act as their agent and employé, and not otherwise, in the buying and selling of cattle, and agree to pay him for his services the sum of $50 per month and his reasonable personal expenses," the "employment to be continued" as long as "agreeable to the parties," except that it was provided that upon plaintiff being fully paid "this contract shall cease." It was further expressly provided that "all stock shall be purchased and sold in the name of the parties of the first part," and "the expenses of caring for, transporting, and selling of said stock, and the personal expenses of second party, and his said wages of $50 per month, and interest * * * shall be first deducted from the proceeds of sales, and the balance, if any, shall be applied upon the said indebtedness." The evidence was that the 6 head of cattle were purchased by Hamlin and constituted no part of the 186 head, that he paid for them by check upon plaintiff, and that at that time he was still indebted to plaintiff. Both of the members of the plaintiff bank testified that they paid for and were the owners of the 6 head of cattle in dispute, and that Hamlin was in its employment, on wages. Hamlin testified that, when he purchased these 6 head of cattle, he said nothing to the vendor as to whom they were purchased for; that he sometimes bought cattle and sold them to butchers, stating that they belonged to plaintiff, and that he collected the money for plaintiff; at other times he sold to other butchers and collected the money without informing them who owned the cattle, and all this money was used in the business; that at times he used some of his own money for expenses, which he charged to plaintiff; and that plaintiff's books show the number of cattle purchased by him under this employment.

Defendant urges several considerations as showing that the court should have found from the evidence that the cattle belong to him. It is said that they were attached in Hamlin's possession which constituted prima facie evidence of title; that plaintiff failed to explain this possession because, as is claimed, plaintiff failed to show that the contract above referred to was in force when the cattle were purchased. It is true that the cattle in question were not purchased until after January 1, 1901, by which time Hamlin had agreed to turn over the 186 head. But it appeared that the business was continued after that date. Whether or not these 186 head were delivered to plaintiff does not appear, but it does appear that Hamlin was still in plaintiff's debt, and his checks were being honored under his employment. Hamlin's possession was explained by the contract and by the testimony. But, conceding this, appellant contends that it is not possible "to get out of the contract a construction which makes plaintiff the owner of the cattle." Considering the circumstances which to appellant's mind make this construction seems impossible, we see no particular significance in the fact that Hamlin did not explain to his vendor of the 6 head of cattle that he was buying them for plaintiff. If the vendor were the attaching creditor, he might urge the circumstances attending the sale as showing that Hamlin was the owner, without looking to Hamlin's principal, which latter he might also do. Civ. Codes, § 2336. But the vendor was paid by check on plaintiff, and Hamlin was not called upon to make any explanations, and plaintiff's rights cannot suffer because Hamlin did not disclose his principal. Nor do we see that the fact that plaintiff is to have interest for the use of its money, and Hamlin to have all the profits applied to paying his indebtedness to plaintiff, is inconsistent with the idea of plaintiff's ownership of the cattle. There were no profits in excess of the indebtedness, and we need not concern ourselves with the question of their disposition, had there been any such; for the contract provided that as soon as the indebtedness was paid the contract was to terminate.

It is contended that the contract was one for plaintiff's security, and that the cattle could not become a security until delivered to plaintiff. This may be true of the 186 head, for the contract provided that as to them they were to belong to plaintiff when delivered, their proceeds when sold to be applied to Hamlin's indebtedness. But as to the purchase of cattle in the future it was expressly provided that Hamlin should act as plaintiff's agent, should use plaintiff's money in making purchases for plaintiff, and, if there were any profits above the money so laid out and interest thereon, it was to be applied to Hamlin's indebtedness existing at the time the contract was made, and not to any new indebtedness; for none was to be created. and Hamlin's only obligations were such as arose out of the relation of principal and agent. It seems to us that the transaction was the not unusual arrangement by which the principal employs an agent to purchase and sell goods for him, the agent to be compensated out of the profits. In the present case the compensation or profits, if any, were to be applied to pay the agent's debt to the principal. It is quite true that the actual relation of the parties to each other must be judged from a fair construction of the entire contract and all the circumstances, and that the court is not bound to assume that there was the relation of principal and agent from the mere fact that the parties so described themselves. Stockton Sav. & L. Soc. v. Purvis, 112 Cal. 236, 44 Pac. 561, 53 Am. St. Rep. 210. Looking to all the provisions of the contract and the attending circumstances, we think it clear that the cattle in question were purchased by Hamlin as the agent of plaintiff, and that plaintiff was the owner at the time they were attached and sold to defendant. It does not appear upon what indebtedness the cattle were attached, nor under what circumstances nor when the indebtedness accrued. There is no evidence that defendant was in any way deceived by Hamlin in contracting the indebtedness for which the cattle were attached, nor that it had any connection with Hamlin's actual or ostensible relation with plaintiff, either in the purchase of cattle or otherwise; nor was there any concealment of the relation sustained by Hamlin and plaintiff, for the contract was duly recorded in the county where Hamlin bought the cattle, and on occasions he stated that he was buying for plaintiff, and it does not appear that he ever purposely concealed the fact of his agency. An agent is one who represents another, called the "principal," in dealing with third persons (Civ. Code, § 2295), and may be authorized to do any acts which his principal might do (Id. § 2304). In Loomis v. Barker, 69 Ill. 360, the proof was that certain horses belonged to appellee, and that at the time they were levied upon they were in the possession of one Cook as the general agent of appellee, who was authorized to sell them for appellee, and was required to account to him for the proceeds of sale. The court said: "This did not invest Cook with any title to the horses, so as to render them liable to be seized on execution or attached against him and sold for the payment of his debts." The case of Stockton Sav. & L. Soc. v. Purvis, 112 Cal. 236, 44 Pac. 561, 53 Am. St. Rep. 210, relied on by appellant, is not, in its facts, sufficiently similar to the present case to make the principles there enunciated applicable. In that case the plaintiff was the owner of land, and made a secret oral agreement with his tenant that the tenant should pay a cash rental for the land, and that the title to the crops grown on the land should remain in plaintiff, and, when harvested, should be delivered to the nearest warehouse and stored in the name of plaintiff, and from the sale of the crops plaintiff should receive as rent the sum stipulated, and the overplus, if any, should go to the tenant. The growing crop was attached by the creditor of the tenant, and the action was against the sheriff by plaintiff. The court held that, in effect, the contract was "an attempt to obtain the advantages of a chattel mortgage without complying with the provisions of the statute upon that subject." In the case here the purpose was not to secure the money advanced to purchase cattle. It was to make an arrangement or investment whereby Hamlin could pay a debt he owed plaintiff. It was to furnish means whereby the result of his labor alone would discharge this debt. If he so managed, by his skill and labor in the use of plaintiff's money, as to yield a profit in the business, this profit should be his reward, and when it was sufficient to pay his debt the agency was to cease. But in the cattle he was to purchase he had no interest whatever. The case seems to us quite different from the case above cited.

2. It is further contended that the findings and judgment for $25, as compensation for the pursuit of the property, are unsupported by the evidence. The only testimony on the point was that of John Nicholls, one of plaintiffs, who testified that plaintiff paid at different times "consultation fees" to its attorney at Auburn $25; that he "made three trips to Auburn in the matter, for which a legitimate proportion" of his "expense there is $5"; that he paid $10 "in expenses of Charles Tuttle in coming to Dutch Flat to take the depositions"; that he paid "about $5 notary's fees—making in all the sum of $50." Attorney's fees are not recoverable as damages, under section 3336, Civ. Code, nor as costs in the action. Hays v. Windsor, 130 Cal. 230, 62 Pac. 395. Aside from payments for attorney's fees, the evidence does not show for what purpose the witness made a trip to Auburn, though probably to consult his attorney; nor does it appear for what he paid the notary. It may have been for taking the depositions. The payment to Charles Tuttle is not sufficiently explained to enable us to judge in what capacity he served in taking the depositions. The expenditure for depositions, however, should be determined in the cost bill, and forms no part of the damages as such.

The judgment is modified by striking out the item of $25, as compensation for the pursuit of the property, and otherwise the judgment is affirmed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

KEYES et al. v. MEYERS. (Sac. 1,137.)

(Supreme Court of California, Sept. 13, 1905. On Rehearing, Oct. 13, 1905.)

DEEDS—ESCROWS—DELIVERY AFTER GRANTOR'S DEATH.

Where the owner of land signed and acknowledged a deed and delivered it to a third person, with instructions to deliver it to the grantee on the grantor's death, but it was expressly agreed that, in case either the grantor or his wife repaid to the grantee certain advancements, they should be entitled to a surrender of the deed, the grantor did not part with all his dominion over the deed, and there was therefore no valid delivery thereof sufficient to pass title to the grantee.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 124, 134, 140, 141; vol. 19, Cent. Dig. Escrows, § 2.]

Department 1. Appeal from Superior Court, Calaveras County; C. V. Gottschalk, Judge.

Action by Mary A. Keyes and another against John B. Meyers, to annul a deed. From a decree in favor of defendant, plaintiffs appeal. Reversed.

W. A. Dower (Nicol & Orr, of counsel), for appellants. Ira Hill Reed (Robert C. Owens, of counsel), for respondent.

SHAW, J. The plaintiff Mary A. Keyes sued the defendant to annul a deed executed to defendant by John M. Lindsay, purporting to convey to him certain real property, and to quiet her title thereto. W. B. Keyes is joined as plaintiff solely because he is the husband of his coplaintiff. Defendant in his answer prayed that he be adjudged the owner of the property. The court made its findings and gave judgment for the defendant. Plaintiffs appeal, and present the evidence by a bill of exceptions; the appeal having been taken within 60 days after the rendition of the judgment.

The case presents the question whether or not the deed of Lindsay to the defendant was ever effectively delivered to him. In substance, the facts as found by the court are as follows: On January 15, 1895, Lindsay, being the owner of the real property and being indebted to Meyers, in consideration of said indebtedness made, signed, and duly acknowledged the execution of a deed purporting to convey to Meyers the said property, and deposited said deed with W. H. Steffler, with verbal instructions from both Lindsay and Meyers, made at the time, that Steffler should not deliver the same to either party during their lifetime without an order from the other, and that after the death of Lindsay he should deliver it to Meyers. Afterwards, on January 21, 1895, the two parties made and executed the following written agreement: "This agreement, made this 21st day of January, 1895, between John B. Meyers, of Angels Camp, Calaveras county, state of California, and John Lindsay, of the same place, witnesseth: That whereas, the said John Lindsay has executed a deed, now in escrow, and deposited January 15th, 1895, in the hands of William Steffler, county treasurer of Calaveras county, to one-third of that certain quartz mine situated in the Angels mining district, Calaveras county, state of California: Now, therefore, the said J. B. Meyers hereby agrees to provide food, clothing, and proper medical attendance and medicine in case of sickness, and in case of death to pay all funeral expenses, caused by the death of said John Lindsay, and to pay all the necessary expenses the said Lindsay may incur as long as he, the said John Lindsay, may live. Provided, however, that upon the payment of all legal claims held by the said John B. Meyers against him, he, the said John Lindsay, shall have the right to demand and repossess the said deed above referred to from William Steffler, without any costs whatever. It is further agreed that payment of all demands in favor of John B. Meyers may be paid either to him or to Mrs. J. B. Meyers, his wife." On September 25, 1898, Lindsay wrote to Steffler a letter, which Steffler received, which was as follows: "That deed that is placed in your hands in escrow, between J. B. Meyers and J. M. Lindsay, of Angels Camp, I will ask you as a friend to hold it and not to allow it to be opened by Meyers or any one, without my consent. As it is a life contract, I feel safer with it in your hands than any man I know of in Calaveras county. [Signed] J. M. Lindsay." On November 12, 1900, the day of his death, Lindsay executed a deed purporting to convey the same property to the plaintiff Mary A. Keyes for the consideration of $50. On November 13, 1900, Steffler delivered to Meyers the deed deposited with him by Lindsay and Meyers on January 15, 1895. Meyers did not pay the funeral expenses of Lindsay, nor has he been asked or requested to do so; but he has been always ready to do so, upon being informed of the amount. He furnished goods and supplies for the maintenance and support of Lindsay, and paid his living expenses at all times when called upon or requested to do so. On October 19, 1897, Lindsay had become indebted to Meyers, apparently on this account, in the sum of $1,000, which he never paid.

We think there was no legal or effectual delivery of the deed. The essential requisites of a valid delivery in cases of the class here presented were carefully considered and settled by this court in Bury v. Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186, and Kenney v. Parks, 125 Cal. 146, 57 Pac. 772. In Bury v. Young it was held that, where the owner of land signs and acknowledges a deed and delivers it to a third person, with instructions not to record it, but to deliver it to the grantees upon the grantor's death, the grantor thereupon parting with all dominion over the deed, and reserving no right to recall it or alter its provisions, or to have any further interest in the property except to hold the use until his death, the delivery by such third person after the grantor's death is valid, and that such conveyance passes the title upon the first delivery, subject to the grantor's life estate. The court, distinguishing the case from others of contrary import, says: "In every case where the deed has been declared invalid by reason of failure of delivery, it will be found that the grantor reserved some rights over the instrument; that he failed to part with all control and dominion over it; that, upon the happening of some event or contingency or condition, he had the right, if so disposed, to reach out and take it from the possession of the depositary. * * * The essential requisite to the validity of a deed transferred under circumstances as indicated in this case is that, when it is placed in the hands of the third party, it has passed beyond the control of the grantor for all time. That question is determined by the grantor's intention in the matter, and his intention in making the delivery is a question of fact, to be solved by the light of all the circumstances surrounding the transaction." In Kenney v. Parks the deed was held invalid. A husband and wife each owned separate real property, and each executed to the other a deed of his and her property, respectively, and delivered the same simultaneously to a third person, with directions that upon the death of either, leaving the other surviving, the deed executed by the deceased spouse should be duly recorded for the benefit of the survivor, and with the understanding that the deed of the survivor should thereupon become ineffectual and should be returned to the grantor therein. The husband died, and the wife claimed his property under the deed executed by him. The court held that the deeds, though designated by the parties as escrows, were in no legal sense escrows, there being nothing to be performed by either grantee as a condition precedent to the delivery and taking effect of the deed (Civ. Code, § 1057), but that they were either direct grants or no deeds whatever, and that "the all-controlling fact in this case, which defeats plaintiff's claim, is that when the deeds were made and delivered to the cashier of the bank the respective grantors did not absolutely part with all future dominion and control over them, but, upon the contrary, the actual intention and understanding of each grantor was that upon the death of the other the survivor should take back his own deed, and that no title should vest under it." Page 150 of 125 Cal., and page 773 of 57 Pac. See, further, Wittenbrock v. Cass, 110 Cal. 6, 42 Pac. 300; Howlin v. Castro, 136 Cal.

610, 69 Pac. 432; Canale v. Copello, 137 Cal. 24, 69 Pac. 698.

Applying these principles to the case at bar, it is clear that there was no delivery of the deed. Even under the verbal instructions given to Steffler at the date of the deed Lindsay did not absolutely part with all dominion over the deed or the title. Upon procuring an order from Meyers, he still retained the right to withdraw the deed. If any title whatever was to be vested in Meyers prior to such withdrawal, it could not be revested in Lindsay by the mere redelivery of the deed to him, or otherwise than by a grant from Meyers. Civ. Code, § 1058. Hence, although they did not say so in terms, the intention of both parties manifestly was that upon the order of Meyers the deed might be withdrawn by Lindsay, and in that event should be of no force whatever, and that the title was then to be in Lindsay, complete and perfect, without any reconveyance by Meyers. This state of the title would have continued down to the moment of Lindsay's death. It follows that there could have been no intention that the deed was to have any present effect on the title so long as it was subject to this contingency; that is to say, during Lindsay's life. In that view of the case, Steffler in holding the deed must be considered as the mere agent of Lindsay to deliver it after his death, if not otherwise disposed of in his lifetime; and such agency would be revoked by Lindsay's death. Devol v. Dye, 123 Ind. 326, 24 N. E. 246, 7 L. R. A. 439.

But it is immaterial to the decision of the case what would be the effect of the original agreement and instructions to Steffler. It may be conceded that, if the effect of such original agreement was, as contended by appellants, to divest Lindsay of all future control over the deed, it could not be changed without Meyers' consent, and possibly not without his consent in writing. But this limitation is fully met and obviated by the agreement of January 21, 1895. That agreement was in writing, and was executed by Meyers; and consequently it was as effectual to qualify his title or right to the property as any other instrument in writing, and the effect of the agreement made at that time was precisely the same upon the deed and upon the title as if it had been made at the time the deed was originally deposited. This agreement specifically declares that Lindsay should have the right to withdraw the deed at any time upon payment of all legal claims held against him by Meyers. No provision is made in that event for a reconveyance by Meyers. Evidently none was considered necessary, and the intention was that the deed should not take effect as a present conveyance. Lindsay, therefore, did not part with all control either over the deed or the title, and the case comes within the rule established in Kenney v. Parks, supra.

The letter of September 25, 1898, does not in the least change the legal effect of the former transaction. The rule prevailing in some jurisdictions that where a grantor who retains power to regain possession of the deed dies without doing so, and the deed is delivered in pursuance of the original directions accompanying its deposit, such delivery upon the grantor's death is valid and effectual to pass the title, has not been followed in this state. Bury v. Young, 98 Cal. 451, 33 Pac. 338, 35 Am. St. Rep. 186; Canale v. Copello, supra. The judgment is not supported by the findings or by the evidence in the case.

The judgment is reversed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

On Rehearing.

PER CURIAM. The petition for rehearing is denied. We do not intend, by anything said in the opinion, to declare that upon the going down of the remittitur the court below may not permit the defendant to amend his pleadings by filing a cross-complaint to have his debt against the deceased, John M. Lindsay, declared a lien on the property, or to amend his answer to show the want of equity in plaintiff until the debt due defendant, if any, be paid.

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147 Cal. 624

JOHNSON et al. v. SOUTHERN PAC. R. CO.

(L. A. 1,338.)

(Supreme Court of California. Sept. 2, 1905.)

RAILROADS — OVERHEAD CROSSINGS — WARNINGS—STATUTES—APPLICATION.

Civ. Code, § 486, providing that a bell must be rung or whistle sounded at least 80 rods from the place where a railroad crosses any street, road, or highway, does not apply alone to grade crossings, but is applicable where the railroad crosses the highway on a bridge over the same.

Department 2. Appeal from Superior Court, Santa Barbara County; William S. Day, Judge.

Action by Frank W. Johnson and others against the Southern Pacific Railroad Company. From a judgment sustaining a demurrer to the complaint, plaintiffs appeal. Reversed.

Rehearing denied October 2, 1905.

Richards & Carrier, for appellants. Canfield & Starbuck, for respondent.

LORIGAN, J. This action is brought to recover damages for the death of Katherine S. Johnson, wife of the plaintiff Frank W. Johnson, and mother of the other plaintiffs, who are minors, alleged to have been occasioned through the negligence of defendant. The second amended complaint, after stating the corporate existence of defendant, and the maintenance and operation by it of a railroad on July 25, 1901, alleges, as the facts upon which the cause of action for negligence is predicated, that said railroad, "about five miles west of the city of Santa Barbara, crosses obliquely the county road known as 'Hollister Avenue,' about 90 yards east of the place where the road known as the 'Modoc Road' enters said Hollister avenue, the acute angle formed thereby being of about 30 degrees; that the said crossing is an overhead one, the track being upon a bridge over said road, and the public road excavated so as to pass under the bridge, and being flanked by the sides of the cut on each side; that said bridge is supported by three abutments, one on each side of the county road and one in the middle; that the space between said abutments is about 20 feet, and said abutments are about 80 feet in length; that by reason of trees and other obstacles the view up and down the track is very much obstructed, so that persons driving along Hollister avenue cannot see approaching trains; that by reason of the said construction of said crossing the same is a dangerous one to persons driving to and fro along Hollister avenue; that on the 25th day of July, 1901, Katherine S. Johnson * * * was driving from plaintiff's home, near Goleta, along Hollister avenue, towards the city of Santa Barbara, and as she approached said crossing defendant caused one of its locomotives, with a train of cars attached thereto, to approach said crossing at a high rate of speed, and in so doing disregarded its duty to give signal of such approach, but, on the contrary, caused said train to approach negligently and carelessly and without signaling, either by blowing a whistle or ringing a bell, or giving any other signal whatsoever, and without giving any signal by flag or otherwise; that the said Katherine S. Johnson, hearing no signal, was unaware of the approach of said train, and just as her horse and wagon were under said bridge said train passed over the same, negligently and carelessly, as aforesaid; that in consequence of the dangerous character of said crossing as maintained by defendant, and of the failure on its part, by reason of its negligence and carelessness, to give the proper signal as its train approached said crossing, the horse of said Katherine S. Johnson was frightened and ran away, and she was thrown violently out of the wagon and killed." A demurrer to the complaint on the ground that these alleged facts did not constitute a cause of action was sustained, and, plaintiffs declining to further amend, judgment was rendered against them. This appeal is taken from said judgment to test the validity of the order sustaining said demurrer.

It is contended by appellants that the judgment should be reversed on two grounds: First, because they insist that the complaint shows that the crossing was a peculiarly dangerous one, and therefore it became the duty of defendant to take commensurate precautions, and the extent of these precautions was a matter to be left to the jury; second, that it was the duty, under the statute, of the defendant's train to have signaled, either by bell or whistle, before reaching the crossing, and that, having failed to do so, defendant is liable for the damage that ensued.

We do not deem it necessary to discuss the first proposition advanced by appellant, that the allegations of the complaint were sufficient to constitute negligence on the part of the defendant at common law in failing to give warning of the approach of its train to the highway crossing referred to in the complaint, because we are satisfied that the complaint, in alleging that the defendant failed and neglected to give such warning of the approach of its train, as provided by section 486 of the Civil Code, sufficiently stated a cause of action. The lower court, in sustaining the demurrer, necessarily took the view, which is also insisted on here by respondent, that the section above referred to has application only where a railroad crosses a highway at grade—upon the same level as the highway. We cannot agree with this construction of the statute, and find no warrant in its language for this limitation placed upon its meaning. The section provides that a bell must be rung, or whistle sounded, at least 80 rods from the place where the "railroad crosses any street, road, or highway." There is certainly nothing in this language which limits the giving of signals of approach to any particular crossings. The language of the section is plain and unambiguous, and applies in general terms to all crossings. By it the duty is enjoined upon the railroad to signal at a prescribed distance from "where the railroad crosses any street, road, or highway." This is broad enough to apply to any crossing of a highway by a railroad, whether it is super, sub, or level grade. Nothing is said in the section about signaling only when the railroad crosses a highway at level grade. Nor is there anything in the section which would warrant so construing it. In fact, the language is so plain as not to be subject to construction at all. If the Legislature had intended that the railroad should only be required to give signals when crossing highways at grade, it would, as has been done in other states, have readily and clearly expressed that intention. It could not, however, have used more general language than is employed in the section under consideration to express the intention that the required signal should be given at all crossings of highways, whether above, below, or at grade. To construe this language as applying only to grade crossings, when nothing is said about grades, would be to judicially legislate into the section an exemption which its plain and comprehensive language clearly excludes. Nothing is said in the section about crossing at grade; but it is simply provided that signals shall be given whenever the railroad crosses any street, road, or highway. In the case at bar it is alleged that the railroad crosses Hollister avenue, a public highway, upon a bridge. The fact that it crossed it upon a bridge did not make it any the less a crossing within the terms of the statute. It was a crossing at supergrade, but still a crossing. People

v. New York Central R. R., 13 N. Y. 78; Id., 25 Barb. 199.

It is, however, insisted by respondent that, while the language of the section may be broad enough to include all crossings, yet that, when the object sought to be accomplished by requiring such warnings at crossings is taken into consideration, it is evident that the Legislature intended to use the phrase "when the railroad crosses any street, road, or highway" in a restricted sense, as applying only to grade crossings. In this connection it is urged that, as the primary object of requiring warning is to guard against the danger of collision at the crossings of highways by railroads, which can only occur at grade, the statute was only intended to apply to prevent such collisions, that this was the object in view in the legislative mind when the section was enacted, and, as such collisions are rendered impossible by overhead crossings, the section was not intended to apply where such crossings existed. While it is true that the primary object of requiring signals at crossings is to prevent collisions, still this was not the only purpose the Legislature had in view. It recognized other dangers, and the more general purpose was that, by giving such signals, travelers upon the public highway near the crossing might be warned of the approach of the train, and be afforded an opportunity to guard themselves against any harm or danger by reason of its approach. The construction of an overhead bridge across a highway obviates, it is true, the danger of collision; but it does not remove the danger to persons driving upon the highway, at or near the crossing, which may arise from the sudden and unannounced approach of the train to the bridge, and the consequent frightening of their teams. The liability of horses to become frightened at sudden and unusual noises is matter of common knowledge, and, while the giving of such signals may not remove all danger therefrom, yet when given at the proper time and place, as provided by the statute, they at least tend to lessen the danger, by putting the traveler approaching the crossing upon his guard, and giving him an opportunity to remain at a safe distance with his team, or to take such precautionary measures with reference to it as may be necessary for his and their safety. As said by the court in People v. N. Y. Central R. R., 25 Barb. 203, confirmed by the Supreme Court of New York in 13 N. Y. 81, in speaking of the objects to be attained under a section of the New York statute identical with our section under consideration: "The hazards to be provided against were twofold: (1) The danger of actual collision at the crossing; and (2) that of damage by the frightening of teams traveling upon the public highway. And to guard against the latter peril it was as important to provide for a proper warning when the railroad passed over the highway at an elevation, which allowed a passage upon the highway underneath, as when it passed upon the same level, to enable those passing upon the highway to place their teams in such positions of security as would best guard against injury from their fright. But, whatever may have been the reason, it is sufficient that the Legislature have deemed the performance of this duty, which is not onerous upon the company, sufficiently beneficial to the public to secure its performance by the imposition of a penalty"—a penalty which our statute also imposes. Upon this same subject it is said by the Supreme Court of Kentucky, in Rupard v. Chesapeake & Ohio R. R. Co., 88 Ky. 284, 11 S. W. 70, 7 L. R. A. 316: "Injury may occur to the traveler at the crossing in two ways, namely, by collision with him, or by scaring the horse that he is riding or driving whereby he is injured. It is the duty of the appellee [the railroad], in approaching a crossing, if danger to the traveler in either of the ways above mentioned may be reasonably apprehended, to give timely notice of its approach, in order that a traveler may not only be warned not to come in collision with the train, but secure himself from injury by his frightened horse. By the trains crossing the highway on a trestle, there is no danger of a collision with the traveler on a highway; but, if he should be under the trestle with his horse while the train is passing over it, the danger is increased, for it is well known that a horse is more likely to scare at a sound made over his head than when the same sound is made on the ground."

It is suggested by counsel for respondent that there is no more reason why signals should be given at crossings of the character here involved than when the railroad and the public road run parallel to each other. Aside from the fact that the language of the statute requires these signals at all crossings, it is, we think, quite obvious that a greater reason exists for them in the one case than in the other. It is never absolutely necessary that a public highway, in any case, should parallel a railroad at an unsafe distance. On the other hand, in the very nature of things, there must be points at which public highways and railroads must necessarily intersect each other, and where danger to travelers by team is much more likely to arise than upon the highway paralleling the railroad; and, realizing the greater danger which must exist from the necessity of having highways crossed by railroads, the Legislature has provided for greater precautionary measures to meet the danger which this necessity creates. It is apparent, therefore, from what has been said that the purpose of the statute is not alone to require warnings so as to prevent collisions, but also to guard against injury to travelers from the frightening of their teams, and to afford as much security as possible against accidents at or on such crossings, by requiring notice to travelers of the approach of the train. If the restricted construction which respondent claims for it should be placed on the section of the Code, this security to the public would be taken away. On the other hand, reading the language as it is plainly written, there is extended to the public all the practical protection which can be afforded against the danger at such crossings, and which it is clear the statute was intended to secure. There have been but few authorities cited upon either side bearing directly upon the points we have been discussing. The New York statute, considered in the cases from the courts of that state to which we have referred, is in its essential particulars the same as the provisions of our Code section. It uses the same plain and comprehensive language, requiring warning by whistle or bell to be given when the railroad "shall cross any traveled public road or street," and it was determined by the courts of that state that under this provision, as the language used in the statute was broad enough to include all crossings, it was required thereby that the railroad give the statutory signals, even when the crossing of the highway by the railroad was overhead. The Kentucky case referred to, and the case of Penn. R. R. Co. v. Barnett, 59 Pa. 259, 98 Am. Dec. 346, cited by appellant, while not involving the construction of any statute upon the subject, very clearly state the necessity for and reasons why warnings for the protection of travelers with teams at the crossing should be given by a railroad of the approach of its train, where the track crosses the highway above or below grade—reasons which doubtless the Legislature of this state bore in mind when it provided in general terms that such warning should be given at all crossings, without limitation as to grade.

In support of its claim that the sections of the statute should be given the restricted meaning it contends for—that it only applies to grade crossings—respondent relies upon the cases of Favor v. Boston & Lowell R. R. Co., 114 Mass. 351, 19 Am. Rep. 364; Jenson v. Chicago, St. P., M. & O. Ry. Co., 86 Wis. 589, 57 N. W. 359, 22 L. R. A. 680; Mo., Kan. & Tex. Ry. Co. v. Thomas et al., 87 Tex. 282, 28 S. W. 343, and McElroy v. Ga. C. & N. Ry. Co., 98 Ga. 257, 25 S. E. 439. All these cases involved the question whether the statutes of the several states in which the cases were determined provided for the giving of warnings at crossings above or below grade. It was held that they did not, and this conclusion was reached from a particular examination of the statute in each state. An examination of the section of the statute referred to in the opinion in the Massachusetts case shows that it provides for signals "80 rods from the place where the road crosses a highway * * * upon the same level therewith." The court held that the statute required signals only at crossings on grade, which, of course, is what the statute plainly says. In the Wisconsin case the attorney for respondent (plaintiff in the court below) conceded in his argument, and it is so intimated in the opinion, that the statute of that said state did not require a warning to be given at the overhead crossing where the accident occurred. In the Texas case, while the statute did not say that the warning should be given at grade crossings, the court, construing the language, held that it must refer only to grade crossings, because it provided that the train should come to a full stop under certain conditions, which could only apply to grade crossings. The Georgia court reached a similar conclusion, based upon a construction of the language of the statute of that state, which provided that the engineer should commence giving warning at a certain distance from the crossing, and simultaneously commence checking and keep checking the speed of the locomotive, "so as to stop in time should any person or thing be crossing said track or said road." The court held that, in requiring a slacking of speed, so as to readily stop if any one was crossing the track, the section could only apply to grade crossings, and that there could be no occasion for stopping the train for the protection of persons not on, or about to go upon, the track itself. It will be observed that, in all these cases cited by respondent, either the sections of the statute under examination expressly applied to grade crossings only, or, when carefully examined, showed from their phraseology that they were only meant to be applied to grade crossings. Our section, however, is, as we have said, so plain in its language as not to be open to construction. It says nothing about any particular kind of crossing, but speaks of crossings generally. To say that, when it so speaks of crossings generally, it means crossings at grade only, would be to place a limitation upon the section by construction which can find no warrant from anything in the language of the section itself.

We are satisfied that the demurrer was improperly sustained, and the judgment is accordingly reversed.

We concur: McFARLAND, J; HENSHAW, J.

147 Cal. 707

QUINT v. DIMOND et al. (Sac. 1,164.)

(Supreme Court of California. Sept. 13, 1905.)

1. EVIDENCE—DECLARATIONS OF EMPLOYÉS—RES GESTÆ.

In an action for damages caused by fire alleged to have been negligently set out by defendant's harvesting engine, a statement by defendant's foreman, on the day succeeding the fire, that he would never take the engine back into the field unless she was fixed so she would not throw sparks, was not a part of the res gestæ.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 367.]

2. TRIAL — DEMONSTRATIVE EVIDENCE — INSTRUCTIONS.

Where, in an action for loss of plaintiff's grain by fire set out by sparks from defendant's harvesting engine, defendant claimed that the engine was properly guarded by spark arresters, and three different screens were before the jury for inspection, and one of them was admitted in evidence, an instruction that the screens were not in evidence and were not to be considered was prejudicial error.

3. NEGLIGENCE—INCONSISTENT INSTRUCTIONS.

Where the court charged that, though the jury should find that the fire in question was caused by sparks from defendants' engine, still defendants were not liable, if they had used due care and had used ordinary care in procuring for the engine a good and safe spark arrester and such as were mostly used and approved by experienced mechanics, and they would not be required to use any greater care in respect to the spark arrester used by them, a further instruction that if a traction engine, properly constructed and fitted with a proper spark arrester, would not throw sparks which would start fires when the engine was otherwise properly operated, and the fire by which plaintiff's property was destroyed was set out by defendants' engine, then the jury should find that the engine was not properly operated, and that ordinary care was not used, was contradictory and erroneous.

4. TRIAL—WEIGHT OF EVIDENCE.

Where, in an action for damages from fire set out by defendants' harvesting engine, there was no evidence that the engine had ever before set fire to anything on the ground, but there was evidence that light wood had been used to generate steam, and there was a conflict of evidence as to whether that kind of wood was more likely to emit sparks, and that on one or two occasions there had been a small fire on a canvas appliance on the harvester, an instruction that plaintiff was not bound to prove with absolute certainty that the fire was caused by fire escaping from the engine, but was only bound to prove that immediately before the breaking out of the fire defendants' traction engine, burning light wood, was in operation in close proximity to the place where the fire broke out, and that the engine had on previous occasions set fire to the canvas appliance by sparks escaping, and was so operated with reference to the place where the fire started that sparks escaping could have set the fire, etc., was prejudicially erroneous as a charge on the weight of evidence.

5. DAMAGES—EVIDENCE.

Where plaintiff's wheat, if it had not been burned by fire alleged to have been communicated from defendant's traction engine, would have been ready for market in a very short time, plaintiff was entitled to prove the market value of wheat in the nearest market at the time of the fire, on the issue of damages.

Department 2. Appeal from Superior Court, Glenn County; Oval Pirkey, Judge.

Action by Fred Quint against Dennis S. Dimond and others. From a judgment in favor of plaintiff, and from an order denying defendants' motion for a new trial, they appeal. Reversed.

C. W. Lynch, F. G. Drury, and W. M. Finch, for appellants. Frank Freeman and Charles L. Donohoe, for respondent.

McFARLAND, J. This is an action to recover damages for the burning and destruction of certain wheat and fences growing and being on land of plaintiff. At the time of the fire which destroyed plaintiff's said property defendants were operating a combined harvester propelled by a traction engine on land of one Jenkins, adjoining that of plaintiff, and it is averred that a fire was caused on this adjoining land by sparks from said engine; that this fire, in spite of all efforts to suppress it, spread onto plaintiff's land and destroyed his said wheat and fences; and that the fire was caused by the imperfect construction of the engine and its careless management by defendants. The verdict and judgment were for plaintiff, and defendants appeal from the judgment and from an order denying their motion for a new trial.

There was no direct evidence that the fire was started by sparks from the defendants' engine. It was first discovered at a point where the engine had been about 15 or 20 minutes before the discovery, and at that time the engine was about a quarter of a mile away from the place of the fire. It is argued by respondent that there was evidence of certain circumstances and conditions which warranted the jury in inferring that the fire was caused by the engine. Defendants contend that this evidence was insufficient to warrant this inference, and that the jury, if they had been left to exercise their own judgment, would probably have reached a different conclusion, and they particularly contend that the instructions of the court deal mainly with questions of evidence and facts; that they told the jury what weight they should and should not give to certain evidence, and what inferences of fact they should draw therefrom; that they constituted an argument in favor of plaintiff, and were plainly violative of the constitutional provision that "judges shall not charge juries with respect to matters of fact." Before discussing this general contention, we will notice two or three particular rulings which, in our opinion, were erroneous, and so prejudicial to defendants as to call for a reversal of the judgment and order appealed from.

There were two main questions in the case: First, was there evidence sufficient to show that the fire was actually caused by defendants' engine? and, second, if it was so caused, was it the result of defendants' want of due care in its construction and management? The fire occurred about 2 o'clock on the afternoon of June 20, 1900, and plaintiff's witness Breuss was permitted, over the objection and exception of defendants, to testify that on the next day he heard defendants' foreman, Laurensen, say: "I will never take the engine back into the field, unless she is fixed so that she will not throw sparks." This was clearly erroneous. The statement of the foreman made the next day was no part of the res gestæ, and was not properly admissible upon any conceivable ground. See Luman v. G. A. C. M. Co., 140 Cal., commencing at page 709, 74 Pac. 311, and cases there cited. It was averred in the complaint that the fire was caused "by sparks and fire thrown out and permitted to escape from and by the aforesaid described traction engine," and that they were "thrown out and escaped as aforesaid therefrom by the defective construction of said engine"; and this unauthorized declaration of Laurensen went directly to establish these averments.

The main contention of plaintiff was that the fire was caused by sparks from the smokestack of the engine, which, as is claimed, was not properly guarded by screens, etc., to prevent sparks and fire from the engine flying out in the field. The smokestack itself was offered and received in evidence, and, as tending to show that it was properly guarded by an arrester of sparks, the defendants brought into court and exhibited to the jury three screens by which they claimed the smokestack had been surrounded, so as to prevent the escape of sparks. These screens remained a long time in the presence of the jury. One of them was formally introduced and admitted in evidence. Another was formally offered in evidence, but an objection to it by plaintiff was sustained on the ground that the witness testifying to it could not fully identify it as one actually used on the smokestack, although he said that it was similar in character; and, although defendants excepted to this ruling, they do not make it a point in their briefs. As to the third screen, while it remained before the jury for inspection, it does not appear that it was formally offered in evidence or that any ruling was made as to its admissibility. Under these circumstances the court gave the following instruction, to which defendants excepted, and which they contend was erroneous: "In the course of the trial of this case certain screens were brought into court and placed before the jury, and remained there, subject to more or less inspection on the part of the jury. These screens were presented on the part of the defendants as part of their case, but on objection on the part of plaintiff they were by the court excluded from being considered as evidence in this case; and the jury are therefore instructed that, in considering the verdict in this case, they must not take into consideration said screens as presented to you at all, as the same were not admitted in evidence, and no impression received by the jury from said inspection must be considered in this case, as the same have nothing to do with the evidence admitted here whatever." This instruction was, in our opinion, erroneous and prejudicial. Certainly it was proper and highly important for defendants to show, if they could, that the smokestack was properly protected by spark arresters, and it is difficult to conceive of evidence more pertinent to that end than the means, the appliances, the screens, by which it was claimed the purpose of arresting the sparks was accomplished. And, even if we do not consider the screen which was subject to the inspection of the jury without objection or ruling, and the other one which was excluded upon objection, certainly the one which was formally introduced and admitted was a proper matter for the consideration of the jury. And it is no answer to say that the instruction must be held to apply only to the two which were not formally admitted in evidence. The instruction clearly included all the screens. Its language is: "Certain screens were brought into court and placed before the jury, and remained there subject to more or less inspection on the part of the jury." And it clearly referred to all the screens which were brought into court, etc., and the statement that they were all excluded as evidence was incorrect.

The court in general terms correctly instructed the jury that, although they should find that the fire was caused by sparks from defendants' engine, still defendants were not liable if they had used due care in its construction and management, and that: "If this jury finds from the evidence that the defendants used ordinary skill in procuring, and did procure for the engine in question, a good and safe spark catcher and arrester, and such as were at the time of the accident most in use and approved by experienced mechanics, they (said defendants) would not be required to use any other or greater care or skill in respect to the spark catcher or arrester used by them; and, if the jury find that the defendants were not guilty of negligence in any other particular, plaintiff cannot recover, and your verdict must be for defendants." But on this subject the court also instructed the jury as follows: "If from the evidence you shall find that a traction engine, properly constructed and fitted with the proper spark arrester or means of preventing the escape of sparks, would not throw sparks which will start fires when the said engine is otherwise properly operated, and you shall further find that the fire by which the property of the plaintiff was destroyed was set by the said traction engine of defendants, then and in that case you should find that the said engine at that time was not properly operated, and that ordinary care was not exercised in its operation." This instruction is clearly inconsistent with the other instructions on the subject of defendants' negligence, and is erroneous and prejudicial. Although the jury had been told in various forms that the defendants were not liable if they had used due care and diligence in managing the engine and preventing sparks from escaping from it to the ground, still they are told by this last instruction that if sparks did escape and caused the fire they were absolutely liable, notwithstanding they had not been guilty of any negligence whatever, and that the fact that the fire was caused by their engine was conclusive proof that they had been negligent. It substantially took away from the jury all consideration of defendants' carelessness, and it made all the other instructions on the subject of care or negligence absolutely meaningless and of no consequence.

For the errors above noticed, there must be a reversal. We think, also, that defendants' contention that the charge was erroneous, because argumentative and dealing with questions of evidence and facts entirely within the province of the jury, must be sustained. The charge consisted entirely of written instructions presented by the parties and given at their request. If the matters contained in those given at the request of plaintiff had been argued by his counsel to the jury, as they no doubt were argued, they would have constituted legitimate argument by counsel, and they might have been answered, as no doubt they were answered, by counsel for defendants as best they could. These arguments of respective counsel, pointing out the weight which they thought should be given to certain evidence, no doubt assisted the jury in coming to a conclusion; the jury, however, knowing that they were merely the arguments of interested counsel, not binding on them, and to be considered, contrasted, and weighed by the jury and given the significance and force to which the jury considered them entitled. But, when the arguments of either side as to questions of fact are injected into the charge of the court, there is no answer to them, and the jury naturally take them as conclusive. And we think that in the case at bar the instructions given at plaintiff's request consisted mainly of argument in favor of plaintiff upon questions of fact. To show this characteristic of these instructions, it is not necessary to quote all of them here. It will be sufficient to quote a part of instruction No. 2. And to explain this part of the instruction it is necessary to state two or three items of evidence. There was no evidence that the engine had ever before set fire to grain or anything upon the ground, but there was evidence that light sycamore wood had been used in generating steam, and there was a conflict of testimony as to whether or not that kind of wood was more likely than hard wood to emit dangerous sparks. There was also, as a part of the harvester, an appliance called a "dog house." This was made of canvas, and was near the smokestack, and was used as a "header draper." Chaff sometimes collected on this dog house, and it was shown that upon one or two occasions there had been a small fire either in the chaff or the canvas, which was easily extinguished. Of course, there were also the "general conditions of the property and surrounding circumstances," consisting of the facts that an engine propelled by steam generated by fire was being operated in a grain field. The foregoing facts were specially called to the attention of the jury by the instructions, and the part of instruction No. 2 above referred to is as follows: "In this connection you are instructed that the plaintiff is not bound to prove with absolute certainty that the fire was caused by a spark or sparks escaping from the said traction engine of defendants. The plaintiff is only bound to prove by a preponderance of the evidence of that fact, and prove to the effect that immediately before the breaking out of the fire the said traction engine of the defendants, burning light wood for the purpose of generating steam, was in operation by and immediately in close proximity to the place where the fire broke out, and that said traction engine had on previous occasions set fire to the dog house thereof by sparks escaping therefrom, and the said traction engine was so operated with relation to the place where the fire started that a spark or sparks escaping therefrom could have set fire; and the condition of the property and surrounding circumstances, being such as to warrant a belief on your part that the fire was more likely brought about by another cause, would be such reasonable evidence, and would prima facie establish that the fire had been caused by the said traction engine, and would warrant a finding upon your part to that effect, in the absence of evidence that the fire arose from some other cause." We do not see in this instruction any proposition of law, nor anything other than an instruction that the jury should draw certain inferences from certain evidence and facts. It was substantially an argument to the jury in favor of plaintiff upon questions of fact. Indeed, the latter part of it appears to tell the jury that, although they may believe that the fire was "more likely brought about by another cause," still the facts thereinbefore referred to would prima facie establish that the fire had been caused by the said traction engine; and, although plaintiff argues that apparently there was a word missing from the instruction, still the language is, at best, confusing and misleading. Whether or not it would be wiser to allow judges to instruct juries as to matters of evidence and fact, and thus influence their verdicts as to such matters, as is permitted in some jurisdictions, is not a question to be here considered. Our Constitution expressly prohibits it. "To tell the jury what weight to give or not to give any particular evidence is to express an opinion upon a matter of fact" (People v. O'Brien, 96 Cal. 181, 31 Pac. 45); "to weigh the evidence and find the facts is, in this state, the exclusive province of the jury, and with the performance of this duty the judge cannot interfere without a palpable violation of the organic law" (People v. Dick, 34 Cal. 663); and "the court has no right to dictate or suggest the process of reasoning by which the evidence shall be judged" (Estate of Carpenter, 94 Cal. 417, 29 Pac. 1101, 1104. See, also, Kauffman v. Maier, 94 Cal. 282, 29 Pac. 481, 18 L. R. A. 124; Estate of Blake, 136 Cal. 306, 68 Pac. 827, 89 Am. St. Rep. 135; McNeil v. Barney, 51 Cal. 603; People v. Fong Ching, 78 Cal. 169, 20 Pac. 396). The language of the instruction above quoted and other parts of the instructions are clearly erroneous, within the law as declared in the cases above cited. In Liverpool, L. & G. Ins. Co. v. S. P. Co., 125 Cal. 434, 58 Pac. 55, cited by appellant, the only part of the instruction there considered that was directly condoned was that which told the jury that, if "you find it more probable that the fire was caused by sparks escaping from the swing engine than from any other cause, your finding on that point, to wit, the origin of the fire, should be accordingly." But this does not, by any means, cover all that was said in the instructions in the case at bar.

We do not think that, on the question of the amount of damages, it was error to allow plaintiff to prove the market value of wheat in the nearest market at the time of the fire. It was some evidence tending to show value. The wheat, if it had not been burned, would have been ready for market in a very short time, and if the market had fallen before that time such fact could have been shown by defendants.

The judgment and order appealed from are reversed.

I concur: LORIGAN, J.

I concur in the judgment: HENSHAW, J.

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147 Cal. 653

HELLMAN v. CITY OF LOS ANGELES.

(L. A. 1,346.)

(Supreme Court of California. Sept. 6, 1905.)

1. MUNICIPAL CORPORATIONS — TAXES — PAYMENT UNDER PROTEST—STATUTES.

Los Angeles City Charter (St. 1889, p. 471, c. 1) § 46, declares that the manner of collecting municipal taxes shall substantially be the same as that for the collection of city and county taxes. Pol. Code, pt. 3, tit. 9, entitled "Revenue," contains the assessment and tax scheme of the state, including section 3819, which, as amended by St. 1895, p. 335, c. 218, authorizes the payment of taxes under protest and declares that, when so paid, the payment shall in no case be regarded as a voluntary payment and in case of suit may be "recovered back." *Held*, that such section applied to the collection of municipal taxes of Los Angeles, though section 46 of the charter went into effect before the amendment of section 3819.

2. SAME—ASSESSMENT—IMPROPER ITEMS.

Where an assessment of city taxes contained assessments for general public school and water bonds, and it appeared that no such bonds had ever been issued as designated, and also that proceedings for their issuance had been declared illegal by the Supreme Court, the assessment was invalid as to such items.

3. SAME—DESIGNATION OF FUND—SURPLUSAGE.

Where an assessment of municipal taxes was made for the payment of "public school improvement bonds (1899)," the designation of the year was essential in particularizing the fund, under a charter provision requiring the city council to make a levy for each fund, and could not be treated as surplusage for the purpose of sustaining the levy to pay public school improvement bonds of 1889.

Department 2. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by I. W. Hellman against the city of Los Angeles. From a judgment in favor of plaintiff, the city appeals. Affirmed.

W. B. Mathews, for appellant. Graves, O'Melveny & Shankland, for respondent.

HENSHAW, J. Plaintiff brought this action to recover from the city of Los Angeles the sum of $479.60, with interest, on account of taxes paid by him to the city under protest, which taxes he claims were illegal and void. In September, 1900, the council of the city of Los Angeles passed an ordinance fixing the tax levy for municipal purposes for the year 1900–01. This tax levy embraced the following items:

	Cents.
For general public school bonds (1899)…………	.06.46
For waterworks bonds (1899)…………………	.00 69
For public school improvement bonds (1899)……	.02.36

Plaintiff was the owner of property in the city of Los Angeles subject to taxation, and paid the taxes for these three items, accompanying his payment with a written protest. The facts being matters of record, there was no dispute over them, and the trial was had substantially to determine the conclusions of law which should be drawn from these facts. The court adjudged the items above set forth to be illegal and void, and rendered its judgment accordingly. The city of Los Angeles appeals.

The city first contends that the complaint does not state a cause of action, in failing to show that the taxes sought to be recovered were paid involuntarily and under protest, contending that the payment was a voluntary payment, under the authority of Maxwell v. San Luis Obispo, 71 Cal. 466, 12 Pac. 484, Bank of Santa Rosa v. Chalfant, 52 Cal. 170, and Phelan v. San Francisco, 120 Cal. 1, 52 Pac. 38. We think, however, that this contention cannot be sustained. Under the peculiar condition of the revenue law of the city of Los Angeles, the cases above cited are not applicable to the question involved. Pol.

Code, part 3, tit. 9, is entitled "Revenue," and contains the assessment and tax scheme of the state. Chapters 7 and 8 of that title deal with the collection of property taxes, and section 3819 is one of the sections of these chapters. In 1895 the Legislature, revising the subject of the revenue and taxes of the state (St. 1895, p. 335, c. 218), amended section 3819 of the Political Code, providing for the payment of taxes under protest, to read, "and when so paid under protest the payment shall in no case be regarded as voluntary payment," and in case of suit may be "recovered back." The charter of the city of Los Angeles, in section 46, declares: "The mode and manner of collecting such municipal taxes * * * shall substantially be the same as the mode and manner * * * for the collecting of state and county taxes." Charter of Los Angeles, St. 1889, p. 471, c. 1. It is quite plain that section 3819, found in chapter 7 of the Political Code, under the subject or title of "Collection of Property Taxes," is a part of the "mode and manner" of collecting state and county taxes, and is none the less a part of that mode and manner in that it deals with the right of the taxpayer to pay under protest. It would be absurd to say that the mode and manner of collecting taxes was limited solely to the right of the state and its tax collectors, and had reference only to the duties of the taxpayer, and no pertinency whatever to the taxpayer's correlative rights. It is a provision definitely declaring a certain mode and manner in which the taxpayer may pay his taxes and preserve his rights, in case the assessment and levy should be found void. The statute is in derogation of the general common-law rule as to voluntary payments, and is befitting to this more enlightened age. Nor can the argument of appellant that, as section 46 of the charter of Los Angeles went into effect before the amendment of section 3819 in 1895, and therefore the amendment of section 3819 should not be held to apply in the collection of municipal taxes, be accorded much weight, first, because the language of the charter of Los Angeles is general, and does not limit the mode and manner of collecting municipal taxes to the then existing mode and manner of collecting state and county taxes; and, second, because, the charter of Los Angeles prescribing that the mode and manner of collecting municipal taxes shall be substantially the same as the mode and manner for the collection of state and county taxes, the council of Los Angeles, acting within the scope of the power and authority vested in them by section 46 of their charter, and evidently to set at rest any question that might exist upon the subject, by Ordinance No. 2848 (N. S.) § 55, enacted and adopted section 3819 of the Political Code in the following language: "And when so paid under protest the payment shall in no case be regarded as voluntary, and such owner may at any time within six months after such payment, bring an action against the city * * * to recover back the taxes so paid under protest." Plaintiff's action was brought within the time prescribed, and sufficiently states a cause of action.

Of the three contested items, the second is for taxes on waterworks bonds. The complaint alleged that no waterworks bonds had been issued. The answer raised no issue on that allegation, and the agreed statement upon which trial was had recited a judicial determination in Barrows v. City of Los Angeles, "whereby it was adjudged that the proceedings taken at the instance of the council of the city of Los Angeles, with reference to the issue of the bonds known as the 'Waterworks Bonds (1889)' * * * were null and void." No other evidence was offered on this item, and no specification is made against the judgment of the court below as to the item, and upon the evidence under the stipulation the judgment was correct.

The first item is for general public school bonds (1889), $329.93. As to this the complaint contains the same allegation, and no issue was raised by the answer, and in the agreed statement there is a recital of an adjudication of the invalidity of this pretended bond issue in the judgment of City of Los Angeles v. Hance, 130 Cal. 279, 62 Pac. 484. There was thus sufficient evidence before the court upon this item, and the judgment in regard to it was correct.

The last item, for public school improvement bonds (1889), is the one most seriously contested. The complaint alleged that no such bonds existed. The answer admitted that no such bonds existed of the year 1899, but there did exist bonds of the year 1889. The agreed stipulation shows that the tax levy was for the public school improvement bonds of the year 1899, and "that at the time of said levy there had not been voted, authorized, or issued any bonds entitled 'Public School Improvement Bonds (1899).'" There were existing and outstanding bonds of the city of Los Angeles known and designated as "Public School Improvement Bonds (1889)." The point in controversy turns upon this variance. In the court below plaintiff admitted the truth of the facts set up in the answer, subject, however, to his objection to the admissibility of such facts, as seeking to vary by parol the terms of an ordinance, which not only was a written instrument, but proceedings under which were, as to the plaintiff taxpayer, in invitum, and therefore the more subject to strict construction. The trial court held with the respondent upon this contention, and, finding that there were no public school improvement bonds of 1899 to which the levy could be addressed, declared it to be void. In this we think the court was correct. Under the charter of Los Angeles the tax ordinance was necessary. The city auditor was required to make an estimate for each fund. Charter of Los Angeles, St. 1889, p. 466, c. 1, § 43. The city council in its ordinance was required to make a levy for each fund. Ordinance No. 2848 (N. S.) § 23; Pol. Code, §§ 3714, 3737. The situation, therefore, presented is that, with the requirement that the estimate and levy must be made for each fund, there was an estimate and levy made for a nonexisting fund and to meet a nonexisting liability; for no presumption of intention that is not distinctly expressed in a tax ordinance can be indulged by the court, and every construction must be in favor of the taxpayer and against the government. Merced Co. v. Helm, 102 Cal. 159, 36 Pac. 399. The designation "1899" cannot be regarded as surplusage. It was essential, within the requirements of the charter and of the Code above cited, in particularizing the fund. Not only can the figures "1899" not be regarded as surplusage, but their elimination by a court would be equally unwarranted. It would leave the levy without proper description, and compel the court to assume and usurp the power of the executive department of the government by deciding whether there were any other bonds to which the levy could apply, or what, in any event, should become of the money. As said in Clunie v. Siebe, 112 Cal. 597, 44 Pac. 1064: "The assessment of property for the purposes of taxation is a function of the executive department of the government, but the proceeding contemplated by the petition herein would transfer that function to the judicial department of the government." Moreover, by eliminating "1899," the reference to any particular bonds, and, in consequence, to any particular fund, would be so indefinite, ambiguous, and uncertain as itself to render the assessment void. Falkner v. Hunt, 16 Cal. 167; Harvey v. Meyer, 117 Cal. 62, 48 Pac. 1014; People v. Flint, 39 Cal. 670; Keane v. Cannovan, 21 Cal. 302, 82 Am. Dec. 738; Kelsey v. Abbott, 13 Cal. 609; Maxcy v. Clabaugh, 1 Gilman (Ill.) 26. It follows, therefore, that it would be an unwarranted departure from the accepted rules of interpretation, and an infringement upon the taxpayer's well-settled rights to a strict construction of the levies and assessments under which he is compelled to pay his taxes, to consider the ordinance levying the tax otherwise than is plainly imported from its reading.

This case is not at all like that presented in Burch v. Newbury, 10 N. Y. 374, where, in the construction of a statute, the Supreme Court of New York reiterated the well-accepted rule that, where words or phrases are obscure or doubtful, the intention of the Legislature is to be resorted to in order to find the meaning. There is no ambiguity, nor are there words of doubtful import, upon the face of this levy. Equally dissimilar is this case from that of Burlington, etc., v. Cass County (Neb.) 19 N. W. 700, relied upon by appellant. There the objection made to a tax was that its levy was for "the insane fund." The answer showed that it was levied for the purpose of paying the indebtedness of the county to the state, as its proportion of caring for the insane at the hospital, according to the certificate of the auditor. Here the court pointed out that the law did not designate any name for the fund to which this tax would belong, and said: "The mere fact that this tax was named or designated the 'insane fund' does not change its character or vitiate the tax; and especially is this true in a case like this, where the law does not attach to it any name." But in this case a specific name has been given, and the appellant city is not willing to stand upon the sufficiency of the description, but asks that the name be so changed as to make the levy apply to a fund entirely different from that which was expressly designated. The inapplicability of this case, therefore, becomes apparent.

For the foregoing reasons the judgment appealed from is affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

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147 Cal. 649

Ex parte HAYDEN. (Cr. 1,233.)

(Supreme Court of California. Sept. 6, 1905.)

CONSTITUTIONAL LAW—PERSONAL LIBERTY—POLICE POWER—FRUIT LABELS.

St. 1903, p. 338, c. 251, § 1, providing that all fruits, green and dried, contained in packages to be shipped or offered for shipment, shall have stamped on the outside of every such package, in legible letters of certain dimensions, a statement truly and correctly designating the county and immediate locality in which such fruit was grown, and providing a penalty of fine and imprisonment for violation, was not a proper exercise of the state's police power, but was invalid as an unlawful invasion of personal liberty.

In Bank. Application by Charles E. Hayden for writ of habeas corpus to determine the legality of his incarceration for violation of St. 1903, p. 338, c. 251, § 1, requiring location labels on fruit packed for shipment. Writ granted. Petitioner discharged.

Wright & Wright, for petitioner. Benjamin K. Knight, Dist. Atty. of Santa Cruz County, for the sheriff.

HENSHAW, J. Petitioner was convicted and sentenced to punishment for a violation of the provisions of a state statute, which provides as follows: "All fruit, green and dried, contained in boxes, barrels or packages, which shall hereafter be shipped or offered for shipment in this state by any person, firm or corporation, shall have stamped, branded, stenciled or labeled in a conspicuous place on the outside of every such box, barrel or package, in clearly legible letters, at least one-quarter of an inch in height, a statement truly and correctly designating the county and immediate locality in which such fruit was grown." St. 1903, p. 338, c. 251, § 1. For a violation of this act he was sentenced to pay a fine of $300, with the alternative of imprisonment, and sued for and obtained a writ of habeas corpus.

He contends that the penal statute in question is violative of section 1 of the fourteenth amendment of the Constitution of the United States and of article 1, § 1, of the Constitution of this state, and that the statute in question works an unwarranted invasion of his liberty. It has come to be well recognized that the liberty and the pursuit of happiness, in which the individual is protected by the Constitution of the United States and of the state, apply as fully to his right of contract, his right to follow a legitimate vocation untrammeled by unnecessary regulations, as it does to the freedom of arrest or restraint of his person. This subject has received recent consideration by this court, and it is unnecessary to do more than refer to Ex parte Dickey, 144 Cal. 234, 77 Pac. 924, 66 L. R. A. 928, 103 Am. St. Rep. 82. Putting out of contemplation, therefore, the fundamental right of the government to subject private property to taxation and to take such property in time of public calamity and peril, the right of the state to impose burdens upon such property where the business is legitimate and innocuous, in other words, to regulate harmless vocations, is found in the police power alone. Young v. Commonwealth (Va.) 45 S. E. 327; Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780. The police power, deriving its existence from the rule that the safety of the people is the supreme law, justifies legislation upon matters pertaining to the public welfare, the public health, or the public morals. Cooley on Constitutional Limitations (7th Ed.) p. 837; Ruhstrat v. People, 185 Ill. 133, 57 N. E. 41, 49 L. R. A. 181, 76 Am. St. Rep. 30.

But the Legislature, under the guise of police regulations, cannot enact laws which do not pertain to one or the other of these objects, and which impose onerous and unnecessary burdens upon business and property. By this court it has been said (Ex parte Whitwell, 98 Cal. 73, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152): "But it is not true that, when this power is exerted for the purpose of regulating a business or occupation which in itself is recognized as innocent and useful to the community, the Legislature is the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue such business or profession. As the right of a citizen to engage in such a business or follow such a profession is protected by the Constitution, it is always a judicial question whether any particular regulation of such right is a valid exercise of legislative power. * * * This principle is stated very forcibly in the case of Mugler v. Kansas, 123 U. S. 661, 8 Sup. Ct. 273, 31 L. Ed. 205, in the following language: 'The courts are not bound by mere forms, nor are they to be misled by mere pretense. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.'" The propositions here enunciated have received the sanction of all the courts, and may not be gainsaid. Indeed, respondent upon this appeal does not dispute them, but undertakes to show that the act in question is a legitimate exercise of the police power, in that its object and purpose is to preserve and promote public health and public welfare. His reasoning in this regard is that from time to time the Legislature has passed and this court has approved statutes providing for the quarantining of infected fruit, for the destruction of diseased fruit and fruit trees, and for the compulsory care and preservation against disease of orchards; and it quotes this court's statement in County of Los Angeles v. Spencer, 126 Cal. 673, 59 Pac. 203, 77 Am. St. Rep. 217, to the following effect: "It is known that the existence of the fruit industry in this state depends upon the suppression and destruction of the pests mentioned in the statute. The act in question is therefore a proper exercise of the police power, which the Legislature has under section 1, art. 19, of the Constitution, to subject property to such reasonable restraints and burdens as will secure and maintain the general welfare and prosperity of the state." From this respondent argues that the effect of the act is (e. g.) that when apples are shipped to the markets of this state, properly labeled, "Apples Grown in Santa Cruz County," because of their known cleanliness and freedom from disease, such apples are permitted to pass local boards of commissioners, while at the same time, if apples are shipped from San Mateo county into Santa Cruz county bearing the label, the county of Santa Cruz can protect itself against the diseased fruit from the neighboring county. Still further it is argued that the act would prevent the false labeling of fruit, and that the prevention of a general fraud is legitimately within the scope of the police power.

But the difficulty with this argument is that the act clearly is not designed to accomplish any of these purposes, and is wholly inadequate to their accomplishment. The scope, the meaning, and intent of an act must be gathered from its title and from its body. There is nothing in either the title or the body of this act which deals or pretends to deal with any of the difficulties which respondent mentions. If it is a question, as respondent contends, of the shipping of diseased apples, it would be simple enough for the Legislature, and quite within its powers, to regulate or prohibit the transportation of such diseased fruit. If it were a question merely of deception in the label, the direct and efficacious method would be for the Legislature to prohibit false labeling. None of these things, as we have said, does this act do or pretend to do. It requires merely that every shipment of every package of fruit, whether it be from the small farmers with few trees or vines, or whether it be from the large producer, must in every instance bear a label naming the county and immediate locality in which the fruit was grown. It is a matter of common knowledge that this requirement would work the absolute destruction of certain important branches of industry. Dried fruit, such as prunes, peaches, and apricots, are gathered in establishments in enormous quantities from the state over. These fruits, when dried, are assorted by grade and quality, and, thus assorted and packed, are shipped to the uttermost parts of the earth. It would absolutely prohibit this industry, if these fruit driers were compelled to label each package with the names of the localities from which the fruit came, and, if it did not absolutely prohibit it, it would render their business so onerous, complicated, and expensive as seriously to imperil its existence. It is plain, therefore, that the act was not designed to prevent either false labeling or the shipping of diseased fruit, and, if so designed, it is both meaningless for this purpose and burdensome for all others. It seems quite apparent that the true purpose of the act was to obtain for the fruit raisers of some well advertised and favored localities an advantage in the disposition of their own fruit. But this, for reasons well and elaborately set forth in People v. Hawkins, 157 N. Y. 1, 51 N. E. 257, 42 L. R. A. 490, 68 Am. St. Rep. 736, forms no part of the police power, and is wholly beyond the prerogative of the Legislature.

It follows, therefore, that the act in question works an unconstitutional invasion of the prisoner's liberty; and it is ordered that he be discharged.

We concur: McFARLAND, J.; LORIGAN, J.; ANGELLOTTI, J.; VAN DYKE, J.; SHAW, J.

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147 Cal. 659

ISOM v. REX CRUDE OIL CO. et al.

(L. A. 1,341.)

(Supreme Court of California. Sept. 6, 1905.)

1. Landlord and Tenant—Cancellation of Lease—Fraud—Complaint—Knowledge of Assignee.

Where the assignor of a lease procured the same from plaintiff by fraud and false representations, and then assigned the lease to defendants, a complaint for the cancellation of the lease for such fraud, failing to allege that the assignees took with knowledge or notice of the fraud, was fatally defective.

2. Same—Use of Leased Property—Statutes—Application.

Civ. Code, § 1930, providing that when a thing is let for a particular purpose the hirer must not use it for any other purpose, and, if he does, the letter may hold him responsible for its use or treat the contract as rescinded, is applicable to the hiring of real property.

3. Minerals—Oil—Realty.

Oil is a mineral, and as such is a part of the realty.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, §§ 134, 201, 202.]

4. Landlord and Tenant—Removal of Oil—Waste.

The unauthorized severance and removal of oil by a tenant constitutes waste.

5. Same—Lease—Construction.

Where defendant's assignor leased certain oil land for three years, with privilege of renewal for five, on the representation that he wished the premises to erect a tenement building thereon, at an annual rental of $100, with permission of the lessee to remove at the termination of the lease such buildings as he might have erected, the lease was a grant of the use merely of the superficies of the soil, and, the lessee and his assignees having drawn oil therefrom, plaintiff was entitled to cancel the lease under Civ. Code, § 1930, authorizing such cancellation for an unauthorized use of the leased premises.

6. Same—Cancellation of Lease—Return of Rent Paid.

Where a lease was for a term of three years, with the privilege of renewal for five years at an annual rental of $100, and at the expiration of two years the lessor canceled the same because the lessee and his assigns had used the property for an unauthorized purpose, the contract should be considered as executed with reference to the expired period, so that the lessor was not required to return the rent paid therefor as a condition to the exercise of her right of cancellation.

Department 2. Appeal from Superior Court, Los Angeles County; W. F. Fitzgerald, Judge.

Action by S. McG. Isom against the Rex Crude Oil Company and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

See 74 Pac. 294.

Rehearing denied October 5, 1905.

Edwin A. Meserve (Jeff Paul Chandler of counsel), for appellants. Works, Lee & Works and Stephens & Stephens, for respondent.

HENSHAW, J. Plaintiff, the owner of a certain piece of land in the city of Los Angeles, sued defendant, as assignee of her lessee, to have canceled and annulled a lease under which it was holding, and for damages for its unlawful extraction of oil from her land. She alleged that she was in an Eastern state, and in ignorance of the condition of her property and of the surrounding property, and in ignorance of the fact that the land lay in an oil belt or district within the city of Los Angeles; that Book, her lessee, by letter represented to her that he wished to lease the premises for the purpose of erecting a tenement building thereon, and concealed from her the fact that oil existed upon the premises; that in fact Book had already entered upon the land and was at that time by a well extracting oil therefrom; that she executed to Book a lease for the term of three years, with the privilege of a renewal of five years, for the annual rental of $100, payable quarterly in advance, with permission to the lessee to remove, at the termination of the lease, such buildings as he might have erected. It is then alleged that the defendant took an assignment of this lease from Book, and entered into possession of the property under the lease "with knowledge of the terms thereof." Then follow allegations of the discovery of the true condition and of the fraud of Book after two years had expired and two years' rent had been paid, the service of notice upon Book and upon the defendant receiver, and vacation of the lease because of its fraudulent procurement and the continued pumping of oil by the defendant after such notice. Trial was had before the court without a jury. The court found in accordance with the allegations of the complaint, decreed a cancellation and annulment of the lease, gave damages to plaintiff in the sum of $4,070, and enjoined defendant from operating the oil well and removing therefrom any of the tubing, machinery, tanks, and other appliances.

Treating that phase of the action which deals with the rescission and cancellation of the lease for the fraud of Book, the complaint is radically defective in failing to allege that the defendant took with knowledge or notice of the fraud. It is not sufficient, as respondent argues upon this point, that the evidence in the case shows constructive knowledge on the part of defendant through notice and knowledge of facts sufficient to put a prudent person upon inquiry. The difficulty is in the complaint itself, which nowhere avers such notice or knowledge. So far as the pleadings go, plaintiff by her absence of averment has placed the defendant in the position of an innocent purchaser without notice, and the fraud of its assignor, therefore, cannot be made a ground for the avoidance of the lease which it had thus innocently and for value acquired. Deputy v. Stapleford, 19 Cal. 302; Conn. Co. v. McCormick, 45 Cal. 583; Schultz v. McLean, 93 Cal. 329, 28 Pac. 1053. It follows, therefore, that plaintiff was not entitled to a cancellation of the lease against this defendant for the fraud of Book, to which it was not a party and with knowledge of which it was not charged.

But section 1930 of the Civil Code provides as follows: "When a thing is let for a particular purpose the hirer must not use it for any other purpose, and if he does the letter may hold him responsible for its safety during such use in all events, or may treat the contract as thereby rescinded." This provision is found in chapter 1, under the title of "Hiring in General," chapter 2, providing for the hiring of real property, and chapter 3, for the hiring of personal property. It is therefore applicable to the hiring of real property. When the Code speaks of the letting for a particular purpose, it is, of course, not limited to a single purpose. It means that when property is used for a purpose other than that or those for which it has been let. And if, in fact, the land here leased was used for a purpose other than that legitimately contemplated by the lease, the section is applicable. That it was so used admits of no doubt. Oil is a mineral, and as a mineral is part of the realty. Funk v. Haldeman, 53 Pa. 229. It is recognized as a mineral in our mining laws. Corporations formed for the purpose of securing and marketing it come within the purview of the mining laws, and claims for oil-bearing lands are taken up as are claims for mineral lands. Like the precious metals, therefore, or coal, oil in place is a part of the freehold. Its severance and removal, except in proper cases, is waste. Stoughton's Appeal, 88 Pa. 198; Williamson v. Jones (W. Va.) 19 S. E. 436, 25 L. R. A. 222. It is likewise beyond peradventure that such a lease as here was executed, without any reference to minerals, mines, or quartz, is a lease merely of the superficies of the soil. Owings v. Emery, 6 Gill, 260. It follows, therefore, that, aside from any question of the fraud of Book, he had no right, under his lease, to commit waste by the removal of the oil; and as his assignee, the defendant herein, at best could only acquire by the assignment such rights as Book himself was legally entitled to exercise, it likewise follows that the defendant had no right to continue to extract this oil. Here, then, was a use of the thing let for a purpose not only foreign to the letting, but for a purpose which absolutely involved the impairment, and to a great extent the destruction, of the value of the freehold. While at common law against a tenant who committed waste the remedy was by an action for waste, and later by an action on the case for waste and for injunction, and while an action for forfeiture could not follow unless a right of re-entry was preserved in the lease, it would appear that section 1930 of our Civil Code has modified this common-law rule in distinctly declaring that the letter, under such circumstances, may treat the contract as thereby rescinded—rescinded, that is to say, by force of the wrongful act of the possessor in using the property for a purpose foreign to that for which it was let. The property in this case having been so used, all questions of fraud may be eliminated, and plaintiff's complaint is sufficient for a rescission under section 1930.

But against this it is urged that the plaintiff was not entitled to rescind for her failure to offer to restore the two annual payments of rent, amounting to $200, which admittedly she had received. In proper cases it is unquestionably true that restoration or offer to restore is essential to a rescission. Authority need not be cited in support of so elementary a proposition. But in this case it was not incumbent upon the plaintiff to restore or to offer to restore all or any part of the money which she had accepted as rent. While for many purposes the term of lease is regarded as indivisible, and the rent likewise indivisible, and as applying to the whole term, in modern estates of leaseholds, where monthy rental or annual rental (as here) is specified, it is frequently necessary to divide the rent to cover the indicated period. Here Book and his assignee had had possession of the premises under the lease for the two years for which the rent had been paid, and were entitled with that possession to the enjoyment of the property for all legitimate purposes. This use of the property, and this withholding of it from the owner, constituted a sufficient consideration year by year for the yearly payments which were made. As to the payments which had been made for the time which had elapsed, the contract was not executory. It was executed. Defendant and its predecessor had received the full benefit for the money which had been paid, and a restoration of it was not necessary by plaintiff before commencing this action. The case in this respect is similar to that of Wilson v. Moriarty, 77 Cal. 596, 20 Pac. 134, and Whyte v. Rosecrantz, 123 Cal. 634, 56 Pac. 436, 69 Am. St. Rep. 90.

The evidence, which was admitted under objection and exception of defendant, touching the fraud of Book, in consideration of what has been said, becomes immaterial, and therefore the error, if error there were, could not have prejudiced the defendant. The evidence as to damage was sufficient to support the finding of the court.

The judgment appealed from is therefore affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

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147 Cal. 663

ISOM v. REX CRUDE OIL CO. et al. (L. A. 1,342.)

(Supreme Court of California. Sept. 6, 1905.)

1. MINING CORPORATIONS — CONSOLIDATION — EFFECT.

Under Civ. Code, § 361, relating to mining companies, and declaring that no consolidation shall in any way relieve such companies or the stockholders thereof from any and all just liabilities, the consolidation of a mining company into a new company did not work a dissolution of the company consolidated; and hence the service of process after consolidation on its secretary, who still held office, except for the consolidation, was sufficient to confer jurisdiction of the corporation.

2. COURTS—CONFLICTING JURISDICTION—POSSESSION OF RECEIVER.

Where suit was brought in a federal court against the assignee of the lease alone to cancel the same, when the property was in the hands of a receiver appointed by a state court in a similar action, the receiver not being a party to the action in the federal court, it was no objection to that court's jurisdiction that the property was in the hands of such receiver and that leave had not been obtained from the state court to sue him.

3. SAME.

Where, after appeal from a judgment for plaintiff in a suit to cancel a lease, and the filing of a supersedeas, and the appointment of a receiver to take charge of the property, plaintiff brought a similar suit for the same relief in a federal court, in which she recovered judgment by default and the court issued a writ of assistance, directing its marshal to put complainant in possession of the property, an order of the state court, on the application of the receiver for instructions, directing him to deliver the property to the marshal before the determination of the appeal, was an abuse of discretion

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by S. McG. Isom against the Rex Crude Oil Company and another. From an order directing a receiver of the assets of the Rex Crude Oil Company to turn over to a United States marshal possession of certain real estate held by him under a lease assigned to the company, defendants, the Rex Crude Oil Company and the Union Consolidated Crude Oil Company, appeal. Reversed.

See 74 Pac. 294.

Edwin A. Meserve (Jeff Paul Chandler, of counsel), for appellants. Stephens & Stephens, A. W. Hutton, and Works, Lee & Works, for respondent.

HENSHAW, J. The plaintiff, Isom, had sued defendant the Rex Crude Oil Company in the superior court of the county of Los Angeles, and had obtained a judgment for the annulment of a certain lease held by it, upon the ground that it was procured by fraud, and for damages. Subsequently the court appointed a receiver of the property, who was ordered to take possession of it and operate it; the land being oil-bearing land. This the receiver did, and the defendant the Rex Crude Oil Company took its appeal from the judgment, and with its appeal filed a supersedeas bond. Thereafter the Rex Crude Oil Company and two other corporations consolidated their assets, franchises, and property into the Union Consolidated Crude Oil Company. After this consolidation the plaintiff, Isom, filed her bill in the Circuit Court of the United States, Ninth Circuit, Southern District of California, against the Rex Crude Oil Company. Substantially the same allegations of fraud were made in this bill as were set forth in the complaint in the state court, and additionally it was alleged that the lease in question had expired by its terms. The bill further set forth the proceedings in the state court resulting in favor of the plaintiff, and the appointment of the receiver, and the possession of the property by the receiver. It was prayed that the lease be declared void and canceled, and that it be adjudged and decreed that the lease, if valid, had been terminated by its own provisions, and that plaintiff be decreed to be entitled to the possession of the property free from any claim on the part of the defendant. The Rex Crude Oil Company made no appearance in this action. Judgment passed for the plaintiff; the Circuit Court finding in accordance with the allegations, and decreeing in accordance with the prayer. To this action in the Circuit Court the receiver was not made a party. The Rex Crude Oil Company was the sole defendant. A writ of assistance was issued by the Circuit Court, directing the marshal to put the complainant in possession of the property. On the following day the receiver appointed by the state court filed his report, in which he alleged that the writ of assistance had been served on him by the United States marshal, and he submitted the writ and the facts above stated to the superior court, requesting the direction of that court as to the proper course for him to pursue. Following this, plaintiff, Isom, after due notice, moved the superior court for its order directing the receiver to turn over and deliver the possession of the property to the United States marshal. The superior court made its order in compliance with this motion, and it is from that order that this appeal is taken.

The Union Consolidated Crude Oil Company, claiming by consolidation to have succeeded to all the rights of the Rex Crude Oil Company, appears also as appellant herein. Objection is made that it has no standing in the matter; but the objection is immaterial and need not be considered, since all of its rights are fully protected by the appeal of the Rex Crude Oil Company.

As has been stated, the action in the Circuit Court was commenced, and service upon the secretary of the Rex Crude Oil Company was had, after the consolidation of the corporations into the Union Consolidated Crude Oil Company. In this regard the admission upon the record is that W. F. Armstrong had been the secretary of the Rex Crude Oil Company, and that he ceased to be secretary of that company only by virtue of its consolidation with the Union Consolidated Crude Oil Company, and not otherwise, by resignation or removal. Appellant's contention is that by the consolidation the Rex Crude Oil Company as a corporation ceased to exist, and consequently ceased to have any officers; that the attempted and pretended service upon W. F. Armstrong, as its secretary, was a nullity; and that the Circuit Court never acquired jurisdiction of defendant. The question thus presented is whether, under our laws, such consolidation works a dissolution of the constituent corporations. It is, of course, true that the consolidated corporation itself becomes a new and distinct entity, and such, indeed, has been decided in Market Street Railway Co. v. Hellman, 109 Cal. 587, 42 Pac. 225. No decision in this state bears directly upon this question. In California Central Railway Co. v. Hooper, 76 Cal. 407, 18 Pac. 599, the court, discussing an Ohio case, which holds that under the Ohio statute a dissolution of the consolidating corporations results, says: "Whether the consolidated companies cease to exist for every purpose immediately upon consolidation, whether they did not continue separate as to their creditors (Civ. Code, § 473), is, perhaps, unimportant here." This language was used, having regard to the consolidation of railroad corporations, to which section 473 applied; but the consolidation in the case at bar was that of mining corporations, and upon that the language of section 361, Civ. Code, is so plain as to relieve from all doubt. It provides: "No such consolidation shall in any way relieve such companies, or the stockholders thereof, from any and all just liabilities." In the case of a railroad corporation, section 473, as amended in 1901, makes provision that a demand against a constituent company may be enforced against the consolidated corporation. No such provision is found in the act relative to the consolidation of mining corporations, and, if neither the companies nor their stockholders, by virtue of the consolidation, are to be relieved from any just liability, it would seem to require little argument upon the proposition that their corporate entities are preserved, to the end that they may be served with process and called upon to defend any action, arising either from contract or from tort, which may be brought against them. We conclude, therefore, that, notwithstanding the consolidation, the corporate existence of the Rex Crude Oil Company was preserved by law to the extent that in its corporate capacity it might be called upon in court to meet any and all just liabilities, and that the service upon its secretary Armstrong was sufficient to confer jurisdiction upon the Circuit Court.

It is contended that the judgment of the Circuit Court was a nullity, in that the receiver was not made a party to that action, that he was a necessary party, and that permission to sue him had not been obtained from the state court. It is unquestionably true that a court will not entertain an action to recover property in the possession of a defendant as receiver of another court unless leave to sue its receiver has been obtained from that court (Ross v. Heckman [C. C.] 84 Fed. 6), and the want of power in the federal court to entertain such a suit is held to be jurisdictional. Peale v. Phipps, 14 How. 368, 14 L. Ed. 459; Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672. But in this case the receiver was not made a party defendant. There was nothing, therefore, touching the jurisdiction of the Circuit Court—a question which could be raised only when the receiver had been made defendant without permission. Nor did the judgment as such affect, or pretend to affect, the rights of the receiver in possession. It was an adjudication, as between the owner of the property and the assignee of her lessee, that the lease under which the defendant was claiming its right to possession had terminated, and that as between the two the right to possession was in the plaintiff. No effort was made by this judgment to disturb the receiver in his possession, nor to impose upon the receiver any liability or responsibility of any kind. It is only so far as the rights of the receiver are involved that concern is here paid to the judgment of the Circuit Court.

The other propositions which appellant argues are not matters for consideration upon this appeal. What effect the Circuit Court might give to its judgment, how fully it could execute it, are not matters before us on this collateral attack, for the judgment certainly was not void upon its face. Wheelwright v. Canal Co. (C. C.) 50 Fed. 709.

We thus come, finally, to the direct consideration of the order of the state court directing its receiver to turn the property in question over to the United States marshal. There can be no doubt that a court having property in custody through its receiver may, in a proper case, direct that receiver to turn over the property to the federal court in aid of the enforcement of its writ. The matter is one of comity (Wheelwright v. Canal Co., supra); but it is equally true that in an improper case such an order by the state court is error; and erroneous we think the order was in this instance. The judgment for plaintiff in the state court which formed the basis and reason for the appointment of the receiver was not final, but was undetermined upon appeal. Appellant from that judgment had filed its supersedeas bond staying its execution, and had the right to insist that the status quo should be preserved until the final adjudication of the controversy upon its appeal.

The order appealed from is therefore reversed.

We concur: McFARLAND, J.; LORIGAN, J.

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147 Cal. 633

NICCOLLS v. RICE et al. (L. A. 1,401.)

(Supreme Court of California. Sept. 5, 1905.)

CORPORATIONS — DIRECTORS — FUNDS — MISAPPROPRIATION — CREDITORS' SUIT — PARTIES IN INTEREST.

Where plaintiff, in a suit against the directors of an insolvent savings bank to recover for assets misappropriated, appeared only for himself and such other creditors "as would join with him," and it did not appear, prior to the dismissal of such suit under a compromise, that there were any creditors who did not join in the action, a creditor who did not join, and was not a party to the arrangement between the creditors for the bringing and maintaining the suit, and did not contribute thereto, was not entitled to recover any portion of the proceeds of the settlement.

Department 1. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by R. Niccolls against J. A. Rice and another. From a judgment granting a nonsuit, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

J. B. Mannix, Geo. H. P. Shaw, and Edwin A. Wells, for appellant. C. H. Rippey and Withington & Carter, for respondents.

VAN DYKE, J. This is an appeal from a judgment granting a nonsuit and from an order denying a motion for a new trial.

In June, 1893, the Savings Bank of San Diego County closed its doors and suspended business. Thereafter, in 1895, proceedings were instituted by the Attorney General of the state of California, and said bank was thereupon declared insolvent and proceeded to liquidate. In December, 1895, certain depositors of said bank entered into an agreement, constituting a committee from their number, consisting of A. P. Meeker, T. J. Higgins, Joseph Winchester, George Fuller, and Isaac Smith, for the purpose of instituting proceedings against the directors of said bank, for the purpose of enforcing any and all legal liability calculated to result in the betterment of the claims of the parties who signed said agreement. They also by said agreement constituted Joseph Winchester trustee, and assigned their respective claims to him for the purpose of enforcement. Thereafter, in June, 1896, said Winchester, as said trustee of the depositors and creditors of said bank who had entered into said agreement, commenced an action in the superior court of San Diego county against Bryant Howard, Hiram Mabury, E. W. Morse, O S. Witherby, J. H. Barbour, John Ginty, Monroe Johnson, Medora H. Howard, and the said savings bank. It was declared in the complaint "that the plaintiff brings this action in behalf of himself and any other creditors or depositors of said institution who may join with him." Plaintiff herein never applied to be made a party to the action, and no order was ever made bringing him or any other person in as parties to the action. The savings bank defaulted in said action, and defendant Hiram Mabury filed a demurrer to the complaint of Winchester on various grounds, and thereafter, in June, 1899, the superior court of San Diego county sustained said demurrer and entered judgment in favor of Mabury. Winchester thereupon appealed from said judgment. Pending said appeal Winchester died, and thereupon the committee of depositors mentioned in said agreement nominated J. A. Rice as successor in said trust of Joseph Winchester, deceased, and upon an application the superior court of San Diego county appointed said Rice as such trustee in place of said Winchester, and he was thereafter, in October, 1900, substituted as plaintiff, as successor in interest, in place of said Winchester in said action against Bryant Howard and others; and in May, 1902, the Supreme Court, by order, substituted said Rice as plaintiff in place of said Winchester, and the action was thereupon continued in his name, as trustee in place of said Winchester, as plaintiff in said action against Bryant Howard and others. In this court, upon the hearing of said cause, the judgment of the lower court was reversed, with directions to overrule the demurrer and allow the defendant reasonable time to answer. Winchester v. Howard, 136 Cal. 432, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153. Thereafter, and for the purpose of ending said litigation, in the way of compromise, the said Mabury agreed to pay, and paid, through his attorney, the sum of $40,000 to D. L. Withington, as attorney for the plaintiff in said action, and certain other persons who had joined with the plaintiff, under the provisions of said agreement. Thereafter, upon stipulation of the parties to the action, the judgment of this court (136 Cal. 432, 448, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153) was vacated, and the appeal dismissed; the effect thereof being the affirmance of the judgment of the superior court. Subsequently the superior court action was dismissed as to the defendants other than Mabury. Thereafter, in July, 1902, this action was commenced against said Rice (the plaintiff in the former action), and said Savings Bank of San Diego County.

In the complaint herein it is alleged that the plaintiff deposited in the said Savings Bank of San Diego County $2,000, none of which sum has been paid, and that the same, with interest thereon, is due. It is further alleged in the complaint herein, among other things, that said Winchester and said Rice, respectively, assumed and claimed to represent, and did represent, all the creditors of said savings bank; and in fact said action was brought, prosecuted, maintained, and compromised for and on behalf of all the creditors and depositors of said bank as a body, and not for the exclusive benefit of any particular creditor or depositor, and said Hiram Mabury paid said sum of $40,000 in compromise of said cause of action of all of said creditors and depositors and for their use and benefit, to said Rice as the representative of all said creditors and depositors. The savings bank, one of the defendants, defaulted in this action, the same as in the former. In the answer of defendant Rice it is denied that in the action entitled "Joseph Winchester, Trustee, v. Bryant Howard et al.," and referred to in plaintiff's complaint, and throughout the prosecution, maintenance, and compromise thereof, or at all, the said Joseph Winchester and J. A. Rice, respectively, or at all, professed or claimed that said action was brought for the use and benefit of all the creditors and depositors of said bank; denies the fact to be that said action was brought, or prosecuted, or maintained, or compromised for and on behalf of all the creditors and depositors of said bank as a body; denies that said Hiram Mabury paid the sum of $40,000, or any sum, in compromise of said or any cause of action of all the creditors and depositors of said bank, and for their use and benefit; and denies that the said sum of $40,000, or any sum, was paid to said J. A. Rice as a representative of all the creditors and depositors of said bank. It is further denied that, in the compromise of the cause of action set forth in the complaint, said Hiram Mabury agreed to and did pay the sum of $40,000, or any sum, in order to carry into effect the agreement referred to in said complaint, or any agreement, to pay this plaintiff. On the contrary, it is averred that said sum of $40,000 was paid by said Hiram Mabury to D. L. Withington as the attorney of the plaintiff in said action and the persons who had joined with the plaintiff therein, and that the only part thereof which this defendant has received is the sum of $28,000, which sum was paid to him as the trustee of those persons only who, under and by the instrument set forth in the complaint, had assigned their claims against the said Savings Bank of San Diego County to said Joseph Winchester, and that said sum was so received by this defendant for the sole purpose of distributing the same to such persons or their assigns under the provision of said instrument.

The only evidence introduced on the trial of the cause was that offered on the part of the plaintiff, consisting in the deposition of S. F. Leib, who acted as the attorney of Hiram Mabury. Leib testifies that he is familiar with the action brought in Winchester v. Howard, and also with the previous case of Winchester v. Mabury, reported in 122 Cal. 522, 55 Pac. 393. He says: After the decision of this court reversing the judgment had in the court below in favor of Mabury, "I started to prepare and was preparing a petition for rehearing of the case, when the adjustment of the litigation and compromise of it was brought up, and negotiations were conducted exclusively on my side by myself and on the other side by Mr. Withington, and resulted finally in a compromise, by which a stipulation was signed, the precise terms of which I do not recall, but which will speak for itself; but the effect of it was that the order of the Supreme Court reversing the judgment below should be set aside, and such order, upon such stipulation, was in fact by the Supreme Court set aside, and a remittitur was issued affirming the judgment below in favor of Mr. Mabury, which judgment is now final and in full force in his favor." He was asked: "Who effected this settlement and compromise?" and answered: "It was effected between Mr. Withington and myself, the two of us. There was considerable negotiation before it was effected." He was asked: "What was the consideration for such payment?" and answered: "The settlement of the litigation. Q. For whose use and benefit was such payment made? A. For whomever Mr. Withington might legally represent in that action. Q. Did you know for whose use or benefit this payment was made? A. No further than what the complaint disclosed. Q. Are you able to state for whose use and benefit this payment was made? A. No further than I have answered. When I say the complaint, I mean the complaint in that action of 'Winchester, Trustee (Rice, Trustee, Substituted), v. Howard, Mabury et al.'—not in the complaint in the action in which I am giving this deposition." Further answering, he says: "In San Francisco, the day of the final culmination of the settlement, the day the order was made, and during the negotiations for settlement, the question occurred to me as to whether the parties who had specifically been named in the complaint, and who had not specifically applied to be joined as plaintiffs, might bring a subsequent action, and that matter was mentioned between Mr. Withington and myself, and it was, I think, agreed between us (at least I so understood it) that, not only would they be barred by the statute of limitations, should they do so, but that, under the decision of the court in the case as to all parties being represented by the plaintiffs in the case, whatever judgment was entered in that case would necessarily be a bar as to all such parties; but I do not mean by this to say that it was understood or agreed that these other parties, who had not applied to be made parties and had not contributed to the prosecution of the action, would be entitled to share in the proceeds of this settlement. I think Mr. Withington's idea was that they would not; but that was a question which it was not necessary for me to determine in making the settlement, so I did not pretend to do so, nor do I venture an opinion upon that matter now. That is a matter for them to determine in this litigation. Q. Did you know what disposition was to be made of this $40,000? A. I did not. I did not care anything about that proposition, because Mr. Withington had full power to settle that suit, and it did not become me to ask him what he was going to do with the money."

The controlling issue in the action is whether Winchester, and subsequently Rice, respectively, assumed to and did represent all the creditors and depositors of said Savings Bank of San Diego County in said action, so brought, prosecuted, and compromised as alleged in plaintiff's complaint herein, or whether said action was brought, prosecuted, and finally compromised for and on behalf of the creditors and depositors only who had joined in the said agreement. The answer, as already shown, specifically denies the allegation of the complaint that said action was brought for the use and benefit of all the creditors and depositors of said bank, or that the same was finally compromised for and on behalf of all the creditors, or that the said sum of money received from said Mabury was received in said compromise for and on behalf of all the creditors, or that said Rice entered into said stipulation of June 4th, attached to plaintiff's complaint herein, in order to carry into effect such agreement. On the contrary, the answer, as already shown, avers that said action was brought, prosecuted, and compromised for and on behalf of the persons who had joined with the plaintiff therein under the said agreement, and who had assigned their claims against said bank to the said trustee constituted in said agreement. The agreement in question is appended to the complaint therein and made a part thereof. By the terms of said agreement, as already shown, a committee composed of some of the subscribers was constituted to manage the contemplated prosecution of said suit on behalf of the subscribers to said agreement, and Winchester was appointed trustee in their behalf to conduct said litigation, and he was authorized to employ the law firms of Rippey & Nutt and Withington & Carter as counsel for the purpose of such suits and actions, and no compromise was to be made or any suit commenced, "founded upon the claims herein assigned, except with the consent of the assignors, whose claims aggregate the major part or amount of such claims." A bond was also required from the trustee, Winchester, in the sum of $10,000, with sureties, approved by the depositors' committee, and the subscribers agreed to pay the trustee according to a scale of assessments mentioned in the agreement, to be applied under the direction of the committee for payment of costs and expenses in the litigation. The plaintiff was not a party to the agreement, and neither Winchester nor Rice acted as trustee on his behalf, and he did not join in the employment of counsel or contribute to the expenses of the litigation. It will also be seen that the only evidence in support of the issue on the part of the plaintiff consisted of the deposition of Mr. Leib, the substance of which has already been given. It appears from this that, so far from supporting the allegation of the complaint on this material issue, it tends to support the contention in defendants' answer, to wit, that the action was compromised and settled with Mabury, and the sum by him paid over to the attorney of defendant Rice, for and on behalf of the parties who entered into the agreement constituting said Winchester, and subsequently said Rice, their trustee and representative for that purpose.

As shown in the foregoing opinion, there was no evidence warranting a conclusion that the $40,000 was paid upon any such agreement as would make Rice a trustee for creditors not parties to the trust agreement. It may be conceded that where, under section 3, art. 12, of the Constitution, a creditor brings an action, on behalf of himself and all other creditors, against the directors of the corporation, to recover for such creditors moneys misappropriated by such directors, such plaintiff creditor cannot, after putting himself in that position, effect a compromise of the suit and appropriate the money obtained by the compromise to his own use, or to the use of a part of the creditors, to the exclusion of others. A creditor, suing as plaintiff in such suit, occupies the position of a trustee for the benefit of all of the creditors, and he cannot maintain the action at all, unless he consents to be such trustee. Once he assumes that position, he is subject to the rules applicable to all trustees, and everything which he may obtain by means of the suit, whether by way of compromise or by a judgment regularly rendered, will be, in equity, the joint property of all the creditors, and, after deducting the just sum due the plaintiff for his services and expenses, must be divided pro rata among them all. But according to the evidence in this case the plaintiff in the suit against the directors never consented to stand as plaintiff for the benefit of all the creditors, and hence never became a trustee for all. In his complaint he expressly limited his trusteeship, and appeared only for himself and such other creditors as would join with him. The objection was made that this constituted a defect of parties. This court, in its decision (136 Cal. 447, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153), held that the complaint was not demurrable on that ground, as it did not on its face show that there were other creditors, but stated that, if it was made to appear that there were other creditors, the court should order them brought in as parties. There were in fact other creditors who did not join in that action, and who should have been brought in if the action were to be further prosecuted; but this fact never was made known to the court, and before any further steps were taken in the case after the decision of this court the plaintiff therein, while still limiting the beneficiaries of his suit to those creditors who should join with him, made the compromise in question, receiving therefor the $40,000, of which the present plaintiff claims a share. The plaintiff in the case at bar never joined in the former action, nor in any manner aided or assisted therein. Under these circumstances Rice, the plaintiff in the former action, never became a trustee for this plaintiff, nor for any others who did not act in concert to bring the former action; and consequently those parties not joining or assisting are not entitled to share in the money received in the compromise. See Hirshfeld v. Fitzgerald, 157 N. Y. 166–180, 51 N. E. 997, 46 L. R. A. 839.

The plaintiff clearly failed, on his own evidence, to make out a case, and the nonsuit was properly granted. The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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147 Cal. 641

BROWNLEE et al. v. REINER et al.

(Sac. 1,127.)

(Supreme Court of California. Sept. 5, 1905.)

1. Appeal—Time.

An attempted appeal from a judgment, not taken within six months after the entry thereof, was too late.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1897.]

2. Witnesses—Cross-Examination.

Where a witness in his testimony in chief had made certain statements showing that he dealt with R., as plaintiff's agent, questions asked on cross-examination relating to what he said on that subject were properly allowed.

3. Evidence—Materiality.

Where a contract relating to the sale of a mine contained a recital that plaintiffs were unable to sell the mine, a question, asked of one of the plaintiffs as a witness, as to why they could not sell the property, was objectionable as immaterial.

4. New Trial—Reception of Evidence.

Where plaintiffs testified as to the reason why R.'s act in taking a deed to a certain mine in his own name had been ratified, error in sustaining an objection to a question as to whether there was any other reason for such ratification was too unimportant to warrant a new trial.

5. Evidence—Secondary Evidence.

Where the addressees of a telegram sent them by plaintiffs were in court, and no demand was made for the production thereof, the offer of a copy of the telegram was objectionable as secondary evidence.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 558.]

6. Appeal—Review.

Whether the judgment is the proper logical conclusion from the findings cannot be considered on appeal from an order denying a new trial.

[Ed. Note.—For cases in point, see, vol. 3, Cent. Dig. Appeal and Error, § 3480.]

Department 2. Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by A. G. Brownlee and another against George J. Reiner and another. From a judgment in favor of defendants, and from an order denying plaintiffs' motion for a new trial, they appeal. Affirmed.

Rehearing denied October 5, 1905.

John H. Magoffey (J. C. McKinstry, of counsel), for appellants. R. S. Taylor and Gillis & Tapscott, for respondents.

McFARLAND, J. Plaintiffs appeal from an order denying their motion for a new trial. The transcript also shows an attempted appeal from the judgment; but said attempted appeal cannot be considered, because it was not taken within six months after the entry of the judgment.

The main purpose of the action was to obtain a judgment decreeing that the defendant George J. Reiner convey to plaintiffs certain mining property known as the "Schroeder Consolidated Quartz Mine." The Siskiyou County Bank is made a defendant for the purpose of restraining it from delivering to the said defendant Reiner a certain deed of said mine held in escrow by the bank; but this feature of the case is merely incidental to the main purpose. The court decided that plaintiffs were not entitled to a deed of conveyance of said mine from defendant Reiner; and, if that decision stands, there is no reason for disturbing any other part of the judgment. The most important parts of the argument of counsel for appellants go to points which cannot be considered on an appeal from an order denying a motion for a new trial—as, for instance, that "the findings of the court do not support the judgment," and that "plaintiffs are entitled to a decree for the whole of the Schroeder mine." The only points available to appellants on the record here presented are that the evidence is not sufficient to justify the findings, and that there occurred at the trial, in ruling on the admissibility of evidence, errors of law of sufficient importance to warrant a reversal of the order denying a new trial. And as to the first point it is enough to say that there was sufficient evidence to support the findings.

In order to intelligently present and consider the question whether the court committed any error in ruling on the admissibility of evidence, and whether, if there was any such error, it was material and prejudicial, it is necessary, perhaps, to refer briefly to some of the numerous documents and transactions out of which this litigation arose. The Schroeder mine, the property here involved, belonged on April 26, 1899, to Henry Schroeder, and on that day he executed a written instrument by which he gave to plaintiffs here a 60-day option to buy said mine for $40,000. Afterwards, on May 19, 1899, the plaintiffs, having no interest in the mine other than said option, entered into a written contract with the defendant Reiner, by which plaintiffs agreed to sell said mine to Reiner, and the latter agreed to buy the same, for the sum of $100,000—$50,000 in 35 days, and the balance in certain deferred payments; a conveyance to be made by the plaintiffs to Reiner when he shall have paid all the purchase money, and Reiner to forfeit all rights if he should fail to make all of the payments. This contract was free from ambiguity. It was a usual contract for the sale and purchase of property, and by it Reiner promised to buy the mine for a certain sum due in certain payments, and plaintiffs promised to execute to him a deed of the mine upon his compliance with the terms. There was nothing in the contract about agency. The relation of the parties to it was simply that of vendor and vendee. But on the next day, May 20, 1899, the said parties entered into another written contract, which referred to the contract of May 19th, and changed some of its provisions, and, perhaps, entirely rescinds it, although whether it does so is not clear. This second contract of May 20th is the one upon which the plaintiffs found their present cause of action. This contract is to a considerable extent ambiguous, vague, and contradictory in its terms, although, perhaps, not entirely void for uncertainty. If its main purpose had been to create puzzling questions for lawyers and courts, it would have been a marked success. It first refers to and states at length the provisions of the previous contract of May 19th in which the relation of the parties was solely that of vendor and vendee, and does not, at that point, make any change in the said previous contract. But it then abruptly refers to the option which plaintiffs had to purchase the mine from Schroeder for $40,000. It then proceeds as follows: "And whereas, the party of the first part herein [plaintiffs] is unable to sell said property; and whereas, the party of the second part herein [Reiner] may be able to sell the same, and has agreed to endeavor to find a purchaser for the same, and is now engaged in the effort to find a purchaser therefor: Now, notwithstanding the execution of the agreement heretofore entered into between the parties hereto, it is by the parties hereto mutually agreed, * * * as follows, to wit: The said party of the second part hereby agrees to endeavor to find a purchaser for the property hereinbefore described, for such sum as he may see fit to take for such property, over and above the sum of $40,000." If this had ended the contract, it might be construed, perhaps, as entirely abrogating the first contract and putting in its place a mere power to Reiner to sell for plaintiffs for any price Reiner "may see fit to take" over $40,000—which practically means not less than $40,000, for a sale for a merely nominal sum more than $40,000 would satisfy the terms of the contract. But the contract proceeds as follows: "And the party of the first part agrees with the party of the second part that if he shall, on or before the 25th day of June, A. D. 1899, pay to the said party of the first part the sum of $40,000, the party of the first part will forthwith deliver to the party of the second part a good and sufficient conveyance of the hereinbefore described property, free of all incumbrances of any kind or character whatever, and the provisions of the agreement heretofore made by and between the parties hereto as to the payment of any other sum or sums of money, or the forfeiture of any rights of the party of the second part under this agreement, are hereby declared and agreed to be null and void." The language just quoted refers to the former contract, which was a pure agreement between the parties of sale and purchase, and seems to continue that contract with amounts, forfeiture, etc., changed. Moreover the language of the second contract, just quoted, itself, clearly gives to Reiner the right to himself become the purchaser for $40,000, and to receive a deed upon making payment. However, in subsequent parts of the contract it is provided that, if there be any surplus of the purchase price over $40,000, such surplus shall be equally divided between the parties. It is also provided that Reiner may, if he choose to do so, form a stock company to take the title to said mine, and that he shall have the right to accept in payment of the property "$40,000, or any sum in excess thereof that he may deem proper, and any amount of stock in such company as the balance of the selling price of said property, and that the stock so remaining may be treated as a surplus as aforesaid, and may be divided between the parties hereto, in the same manner as if it were money as aforesaid."

The foregoing are the main and material features of this confused and obscure contract upon which plaintiffs rely for the judgment which they pray for in this action. After this contract was made the parties immediately proceeded to do things which gave rise to more complications. The plaintiffs gave Reiner a letter of introduction to Schroeder. In this letter they say that Reiner is the man to whom they have "turned over our bond on the Schroeder Consolidated Mine"; but it may be said that there are other expressions in the letter tending to show that they had not relinquished to Reiner all their interest in the option. But Reiner then made an arrangement with Schroeder by which the latter made a deed of the mine directly to Reiner, and deposited it in the Siskiyou County Bank, defendant herein, to be held by the bank in escrow, to be delivered to Reiner upon his payment of $40,000. At that time Reiner had also made a written contract in his own name with two men residing at Montreal, Canada, named Chisholm and Bell, by which Reiner agreed to sell the mine to them for $100,000, to be paid in certain installments, and Chisholm and Bell agreed to pay that sum, and to forfeit whatever they should have paid if they failed to make all the payments at the times stipulated. This contract was also deposited in said bank, and it was agreed between Schroeder and Reiner that whatever payments Chisholm and Bell should make on their contract with Reiner should go to Schroeder on his contract with Reiner until $40,000 should have been paid, when the bank was to deliver Schroeder's deed to Reiner. Chisholm and Bell made two payments of $15,000 each and the $30,000 thus paid was received by Schroeder. Afterwards Reiner advanced to Schroeder the remaining $10,000, and under the terms of the contract Reiner was then entitled to receive the said deed from Schroeder. It is possible that this $10,000 advanced by Reiner was afterwards paid him by Chisholm and Bell; but the court found that there was no evidence to show that fact. At all events, Chisholm and Bell never paid, at most, any more than the $40,000, and, as the time for paying the balance of the $100,000 has expired, they have forfeited all their rights under their contract. Perhaps the above statement of the confusion which has followed the contracts and acts of the various parties might have been omitted. We have made it, however, not only as an interesting showing of the manner by which parties may needlessly complicate their affairs, but as necessary, perhaps, in passing upon the alleged errors of the court in ruling upon the admissibility of evidence. As to the equities of the parties, it is hard to tell where they lie. The plaintiffs have received $2,200 as one-half of the value of certain bullion taken out of the mine by Chisholm and Bell, and, according to the decree of the court, they may be entitled to receive some more money from Reiner. They never paid out any money whatever for the mine, and it is clear that the efforts of Reiner procured the $40,000 which was paid to Schroeder. It does not appear whether or not the mine is of any value. The only persons who appear to have lost anything are Chisholm and Bell.

There are a large number of exceptions to rulings made on objections to offered evidence. Many of them are about trivial matters. We will specially notice some of them.

Several exceptions are to rulings allowing questions asked Schroeder on cross-examination, which are asserted to be not proper as cross-examination. But these rulings were correct. The witness had made certain statements in his testimony in chief tending to show that he dealt with Reiner as agent of plaintiffs, and the questions on cross-examination clearly related to what he had said on that subject.

The contract of May 20th contains a recital that plaintiffs were unable to sell the Schroeder mine, and an objection to the question asked of one of the plaintiffs, when a witness, why they could not sell the property, was sustained; and this ruling constitutes one of the grounds of exception. This ruling was also correct, for it was immaterial why the plaintiffs could not make the sale.

Plaintiffs having ratified the act of Reiner in taking the deed from Schroeder in his own name, one of the plaintiffs when on the witness stand gave quite a long explanation of the reason why this was done, and was then asked if there was any other reason, to which question an objection was sustained, and this ruling constitutes another exception. Whether or not the ruling was in a strict sense erroneous, the matter under the circumstances was too unimportant to warrant a new trial.

Plaintiffs offered in evidence a copy of a telegram from plaintiffs to Reiner and his alleged partner, H. M. Herrin, and an objection that it was secondary evidence, immaterial, etc., was sustained and an exception taken. The ruling was correct. Reiner and Herrin were in court and no demand was made for the production of the telegram. The authorities cited by appellant are not in point. Moreover, the telegram is in the record, and we cannot see its materiality. Certainly the ruling excluding it, even if erroneous, was not of importance enough to warrant a new trial.

A large number of exceptions are founded upon rulings of the court sustaining objections to various items of evidence offered by plaintiffs, not as directly pertinent to any issue in the case, but for the purpose, as plaintiffs' counsel stated, of showing that the parties by certain of their acts had construed certain things that were in the contract of May 20th, and, indeed, other things that were not in it. We do not think it necessary to state here this mass of offered testimony. It is sufficient to say that it was irrelevant to any issue in the case, and could not properly have worked its way into the evidence under the garb of the general purpose indicated.

We do not deem it necessary to notice specially the other exceptions. There were either no errors in the rulings, or the matters involved were too unimportant to have been prejudicial to the appellants. There was also an objection that the court did not find upon all the issues; but, assuming for the purposes of this case that this point can be raised on this appeal, we think that the court found all the facts involved in the issues. Of course, as before stated, we cannot consider whether the judgment is the proper logical conclusion from the findings.

The appeal from the judgment is dismissed, and the order appealed from is affirmed.

We concur: LORIGAN, J., HENSHAW, J.

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147 Cal. 689

BELL v. THOMPSON. (L. A. 1,387.)

(Supreme Court of California. Sept. 11, 1905.)

1. Mortgages — Foreclosure — Attorney's Fees—Executors and Administrators.

Where, in a suit to foreclose a mortgage against the executor of the mortgagor's estate, etc., the inclusion of a lien for counsel fees in the judgment operated to make such fees payable out of the mortgaged property and thereby released the general assets of the estate, and there was no claim that such addition of attorney's fees to the judgment lien interfered with the redemption, a special administratrix of the estate was not entitled to have the foreclosure judgment set aside therefor.

2. Same—Rent—Collection by Purchaser—Setting Aside Sale.

It is no ground for the setting aside of a foreclosure sale, on a bill by a special administratrix, that the purchaser under the foreclosure decree against the executor of the mortgagor's estate collected an installment of rent which fell due before the foreclosure sale; the remedy of the administratrix subsequently appointed being an action at law, either against the tenant to recover as for rent unpaid, or, if the rent had been paid to the executor, against him for misapplication thereof.

3. Same—Sufficiency of Bill.

In a suit by a special administratrix to set aside a foreclosure decree against the executor of the mortgagor for fraud, a bill failing to aver that plaintiff, or the estate, or any other parties, privy or interested, had a good and valid defense to the foreclosure suit on its merits, coupled with the facts establishing such defense, was fatally defective.

4. Pleading—Objections—Waiver.

An objection that the complaint fails to state facts sufficient to constitute a cause of action is not waived by a failure to demur, and may be taken at any stage of the case, as provided by Code Civ. Proc. § 434.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1366.]

5. Same—Aider by Verdict.

Where a complaint did not state facts sufficient to constitute a cause of action, the omission was not cured by verdict or judgment.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1459.]

Department 2. Appeal from Superior Court, Santa Barbara County; W. S. Day, Judge.

Action by Teresa Bell, as special administratrix of the estate of Thomas Bell, deceased, against Louisa J. Thompson. From a decree in favor of defendant, plaintiff appeals. Affirmed.

Rehearing denied October 11, 1905.

T. Z. Blakeman, for appellant. Drown, Leicester & Drown, for respondent.

HENSHAW, J. This action was brought by Teresa Bell, as special administratrix of the estate of Thomas Bell, deceased, to vacate and annul a decree of foreclosure of mortgage secured by defendant against property of the estate of Bell for alleged fraud in its procurement. The gravamen of the charge is that George Staacke, while executor under the will of the estate of Bell, deceased, was likewise the agent of Louisa J. Thompson, who owned and held a mortgage and mortgage note in the sum of $50,000 upon property of the estate of Bell, and that by collusive fraud upon the part of the two Staacke permitted the mortgage to be foreclosed and the property to be sold and purchased by the defendant Thompson. The asserted fraud, as set forth in appellant's brief, consisted in Staacke, while executor of the estate, assuming the position of agent for the defendant in the collection of the note and mortgage, and in defendant's profiting by the foreclosure suit against her own agent in acquiring the mortgaged premises, which the court found to be of value exceeding the amount due on the mortgage; also because of alleged collusion between the executor and defendant in the inception and prosecution of the foreclosure suit, and actual fraud committed upon the estate of Bell by Staacke, and the defendant in the proceedings by which the mortgaged premises were transferred to the defendant; and, finally, that the defendant, in prosecuting the foreclosure suit, was merely suing her own agent in charge of the collection of the note and mortgage—that is to say, the plaintiff was in the foreclosure suit practically plaintiff and defendant. Trial was had upon all these matters. The findings of the court were in favor of defendant, and these findings draw abundant support from the evidence. It is uncontested and incontestable that the mortgage debt was a bona fide debt, that the claim against the estate upon it had been duly presented and allowed, that the estate was in default, and that a suit upon the note and mortgage, regularly instituted and regularly prosecuted in a court of competent jurisdiction, was properly tried and properly decided by the court. Not this alone, but while it was incumbent upon the plaintiff in the foreclosure suit (defendant and respondent in this) to have sued only the executors, and thus while it was unnecessary for her to have made the heirs, devisees, and trustees under the will parties to the action (Bayly v. Muehe, 65 Cal. 345, 3 Pac. 467, 4 Pac. 486; Collins v. Scott, 100 Cal. 446, 34 Pac. 1085; Finger v. McCaughey, 119 Cal. 59, 51 Pac. 13), nevertheless she impleaded in her action the trustees of the trust created by the will, the devisees under the will, the children of the decedent, the tenants in possession of the mortgaged property, and the widow of the deceased, who, as special administratrix, here prosecutes this appeal. The case was duly brought to trial without the slightest irregularity in procedure or haste in time, and under these circumstances the judgment was rendered.

The evidence offered by appellant at the trial was wholly insufficient to charge the defendant or her attorneys with any misconduct or irregularity in obtaining the judgment, not $1 of which was in excess of the sum justly due. The only possible objection to the judgment is the contention that it made the counsel fees a lien upon the mortgaged property. This proposition is not even presented by the complaint; but, conceding that it is valid and that the judgment was erroneous in that particular, it does not follow that injury resulted to the Bell estate. Far less does it follow that the error arose from fraud. If the counsel fees had not been made a lien upon the mortgaged property, they would have been payable out of the general assets of the estate, which have thus been relieved to that extent from the charge to which they otherwise would have been subjected, and there is no pretense that this small addition to the judgment lien interfered with a redemption. As to the further complaint that Miss Thompson, after purchasing the estate at foreclosure sale, collected an installment of rent which fell due before the sale, conceding, without deciding, the correctness of appellant's contention that this was payable to the executors, and not to her, the remedy of the subsequently appointed administratrix (this plaintiff) was an action at law against the tenant for rent unpaid, or, if the tenant had paid and the misapplication lay with the executor, then against him. From no point of view was it a ground for setting aside either the sale or the judgment.

The decision of this case is wholly justified by the findings of the court to which we have adverted, and rests upon them. It may be pointed out in addition, however, that plaintiff's complaint fails utterly to state a cause of action, since there is a complete absence of averment that the plaintiff, or that the estate of Bell, or that any other parties, privy or interested, had any defense to the foreclosure suit upon its merits. The absence of this necessary averment doubtless arose from the fact that it was impossible for the pleader, under the facts, to make such an allegation. That such an averment, and not only such an averment, but such an averment coupled with the facts establishing the defense, are necessary to the sufficiency of such a complaint, is a proposition of law settled beyond the possibility of controversy. In 1859, in this state, the rule was stated in Riddle v. Baker, 13 Cal. 295, as follows: "He must show that he was defrauded of his opportunity to defend, and that his defense, which, but for the practices of his adversary, would have been effectual, was by such practices rendered unavailing." In Gregory v. Ford, 14 Cal. 138, 73 Am. Dec. 639, it is said: "Nor is it charged that the defendant had any defense to the note which was the foundation of the action; but, on the contrary, there is evidence that the defendant owed the debt, and that it is still due. The case, then, on the pleadings and proofs resolves itself into this proposition of law: Can a defendant having no defense to an action enjoin a judgment by default, obtained on a return by the sheriff of service of process, upon the ground that the return is false, and that in fact he had no notice of the proceeding? It is difficult to see upon what principle chancery would interfere in any such case in favor of such a defendant. * * * A court of equity would not take a legal advantage away in favor of a party who comes into equity acknowledging that he owes the money, and claims only the barren right of being permitted to defend against a claim to which he has no defense." In Whitney v. Kelly, 94 Cal. 153, 29 Pac. 626, 15 L. R. A. 813, 28 Am. St. Rep. 106, it is said: "In an action to set aside a judgment for fraud, the plaintiff must not only show by his complaint the facts constituting the fraud which gives him his right to the relief, but must also show that he has a defense to the original action upon the merits, and that he is able to present to the court the evidence constituting that defense. It is not sufficient to merely allege these matters as ultimate facts, or to aver them in the form of an affidavit of merits, but the facts themselves — those constituting the fraud, those constituting his defense, and those constituting his ability to present them to the court—must be incorporated into his complaint, so that the court may determine that, if his allegations are admitted by the other party, the plaintiff would have been entitled to a judgment in his favor in the original action." And, without further multiplying quotations, reference is made to Harnish v. Bramer, 71 Cal. 155, 11 Pac. 888; Davis v. Chalfant, 81 Cal. 627, 22 Pac. 972; Dunlap v. Steere, 92 Cal. 344, 28 Pac. 563, 16 L. R. A. 361, 27 Am. St. Rep. 143; Collins v. Scott, 100 Cal. 446, 34 Pac. 1085; Painter v. J. B. Painter Co., 133 Cal. 129, 65 Pac. 311; Hibernia Sav. & Loan Soc. v. Cochran, 141 Cal. 656, 75 Pac. 315; Parsons v. Weis, 144 Cal. 417, 77 Pac. 1007; White v. Crow, 110 U. S. 187, 4 Sup. Ct. 71, 28 L. Ed. 113.

This objection that the complaint fails to state facts sufficient to constitute a cause of action is not waived by failure to demur, and may be taken at any stage of the case. Code Civ. Proc. § 434. Nor is the omission cured by verdict or judgment. Buckman v. Hatch, 139 Cal. 53, 72 Pac. 445.

The judgment and order appealed from are affirmed.

We concur: BEATTY, C. J.; LORIGAN, J.

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147 Cal. 682

MILLARD v. KERN COUNTY. (L. A. 1,547.)

(Supreme Court of California. Sept. 11, 1905.)

1. Counties—Claims—Presentation.

Where a claim against a county was wholly rejected on its first and only presentation to the board of supervisors, it was unnecessary for the claimant to present it again before suing thereon.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Counties, §§ 329, 342, 343.]

2. Justices of the Peace—Fees—Statutes—Constitutionality.

The county government act of 1897 (St. 1897, p. 536, c. 277) provided that justices of the peace in K. county in townships having a population of 4,000 should receive a monthly salary of $125 in full for all services, and that justices in townships of less than 4,000 should receive "fees as are now or may hereafter be allowed by law." In townships of from 900 to 4,000 inhabitants it was provided that a justice should receive not more than $100 a month for work in criminal cases, and in other townships they were entitled to receive $3 in each criminal case, not exceeding $40 in any one month. St. 1901, p. 749, c. 234, amended the county government act by classifying townships in K. county, and changed the township in which plaintiff was a justice so as to give him a fixed salary of $125 per month. *Held*, that such act as so amended was in violation of the constitutional provision requiring the compensation of officers to be fixed "in proportion to duties."

3. Counties—Action for Fees—Complaint.

Where a complaint of a justice of the peace against a county to recover fees alleged that on a specified date plaintiff presented to the board of supervisors for allowance and filed with the clerk of the board his claim for services as a justice of the peace of a certain township, which claim was duly itemized and was by the oath of the plaintiff certified to be correct, and that the amount claimed was then justly due, and that such claim was presented within a year after the last item therein set out accrued, a copy of which was annexed and marked an exhibit and made a part of the complaint, it contained a sufficient statement of the steps taken by plaintiff in presenting his claim to the board of supervisors, and stated a cause of action.

Van Dyke and Shaw, JJ., dissenting.

Commissioners' Decision.

In Bank. Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by W. S. Millard against Kern County. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

U. S. Webb, Atty. Gen., and J. W. P. Laird, Dist. Atty., for appellant. C. L. Claflin, for respondent.

GRAY, C. The action was brought to recover from defendant county $405 alleged to be due plaintiff as justice of the peace on 135 criminal actions and proceedings heard before him during the month of September, 1903. The plaintiff had judgment for the amount claimed, and the defendant county appeals therefrom.

1. Appellant's first contention is that the complaint fails to show that the claim was presented twice to the board of supervisors, and is therefore defective. It appears that the claim was wholly rejected on its first and only presentation to the board. It was therefore unnecessary to present it again. San Diego v. Riverside, 125 Cal. 499, 58 Pac. 81.

2. The vital question in the case relates to the constitutionality of the county government act of 1897 as amended in 1901. In 1897 (St. 1897, p. 536, c. 277) it was provided that justices of the peace in Kern county in townships having a population of 4,000 should receive a monthly salary of $125 in full compensation of all services in both civil and criminal cases. Under the same section justices of the peace in townships of less than 4,000 inhabitants were to receive the "fees as are now or may hereafter be allowed by law." In townships of from 900 to 4,000 inhabitants it was provided that a justice of the peace should receive not more than $100 in one month for work in criminal cases. In other townships they were to receive $3 in each criminal case, not exceeding $40 in any one month. In 1901 (St. 1901, p. 749, c. 234) the townships of Kern county were classified "for the purpose of regulating the salaries of justices of the peace and constables." This was intended as an amendment to the act of 1897 above referred to. Under the provisions of the act of 1897, as amended by the classification of townships in 1901, the township in which plaintiff was a justice of the peace was of the first class, which by the amendment was raised to a population of 5,000

and upwards, and the total compensation of the said justice by the terms of the statute was to be a fixed salary of $125 per month. We are of opinion, however, that the act as amended in 1901 does not regulate the compensation of justices of the peace "in proportion to duties," and is therefore in conflict with the Constitution. The late case of Tucker v. Barnum, 144 Cal. 266, 77 Pac. 919 is decisive of the question before us, and we quote its language as applicable here: "The objection, therefore, to the section under consideration, comes, not from the fact that it so classifies townships, but from the fact that within this classification there is a violation of the constitutional provision that the Legislature shall regulate the compensation of all officers 'in proportion to duties.' If two justices of the peace in townships of different population shall each dispose of 50 criminal cases in one month, they have rendered identical service; and that one, because he is a justice in a township of a smaller population than another, shall receive less compensation for identical services than shall the other justice, residing in a township of larger population, is a manifest violation of the constitutional provisions to which we have adverted. The law under consideration falls, therefore, not because it classifies townships by population for the purpose of regulating the compensation of township officers, but because, within the classification so made, it does not regulate the compensation 'in proportion to duties.'" The law of 1897, as amended in 1901, being unconstitutional, it follows that plaintiff is still entitled to $3 in each criminal case, just as he was before the passage of that act.

3. The complaint contained the following allegation: "That on the 6th day of October, 1903, plaintiff duly presented to the board of supervisors of said county for allowance, and filed with the clerk of said board, his claim for his services performed and rendered in the said actions and proceedings as justice of the peace of said township, which said claim was duly itemized, giving names, dates, and particular services rendered, and was by the oath of plaintiff duly verified to be correct, and that the amount claimed was then justly due, and that said claim was presented within a year after the last item of the account therein set out accrued. A copy of said claim is hereunto annexed, marked 'Exhibit A,' and made a part of this complaint." There was attached to the complaint as an exhibit a copy of the duly verified itemized claim. In the foregoing allegation the complaint contained a sufficient statement of the steps taken by plaintiff in presenting his claim to the board of supervisors. The complaint stated a cause of action.

We advise that the judgment be affirmed.

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed: HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

I dissent: VAN DYKE, J.

ANGELLOTTI, J. I concur. There is no express authorization in the Constitution for a classification of the townships of a class of counties by population, for the purpose of fixing the compensation of township officers. The Constitution expressly provides only for a classification of counties by population. In the case of townships, therefore, a classification by population is not founded on any constitutional distinction, and must find its justification in other reasons. But it is recognized that a substantial difference in the population of the several townships of a class of counties will be ordinarily attended with a corresponding difference in the duties of the officers, and it has therefore been held that the Legislature may classify the townships of a class of counties by population for the purpose of fixing the compensation of the township officers. It is, however, not because of any constitutional distinction that this is permissible, but simply because a substantial natural reason exists for the creation of such classes, viz., that the duties in a class of townships having a larger population will be greater in amount than those of a class of townships having a smaller population. This is the only conceivable natural reason justifying such a classification, and it requires the fixing of the compensation upon a scale proportioned to the population of the different classes of townships. If the compensation be not so fixed, it is not "in proportion to duties," if the population is to be the measure of the duties, and it is only upon the theory that the population is such measure that such classification of townships is permissible.

Where it is apparent from the face of the act that the compensation in the different classes of townships of the class of counties, based solely upon differences in population, has not been fixed upon a scale proportioned to their respective populations, it seems very clear to me that the act of the Legislature is in violation of the constitutional provision requiring the compensation to be in proportion to duties. Under the decision in Tucker v. Barnum, 144 Cal. 266, 77 Pac. 919, the provisions as to limitations upon the respective amount of fees to be allowed justices of the peace in criminal cases in townships of the second, third, and fourth classes of Kern county are void. This being so, the provision as to the compensation by salary of justices of townships of the first class of townships of said county must also fall, for that salary was necessarily fixed with reference to the compensation prescribed for the other classes. It could only be upon the theory that the amounts prescribed for the other classes were to be received by the officers thereof that the salary of $125 per month for justices of the first class was fixed upon as a proper proportionate compensation for them. The respective provisions are so interwoven and interdependent that one cannot stand without the others.

As the Constitution expressly warrants the classification of counties by population for the purpose of regulating the compensation of all township and county officers in proportion to duties, what is here said in no way affects the question as to the right of the Legislature to fix the compensation of the county and township officers of the various classes of counties, otherwise than in proportion to the population of the various classes. The classification being a proper one, because expressly authorized by the Constitution, it has been held that the Legislature may take into consideration other matters besides population in determining what is a compensation in proportion to duties (see Longan v. County of Solano, 65 Cal. 122, 3 Pac. 463), and its conclusions on the question are conclusive on the courts.

SHAW, J. I dissent. In Tucker v. Barnum, 144 Cal. 266, 77 Pac. 919, the court decided that the constitutional requirement to fix the compensation of township officers in proportion to duties was violated in every case where it was so fixed in different classes of townships that in any particular month it might happen that the officers of the class of townships, or of a single township of the class, under consideration, would be paid at a rate in greater or less proportion to duties performed than the officers of some other class or township whose pay was fixed by a different act, or a different section or clause of the same act, and, in effect, that such a law would be void, although as matter of fact the compensation so received for such month in the class or township involved was in proper and just proportion to duties. The same rule is followed here with a wider application. The flat rate of $125 a month in the class of townships here considered is declared invalid, because it is not the same as that given in other townships of different population, although in those other townships the rate is fixed upon an entirely different plan or basis, having no relation to, and furnishing no means of comparison with, the rate in question in the class involved. And this is again done without deciding or inquiring whether the rate in either of the classes referred to is or is not in just proportion to duties.

Although it is put on an entirely different ground, the facts show that the decision really is that the rate in different classes of townships is contrary to the constitutional mandate in question, unless the different rates are graduated to a scale so as to make them proportional to population, rather than in proportion to duties—a proposition expressly repudiated in the leading case on the subject, namely, Longan v. Solano Co., 65 Cal. 122, 3 Pac. 463, which has been considered the rule of legislative action for the last 20 years. If this is not the correct rule in respect to counties, I can perceive no just ground for holding it a correct rule for townships; both being subject to the same constitutional injunction. Unless that case is to be overruled, with the result that until the Legislature makes further provision the compensation of officers will be regulated entirely by the fee bill of 1895, I do not think the decision of this court in this case can be logically sustained. It may be added that in Green v. Fresno Co., 95 Cal. 329, 30 Pac. 544, it was decided that the question whether or not the compensation of county and township officers was in due proportion to duties was for the Legislature, and not for the courts, and that the legislative judgment on the subject is conclusive. The same proposition was, in effect, held in Longan v. Solano Co., supra, but it was not expressly stated. The argument in that case covered the entire county government act, which presented as great a lack of uniformity of compensation, as compared either to population of the respective counties or to the duties required, as could well be conceived, and yet it was held not to be a violation of the constitutional command to fix the compensation in proportion to duties.

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147 Cal. 694

HEATH v. MANSON et al. (S. F. 4,024.)

(Supreme Court of California. Sept. 11, 1905.)

1. Appeal—Conflicting Evidence—Review.

Where, in an action for injuries caused by a defective sidewalk, the evidence was conflicting, a verdict for plaintiff thereon was final.

2. Municipal Corporations — Board of Public Works—Repair of Sidewalks—Jurisdiction.

San Francisco City Charter, art. 6, c. 2, § 16, declares that where any portion of the roadway of any street or alley or any portion of any sidewalk shall be out of repair, the board of public works shall require the owners or occupants of adjoining property to repair said portion. *Held* to confer on such board jurisdiction to repair defective sidewalks, or to award a contract for the repairing thereof.

3. Same—Defective Notice to Owners.

Where a defective sidewalk came under the observation of the agent of the board of public works of the city whose duty it was to know, report, and act on the condition of streets and sidewalks, the board could not escape its liability to see that the walk was repaired by serving an insufficient notice on the adjoining property owners to make such repairs.

4. Same—Repair—Reconstruction.

Where a wooden sidewalk, located between two strips of cement sidewalk, had become defective, a notice to repair the same by constructing a cement sidewalk was proper, within San Francisco City Charter, art. 6, c. 2, § 16, declaring that the board of public works shall specify in such notice what material shall be used in repairs.

5. SAME—BOARD OF PUBLIC WORKS—FINANCIAL ABILITY.

The board of public works of San Francisco having authority to obtain an appropriation for the repair of sidewalks, to compel the abutting property owners to make needed repairs, to procure the work to be done themselves, and to acquire a lien on adjoining property for the amount expended, as provided by San Francisco City Charter, art. 6, c. 2, §§ 16, 17, and being authorized by section 18 to procure the arrest of the owners in default, and to apply fines collected to such repair, it was no answer to the board's liability for injuries on a defective sidewalk that it did not appear that the board had funds with which to make needed repairs.

6. SAME—SPECIAL DEFECT—NOTICE.

Where a sidewalk was generally defective, it was not necessary, in order to render the city authorities liable for injuries sustained thereon, that they should have acquired notice of the particular defect which occasioned the injury.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1649.]

7. DISMISSAL—CODEFENDANTS.

Where, in an action for injuries on a defective sidewalk, the board of public works and their sureties were joined with abutting owners, the board was not entitled to object to the dismissal of such owners from the case; the defendants being jointly and severally liable.

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by Dora A. Heath against Marsden Manson and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Rehearing denied October 11, 1905.

Myrick & Deering, Campbell, Metson & Campbell, M. J. Waldheimer, and John B. Gartland (N. J. Manson, of counsel), for appellants. Carl M. Mueller (Alfred Fuhrman and John Heenan, of counsel), for respondent.

HENSHAW, J. This action is against defendants, constituting the board of public works of the city and county of San Francisco, and the sureties upon their official bonds, for damages caused by a personal injury suffered by plaintiff in stumbling and falling over a sidewalk in the city which was out of repair and in a dangerous condition. The action is predicated upon the duty of the board of public works to maintain the sidewalks of the city in a reasonably safe condition and upon their negligent failure so to do in this instance. The liability of the defendants in a proper case is not questioned, but various grounds are urged against their liability in this case, which went to trial before a jury and resulted in a verdict and judgment in favor of plaintiff in the sum of $5,000.

It is argued that the sidewalk was not in such a condition of dilapidation as to make it unsafe or dangerous, it is argued that the evidence shows that the defendants were not negligent in the matter of this particular sidewalk, and it is argued that the evidence shows clearly that the plaintiff herself was guilty of contributory negligence. It appears that the sidewalk was a wooden sidewalk in the middle of a block, the sidewalks on either side of which were of cement. Plaintiff was reasonably familiar with the condition of the sidewalk before the time of the accident, and testified to its condition of general dilapidation and lack of repair. In this she was supported by other testimony. Photographs were likewise exhibited to the jury showing the condition of the sidewalk immediately after the accident. She walked over the sidewalk upon a dark night, stepped into a hole from which a plank had been removed, caught her foot in a projecting plank, was thrown, and suffered injuries. All these questions, whether the sidewalk was or was not in a reasonably safe condition, whether the plaintiff was or was not exercising due care in walking over it at night, were questions, under the conflicting evidence, addressed to the jury, and its verdict here is final.

It is contended that the board of public works was without jurisdiction either to repair the sidewalk in question or to award a contract for the repairing of it, in pursuance of the provisions of section 16, c. 2, art. 6, of the charter of the city and county of San Francisco, and that consequently the board must be held blameless in point of fact and without liability in point of law. So much of section 16 as is here involved reads as follows: "When any portion of the roadway of any street, avenue, lane, alley, court or place or any portion of any sidewalk * * * shall be so out of repair * * * the board of public works shall require the owners or occupants of lots or portions of lots fronting on said portion of said street, avenue, alley, lane, court or place by a notice in writing * * * to repair forthwith said portion of said street, avenue, lane, alley, court or place," etc. The point made by appellants is that "sidewalk," used in the first portion of the section above quoted, is not specifically repeated in the latter part, and that the jurisdiction of the board therefore extends only to the roadway proper, as distinguished from the sidewalk. But when the section declares that the board of public works shall require the owners or occupants of lots or portions of lots fronting on said portion of said street, avenue, etc., to repair forthwith said portion of said street, it is plain that "street" is here used with full and broad significance to include the sidewalks which are always a part of it.

It is undisputed by the evidence that an agent of the board of public works, a street inspector, whose duty, amongst others, it was to note, report, and act on the condition of streets and sidewalks, gave two different notices to the owners of the property touching the condition of the sidewalk. These notices directed them as owners of the property to repair the plank sidewalk in front thereof by constructing an artificial stone or bituminous rock sidewalk, and notified them that unless such repairs were commenced within five days after service of the notice, and diligently and without interruption prosecuted to completion, the board of public works, under and by virtue of the authority vested in it by the charter of the city and county of San Francisco, would enter into a contract with some suitable person to execute the prescribed work at the owner's expense. It is argued by appellants that these notices were not such notices as the charter contemplated, and that they were not delivered personally to the owner, but were sent to him by mail; and it is further contended that the notices called for repair of a wooden sidewalk by the construction of a bituminous rock or cement sidewalk, and that such construction is no part of repairing. But to this it must first be answered that the sidewalk in question, having come under the observation of the agent of the board of public works, if in fact, as the jury decided, the sidewalk was in need either of reconstruction or repair, the board of public works could not escape liability for its negligent performance or nonperformance of duty by proof of a negligent failure to perform another duty; that is to say, by proof that the notices which it actually sent were improper and insufficient. If this were so, then by the mere sending out of defective notices the board of public works could forever escape legal liability by failing to acquire jurisdiction. "The law does not permit itself to be thus trifled with, nor allow its ministers to thus substitute pretense for performance." Nicolson Pavement Co. v. Painter, 35 Cal. 700. And while it is true that, in general, repair has reference to the reconstruction and restoration of an imperfect existing thing, it is none the less true that in contracts and in statutes it frequently has a broader significance. The charter of San Francisco, in dealing with the question, declares in section 16 of chapter 2 of article 6, that the board "shall particularly specify in said notice * * * what materials shall be used in said repairs." And in note 2 to Encyclopædia of Law (2d Ed.) vol. 24, p. 472, under the head of "Repairs," will be found numerous cases in which the word has been held to apply to a new construction of different material. The notice in terms called for repair as well as for construction, and "to permit such walk to remain and attempt to repair it by nailing a rotten or even a sound board back to a rotten stringer is as negligent as to construct a walk of unsound materials in the first place." City of Shelbyville v. Brant, 61 Ill. App. 154.

It is urged that it does not appear that the board of public works had any money with which to make the needed repair, and is, therefore, relieved of responsibility. It does not appear that they sought an appropriation for the purpose; but, moreover, they had power to compel the abutting property owners to make the needed repair, to do the work themselves, or to enter into a contract with a suitable person to have it done, which person would have a lien for the amount expended. Charter of San Francisco, c. 2, art. 6, §§ 16, 17. They still further had power to procure the arrest of the owners in default, and the fines so collected form a special fund for repairing sidewalks. Charter of San Francisco, c. 2, art. 6, § 18. As said in City of New Albany v. McCulloch, 127 Ind. 500, 26 N. E. 1074: "An examination of the statute above referred to will disclose the fact that cities in this state are clothed with power to improve and keep in repair their streets and alleys without expense to the city, and where such power exists we do not think it is a defense, when sued for injuries occurring by reason of its neglect to keep the streets in repair, to say it had no funds with which to pay for such repairs." See, also, City of Belton v. Turner (Tex. Civ. App.) 27 S. W. 831; Village of Shelby v. Clagett, 46 Ohio St. 549, 22 N. E. 407, 5 L. R. A. 606; Erie v. Schwingle, 22 Pa. 384, 60 Am. Dec. 87; Evanston v. Gunn, 99 U. S. 660, 25 L. Ed. 306.

It was not necessary, as argued by appellant, that the board should have knowledge of the precise defect in the sidewalk which occasioned the injury. "In such case the city would be justly chargeable with notice of the general unsafe condition of the walk, though nobody may have known the special condition of the particular board which did the mischief." City of Shelbyville v. Brant, 61 Ill. App. 154; Shaw v Sun Prairie, 74 Wis. 108, 42 N. W. 271; Furnell v. City of St. Paul, 20 Minn. 117 (Gil. 101); City of McLeansboro v. Trammel, 109 Ill. App. 524; Moore v. City of Minneapolis, 19 Minn. 300 (Gil. 258).

With the board of public works and their sureties were sued the owners of the property. Appellants contend that under chapter 2, art. 6, § 16, and article 1, § 5, of the charter of San Francisco, the liability of the owners with the board of public works was joint and several, and that the court erred in dismissing the defendant owners of the property from the case. But the rule is fundamental that, if several are guilty in common of tort, the injured person has his right of action for damages against all or each, and may sue them either individually or collectively. Grundel v. Union Iron Works, 127 Cal. 438, 59 Pac. 826, 47 L. R. A. 467, 78 Am. St. Rep. 75. Moreover, the appellants in this case affirmatively sought by their demurrer this very dismissal, urging that there was a misjoinder of defendants, in that they themselves were joined in the action with the defendant owners of the property. We perceive no errors in the rulings of the court in admitting and rejecting evidence, nor in the instructions which it gave and refused to give. Those refused were either properly refused as containing a mistaken proposition of law, or were substantially covered by those actually given.

For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; LORIGAN, J.; SHAW, J.

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147 Cal. 668

KRAMER v. CITY OF LOS ANGELES.

(L. A. 1,379.)

(Supreme Court of California. Sept. 7, 1905.)

1. MUNICIPAL CORPORATIONS — DEFECTIVE DRAINS—DAMAGES—ACTIONS—FINDINGS — EVIDENCE.

In an action against a city for damages caused to a private property owner by the bursting of a storm sewer, evidence *held* to sustain findings that the city constructed the portion of the sewer lying across plaintiff's property and connected it with a storm drain in such a manner that it was incapable of sustaining the pressure of water which was intended to and did pass through it, and that the city was negligent in allowing the outlet to become clogged with débris, so as to increase the pressure.

2. SAME—CONSTRUCTON OF SEWER—PRIVATE PROPERTY—POWER OF MUNICIPALITY.

A municipal corporation, having power to construct a public storm drain under its general power to construct and maintain streets, and being authorized, also, to construct the same either in the streets or in private property condemned for such purpose, was authorized to agree with private property owners to construct the same along a right of way donated by them in a ravine in the city at the joint expense of such property owners and the city.

3. SAME—EVIDENCE.

Where, in an action by a property owner for damages sustained by the bursting of a storm sewer, he contended that the outlet of the sewer was obstructed by débris, evidence showing the condition of the outlet immediately after a storm had subsided was admissible; it being impossible to observe the outlet while the storm prevailed.

4. SAME—NOTICE.

Where the largest part of the damage sustained by a property owner by a break in a storm sewer occurred during a second storm, and after such owner had notified the city street departments, the city engineer, and the mayor and common council in open session of the break in the sewer on his premises, the city was not entitled to notice of an obstruction at the outlet of the sewer as a condition of its liability for damages resulting therefrom; the city being bound to anticipate the probability of such occurrences and to guard against them by inspection.

5. SAME—DAMAGES.

Where plaintiff maintained a building which he used as a residence, dancing school, and to rent for parties and entertainments, and he suffered a loss of engagements already made for dancing classes and receipts from rentals of the dancing hall by reason of the flooding of the building by a break in defendant's storm sewer, a recovery for the loss of such receipts was not objectionable as an attempt to recover lost profits.

Department 2. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by Henry J. Kramer against the city of Los Angeles. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Affirmed.

Rehearing denied October 7, 1905.

W. B. Mathews and Herbert J. Goudge, for appellant. Bicknell, Gibson & Trask and Dunn & Crutcher, for respondent.

LORIGAN, J. This action is brought by plaintiff to recover damages from the city of Los Angeles for injuries alleged to have been sustained by plaintiff through the negligence of the city relative to a drainage conduit constructed through his premises. From a judgment in favor of plaintiff, and an order denying defendant's motion for new trial, the city appeals.

The material facts, as found by the lower court, substantially stated, are: That prior to the year 1883 there existed in the city of Los Angeles a small ravine or arroyo, known as the "Arroyo de los Reyes," which began in the hilly section of the northwestern portion of said city at a point north of the intersection of Second and Fremont streets, and ran thence in a southerly direction through, along, and across the public streets of said city, and through and across private property, to a point south of the intersection of Eighteenth and Figueroa streets; that said arroyo, by means of its branches, tributaries, and the contour of the ground in said hill section of the city, received, collected, and carried off a large portion of the storm water naturally falling in said hill section, and delivered the same to and upon the public streets and private property of said city; that in 1883 or 1885 the city, for the purpose of confining said surface waters falling and accumulating in said hill section and flowing in said arroyo, constructed in said arroyo, at the places where it crossed the public streets, a 32-inch cement pipe or main, and also constructed in said arroyo, from a point in said hill section near the corner of Second and Fremont streets to a point southerly and in the east line of Flower street near Fifth street, a 41-inch brick conduit; that thereafter a cement pipe of 30 inches in internal diameter was laid in said arroyo from the southerly end of said brick conduit to Ninth street, a short distance north of the property of plaintiff; that there was also constructed in said arroyo, from a point just south of plaintiff's property southerly to a point in Figueroa street near its intersection with Eighteenth street, another cement pipe 30 inches in internal diameter, and terminating in a well constructed by said city in Figueroa street, which well was by said city also connected by means of a 22-inch pipe with another small well constructed by the city in Figueroa street about 50 feet from the first one, and over these wells the city placed iron gratings flush with the surface of said street, said two gratings constituting the only outlets of said cement pipe; that portions of said cement pipe were constructed in said arroyo by and at the expense of the owners of the lots through which the same was laid, portions by the city at its own expense, and other portions at the joint expense of the city and the owners of the lots through which the same was laid; that in March, 1897, plaintiff and the owners of the lots next adjoining plaintiff petitioned the city council to pipe that portion of said arroyo which ran across their respective lots, offering to pay one-half of the cost thereof, and in November, 1897, said city, for the purpose of completing said storm drain, which had already been constructed from a point in the hill section of said city within a short distance north of plaintiff's property, and from the south of plaintiff's property down to the southerly terminus of said drain in the wells in Figueroa street, and for the purpose of carrying said storm water therein, constructed across the property of plaintiff and the lots of the adjoining owners a cement pipe of 30 inches internal diameter, and so connected the same with the other portions of said storm drain already completed that the same then constituted a closed conduit or storm drain from a point in the hill section of said city to its southerly terminus or outlet in said wells in Figueroa street, near Eighteenth street; that half the cost of construction through the property of plaintiff and through the adjoining lots was paid by the owners of said lots into the city treasury of said city; that subsequent to the completion of said storm drain, and prior to November 17, 1900, plaintiff constructed upon his property a frame dwelling, described in the pleadings and known as "Kramer's School for Dancing," which on said last-mentioned date was being used, and had theretofore been used, by plaintiff as a residence and hall for conducting a dancing school, and also for renting purposes for parties and entertainments; that subsequent to the construction through the property of plaintiff of said cement pipe, and prior to said 17th of November, 1900, the city, for the purpose of more effectually collecting and confining the storm waters which fell and accumulated in said hill section of the city and ran through and over the public streets thereof, built and laid under the said public streets two other cement pipes or storm drains 30 inches in internal diameter, and connected the same with the first-mentioned storm drain at or near the intersection of Second and Fremont streets, one of which laterals or tributaries extended in a northeasterly direction in said hill section, and the other in a northwesterly direction in said hill section; that said city at all times after the construction of said cement pipes or storm drains has maintained the same under its supervision; that the portion of said pipe so constructed under the building of plaintiff was negligently constructed, and of improper, insufficient, and defective material, and was inadequate to withstand the pressure of the water which was intended to and did pass through the same; that just prior to November 17th defendant city negligently permitted said pipe and the outlet thereof to become partially clogged and stopped up with débris, and that by reason of the negligence of said defendant in the construction of said pipe and the defective character of the material used by said defendant in its construction, and by reason of its negligence in the maintenance of said pipe, the same on the 17th of November, 1900, broke at certain points underneath plaintiff's building, in consequence of which large volumes of muddy and oily water were discharged into the basement of said building; that immediately and on November 17, 1900, plaintiff notified the street department, the city engineer, and mayor of said city of the breaking of said pipe and the condition of plaintiff's premises; that on November 21, 1900, he appeared before the city council of said city, convened in regular session, and informed said council of the breaking of said pipe and the condition thereof and the condition of his premises; that defendant wholly failed to take any steps or make any effort to repair said pipe or place the same in safe condition, and thereafter, on said 21st of November, 1900, in consequence of the broken condition of said pipe, the basement of plaintiff's building was again submerged with muddy and oily water. And the court found that plaintiff had been damaged in the sum of $2,613.86, injuries sustained by the sinking of the foundations of his building, injuries to his furniture contained therein, and loss resulting to his business.

Upon this appeal appellant attacks practically all of the findings made by the court upon the ground that the evidence is insufficient to justify them. We do not deem it necessary to consider this attack, except as to a few of the main findings. As to the others, it is sufficient to say that we have given them careful attention, and, while it must be conceded that some of them could have been better and more satisfactorily supported by evidence which from the nature of the case was accessible, yet we cannot say that a reasonable consideration of such evidence as was addressed to them warrants the claim of appellant that it was insufficient to sustain them.

Referring now to the principal findings attacked, it is insisted that the evdence was insufficient to justify the finding that the city constructed the portion of the pipe lying across the property of plaintiff and connecting it with the storm drain already constructed. Aside from such facts as are contained in the recited findings, the evidence shows that the pipe which was constructed across the premises of plaintiff was designed as, and was a portion of, a conduit system practically constructed by the city at its own expense, or conjointly with the owners of property through which the conduit ran, for the purpose of draining, as far as its capacity would do so, a portion of the hill section of the city, and relieving that portion of the city south of said hill section from the burden of the storm waters. This system, save the laterals in the hill sections, had been completed, including the outlet on Figueroa and Eighteenth streets, along the arroyo north and south of the property of plaintiff and that of a few others adjoining him at the time they applied to the city to complete the portion through their property. When this application was filed with the city council, in which plaintiff and his co-petitioners offered to pay one-half of the expense of construction, the city having refused to bear more than one-half, that body took the matter entirely in charge and ordered a contract for the construction of the cement pipe across the property of plaintiff and his co-petitioners to be made between the city and W. A. Frinck. This contract was approved by the city attorney and signed by the mayor, and the contractor, Frinck, constructed the pipe in question, which being completed, the city paid the contract price; the plaintiff and his neighbors paying into the treasury one-half thereof. Plaintiff was not consulted as to the size, materials, or laying of said pipe, or anything relating to it. The city controlled the entire matter. It thus appears from the evidence that the city assumed the power to, and in fact did, contract for the construction of the conduit in question.

But it is contended by appellant, and its objection to the sufficiency of the finding is grounded mainly on that proposition, that while the city entered in fact into the contract for the construction of this portion of the conduit, and did construct it, yet its act in that regard was ultra vires and void; that the construction of this conduit was an improvement in private property; and that the city had no power or authority to build a pipe line or storm drain for the benefit of the owners of private property. We cannot agree with this position of appellant. It is true, as suggested by appellant, that a municipal corporation has no power to construct upon private property a pipe or conduit for the sole purpose of relieving the property owner of the inconvenience or danger caused by the existence thereon of a natural water course or drain. But this was not the purpose of the construction of the conduit over plaintiff's premises. It was for the purpose of completing a drainage system mainly constructed by the city and used by it to concentrate and control the storm waters flowing from the hill section of the city as far as the system was capable of doing so, and that the municipality had power to provide a complete system for that purpose we do not think open to question. The power of the municipality to construct sewers and drains is derived from its authority to construct and maintain streets. It is not necessary that express power should be conferred by the charter for the former purpose. Without any special grant, such power is regarded as incident to the general and express power to construct and maintain streets. Dillon on Municipal Corporations, §§ 805, 807; Am. & Eng. Ency. of Law (2d Ed.) vol. 10, p. 237. The city, when it commenced the improvement of the hill portion of the city—to construct and lay out streets therein—was confronted with the necessity of taking care of the storm waters which fell in that section of the city, and, as no limitation and restriction was imposed upon it under the charter, it had the right to make such provision for their disposition as in its judgment was best. It can hardly be questioned that for such purpose it might have constructed a sewer or drain in the public streets running in the same general direction as the course of the arroyo. And if in the exercise of its discretion there was an opportunity afforded it of constructing a sewer or drain over private property, we do not see how any valid objection could be presented against its doing so. The power existing, the exercise of it is left to the discretion of the municipality. If necessary, a right of way for such purpose might have been condemned by the city along the arroyo. And if the city saw fit, to avoid damaging its streets by tearing them up to construct a storm drain therein, or to avoid the expense of condemning a right of way through private property for that purpose, to accept from the property owners a natural and convenient way along the arroyo, and construct its storm drain therein, we do not see how this construction can be said to be ultra vires. To have constructed the drain in the public streets or under condemnation proceedings would have been for the public benefit and in the exercise of its municipal power. The character of the construction, as being a public benefit and within its municipal power, is not affected by the circumstance that the owners of land along the arroyo consented to give, and the city accepted, a right of way which it might have purchased or condemned. Nor was the construction of the portion of the storm drain across plaintiff's property any the less a public improvement because its construction at that time only involved the premises of plaintiff and those of his neighbors, and was of particular benefit to plaintiff. The construction of this portion constituted the completion of the system, and, as the municipality had the power to construct the whole storm drain, it necessarily had the power to construct every part of it. There is no doubt but that the construction of the conduit through plaintiff's premises was a benefit to him. But so was the construction of the entire system of benefit to each particular portion of property through which it was constructed, and in determining benefits the system in its entirety must be considered. The benefit to plaintiff was no greater, when the portion on his land was constructed, than it would have been if the entire drain had been constructed at one time; and, as its entire construction was a public improvement which the city was authorized to make, it is of no consequence that particular benefit resulted to plaintiff through its completion. It is not necessary, in order that the use may be regarded as public, that the whole of the community or any large portion of it may participate in it. If the drain be of public benefit, the fact that some individuals may be specially benefited above others affected by it will not deprive it of its public character. Ross v. Davis, 97 Ind. 83.

Many other considerations are urged by respondent why the construction of the entire system of storm drainage along this arroyo was a proper exercise of municipal power—the growth of population in the section of the city traversed by the arroyo, and the construction by the city of streets across that stream from the hill section to Eighteenth street; the placing of pipes under those streets at such intersections, and the filling in of the remainder of the bed of the stream; the liability of the existence of nuisances created by stagnant pools formed thereby in a thickly settled portion of the city, and which would be a menace to public health and safety; and the actual existence of such a condition in the open portion of the arroyo on plaintiff's property near the public highway, a condition claimed to have been occasioned through the construction of the conduit by the city above and below his property, and for which condition neither himself nor the adjoining proprietors were responsible, and the removal of which, by completing the conduit through his premises, was a municipal duty and public benefit. We do not discuss these suggestions, satisfied that under the power to construct and maintain streets the city, in making such improvements in the hill portion thereof, had a right to construct and adopt the system, of which the conduit through plaintiff's land constituted a portion, for the purpose of disposing of the storm waters existing at least in the hill section. A general power to construct and maintain streets is sufficient authority to authorize a municipality to construct a sewer to carry off storm waters. McGuire v. City of Rapid City, 6 Dak. 346, 43 N. W. 706, 5 L. R. A. 752.

There are only two other findings which require particular mention. The plaintiff based his claim for damages resulting from the breaking of the pipe constructed by the city through his premises upon two grounds: First, that the pipe was constructed in such manner and of such materials that it was incapable of withstanding the pressure of the water which was intended to and did pass through it; and, second, that the city was negligent in allowing the outlet of the conduit to be partially clogged and stopped up with débris, so as to impede the passage of the water, thereby increasing the pressure upon that portion of the pipe underneath his building. These findings are challenged by appellant as not sustained by the evidence. An examination of the record, however, satisfies us that there was sufficient evidence to sustain the findings upon both points.

The pipe laid upon plaintiff's premises was constructed of cement, and the evidence clearly shows that it burst from the internal pressure of the water upon it. As to the strength and sufficiency of such pipe to withstand water pressure (referring to the testimony of some of the witnesses), the expert Purcell, called for plaintiff, testified that "the cement pipe practically will not carry any pressure at all, and it is considered to be impracticable to put more than eight feet head on it." Another one of plaintiff's experts, Koebig, testified that, when a cement pipe is bedded and tamped, it could not be subjected to a pressure over ten feet; that "the breaking strength really is between eight and ten feet, the safety. That is the pressure which the pipe should be subjected to, and not more." Wolbrecht, one of the expert witnesses for defendant, characterized such pipe as "wholly unfit for water pressure." The pressure upon this pipe across plaintiff's premises was estimated by the expert witnesses for plaintiff to be approximately 75 feet; that the outlet at Figueroa and Eighteenth streets, being covered with iron grating, did not materially decrease this pressure, even when the outlet was not clogged with débris; that under the most favorable circumstances pressure would be exerted upon the pipe on plaintiff's premises which it was entirely inadequate to withstand. It was agreed by the same character of witnesses (expert) called by defendant that the pressure on said pipe would be 75 feet, if the outlet was stopped with débris, but that, as constructed, if the outlet was unobstructed, the pressure would be from 9 to 10 feet. These estimates were given on the assumption that the pipe was full of water, which the testimony showed was liable to happen in cases of ordinarily severe rainfalls in that vicinity, and which was the case when the pipe in question burst. This testimony bore upon the question of the sufficiency of the pipe as constructed to stand, when full, the ordinary pressure of the water intended to pass through it if the outlet was unobstructed.

As to the sufficiency of the evidence to show that the outlet on Figueroa and Eighteenth streets was clogged up at the time the the pipe across plaintiff's premises burst, it appears from the testimony that there were taken out of the well, at the outlet, the day after the storm during which the pipe in question broke, large quantities of branches and several big rocks, and that the bars which covered the 30-inch cement discharge pipe, where it entered into the well on the east side of Figueroa street, and the bars which covered the 22-inch pipe from that well to the outlet on the west side of Figueroa street, were so clogged up that, as the witness St. Martin said they were so "full of stuff, had to pull it out with a shovel; that is, had to get it away from the bars. In the condition it [the well] was in, a small amount of water could run through there. It necessarily lessened, of course, the capacity." We do not perceive from the record that there was any testimony, save that of this witness, as to an actual examination of the condition of the outlet after the storm during which the pipe in question broke, and his examination showed it much obstructed at that time. There was water run through this conduit during the entire year, which would naturally carry more or less débris, to find lodgment against the bars at the outlet and impede the flow of the water in the event of a storm. It is conceded by all the witnesses in the case that the clogging of this outlet would throw a pressure upon the pipe on plaintiff's premises which it was not constructed to withstand, and the fact that it broke when the first storm came would be some evidence of itself that the outlet was then clogged and impeded. There was evidence, too, that as to the grating which covered the well, and which was intended to be a relief to the flow of water there, the débris usually carried or flowing down the street in which the well was located—leaves, straw, filth, etc.—had a natural tendency to clog this grating up, and so create a solid obstacle against the relief to the flow of the water from the outlet which it was intended, in case of a storm, to afford. There is some evidence in the case which, while not showing positively that that was the condition of the grating at the time of the storm, yet strongly indicates that it was; and this evidence was of such character that the court might reasonably infer that this was the condition of the grating at that time.

As we have said, the only evidence of actual inspection of the outlet to ascertain its condition was made by the witness St. Martin. It is not pretended that any officer or employé of the city at any time made any inspection of the outlet to ascertain whether it was obstructed or not, either before or after the storm. It is urged by the appellant, against the testimony of the witness St. Martin and other testimony to the same point that it only tended to show the condition of the outlet after the storm. But evidence showing the condition of the outlet immediately after the storm subsided, it being in the nature of things impossible to observe it while the storm prevailed, was competent evidence from which a reasonable inference could be deduced that the condition as disclosed then existed at and prior to the time of the storm. Dist. of Columbia v. Gray, 6 App. D. C. 319. While there is some additional evidence in the record on this point, we think we have called attention to sufficient of it to meet appellant's objection.

Taking, then, the evidence in the case, which we have referred to in a general way, addressed to the findings of fact which the appellant attacks, we think it entirely sufficient to support both of them. It is not pretended but that the breaking of the pipe was occasioned through the internal pressure of the water. All the witnesses in the case agreed to this. Independent of any question whether there was an obstruction of the outlet at the time the pipe broke, the court was warranted, from the evidence adduced by plaintiff's witnesses, in finding that the pipe as constructed by the city was inadequate to withstand, when full, the mere pressure of the water which it was intended to carry. This finds ample support in the testimony of the experts for plaintiff, and the fact that the pipe broke under pressure of the water flowing freely (if appellant's claim that the outlet was unobstructed were true) would confirm the testimony of these witnesses that it was inadequately constructed to withstand that mere pressure. And that the court was warranted in finding that the outlet was in an obstructed condition is sufficiently clear from the evidence upon that point to which we have referred. These constitute the only findings which we think require discussion. The others which are challenged are, in our opinion, as we have said, sufficiently sustained by the evidence, and particular reference to them we think unnecessary.

There is but one other additional point in the case made by appellant, aside from the matter of damages, which requires mention. The appellant does not question the rule that a municipality, when the construction of sewers or drains is within its power, is liable for injuries such as are claimed to have been sustained by plaintiff, and which are the result of negligence in the construction of such work, or for failure to keep the same, when constructed, in proper repair or free from obstruction. It is, however, insisted that it is the rule that a city is not chargeable with negligence, if permitting such obstruction, until after notice of its existence, and that in the case at bar it does not appear that the appellant had any notice that the outlet on Figueroa and Eighteenth streets had become stopped up. This point of appellant, it is claimed by respondent, is of no moment as affecting the liability of the city in the present case, because, it is insisted by him, that this element of negligence in permitting the outlet to become stopped up may be eliminated, as the evidence still shows, from the testimony of appellant's own witnesses, that appellant was negligent in constructing the conduit across plaintiff's premises of material unfit to bear the ordinary pressure of the water flowing through it without any stoppage of the outlet.

Whatever merit there might be in this claim, the force of it is lost under the finding of the court that the injury to plaintiff was occasioned, not purely through the negligent construction of the conduit in question by appellant, but that this, combined with its negligence in permitting the outlet to be obstructed, occasioned the damage.

Upon the matter of notice, if the rule contended for by appellant applies, it appears, in our judgment, that the city did have notice sufficient to move it to an examination of the outlet to ascertain its condition and remove the obstructions. The flooding of plaintiff's premises by the breaking of the pipe occurred during the first storm mentioned in the findings; the second flooding some five days after the first. When the flooding from the first storm occurred, the plaintiff immediately notified the street department of the city, and the city engineer and mayor, of the broken condition of the pipe and the condition of his premises as a result thereof. He subsequently appeared before the city council in open session and notified the members thereof of the condition of things. Although thus notified, the officials of the city took no steps to actually repair the sewer or to investigate the condition at the outlet, and plaintiff's building was afterwards flooded by the second storm; the water remaining in it for about 18 hours. From the evidence in the case the court was warranted in finding that the greater damage plaintiff sustained was occasioned by the second storm, occurring after the city had ample notice and had failed to act on it. We reach this conclusion without passing upon the point made by respondent, and which appears to be sustained by ample authority, that the city was not entitled to notice obstructions at the outlet before it became liable for damages resulting therefrom; that it is the duty of a city to anticipate the probability of such occurrences and to guard against them by occasional examinations and cleansings. Am. & Eng. Ency. of Law (2d Ed.) vol. 10, p. 246; District of Columbia v. Gray, 6 App. D. C. 314; Fort Wayne v. Coombs, 107 Ind. 75, 7 N. E. 743; Schumacher v. City of New York (N. Y.) 59 N. E. 773. The general rule on this subject is stated in District of Columbia v. Gray, supra, in which obstructions similar to those complained of in the case at bar were involved. "But in a case like the present there seems to be no ground for the application of the doctrine of notice in its ordinary sense. Ordinarily, and in the nature of things, only the officers and agents of the municipality could know of such an obstruction as that of which complaint is here made. There could be no passer-by who could give the information. The location of the obstruction was open only to the employés of the municipality, and it was their duty to inspect it from time to time and ascertain the fact that no obstruction existed. Only by such inspection was it possible, ordinarily, to ascertain the existence of such obstructions; and, if that work of inspection was neglected by the municipality, it has no right to require that it must have notice from some other source. Its neglect of duty cannot be made the basis of exemption from liability."

As to the amount of damages. Aside from injury to plaintiff's building from settling, the amount of damages allowed for which is not questioned, the court allowed plaintiff damages for injuries to furniture and utensils and for loss of the use of his building, the allowance of portions of which amounts appellant questions. Plaintiff was the only witness as to these damages, and we think his testimony justified the allowance. As to the damages to his furniture and utensils, his statement was one of fact, not of opinion, as insisted by appellant.

As to the damages to his business. Plaintiff was also the only witness on this point. Counsel assume that in his claim for such damages plaintiff was seeking to recover profits which he lost. We do not so understand his claim. It was for the loss of receipts for rental of the dancing hall and loss of engagements for dancing classes. These were engagements which he had actually made, and which, on account of injury to the dancing hall, had to be abandoned. The only expenses he had were the running expenses of the hall, which he had all the year round. As the matter of profits did not seem to be involved in this claim for damages, appellant's point that the evidence did not warrant its allowance is without merit.

Various other points are made upon this appeal, which we do not touch on. They relate mainly to claims that the court failed to find on several material issues or found outside the issues in the case. We do not think that any of them are well taken.

The judgment and order are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

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1 Cal. App. 411

PEOPLE v. COWAN.

(Court of Appeal, Second District, California. Aug. 12, 1905.)

1. HOMICIDE—APPEAL—HARMLESS ERROR—COMMENTS ON TESTIMONY.

In homicide an expert testified that it was not possible for deceased, owing to the character of the wounds, to have taken a step after being shot, as immediate paralysis must have necessarily ensued. Thereupon the court stated that it was evident that deceased was not paralyzed when he was running, nor when he was scuffling with his assailant. *Held* that, if the statement of the court was an improper comment on the evidence, it was one favorable to defendant, who fired the first shot, another one having been fired subsequently by himself or some one else; and he could not complain thereof.

2. WITNESSES — CREDIBILITY — AFFILIATION WITH PARTY.

The membership of a witness in the same labor union as the party for whom he is testifying may be shown to affect his credibility.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1201.]

3. HOMICIDE—INSTRUCTIONS—CONSPIRACY.

In homicide, where it was shown that defendant was a member of a mob formed to tar and feather deceased, and that the members of the mob were armed with deadly weapons, it was not error to charge that, if a conspiracy existed, and the conspirators were prepared to use deadly weapons to effectuate their design, defendant would be guilty of murder or manslaughter, although there was a reasonable doubt whether he actually fired the fatal shot, provided he did feloniously fire a shot at deceased, and about the same time or shortly afterwards another shot, which caused the death, was fired in furtherance of the conspiracy.

4. SAME — NEW TRIAL — NEWLY DISCOVERED EVIDENCE.

After a conviction of homicide, a new trial based on newly discovered evidence, which is merely cumulative in character, is properly refused.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2328-2330.]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

James Cowan was convicted of manslaughter, and appeals. Affirmed.

Rehearing denied by Supreme Court October 6, 1905.

Defendant was charged alone, by an information, with the crime of murder. No charge was made of a conspiracy. While defendant's first witness was on the stand, the prosecuting attorney made the following statement: "The res gestæ is confined in this case to the fact of the killing—to the act of the defendant, and not to the act of some person else—and he is not responsible for that; and it is irrelevant, immaterial, and incompetent, and it is hearsay so far as this defendant is concerned." At this state of the proceedings counsel for the defendant asked the following question of the court: "I would ask the court if it is not a defense here if we can show that some one else killed the negro besides the defendant in this case?" To which the court responded: "The objection is overruled, if that is the object of it." At the close of the case the court instructed the jury as follows: "If you find from the evidence in this case, beyond a reasonable doubt and to a moral certainty, that the defendant and some other person or persons entered into a conspiracy to go to the jail at Mojave at the time and place alleged in the information for the purpose of unlawfully tarring and feathering the deceased, and that said defendant and others, in pursuance of said act, also agreed and conspired together at the Bunck House, on the way to the jail, after they had arrived at the jail, or at any other time and place, that they or either of them would shoot and kill the deceased, if necessary in order to carry out the unlawful design of tarring and feathering the deceased, then I instruct you that under such circumstances, if you should find beyond all reasonable doubt that defendant feloniously and of his malice aforethought shot and killed the deceased, your verdict should be guilty; and should you have a reasonable doubt in your minds as whether the defendant fired the shot that killed the deceased, and still you believe beyond a reasonable doubt that he fired a shot feloniously at the deceased, and about the same time, or shortly afterwards, another shot was feloniously and with malice aforethought fired at the deceased, which caused his death, and that said shot was fired feloniously in furtherance of the unlawful design and conspiracy so entered into by defendant and the other person or persons, then I instruct you that under such circumstances it would be your duty to find the defendant guilty, and then proceed to determine, from the evidence and instructions of the court, whether it is murder in the first degree, murder of the second degree, or manslaughter."

Matthew S. Platz, for appellant. U. S. Webb, Atty. Gen., C. N. Post, Asst. Atty. Gen., and J. C. Daly, Dep. Atty. Gen., for the People.

ALLEN, J. Defendant was by information accused of murder, and was convicted of manslaughter, and from the judgment and order denying a new trial he prosecutes this appeal.

The record discloses that defendant and a number of others conspired together to commit an unlawful act by taking forcibly from a jail the deceased, who was a prisoner therein, and applying to his person a coat of tar and feathers. After such conspiracy was formed, the defendant armed himself with a gun, and joined his co-conspirators at the jail, where the same was broken open, and the prisoner rushed therefrom into the crowd of conspirators on the outside. Shortly after he emerged from the building, and when the deceased was but a few feet therefrom, a shot was fired by the defendant at him, and almost immediately thereafter he was grappled by another one of the crowd, and while engaged in a scuffle with the party who had seized hold of him another shot was fired, and the deceased thereupon sank to the ground, or was thrown down by his assailant, his clothing torn from his body, and crude oil and feathers applied. The deceased was then carried back to the jail building, and the crowd separated. It is evident from the character of the injury inflicted by the fatal shot that the deceased was dying, if not already dead, when the oil and feathers were applied. The testimony is convincing that defendant actually fired the first shot, and there was ample testimony to justify the jury in determining that he fired the second shot as well. Strange as it may seem, it appears affirmatively from the record that none of the participants were punished, or any attempt made in that direction by the authorities, except this proceeding against defendant, in which case the jury satisfied its conscience by a verdict of manslaughter.

Notwithstanding the brutal character of the crime, and the undoubted guilt of the defendant, he, nevertheless, on this appeal insists that the judgment should be reversed upon purely technical grounds. Chief among these is that the court erred in expressing an opinion as to the weight of evidence in the presence and hearing of the jury. This statement was induced by reason of expert testimony to the effect that it was not possible for deceased, owing to the character of the wounds, to have taken a step after being shot; that paralysis must have necessarily ensued immediately. The statement of the court was, in effect, that it was evident that he was not paralyzed when he was running, nor when he was scuffling with his assailant. If there was any error or impropriety in such statement, it was in support of defendant's theory, who was seeking to establish that, while he did fire the first shot, someone else fired the second. The effect of this statement of the court could only have been favorable to defendant's theory, and he should not be heard to complain.

The next objection is that the action of the trial court in permitting the district attorney to interrogate a witness as to his membership in the same miners' union of which defendant was a member was error. This was perfectly competent. It is permissible upon cross-examination to show the fact of relationship, fraternal or otherwise, existing between the witness and the party in whose interest he is called, as tending to affect his credibility. For the purpose of fully weighing the evidence of any witness, the jury are entitled to know his bias or feelings in the case, if any there be. People v. Wong Chuey, 117 Cal. 626, 49 Pac. 833. It is elementary that the state of mind of a witness as to his friendship or hostility towards the parties is proper matter for investigation. People v. Thomson, 92 Cal. 509, 28 Pac. 589.

It is insisted further that the court erred in certain of its charges to the jury. The crime charged was murder. There was evidence received and circumstances shown to exist warranting the conclusion that the conspirators were prepared to go to any extent to carry out their unlawful design, and had so agreed. That a mob formed to commit an outrage upon a defenseless prisoner is found to be armed with deadly weapons is a strong circumstance tending to show that their determination and understanding was that, if need be, deadly weapons would be used to effectuate their design. Under these circumstances it was entirely proper to charge the jury that, "if such a conspiracy existed, and to the extent last above stated, and the same was established beyond a reasonable doubt, that even should you still have a reasonable doubt in your minds as to whether defendant actually fired the shot that killed the deceased, and still you believe beyond a reasonable doubt he fired a shot feloniously at the deceased, and about the same time, or shortly afterwards, another shot was feloniously and with malice aforethought fired at the deceased, which caused his death, and that said shot was fired feloniously in furtherance of the unlawful design and conspiracy so entered into by defendant and the other person or persons, that under such circumstances it will be the duty of the jury to find the defendant guilty, and then to determine from the evidence and instructions of the court whether it is murder in the first degree, murder in the second degree, or manslaughter. We perceive no error in this, or in any of the instructions given by the court. People v. Holmes, 118 Cal. 456, 50 Pac. 675.

There was no error in refusing a new trial, the application for which was based upon the ground of newly discovered evidence, where it appears that such newly discovered evidence is cumulative only in its character.

Judgment and order affirmed.

We concur: GRAY, P. J.; SMITH, J.

(7 Cal. Unrep. 229)

SCHINDLER v. GREEN et al.*

(Court of Appeal, Third District, California. Aug. 14, 1905.)

1. Principal and Agent—Existence of Relation—Liability of Agent.

A contract with plaintiff for an alteration of defendants' house was signed by defendants' daughters, who had no interest in the house, but lived there with defendants. Defendants had actual knowledge of the agreement between plaintiff and their daughters, knew that the work was being performed by plaintiff, and received the benefit thereof. *Held*, that defendants' daughters were only agents for defendants, and were not liable on the contract signed by them.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 478.]

2. Contracts — Building Contracts — Acceptance of Work.

Plaintiff contracted to build an addition to defendants' house. The plastering of the addition was to be done by another contractor. Plaintiff claimed that his work was completed, and thereupon the plasterer went ahead with his contract, and did the plastering. But it was not shown that defendants occupied the addition. *Held*, that the doing of the plastering did not constitute an acceptance of plaintiff's work by defendants, such as to excuse plaintiff from actually completing the contract if it was not in fact completed when he quit work.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 1458, 1459.]

3. Mechanics' Liens — Trivial Imperfections—Unworkmanlike Construction.

The unworkmanlike failure of a contractor to place the front windows in the basement story of a small house directly underneath the front windows of the upper portion of the house did not constitute a trivial imperfection within the meaning of Code Civ. Proc. § 1187, declaring that a trivial imperfection shall not be deemed such a lack of completion of the work as to prevent the filing of a mechanic's lien, but was a substantial noncompliance with the contract, which precluded the enforcement of a lien by the contractor.

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*Rehearing granted by Supreme Court January 15, 1906.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by C. Schindler against Thomas Green and another. From a judgment for plaintiff and from an order denying a new trial, defendants appeal. Modified.

J. D. Moynahan and C. A. Elliott, for appellants. R. Platnauer, for respondent.

BUCKLES, J. This is an action to foreclose a mechanic's lien. The contract was made by plaintiff with Annie and Maggie Green, daughters of the defendants, and who lived on the premises with the parents, defendants. The work consisted of doing the carpenter work in making alterations and adding two rooms to the house in which the defendants lived—one room as basement, 12x16, and one room above, 12x16, and a front porch 6x16 feet. The plastering was done under another contract, by another party, with which plaintiff had nothing to do. There were no regular plans and specifications, or specifications as to where the doors or windows should be placed, the contract providing there should be not to exceed six doors and not to exceed ten windows, and the new structure to be built uniformly with the old, to which it was to be an addition; to be plain, at the cost of $403.50 for all material and carpenter work. There were two windows put in the basement part in front, but they were not set directly under the two windows in the front of the upper story. The plaintiff claimed to have finished his contract and done all that he was required to do thereunder. The defendants and Mr. Devine (the brother of the defendant Margaret Green, and who drew the contract, and who seemed to be acting for defendants) demanded that the windows be changed so as to be directly under the windows above. This the plaintiff refused to do, and defendants thereupon refused to pay the balance of the contract, viz., $303.50, or for the extra work, until plaintiff should change the windows. After plaintiff had finished the job, as he claimed—at least after he had done all the work that he did do, and furnished all the material he did furnish—the man employed by defendants went on and did the plastering. The plastering was partially completed, if not fully so, when defendants employed another carpenter to change the windows, setting them exactly under the windows above, at a cost to defendants of $7.50. At the trial the plaintiff had judgment, and the appeal is by these defendants from the judgment and from the order denying their motion for a new trial. In the transcript there are 37 specifications of error in the court's rulings as to the admission of evidence. We have gone over all of these rulings carefully, and, finding no reversible error therein, deem it unnecessary to refer to them further.

The appellant demurred to the complaint on the ground, among others, that there was a misjoinder of parties defendant. The demurrer was overruled, and no exception taken. It is now claimed that no lien could attach to the property until plaintiff should find it impossible to collect his judgment against Annie Green and Maggie Green, who signed the contract. They are not shown to have had any interest whatever in the property. The facts were shown to be as follows: Annie and Maggie Green were the daughters of the defendants, and lived with their parents on the said premises in said house. Devine, who drew the contract and who supervised and superintended the work, was a brother of the defendant Margaret Green, and the other defendant, Thomas Green, could sign his name only with a mark; and that both defendants had actual knowledge of the agreement between plaintiff and Annie and Maggie Green as regards the original contract and also as to the extra work, and they, and each of them, at the time the work was being performed, had actual notice that the work was being performed, and that the plaintiff was performing it. The defendants, and not Annie and Maggie Green, have been the recipients of whatever benefit came from the work of plaintiff, and Annie and Maggie, under all the circumstances named, appear as, and were, only agents for the defendants, and are not, therefore, liable.

It is claimed, also, by respondent that, inasmuch as the defendants caused the rooms he had built to be plastered, they thereby took possession and thereby accepted his work. There is neither allegation, issue, nor finding upon this point. The evidence shows that the defendants were residing in the old part of the house, and that the man who was employed to do the plastering went ahead with his work after the plaintiff had placed the windows as he left them, and after he had quit work thereon. The plaintiff alleged he completed his contract October 13, 1902, but the court found he completed it September 18, 1902. The claim of lien was filed October 15, 1902. We think the circumstances of this case do not warrant us in saying there was an occupation and acceptance on the part of the defendants so as to excuse the plaintiff from completing his contract. The doing of the plastering was not an occupation of the rooms so as to create an acceptance of plaintiff's work so as to start the statute in motion as to time to file lien. This is a dwelling house, and there is no evidence that the defendants have ever occupied these two rooms built by plaintiff as a habitation. Jones v. Kruse, 138 Cal. 616, 72 Pac. 146.

The greatest fault found with plaintiff's work seemed to be in the manner in which the windows were placed in the front of the building. There was no dispute as to the fact that the lower windows were not immediately under the ones above. There was no reason given by any of the witnesses tending to show why they should not or could not have been so placed. The evidence did show that to place the windows as the plaintiff did place them was unworkmanlike, and the court found (finding 10): "That the two windows placed by plaintiff in the front portion of the basement story of said house were not directly underneath the two front windows of the upper portion of said house, which upper portion consisted of the old house after the same had been raised, and that the placing of such windows in this manner was not workmanlike; and the court finds that the failure of plaintiff to place said windows in the basement in a direct line underneath the two windows of the upper portion of said house is a trivial imperfection." We do not think the evidence supports the finding "that the failure of plaintiff to place said windows in the basement in a direct line underneath the two windows of the upper portion of said house is a trivial imperfection." Under the provisions of the last clause of section 1187, Code Civ. Proc., a trivial imperfection in the work will not prevent a lien; but under the peculiar circumstances in this case, and where the court is compelled to find, as it did, that the work complained of was not done in a workmanlike manner, we do not think it can be said the defect is of a trivial nature to the owner. It is true the defect was small, but the building was a small one, and the addition made by plaintiff was a small structure. Whether or not the defect is a "trivial imperfection" in any case depends upon the facts and circumstances of each particular case. Willamette, etc., Co. v. College Co., 94 Cal. 238, 29 Pac. 629. The defendants were just as much entitled to have their little structure, their home, completed according to the contract, and in a workmanlike manner, as the man who builds a palatial residence is to have first-class work done thereon, and in principle we can see no difference. It was a serious matter with the defendants, and they begged the plaintiff to make the change, which cost but $7.50 to make; but he refused, and declared he could do better in a lawsuit. The plaintiff had not complied with his contract. The findings do not support the judgment so far as the same fixes a lien upon said premises.

The motion for a new trial should have been granted. But, inasmuch as the question of the extra work and the value thereof was fully litigated in these proceedings, and the amount found due therefor, and the defendants have caused the work to be completed, it would be useless to order a new trial now, it appearing that a modification of the judgment would secure justice between the parties.

It is therefore ordered that the lower court be directed to modify its said judgment by striking therefrom the decree for a lien on the premises and providing for sale thereunder and cost of lien and attorney's fee, and enter judgment for plaintiff against defendants for the sum of $326.85, being the balance found due on said contract and for extra work, after having deducted the $7.50 paid by defendants for completing the work.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

1 Cal. App. 298

CHATHAM v. MANSFIELD.

(Court of Appeal, First District, California. July 13, 1905.)

1. Elections—Contest—Statement—Capacity to Sue—Satutes.

Under Code Civ. Proc. § 1111, providing that "any elector" may contest an election, a statement of contest, dated November 18, 1902, giving the date of the election and the date when the board of supervisors met to canvass the returns, and alleging that plaintiff was an elector "at all the times herein mentioned," and filed on the succeeding day, was not fatally defective for failure to allege that plaintiff was an elector at the time the statement was filed, since it would not be presumed that plaintiff was an elector on November 18th, and not on the 19th; the defect not affecting the substantial rights of the parties, within section 475 or section 1117, declaring that no statement of the grounds of contest will be rejected or dismissed for want of form, etc.

2. Same — Process — Substituted Service—Statutes—Constitutionality.

Code Civ. Proc. § 1119, providing that, if the person whose right to office is contested cannot be found, he may be served by leaving a copy at the house where he last resided, at least five days before the time specified in the notice, is not unconstitutional; the notice so served being sufficient to constitute due process of law.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 929.]

3. Same—Ballots.

Pol. Code, § 1259, provides that each ballot, as soon as the names marked on it as voted are read and verified, must be strung by one of the election judges, and must not thereafter be examined by any person, but must, as soon as all ballots are counted, be carefully sealed in a strong envelope, each member of the election board writing his name across the seal; and sections 1264, 1265, provide that a member of the board must deliver such envelope, without its having been opened, to the county clerk, or nearest sworn express agent for delivery to the county clerk, who, on receipt of the envelope, must file it, and keep it unopened and unaltered for 12 months, unless in case of a contest. *Held*, that where envelopes containing ballots were received by the county clerk, broken open, so that they could have been examined, and for several days were kept by the clerk in a vault to which the public had access, the ballots were inadmissible as evidence in the contest.

Appeal from Superior Court, San Mateo County; Frank J. Murasky, Judge.

Election contest between R. S. Chatham

and J. H. Mansfield. From a judgment in favor of the former, the latter appeals. Reversed.

Rehearing denied August 12, 1905.

C. W. Eastin, Edw. F. Fitzgerald, and G. W. McEnerney, for appellant. Geo. C. Ross, for respondent.

COOPER, J. The parties to this suit were rival candidates for the office of sheriff of San Mateo county at the election held in November, 1902. The returns from all the election precincts in the county being made, the board of supervisors canvassed them, and thereupon made an order that plaintiff had received 1,378 votes, and that defendant had received 1,441 votes, and that defendant was the duly elected sheriff. Plaintiff filed a written statement for the contest of said election, which came on for hearing at a special session of the court, commencing in December, 1902. The case was finally submitted in March, 1903, and in April following the court filed its findings, to the effect that plaintiff had received 1,219 legal votes, and the defendant had received 1,218 legal votes; and judgment was accordingly entered, declaring plaintiff the duly elected sheriff of the county. From this judgment the defendant has appealed on the judgment roll and a bill of exceptions.

The contest was brought and the proceedings had under title 2 (sections 1111 to 1127, inclusive) of the Code of Civil Procedure. It is declared in section 1111 that "any elector of a county, city, or of any political subdivision of either, may contest the right of any person declared elected to an office to be exercised therein" for certain causes enumerated in the section. Defendant contends that the statement filed is fatally defective in not alleging that at the time of filing it the plaintiff "is an elector." The statement is dated November 18, 1902, gives the date of the election and the date when the board of supervisors met to canvass the returns, and it alleges that plaintiff was an elector "at all the times herein mentioned." It shows that at the time it was dated the plaintiff was an elector. If it had stated that "he is an elector," it would have referred to the time when the statement was made and signed. It was not filed until the following day, November 19th; but we do not think the ends of justice require us to presume that plaintiff was an elector on the 18th, and not on the 19th, day of November. Particularly is this so, as section 1117, Code Civ. Proc. provides: "No statement of the grounds of contest will be rejected, nor the proceedings dismissed by any court for want of form, if the grounds of contest are alleged with such certainty as will advise the defendant of the particular proceeding or cause for which such election is contested." The above section refers to the grounds of contest, but we think the liberal rule therein stated should be held to apply to any other matter alleged in the statement. The defect (if the statement may be considered defective) did not affect the substantial rights of the parties. Code Civ. Proc. § 475. This is in accord with the views of the court in Doty v. Jenkins, 142 Cal. 498, 77 Pac. 1104. There the lower court allowed the plaintiff to amend his statement by showing that he was an elector of "the fifth supervisorial district." It is true that in that case the 40 days had not elapsed at the time the amendment was made, but the principle is stated. The court said: "An amendment to a statement of contest is to be construed by the same rule as an amendment to a complaint. Unless, from the nature of the facts alleged or otherwise, the contrary appears, it is to be deemed a statement of the facts existing at the commencement of the action or proceeding. The amendment in question must be thus construed. It takes effect as if it had been originally incorporated in the statement."

The same rule is applied to the statement and pleadings in an election contest as would be applied to pleadings in other cases. McCreary on Elections, §§ 440, 431. In the latter section cited it is said: "It may be stated as a general rule in this country that statutes providing for contesting elections are to be liberally construed, to the end that the will of the people in the choice of public officers may not be defeated by any merely formal or technical objections. Immaterial defects in pleadings should be disregarded. Necessary and proper amendments should be allowed as promptly as possible." Here there was no special demurrer pointed to the defect now so strenuously urged. It does not appear to have been in any way called to the attention of the trial court. No objection to the jurisdiction of the court or to the evidence was made on the ground that the statement did not show plaintiff to be an elector. In McDougald v. Hulet, 132 Cal. 160, 64 Pac. 280, the court said: "Plaintiff, by bringing the defendant Boggs into court, and asking the court to find the amount due, and by allowing the court to pass upon the issue as though properly made, is estopped from now claiming that the matter was not the subject of a counterclaim. He will not be allowed to thus lull his adversary into repose until his claim is barred by the statute, and then raise a point which is lethal." In the case at bar, if plaintiff was an elector of the county at the time he filed his statement, he had the right to contest defendant's election. He was before the court upon a complaint which he evidently deemed sufficient. Defendant treated it as sufficient. It is now too late to ask this court to hold it to be mere waste paper.

Defendant was served with the citation by leaving a copy at his residence; the officer being unable to find him. Section 1119, Code Civ. Proc., provides that, if the person whose right to the office is contested cannot be found, he may be served "by leaving a copy thereof at the house where he last resided, at least five days before the time so specified." It is claimed that such provision for constructive service is unconstitutional, and that defendant could not be brought into court, except by personal service. If this were held to be the law, the defendant, by absenting himself where he could not be personally reached, might prevent a contest under the provisions of the Code. An election contest is intended to be a summary proceeding, and is one in which the people of the political subdivision in which the contest is pending are interested. The defendant is presumed to have known the law, and to have known that after the return day of the election, if he absented himself, a citation might be left at his residence. It was so left, and he must have received it. The Legislature have the right to provide for constructive service in such case. Due notice to the defendant is essential to the jurisdiction of all courts, but such notice may be either actual or constructive in certain cases, as prescribed by the law pertaining to the forum in which such notice is given. If the Legislature has prescribed a kind of notice by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is given him to defend, and the notice is given as the law requires, this will be held sufficient and due process of law. Rockwell v. Nearing, 35 N. Y. 314; Kennard v. Louisiana ex rel. Morgan, 92 U. S. 482, 23 L. Ed. 478; Earle et al. v. McVeigh, 91 U. S. 507, 23 L. Ed. 398; Sturgis v. Fay, 16 Ind. 429, 79 Am. Dec. 440; McCreary on Elections, § 426.

A more serious question, and one which necessitates a reversal of the judgment, was the receiving in evidence of the ballots from Baden, Colma, and Menlo Park precincts, under defendant's objection. The judges of election in the various precincts are required by law, as soon as the polls are closed, to canvass the votes given at such election in such precinct. The canvass must be public, in the presence of the bystanders, and continued without adjournment until completed and the result declared. The judges are sworn officers, and the result declared by them is prima facie correct. In an election contest the ballots are the best evidence, and may be used to overcome and set aside the result as declared by the official canvass, when their integrity can be satisfactorily established. It is intended by the statute that the ballots shall be preserved inviolate and above suspicion, so that they may be used in a contest. Each ballot, as soon as the names marked on it as voted are read and verified, must be strung on a string by one of the judges, and must not thereafter be examined by any person, but must, as soon as all ballots are counted, be carefully sealed in a strong envelope; each member of the board writing his name across the seal. Pol. Code, § 1259. A member of the board must, without its having been opened, deliver such envelope to the county clerk, nearest postmaster, or sworn express agent for delivery to the county clerk, who shall indorse on such envelope the name of the party delivering it, and date of such delivery. On receipt of the envelope the clerk must file it, and keep it unopened and unaltered for 12 months, unless in case of a contest. Pol. Code, §§ 1264, 1265. It was testified at the trial by the deputy county clerk that the "Colma package was delivered broken open to me. * * * It was delivered by Wells, Fargo & Co." The county clerk testified that the packages from Colma, Baden, and Menlo Park precincts were all "broken open" when received; that the ends of the ballots and the tally sheets were there; "anybody could pull them out if they wanted to look at them; that is the way they came by Wells Fargo." Fox, a deputy clerk, testified that the packages or envelopes containing the ballots were filed, and then placed in the lower vault in the clerk's office, and kept there for several days; that the vault was open all the time. The witness was then asked: "Q. Now, Mr. Fox, during that time that those pouches were in the lower vault, are you prepared to say that they were not interfered with by any person during the whole time that they were there, until they were put in the upper vault? A. I would not say positively that they were not interfered with. They were deposited in the vault, and we were going back and forth, all of us, at different times. Q. Well, the vault is open for all other persons? A. Yes, sir; other people have access to the vault besides the clerk and his deputies." This witness further testified that it was thought there might be some question as to these packages, and they resealed them and put them all in the upper vault, where they were locked and secured.

The lower vault, where the ballots were kept for several days, was used in connection with the county recorder's office, was not kept locked all the time, and was open to the public. After the envelopes containing the ballots had thus lain on the floor of the lower vault several days, they were placed in the upper vault, where, not the clerk, but one of his deputies and a deputy recorder, had the combination. They were not then kept in the exclusive charge of the clerk or his deputy. While the packages lay in the lower vault, many people, including political opponents of defendant, were in and about the office, and knew the condition of the envelopes. On the recount there was one less ballot in Baden precinct than the official canvass showed, in Colma precinct the official canvass showed four more ballots than were produced in court, and in Menlo Park precinct there was one more ballot produced in court than the official canvass showed. In the count in court, defendant suffered a net loss of 36 votes from that shown by the official count in these three precincts. The difference of six ballots between the official count and the ballots counted in court during the trial is certainly a strong circumstance tending to impeach the integrity of the ballots. No election officer was called to prove either the identity of the ballots, or that the envelopes were ever sealed. It was not proven that the envelopes were sealed when delivered to Wells, Fargo & Co., nor who delivered them, or either of them. It was not attempted to be proven that Wells, Fargo & Co. delivered them in the same condition in which they received them. It is said in McCreary on Elections, §§ 471, 473: "Such ballots, in order to be received in evidence, must have remained in the custody of the proper officers of the law from the time of the original official count until they are produced before the proper court or officer; and if it appear that they have been handled by unauthorized persons, or that they have been left in an exposed or improper place, they cannot be offered to overcome the official count. * * * But the better opinion seems to be that, if the deviation from the statutory requirements relative to the manner of preserving the ballots has been such as necessarily to expose them to the public or unauthorized persons, the court should exclude them; but if the deviations have been slight, or of such a character as not necessarily to render doubtful the identity of the ballots, the question of their identity may well go to the jury to be determined upon all the evidence." It is said by Judge Cooley in his work on Constitutional Limitations (7th Ed., p. 941): "If, however, the ballots have not been kept as required by law, and surrounded by such securities as the law has prescribed with a view to their safe preservation as the best evidence of the election, it would seem that they should not be received in evidence at all." Our own court, in the case of Tebbe v. Smith, 108 Cal. 107, 41 Pac. 455 (29 L. R. A. 673, 49 Am. St. Rep. 68), said: "One who relies, therefore, upon overcoming the prima facie correctness of the official canvass by a resort to the ballots must first show that the ballots, as presented to the court, are intact and genuine. Where a mode of preservation is enjoined by the statute, proof must be made of a substantial compliance with the requirements of that mode." In Russell v. McDowell, 83 Cal. 78, 23 Pac. 186, it was said by the Chief Justice, in speaking of a failure of the election board to comply with certain sections of the Political Code: "Officers of election are, like all other persons, presumed to know the law, and their deliberate omission to follow directions designed to prevent fraudulent voting certainly calls for explanation. It casts suspicion upon their integrity, and is sufficient, prima facie, to make out a case of fraud. No doubt such omission is susceptible of explanation, and we are very willing to believe that the officers of those precincts erred through ignorance of the law, and were not actually guilty of fraudulent intent. But, as the case is presented, we cannot indulge in that presumption. The officers were not called as witnesses, as they should have been, to prove that they acted as they did through ignorance, and not with a fraudulent purpose; and in the absence of any rebutting proof on this point we feel constrained to hold that contestant made out a case of malconduct on the part of the election boards."

We may well apply the reasoning of that case to the question here. Why was it not proven that these envelopes were sealed and not opened by any one until placed in charge of Wells, Fargo & Co.? Some one must have taken charge of the envelopes in the precincts, and delivered them to Wells, Fargo & Co. It seems that it would have been easy to prove such fact. It was not incumbent on defendant to prove that votes had been taken out of those envelopes and changed. Where such circumstances appear that it is apparent that opportunities existed for evil-minded persons to have examined the ballots and changed them, their integrity is impeached. It is at once apparent that the official canvass is much more liable to be correct than a recount of ballots that have been in so many suspicious places. In the leading case of People v. Livingston, 79 N. Y. 279, the Chief Justice said: "They [the returns] may be impeached for fraud or mistake, but in attempting to remedy one evil we should be cautious not to open the door to another and far greater evil. After the election it is known just how many votes are required to change the result. The ballots themselves cannot be identified. They have no earmark. Everything depends upon keeping the ballot boxes secure. * * * Every consideration of public policy, as well as the ordinary rules of evidence, require that the party offering this evidence should establish the fact that the ballots are genuine. It is not sufficient that a mere possibility of security is proved, but the fact must be shown with reasonable certainty. If the boxes have been rigorously preserved, the ballots are the best and highest evidence; but, if not, they are not only the weakest, but the most dangerous, evidence. * * * Where ballots in an envelope sealed with the village seal are put by the village clerk in an unlocked desk, containing also the village seal, and situated in a room exposed to the public, and the envelope is partly torn by some unknown person while it remained in such desk, the ballots are not better evidence of the result of the election than the returns of the judges." See, further, People v. Burden, 45 Cal. 241; Coglan v. Beard, 65 Cal. 61, 2 Pac. 737; Ex parte Brown, 97 Cal. 89, 31 Pac. 840; Whipley v. McKune, 12 Cal. 352; Rhode v. Steinmetz, 25 Colo. 314, 55 Pac. 814; Hartman v. Young, 17 Or. 157, 20 Pac. 17, 2 L. R. A.

596, 11 Am. St. Rep. 787; Hughes v. Holman, 23 Or. 489, 32 Pac. 298; Beall v. Albert, 159 Ill. 127, 42 N. E. 166; Ex parte Arnold, 128 Mo. 260, 30 S. W. 768, 1036, 33 L. R. A. 386, 49 Am. St. Rep. 557.

Plaintiff relies upon an expression of Mr. Justice McFarland in Hannah v. Green, 143 Cal. 22, 76 Pac. 708, where it is said: "The question whether ballots have been sufficiently taken care of so as to preclude any reasonable suspicion that they are not in their original condition is a question which is largely within the judgment and discretion of the trial court, and its determination of that question should not be disturbed here, if the evidence fairly warrants the conclusion which the court reached on that subject." The learned justice was speaking with reference to the facts of that case, which were entirely different from the case at bar. In this case, if the evidence were such as to fairly warrant the conclusion reached by the trial judge, we would not interfere. While the decision of the trial court should not be disturbed, if there is sufficient evidence to fairly support it, yet we cannot give it more weight than the law, in its application to the facts, would allow. The discretion of the trial court gives it power to decide upon conflicting evidence, and to consider all the facts and the credibility of witnesses; but, upon a contest depending upon the integrity of ballots, the question is as to whether or not they have been so guarded as to be the best evidence and entitled to be recounted. In this case we do not think there is sufficient evidence to sustain the finding of the court on the question.

The judgment is reversed.

We concur: HARRISON, P. J.; HALL, J.

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1 Cal. App. 396

In re MITCHELL.

(Court of Appeal, Third District, California. Aug. 10, 1905.)

1. PENAL STATUTES—CONSTRUCTION.

The rule laid down by Pen. Code, § 4, that all the provisions of such Code are to be construed according to the fair import of their terms, with a view to effect its object and to promote justice, applies to penal statutes not a part of the Code.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 322, 323.]

2. MALICIOUS MISCHIEF — EXPLOSIONS IN MINES.

The malicious depositing and exploding of dynamite in the levels, stopes, and chutes of a working mine is within Act March 12, 1887 (St. 1886–87, p. 112, c. 95) § 8, declaring guilty of a felony one who maliciously deposits or explodes at, in, under, or near any building, vessel, boat, railroad, tramroad, or cable road, or any train or car, or any depot, stable, carhouse, theater, schoolhouse, church, dwelling house, or other place where human beings usually inhabit, assemble, frequent, or pass and repose any explosive, with intent to injure or destroy such building or other structure, or to injure, intimidate, or terrify any human being.

3. CRIMINAL LAW—COMMITTING MAGISTRATES—BINDING OVER—EVIDENCE.

To authorize a committing magistrate to hold one for trial, the evidence produced need not be enough to warrant a conviction. It is enough that there is evidence making it appear that there is sufficient cause to believe defendant guilty of an offense.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 493.]

Application of W. Mitchell for writ of habeas corpus. Denied.

C. H. Fairall, for petitioner. J. P. Snyder, Dist. Atty., and Solinsky & Wehe, for respondent.

BUCKLES, J. The petitioner was held to answer on the following charge: "Did then and there willfully, unlawfully, feloniously, and maliciously deposit and explode at, in, under, and near a place where human beings usually assemble, frequent, pass and repass, to wit, in the levels, stopes, and chutes of the Angels quartz mine owned by the Angels Quartz Mining Company, a corporation, certain dynamite, hercules powder, and explosives, with the intent to injure the said mine and the said structures therein, and to injure and intimidate and terrify human beings, and by means of which human beings were endangered." The charge is made under section 601, Pen. Code, as amended in 1905 (St. 1905, p. 687, c. 525), or it is brought under section 8 of the act of March 12, 1887 (St. 1886–87, p. 112, c. 95), which sections are identical one with the other, and read as follows: "Any person who maliciously deposits or explodes, or who attempts to explode, at, in, or under, or near any building, vessel, boat, railroad, tramroad, or cable road or any train or car, or any depot, stable, carhouse, theater, schoolhouse, church, dwelling house or other place where human beings usually inhabit, assemble, frequent, or pass and repass, any dynamite, nitro-glycerine, vigorite, giant or hercules powder, gunpowder or other chemical compound or explosive, with intent to injure or destroy such building, vessel, boat or other structure, or with the intent to injure, intimidate or terrify any human being, or by means of which any human being is injured or endangered, is guilty of a felony, and punishable by imprisonment in the state prison not less than one year." It is claimed by petitioner that the charge must be brought under section 8 of the act of March 12, 1887, because that act had repealed section 601, Pen. Code, and, it having been repealed, could not be amended by the attempt made in 1905. This contention is doubtless correct if the repeal was effected as claimed. See section 330, Pol. Code. If the section was really repealed in 1887, it has not been re-enacted, and the prosecution is under section 8 of the act of 1887. Even though there was no repeal, and the amendment of 1905 is proper, the importance to petitioner, according to his standpoint, to have the prosecution under the act, rather than under the Code, is readily discernible. He contends that the common-law rule that "penal statutes must be construed strictly" is in force in this state as to all penal enactments which are not a part of the Penal Code, while a different rule prevails as to the provisions of the Penal Code, to wit: "All its provisions are to be construed according to the fair import of their terms with a view to effect its object and to propromote justice." Section 4, Pen. Code. I know of no reason why a penal statute, not a part of the Code, should be construed by any other or different rule than that prescribed for construing the provisions of the Code. The rule laid down in section 4 of the Penal Code is a common-sense one, a rule which must be acknowledged as just and proper and which does not operate to improperly deprive any person of his liberty. At the time the Code was adopted, this rule was intended to apply to the entire body of criminal law in this state, and it was manifestly the intention that the old common-law rule of such strictness (applied sometimes without reason or sense) should be abrogated. It surely would not be within the light of reason or sense to say that two laws of the same nature, operating upon the same class of persons or things, within the same system of jurisprudence, should have two distinct rules for their construction and interpretation; and that, too, simply because the Legislature may see fit to make one enactment a part of the Penal Code and the other an act outside of the Code. There can be but one rule for the construing of penal enactments in this state, and that is the universal one laid down by section 4 of the Penal Code. I shall view this proceeding as having been brought under the provisions of section 8 of the act of 1887.

How is it possible, after a careful reading of the section referred to, to come to any other conclusion than that when the Legislature has pronounced against the malicious explosion of dynamite and other enumerated explosives (with intent to injure property and person) "at, in, under or near any building, vessel, boat, railroad, tramroad, or cable road, or any train or car, or any depot, stable, carhouse, theater, schoolhouse, church, dwelling house, or other place where human beings usually inhabit, assemble, frequent, or pass or repass," it was the clear intent to prohibit such use of dynamite and the other explosives at and in every and all places whatsoever? Such construction is warranted by the very terms of the section, and will admit of no other rational construction, and any other construction would not be according to the fair import of the terms used, and could not be with a view to effect the true object of the law, nor in the line of promoting justice. But the petitioner contends that the language "with the intent to injure or destroy such building, vessel, boat or other structure" must apply only to the things specifically enumerated, and that "other structure" includes nothing more than "railroad, tramroad, or cable road, or any train or car, or any depot, stable, carhouse, theater, schoolhouse, church or dwelling house." But this construction cannot be. For the purpose of illustration, suppose one maliciously explodes dynamite on or under a private footbridge constructed and built over a ravine, where "human beings pass and repass," with intent to destroy the bridge or injure or intimidate persons. Private footbridge not being enumerated in the list of places such as "building, vessel, boat," etc., can it be said that "other places where human beings pass and repass" would not include a private footbridge? The object of the statute is to prevent the injury to property and person and the intimidation of human beings by the malicious explosion of dynamite, etc., and to my mind there is no question but that "private footbridge" would be included in the term "other place where human beings pass and repass." Such footbridge would undoubtedly be a structure, and would come within the term "other structure" used in the statute. That a working mine, constructed as the Angels quartz mine is shown to be, with its shafts, chutes, tunnels, levels, stopes, excavated chambers, and stulls to hold up the rock and dirt overhead, is a structure in the common-sense view of the term, seems to me to admit of no doubt. It is a structure, and meets every requirement of the letter and spirit of the statute. To say that a man may do the things to wreck a mine that defendant is charged with doing and be able to escape responsibility therefor under the law reading as said section 8 reads, simply because it does not mention the word "mine," would be, to say the least, using a rule of construction not warranted even by the common-law rule which petitioner invokes. The act here sought to be punished surely comes within the reason and spirit as well as the mischief the law was intended to remedy, to wit, the malicious explosion of dynamite and other enumerated explosives with intent to injure property and human beings.

It is next claimed there is no evidence connecting the petitioner with the commission of the offense, except that of the witness Holmes, who is shown by his own admissions to be a co-conspirator and an accomplice. There is evidence in abundance to show a well-directed effort on the part of some one to wreck the mine, to prevent its being worked, or to make it more difficult to work, and to increase the expense of working, by blowing up the foot walls, blasting the timbers which held up the rock and dirt of the hanging wall, and thus allowing the rock and dirt to run in on the stopes and fill them, and cave them in, and make the levels of the mine very dangerous for men to work therein by reason of the supports, the stulls, being blown out from the roof of the chutes and levels, and that the wrecking began in the lower levels of the mine. The evidence also shows that the men then working in the mine were removed to other parts of the mine while the malicious blasting was being done, from which it would appear that those doing this work did not intend to injure the men then working in the mine. But the motive of the persons engaged in the wrecking seemed to be to make it disagreeable and dangerous for the men who should take the places of the wreckers, for they knew they were to be discharged, or work under a new boss. There was a large force of men at work in the mine. The petitioner was the boss, with power to move the men from place to place in the mine, and just before a certain place was wrecked the men were moved to some other place, with only the petitioner to direct them; and Holmes was the man in charge of the blasting powder, and subject only to the direction of petitioner as to its use. The circumstances under which the wrecking of the mine was accomplished are shown by other witnesses than Holmes to be such that it was next to impossible for the work of destruction to have been done by another without the knowledge—yes, and the direction—of the petitioner. The evidence of the witnesses N. Jakuliza, A. Prothero, J. W. Ling, Martinovich, Arnold Adams, and Thomas Fulton, taken together, tends in a strong degree to identify the petitioner as one of the guilty parties, and tends to connect him with the commission of the offense. The evidence produced upon the preliminary examination, independent of that given by the accomplice Holmes, would probably not be sufficient to show beyond a reasonable doubt the guilt of petitioner; but, in order to hold the defendant and to put him on his trial, the committing magistrate is not required to find evidence sufficient to warrant a conviction. All that is required is that there be a sufficient legal evidence to make it appear that "a public offense has been committed and there is sufficient cause to believe the defendant guilty thereof." There was, then, sufficient evidence to warrant the justice in holding the petitioner and committing him for trial.

The petitioner is remanded.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

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1 Cal. App. 390

DE LEONIS v. HAMMEL, Sheriff, et al.

(Court of Appeal, Second District, California. Aug. 3, 1905.)

1. QUIETING TITLE — RIGHT TO RELIEF — PLEADING.

While an action to quiet title cannot be maintained by the owner of an equitable estate against the holder of the legal title under a complaint containing only the usual averments commonly made in such an action, yet the remedies of quieting title, or cancellation, reconveyance, enforcement of trusts, or determination of priorities, may be granted under Code Civ. Proc. § 580, authorizing the award of any relief consistent with the case made by the complaint and embraced within the issue, when the facts upon which the claim to such relief is based are alleged in the complaint, although plaintiff's title is but an equitable one.

2. MORTGAGES—DEEDS — FRAUD — PRIORITIES.

Where an ignorant person, without business experience, executes a deed to her agent and attorney in fact, relying on false representations made by him, and without receiving any consideration therefor, and in order that he may the better take care of her interests in the property, her title to the property is superior to that of mortgagees of the agent, who take with knowledge of the circumstances of the conveyance to him.

3. QUIETING TITLE—RIGHT TO RELIEF—CHARACTER OF DEFENDANT'S CLAIM.

In a suit to quiet title against a certain deed, plaintiff is entitled to have her rights determined, whether such deed was in fact procured by fraud and without consideration, or whether it was intended as a mortgage to the grantee named therein.

4. PARTIES—BRINGING IN ADDITIONAL PARTIES—POWERS OF COURT.

Under the express provisions of Code Civ. Proc. § 389, when a complete determination of a controversy cannot be had without the presence of other parties, the court may order such parties to be brought in, and necessary supplemental pleadings to be filed.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parties, §§ 76, 79, 80.]

5. TRUSTS—CONSTRUCTIVE TRUSTS—FRAUDULENT ACQUISITION OF TITLE.

One who procures title to land by fraud, misrepresentation, and without consideration, acquires only a naked legal title, which he holds under a constructive trust in favor of his grantor.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 145.]

6. MORTGAGES—ABSOLUTE DEEDS—PRIORITIES.

The legal title does not pass under a deed intended merely as a mortgage to secure past and future advances, and subsequent purchasers or incumbrancers through the grantee with notice acquire no rights as against the grantor.

7. LIMITATION OF ACTIONS — ACTIONS FOR FRAUD—APPLICABILITY OF STATUTE.

Code Civ. Proc. § 338, subd. 4, requiring actions for relief on the ground of fraud or mistake to be commenced within three years, is inapplicable to an action to quiet title against a deed, the grantee in which is charged with a constructive trust in favor of the grantor, or which is intended merely as a mortgage to secure past and future advances made by the grantee.

8. TRIAL—NONSUIT—MOTIONS — FAILURE TO SPECIFY GROUNDS.

The granting of a motion for nonsuit will be held erroneous, where the record fails to show that any specification of grounds for the motion was made.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Maria Esperitu Chijulla De Leonis against W. A. Hammel and others. From a judgment in favor of certain defendants, rendered after sustaining a demurrer to the complaint, and from a judgment of nonsuit, plaintiff appeals. Reversed.

Dunnigan & Dunnigan, for appellant. H. H. Appel and H. Bell, for respondents.

TRASK, Special Judge. Two appeals have been taken in this case. The first appeal is from the judgment in favor of certain defendants, rendered because of plaintiff's failure to amend her complaint within the time allowed by law after their demurrer thereto was sustained. The second appeal is from a judgment of nonsuit. By stipulation both appeals have been submitted upon the same transcript.

The substance of the lengthy complaint will be stated, so far as necessary for the purposes of this decision. From the complaint it appears that plaintiff is an ignorant Indian woman. On July 31, 1894, she deeded certain real property to one Laurent Etchepare. For several years prior to the date last mentioned he had been her agent and her attorney in fact in the management of her business and of her litigation as to her property. She made this deed because of her confidence in Etchepare, and because of her belief in his representations and those of an attorney whom Etchepare had induced her to consult. Among other representations made by Etchepare, it should be noted that he stated that she was indebted to him in the sum of $1,600 on account of moneys he had expended in her litigation and in the care of her property over and above what he had received from sales of cattle and from rents, and that it would be to her advantage to convey all her property to him, and "that he could thereby be better able to settle her estate" (evidently referring to the estate of her deceased husband and the litigation relating thereto). It was also represented to her that Etchepare had been advancing her moneys for her support and maintenance, and that it would be proper and advisable for her to convey her property to him, and that he would take care of it for her and defend her rights against adverse claimants. These and other representations, which are stated, are alleged to be untrue. From all the averments made in respect to the matter of the execution of this deed, it is doubtful whether it should be treated as a mortgage to secure past and future advances, or as having been procured by fraud and misrepresentation and without consideration, in which latter event a constructive trust would be created in favor of plaintiff. On February 12, 1895, Etchepare executed a mortgage on the property to defendant Elizabeth Murray to secure the payment of his note given for a loan made by her to him. A decree foreclosing this mortgage was rendered April 5, 1897, in an action brought by Miss Murray. Plaintiff and Etchepare were parties defendant in that action. A part of the relief asked in this action is an injunction restraining defendant Hammel, as sheriff, from selling the premises mortgaged to Miss Murray in pursuance of said decree. One ground upon which this relief is sought is that the sheriff's deed, if issued to a purchaser at such sale, would cloud plaintiff's title to her property. On August 16, 1898, Etchepare conveyed an undivided one-half interest in the property deeded to him by plaintiff to defendant Labaig, and on the same date he conveyed the other undivided one-half to one Mrs. Appel. Later Mrs. Appel conveyed an undivided one-half of the interest deeded to her to defendant Marie Le Mesnager. Thereafter Mrs. Appel died testate, and defendant Julia A. Shepherd is the executrix of the former's estate. In October, 1898, Etchepare executed a mortgage on all the property deeded to him by plaintiff to defendants Bell and Appel to secure the payment to them of $2,000. Bell afterwards assigned his interest in said mortgage to one Gibson, and Appel assigned his interest therein to defendant Julia A. Shepherd. Thereafter, in an action to which Julia A. Shepherd, as executrix and individually, said Gibson, and defendants Appel, Bell, and Labaig were parties, it was adjudged that said mortgage to Bell and Appel "was a valid lien as to the said" Etchepare, Labaig, Julia A. Shepherd, executrix, "the said mortgagees, and their assigns, upon the lands therein described in said mortgage." The representations made to plaintiff whereby she was induced to execute the deed to Etchepare, the situation and relation of the parties thereto, the circumstances and facts of that transaction showing fraud, misrepresentation, and want of consideration, and plaintiff's lack of education, business ability, and experience, are all alleged; and it is also averred that all of the parties to the deeds, mortgages, and assignments mentioned that were made subsequent to the execution of plaintiff's deed to Etchepare took every such deed, mortgage, or assignment thereof with notice and knowledge that her said deed was procured by misrepresentation, fraud, and without consideration, as alleged in the complaint. It is further shown that all of the transactions, subsequent to plaintiff's deed were had without her knowledge or consent, that she never received any benefit therefrom, and that the deeds executed by Etchepare, as well as some of the assignments mentioned, were without consideration. It is not shown who has been in possession of the property since the execution of the plaintiff's deed. The substance of the prayer of the complaint is that plaintiff be decreed to be the owner in fee simple of the land described in her deed to Etchepare; that it be decreed that neither of the defendants has any right, title, or interest therein; that her title thereto be quieted against all the defendants; that the defendant Hammel, as sheriff, be enjoined from making a sale under the decree in the foreclosure action; and that plaintiff have all other and proper relief. The action was dismissed as to defendants Labaig and Le Mesnager. The remaining defendants demurred to the complaint on several grounds—one ground being for insufficiency of facts; another, for uncertainty, in that the complaint does not show what estate or property the plaintiff claims; another, for defect of parties, in that Etchepare and Gibson had not been joined as parties defendant; and on the further ground that plaintiff's cause of action is barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure. Defendant Murray's demurrer was overruled, and the demurrer of the others was sustained. The correctness of the latter ruling is questioned by the first appeal.

1. From the prayer of the complaint it may be inferred that the pleader regarded the action as being substantially one brought to quiet plaintiff's title and to obtain ancillary injunctive relief. An action to quiet title cannot be maintained by the owner of an equitable estate against the holder of the legal title under a complaint containing only the usual averments commonly made in such an action. Chase v. Cameron, 133 Cal. 231, 65 Pac. 460. But where, as here, the facts upon which plaintiff's claim is based are alleged, there is authority to grant any proper relief within the limitations of section 580 of the Code of Civil Procedure. And appropriate remedies, such as cancellation, reconveyance, or decrees quieting title, or establishing or enforcing trusts, or determining the priorities of opposing equities, may be had, as between proper parties, under our system, whenever they are required upon equitable considerations and are justified by the pleadings and proof in the case. Campbell v. Freeman, 99 Cal. 546, 34 Pac. 113; Tuffree v. Polhemus, 108 Cal. 670, 41 Pac. 806; Collins v. O'Laverty, 136 Cal. 31, 68 Pac. 327; Zellerbach v. Allenberg, 99 Cal. 57, 33 Pac. 786; Rollins v. Forbes, 10 Cal. 299; Angus v. Craven, 132 Cal. 691, 64 Pac. 1091. Since general relief was demanded, the prayer of this complaint need not be considered further in determining whether or not the demurrer was properly sustained. Rollins v. Forbes, and Angus v. Craven, supra. If the allegations of the complaint are true, plaintiff's title is paramount to that of any defendant claiming a lien by mortgage. Murray v. Etchepare, 129 Cal. 318, 61 Pac. 930. Whether her deed to Etchepare was procured by fraud and without consideration, as alleged, or whether it was in fact a mortgage, as was once found (De Leonis v. Walsh, 145 Cal. 199, 78 Pac. 637), is immaterial on this demurrer, for in any event she is entitled to have her rights determined. Though it is conceded that Etchepare and Gibson were proper parties, it does not appear from the complaint that they were necessary parties. But, if it should appear at any time during the progress of the case that the presence of parties other than those named by the complaint is necessary for a complete determination of the controversy arising on issues made by the pleadings, they can be brought in. Code Civ. Proc. § 389. The demurrer was not well taken for defect of parties. Nor should it be sustained for uncertainty, since the facts are alleged. In one view it may be concluded from the facts that Etchepare acquired only the naked legal title. This he would hold under a constructive trust, which would arise in favor of plaintiff. Hays v. Gloster (Cal.) 26 Pac. 367. But possibly the correct view of the matter, looking to facts alleged, and not to the pleader's conclusions, is that the deed was intended as, and was in fact, a mortgage. This conclusion is strengthened from the fact that it is not shown that Etchepare's agency did not continue after the execution of the deed, nor that he did not continue to receive and disburse large sums of money and to render services subsequently, as he had prior to that time. If the latter view is correct, the legal title did not pass by this deed, and subsequent purchasers or incumbrancers with notice would acquire no rights as against plaintiff. In either event the particular statute pleaded in bar is inapplicable. Hecht v. Slaney, 72 Cal. 363, 14 Pac. 88; Goodnow v. Parker, 112 Cal. 437, 44 Pac. 738; Nougues v. Newlands, 118 Cal. 102, 50 Pac. 386.

2. Defendant Murray answered after her demurrer was overruled, and the case went to trial between her and plaintiff; they being then the only parties before the court. Upon this trial, after plaintiff had rested, a motion for nonsuit was made in behalf of Miss Murray. This motion was granted, and judgment was rendered accordingly. The record does not show that any specification was made of the grounds of this motion. For this reason plaintiff urges that the latter judgment should be reversed. Miss Murray's counsel answer this contention by saying that they expect to show that the grounds of the motion for the nonsuit were specified, and that same were sufficient in form and substance to justify the order, and that "at the proper time" they propose "to suggest a diminution of the record." No such suggestion has been made. It is admitted in appellant's brief that such general grounds as "that there was no evidence to sustain plaintiff's cause of action" and "that

there was no evidence to sustain plaintiff's complaint" were stated at the time the motion was made. It is probable that the reason why the motion for a nonsuit was granted was for defect of proof that Miss Murray took her mortgage with notice of the fraud, misrepresentation, failure of consideration, and other matters alleged with respect to the execution of the deed from plaintiff to Etchepare. But, in the absence of any showing in the record that this was specified as a ground for the motion, it must be held that the granting of the motion was error; for, if this ground had been specified, it may have been possible that plaintiff could have offered more evidence on this branch of the case, if permission had been asked and granted, and that she would have asked to reopen her case for such purpose. Daley v. Russ, 86 Cal. 114, 24 Pac. 867; Bronzan v. Drobaz, 93 Cal. 647, 29 Pac. 254; Coffey v. Greenfield, 62 Cal. 602; Belcher v. Murphy, 81 Cal. 39, 22 Pac. 264; 6 Ency. Pl. & Pr. 879.

For the reasons given, both judgments appealed from are reversed, with directions to overrule the demurrer.

We concur: GRAY, P. J.; ALLEN, J.

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1 Cal. App. 388

WELDON v. ROGERS.

(Court of Appeal, Second District, California. Aug. 3, 1905.)

COURTS — JURISDICTIONAL AMOUNT — TRANSFER.

Appeal will be transferred to the Supreme Court under Sup. Ct. Rule 32, the amount involved exceeding that of which the Court of Appeal has jurisdiction.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by T. J. Weldon against Ralph Rogers. From an order, defendant appeals. Transferred to Supreme Court.

McNutt & Hannon, Will D. Gould, and Jas. H. Blanchard, for appellant. Louis Luckel, for respondent.

SMITH, J. Judgment was entered against the defendant in favor of T. J. Weldon April 2, 1891, for the sum of $2,000, with interest at 2 per cent. a month from March 1, 1887, aggregating $3,960, and, with costs, $3,979.15. Weldon died August 25, 1894, and on the 10th day of April, 1905, on the motion of Sophie B. Weldon, claiming to be executrix of the last will of the original plaintiff, then deceased, an order was made by the court below "that execution issue, and that the said judgment be enforced in favor of Sophie B. Weldon, executrix of the last will and testament of said T. J. Weldon, deceased, plaintiff herein, and against the defendant, Ralph Rogers, for the sum of $3,979.15, with interest from April 2, 1891, at the rate of 7 per cent. per annum, now amounting to $7,870.44." Thereupon a writ of execution was issued, but in whose name as plaintiff does not appear from the record before us. Nor does it appear that any order was made by the court at any time to revive the action in the name of the executrix. Thereafter, on the 14th day of April, 1905, after due notice, the defendant moved the court to set aside the order of April 10, 1905, and to quash the execution thereon issued; and the motion, coming on to be heard on May 22, 1905, was denied by the court. From this order the defendant appealed—giving only the undertaking provided for in section 941 of the Code of Civil Procedure—and now, pending the appeal, moves the court for a writ of supersedeas directed to the lower court, "requiring said court and its officers to stay proceedings on the order made and entered in said court on the 10th day of April, 1905," etc., "and * * * on the writ of execution issued in pursuance of said order on said 10th day of April, 1905." Upon this state of the case it is clear—whether we have regard to the amount of the original judgment, or that involved in the order of April 10, 1905—that the appeal should have been taken to the Supreme Court. It only remains for us, therefore, under the provisions of the Constitution and rule 32 of the Supreme Court, to transfer the case, together with the pending motion, to that court; and it is so ordered.

We concur: GRAY, P. J.; ALLEN, J.

148 Cal. 41

SMITH et al. v. BRADBURY. (S. F. 3,496.)

(Supreme Court of California. Oct. 3, 1905.)

MECHANICS' LIENS—CONTRACTS—FILING.

Code Civ. Proc. § 1183, provides that all contracts for the construction and repair of buildings shall be in writing when the amount agreed to be paid thereunder exceeds $1,000, and shall, before the work is commenced, be filed in the office of the county recorder; otherwise, the same shall be wholly void, and all materials furnished by persons other than the contractor shall be deemed to have been furnished at the personal instance of the owner. *Held* that, where a contract for plastering specified the prices per square yard and the work to be done at that figure amounted to much more than $1,000 and defendant had paid $2,425.68 under the contract, he was not relieved from the necessity of filing the same because the contract did not state the aggregate price.

Department 2. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by S. W. Smith and another against W. B. Bradbury. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Rehearing denied November 1, 1905.

E. C. Chapman, for appellant. J. N. Young, William H. Young, and Marion S. Blanchard, for respondents.

McFARLAND, J. This is an action to enforce a lien for materials under the mechanics' lien law against a building and lot of land owned by defendant W. B. Bradbury. The amount of the lien claimed is $87.15, and the court gave judgment for plaintiffs, enforcing the lien for that amount, together with interest, costs, etc. Defendant appeals from the judgment and an order denying his motion for a new trial. The case was tried without a jury, and, findings having been waived, no findings were made.

The defendant was engaged in repairing and altering some buildings and adding thereto, so as to convert the whole into a four-story hotel. He made a written contract with McKendrick and Mellon to do all the plastering throughout said buildings, and they purchased from plaintiff certain materials which they used in carrying out the contract, and the lien of plaintiffs here in question is for such materials. It is averred in the complaint that the contract work done by McKendrick and Mellon exceeded $1,000; that neither the whole of said contract nor any memorandum thereof was filed in the recorder's office, as required by the Code; and therefore plaintiffs claim that the contract was void, and the materials furnished by them are to be deemed to have been furnished at "the personal instance of the owner," as provided in section 1183, Code Civ. Proc. Defendant does not deny that the contract was not recorded, but contends that the contract price agreed upon in the contract with McKendrick and Mellon did not exceed $1,000, and that therefore the contract is not within the provisions declaring contracts void which are not recorded. We do not think that this point is tenable. By the contract in question McKendrick and Mellon agree to perform "all of the plastering work, including labor and materials, pertaining to that certain building, improvement, or structure now being altered and repaired by the said party of the first part (Bradbury), and situated," etc. It is further "mutually agreed that the contract price for lathing and plastering all the new work pertaining to said building shall be the sum of nineteen (19) cents per square yard," and that the contract price of the plastering of all the walls and ceilings of all the rooms and halls of the old building should be 13 cents per square yard. The evidence clearly shows that the amount of the work done under the contract at the stipulated price per yard amounted to a great deal more than $1,000. Defendant, himself, testifies, and it is asserted in the brief of his counsel, that he had paid $2,425.68 "pursuant to the contract." And, considering what was shown by the evidence, it must be assumed that the parties knew when the contract was made, unless they shut their eyes to what plainly appeared, that the work to be done at 19 and 13 cents per square yard would necessarily exceed $1,000; and, this being so, the defendant could not evade the provisions of the Code by simply avoiding a statement of the aggregate amount of the full price. The statement of the rate per yard sufficiently showed, under the circumstances, an agreement for an amount exceeding $1,000. Under this view there is no necessity to consider other points argued by counsel.

The judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

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148 Cal. 35

THOMPSON v. CALIFORNIA CONST. CO.

(L. A. 1,309.)

(Supreme Court of California. Oct. 2, 1905.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—DUTY OF MASTER—SAFE PLACE TO WORK.

Under Civ. Code, § 1970, providing that the employer is not bound to indemnify his employé for loss suffered by the latter from the ordinary risks of the business, and section 1971, declaring that an employer must in all cases indemnify his employé for loss caused by the employer's want of ordinary care, an employer is not bound to furnish an employé with a reasonably safe place in which to work, but is only required to exercise ordinary care in that regard.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 171–179.]

2. APPEAL—SCOPE OF REVIEW.

That the trial court limited the ground on which a new trial was granted does not, on appeal from the order, restrict the Supreme Court in its examination of the record to ascertain whether a new trial should have been granted, except as to the sufficiency of the evidence in case the evidence is conflicting.

3. MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMED RISK.

Where plaintiff, who had been employed in defendant's rock quarry for several days, was injured by the sliding of a rock on the slope above him, and the conditions surrounding the place of work were constantly changing, owing to the progress of the work, and there was nothing to indicate that defendant, or its servants in charge of the entire work, or occupying the position of vice principal, had any better means of ascertaining the conditions than plaintiff, or that they knew that the rock was liable to fall, and plaintiff testified that, though he had examined the slope several times on the day of the accident, there was nothing to attract his attention to the fact that there was any danger, he assumed the risk, and was not entitled to recover.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 557, 576, 591, 620.]

4. SAME—RES IPSA LOQUITUR.

There being no evidence that the sliding of rocks down the slope, or some portion thereof, was not a frequent occurrence during the progress of the work, the mere happening of the accident, and the fact that no one had previously been hurt in a similar manner, was not prima facie evidence of negligence on the part of the master.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 881, 898.]

Department 1. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by Tobias Thompson against the California Construction Company. From an order granting defendant's motion for a new trial, plaintiff appeals. Affirmed.

Rehearing denied November 1, 1905.

Kendrick & Knott and Adcock & Reymert, for appellant. Herbert Cutler Brown and Graves, O'Melveny & Shankland (Byron Waters, of counsel), for respondent.

VAN DYKE, J. This was an action by an employé against the employer for damages on account of personal injuries received in a rock quarry in the possession and control of the defendant at the time of the injury. The verdict went for the plaintiff, and the defendant moved for a new trial upon various grounds assigned in his notice of motion therefor. The court below granted a new trial, and, in doing so, entered the following order: "Defendant's motion for a new trial is hereby granted upon the following specified ground, and upon no other, to wit: The court erred in instructing the jury as follows: 'It is the duty of the employer to furnish an employé with a reasonably safe place in which to do any work the employer shall require of the employé, and to keep that place reasonably safe, and the employé has the right to assume that the employer has performed that duty, and the employé is not required to use any degree of care or diligence to discover danger to which he shall be exposed by reason of the failure of his employer to do his duty, and the employé shall be held to have assumed the risk only when he knew, and will be held to have known only when the danger was so obvious that he must have known or simply neglected to open his eyes and see, or when he was put upon inquiry by some discovery or suggestion of danger which it was gross carelessness for him to neglect.'" From this order plaintiff appeals.

The latter clause of the instruction is taken, word for word, from the decision of this court in Silveira v. Iversen, 128 Cal. 192, 60 Pac. 687. We express no opinion upon the question whether or not this part of the instruction was correct as applies to this particular case. The instruction in effect told the jury that the employer must furnish an employé with a reasonably safe place to work, without regard to the nature of the employment, and that "the employé is not required to use any degree of care or diligence to discover danger to which he shall be exposed by reason of the failure of his employer to do his duty." The Code declares the law on this subject as follows: "The employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employé." Civ. Code, § 1970. "An employer must in all cases indemnify his employé for losses caused by the former's want of ordinary care." Civ. Code, § 1971. And, as correctly stated in Rogers v. C. P. Ry. Co., 67 Cal. 607, 8 Pac. 377: "The Code having thus established the rule by which to ascertain the liability of the employer to his employé, it is not within the province of the courts to depart from it." Where a man engaged in a lawful business exercises reasonable care, the law does not make him the insurer of others against those consequences of his actions which reasonable care and foresight could have prevented. The contrary rule would obviously be against public policy, because it would impose so great a restraint upon action as to materially check human enterprise. Rogers v. C. P. Ry. Co., supra. "The law imposes on a master or employer only the obligation to use reasonable or ordinary care, skill, and diligence in procuring and furnishing suitable and safe machinery and appliances for the servant to perform the duties for which he is engaged." Brymer v. S. P. R. R. Co., 90 Cal. 496, 27 Pac. 371. The statement that it is the duty of the employer to furnish an employé with a reasonably safe place in which to work is a defective statement of the law. The duty of the employer in this respect is not absolute. He is not required at all hazards to furnish a reasonably safe place. His duty is fulfilled when he exercises ordinary care for that purpose. In this respect the court in another instruction told the jury that, if the defendant exercised such care as men of ordinary intelligence ordinarily exercise under like circumstances and conditions, taking into consideration the character of the work, then it had done all that was required of it and could not be held liable for the injuries received by the plaintiff. While this might have cured the instruction in the particular above stated, still we cannot say that the court below abused its discretion in granting the new trial upon this ground. Much is committed to the discretion of the trial court in considering such grounds for a new trial.

The action of the court below in limiting the ground upon which the new trial was granted does not restrict this court in its examination of the record for the purpose of ascertaining whether or not a new trial should have been granted, except as to the sufficiency of the evidence, where it is conflicting. Kauffman v. Maier, 94 Cal. 276, 29 Pac. 481, 18 L. R. A. 124. One of the grounds for a new trial was the denial of the motion of the defendant, made at the close of the plaintiff's evidence, for a nonsuit. This motion was made upon several grounds—among others, that the evidence failed to show actionable negligence on the part of the defendant proximately causing or contributing to the plaintiff's injuries. We think the motion for a nonsuit should have been granted. The evidence shows that the defendant was in control of a rock quarry in which the plaintiff was employed; that the business carried on was that of blasting rock out of a cliff of rock some 50 or 60 feet high, and loading large, irregular pieces of rock thus obtained upon cars standing at the foot of the slope upon which the rock lay; that this slope was composed of the rough pieces of rock, mingled with dirt from the soil above the stratum of rock; and that the process of loading consisted of fastening a chain around each rock, attaching it to a derrick, and thereby lifting the rock on the cars. At the time of the injury the plaintiff, with another workman, who seemed to be directing the plaintiff in his actions, was engaged in fastening the chain around one of these large pieces of rock in order to attach it to the derrick. While he was stooping down trying to pass the chain under the rock, another rock situated on the slope above him slipped down upon him and caused the injury. The plaintiff had been engaged in the quarry for 27 days prior to the injury, and during all that time the work of loading the rocks on the cars was continued. Part of the time he assisted in chaining rocks upon the slope where they lay after the blasting, and part of the time he was engaged in shoveling dirt. There is no evidence that the defendant or any of its agents or servants had any better knowledge or any better means of knowledge of the danger arising from the sliding of rocks down the cliff than that possessed by the plaintiff. The plaintiff himself testifies that during the morning before he started to work he looked lots of times at the slope where the broken pieces of rock were lying, and did not see anything lying loose, and that it looked all right; that, as he walked over to the place where he was to assist in chaining the rock, he looked up at the slope above and saw nothing lying loose. According to his testimony, the rock which came down upon him was at that time lying on the slope, some eight or ten feet above the rock which he was chaining, and there was nothing which attracted his attention to the fact that there was any danger that it would slide at that time, and thereby injure him. It is manifest that upon the face of a quarry, worked in the manner here indicated, the conditions of danger must be constantly changing as the work progresses. There is nothing whatever to show that the defendant, or any of its servants in charge of the entire work or occupying the position of a master with respect to the plaintiff, had any better opportunities of ascertaining the conditions than the plaintiff. The rule applicable to such cases is that the master is not liable for dangers existing in the place where the servant is assigned to work, unless the master knows of the dangers or defects, or might have known thereof if he used ordinary care or skill to ascertain them. 19 Am. & Eng. Ency. of Law, p. 92. This rule applies with greater force in cases where the conditions surrounding the place of work are constantly changing, owing to the progress of the work. The rule is further modified by the proposition that, where the servant is under the same obligation as the master is to look for dangers in the place of work, and has equal facilities for ascertaining them, and under these conditions continues the work, the master is not liable for any injury caused by the dangers thus existing, unless in some manner he urges or coerces the servant to continue the work after he himself is aware, or should have been aware, of the danger. 19 Am. & Eng. Ency. of Law, 130. In a case such as that under consideration, where the dangers complained of may to some extent arise from the changes in conditions made by the servant himself in the progress of the work, he is under as much obligation as is the master to be on the lookout for such dangers. The plaintiff had the burden of proving that his injury was due to the negligence of the defendant. There was no evidence of such neglect other than the fact that the rock slipped down and caused the injury. Under the circumstances above stated, the mere happening of the accident is not prima facie evidence of negligence on the part of the master. That rule applies only in cases where, in the ordinary course of things, due care being used, such accidents do not happen. The plaintiff testified that during the time he was working in the quarry he had not seen anyone injured from such causes as the sliding of rocks down the slope. This, however, does not prove that such accidents would not happen in the ordinary course of things. It is not the injury itself, but the happening of the causes which produce the injury, that must be absent in the ordinary course of things. There is no evidence that the sliding of rocks down the slope, or some portion thereof, was not a frequent occurrence during the progress of the work. It is almost self-evident that such things would occur in a case of a slope made by blasting rocks from a high cliff, and, if that were the case, the danger arising therefrom would be obvious to any one having knowledge of the situation such as he could obtain from the use of his own eyesight. The mere fact that no one had previously been hurt by being in the way of such sliding rocks does not establish any presumption that there was no danger, or that due care had been theretofore used. There is no evidence that proper precautions to prevent the rocks sliding were not taken by the defendant. The motion for a nonsuit should have been granted upon the ground that it is not shown that the defendant was negligent with respect to the safety of the place in which the plaintiff was at work at the time of the injury.

The order granting a new trial is affirmed.

I concur: SHAW, J.

I concur in the judgment, upon the ground that the court erred in denying defendant's motion for a nonsuit, and also concur in what is said in the opinion upon that point: ANGELLOTTI, J.

147 Cal. 724

CHERRY HILL GOLD MIN. CO. v. BAKER et al. (Sac. 1,140.)

(Supreme Court of California. Sept. 16, 1905.)

INJUNCTION—EX PARTE APPLICATION—MODIFICATION—NOTICE—JURISDICTION.

Under Code Civ. Proc. § 532, providing that, if an injunction be granted without notice, the defendant at any time before the trial may apply upon reasonable notice to the judge who granted the injunction or to the court to which the action is brought to dissolve or modify the injunction, where a preliminary injunction was granted on complainant's ex parte application, the court had no power to modify the same in important particulars without notice to complainant.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 355.]

Department 2. Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Suit by the Cherry Hill Gold Mining Company against E. D. Baker and another. From an order modifying a preliminary injunction without notice, plaintiff appeals. Reversed.

James F. Farraher and E. A. Belcher, for appellant. R. S. Taylor and L. F. Coburn, for respondents.

HENSHAW, J. The court, having granted a preliminary injunction upon the verified complaint of plaintiff, subsequently, upon the ex parte application of defendants, modified this injunction in important particulars. The appeal is from this latter order, and involves the single question as to the power of the court so to do without notice to plaintiff. This question must be considered as definitely settled in favor of appellant by the cases of Heflon v. Bowers, 72 Cal. 270, 13 Pac. 690, and Page v. Vaughn, 133 Cal. 335, 65 Pac. 740. In the latter case it is said: "The evident purpose of the foregoing statute (Code Civ. Proc. § 532) is to empower the court to dissolve its injunction only after notice to the plaintiff. The meaning of the statute is plain, and to put a construction on it that would dispense with the notice required by it is to construe one provision of the statute out of existence and thereby thwart the purpose of the Legislature in enacting it." There is not, of course, here involved the question of the power of the court to modify or dissolve its preliminary injunction. It is merely a question of procedure. It is still always open to defendant, upon such notice as the court may direct, to obtain all the relief to which he may be entitled.

For the foregoing reason, the order appealed from is reversed.

We concur: McFARLAND, J; LORIGAN, J.

147 Cal. 614

COOK v. CEAS et al. (Sac. 1,369.)

(Supreme Court of California, Sept. 2, 1905. On Rehearing, Oct. 20, 1905.)

1. EQUITY—LACHES—LOSS.

In the absence of hardship or injustice to the opposite party, a plaintiff is not guilty of laches by mere lapse of time less than that specified by the statute of limitations.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 204.]

2. GUARDIAN AND WARD—ACTION ON BOND—LACHES.

Where, in an action on a guardian's bond, nothing appeared on the face of the complaint to indicate that defendants, or any person other than plaintiff, had suffered or could have suffered any loss or prejudice by plaintiff's delay in proceedings to compel an accounting by her guardian, a defense of laches must have been pleaded and proved in order to be available.

3. SAME—LIMITATIONS.

Under Code Civ. Proc. § 343, providing that an action for relief not previously provided for must be commenced within four years from the time the cause of action shall have accrued, mere delay of three years and two months on the part of the ward in compelling an accounting by her guardian was not of itself sufficient to raise a presumption that the sureties on the bond would be prejudiced thereby.

Department 1. Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Adelia Cook against George T. Ceas and others. From a judgment in favor of plaintiff, defendant P. H. Gardiner appeals. Affirmed.

A. L. Shinn, for appellant. W. A. Gett, for respondent.

VAN DYKE, J. The appeal is from a judgment rendered upon a guardian's bond. The plaintiff, whose maiden name was Ceas, and who is the daughter of defendant George T. Ceas, while still a minor, became or was the owner of some property, and her father, George T. Ceas, was appointed by the probate court of Sacramento county as guardian of her person and estate, and in compliance with the requirement of the court, on April 2, 1883, entered into a bond in the sum of $3,000, with C. P. Hensley and P. H. Gardiner as sureties. The plaintiff having arrived at age April 30, 1897, and her father as such guardian having failed to settle his guardianship or account to her and pay over the sums in his hands belonging to her, on the 21st of June, 1900, plaintiff commenced proceedings which resulted in a settlement of his account on the 24th of January, 1901. In said settlement it was ascertained and determined by the superior court of Sacramento county that there was a balance due from George T. Ceas, as guardian of the plaintiff, of $3,150.47. Upon demand being made by the plaintiff of the sum found due by the court, and failure and refusal on the part of the guardian and sureties on his bond to pay the same, the plaintiff thereupon commenced an action against her guardian and the sureties on his bond for the recovery of the sum of $3,000, being the sum mentioned in said bond. The defendant Ceas and one of the sureties, C. P. Hensley, defaulted; but the other surety, P. H. Gardiner, appeared and defended said action. In his answer he set up as an affirmative defense that the judgment ascertaining and settling the final account had not become final, 60 days not having elapsed after the rendition thereof before the beginning of said action, and that said action was therefore prematurely brought. (It appears that an appeal was taken from said judgment settling said account, and the judgment affirmed. Guardianship of Ceas, 134 Cal. 114, 66 Pac. 187.) The ruling of the court below that the action was prematurely brought, the time for taking an appeal from the order settling the final account not having elapsed, was by this court held to be correct. Cook v. Ceas, 143 Cal. 227, 77 Pac. 65.

By another affirmative defense it was contended that the action was barred by the provision of section 1805, Code of Civil Procedure, which defense was also sustained by the court below. But this court, however, held that an action against the sureties of a guardian was not barred by the terms of section 1805, Code of Civil Procedure, until three years after a final order of court removing or discharging the guardian, and that it did not appear that the guardian had ever been discharged or removed. Section 1805, Code of Civil Procedure, referred to, reads as follows: "No action can be maintained against a surety on any bond given by a guardian unless it be commenced within three years of the discharge or removal of the guardian; but if, at the time of such discharge, the person entitled to bring such action is under any legal disability to sue, the action may be commenced at any time within three years after such disability is removed." In the opinion of this court on this branch it is said: "A statute of limitation ought not to be enlarged in its operation by judicial construction, when it is so framed as to work injustice, either by itself or in conjunction with other provisions of law. In this state we have one rule which prohibits an action on the bond of a guardian's surety until there is a final order settling the guardian's account, and another rule barring the action in three years after the removal or discharge of the guardian. So far as its express terms require, the rule must no doubt be enforced, even where, without the fault of the ward, a final settlement of the account has not been obtained within three years after the removal or discharge; but neither justice nor sound policy requires that a law capable of working so inequitably should be enlarged by construction so as to embrace a class of cases not comprehended in its terms. And this conclusion does not leave the sureties on guardians' bonds without an ample measure of protection against stale claims. They have all the advantage of the general statute of limitations, and of the doctrine of Barnes v. Glide, 117 Cal. 1, 48 Pac. 804, 59 Am. St. Rep. 153, which will hold wards to the rule of reasonable diligence in procuring settlement of their guardians' accounts. In this case it does not appear whether or not there was unreasonable delay on the part of plaintiff in seeking a settlement of the account." And the judgment of the court below in the former action was affirmed on the ground that the action was prematurely commenced, and was remanded without prejudice to another action.

Upon the going down of the remittitur in the former action, the present action was commenced July 29, 1904. The defendant Ceas, and Hensley, one of the sureties on his bond, failed to appear and defend in this action, as in the former. The defendant Gardiner in his answer sets up the same affirmative defenses as in the former action, and in addition thereto alleges that said action is barred by the provisions of section 337 and subdivision 1 of section 338, Code of Civil Procedure. The court found that no order or decree had ever been entered by the superior court of Sacramento county, having jurisdiction of the matter of guardianship in question, discharging or removing said George T. Ceas as guardian of plaintiff, and that the action was not barred by section 337 or subdivision 1 of section 338, Code of Civil Procedure. On the question raised by defendant's answer of laches on the part of the plaintiff in commencing proceedings to compel a settlement of the account of the guardian, the court finds that there was no evidence offered by either party to the action in explanation thereof, nor as to the question whether the defendant was injured or his rights affected thereby. The court in this connection finds "that the time which elapsed between the coming of age of the plaintiff and the commencement of the proceedings by her to compel an accounting by her guardian did not amount to laches, nor affect her right of recovery herein."

On the present appeal it is contended on behalf of the appellant that the action is barred by laches, on the authority of Barnes v. Glide and similar cases, especially, however, on the authority of Barnes v. Glide, 117 Cal. 1, 48 Pac. 804, 59 Am. St. Rep. 153. That was a proceeding in mandamus to compel the trustees of a swamp land district to levy a tax to pay warrants, and the court in its opinion says: "The warrant set up in the first count of the complaint was issued, presented, and payment thereon was refused, in November, 1877, and this present suit was not commenced until November, 1895, which was 18 years thereafter. The date of the latest warrant set up in the complaint is 1881, more than 14 years before the commencement of the action. The present board of trustees, who are made defendants, do not appear to have occupied that position for a longer period than 6 months prior to the commencement of the suit. The warrants sued on were issued, if at all, by other trustees, who were in office from 15 to 18 years before this proceeding was instituted. They may have been issued illegally. The act of issuing them may have been ultra vires. They may not have been issued for any labor done in the construction of the works of the district. They may have been issued without consideration and fraudulently. They may be forgeries. And it is quite evident that the present defendants, after such a lapse of time, would be in no condition to make any of the defenses above indicated, when witnesses who knew of the facts at the time may be dead, or may have allowed the recollection of them to vanish from their memories. And the evident purpose of the statute of limitations is to prevent such a condition of affairs, and to preclude parties from disturbing that repose which is intended to be final, after the lapse of certain periods of time designated in the statute itself. The position cannot be successfully maintained that no action could be commenced until a demand had been made by plaintiff upon the defendants to act. * * * If the facts stated in the complaint in the case at bar constitute a cause of action, they constitute a cause of action which accrued, and for which an action might have been instituted, from 14 to 18 years before the present complaint was filed. The statute of limitations is intended to embrace all causes of action not specially excepted from its operation; and there is no exception applicable to the present proceeding."

It will be seen from the foregoing that there is no similarity whatever between Barnes v. Glide and the case at bar, and the same may be said of the other cases referred to by appellant. The effect of lapse of time upon a cause of action, when the delay is unproductive of and unaccompanied by any hardship or injustice to the other party, is determined by the provisions of the statute of limitations. In order to constitute laches, there must be something more than mere lapse of the time which would bar the remedy under the statute of limitations. This subject was fully considered in Cahill v. Superior Court, 145 Cal. 47, 78 Pac. 467, and Kleinclaus v. Dutard (Cal. Sup.) 81 Pac. 516. In the Cahill Case it is said that, "in order to bar a remedy because of laches, there must appear, in addition to mere lapse of time, some circumstances from which the defendant or some other person may be prejudiced, or there must be such lapse of time that it may be reasonably supposed that such prejudice will occur if the remedy is allowed." Laches, like the statute of limitations, is a defense which must be alleged and proved by the defendant, unless the facts constituting it appear on the face of the complaint, in which case, as in the case of the statute of limitations, it must be urged by the defendant by means of a demurrer, or in some other legal manner (Kleinclaus v. Dutard, supra); otherwise, it is waived. Nothing appeared on the face of the complaint herein to indicate that the defendants, or any person excepting the plaintiff herself, did suffer, or could have suffered, any loss or prejudice by reason of her delay in proceeding to compel an accounting by the guardian. It is at least doubtful if any statute of limitations constitutes a bar to such a proceeding (see Estate of Sanderson, 74 Cal. 215, 15 Pac. 753); but if there is such a statute it must be section 343 of the Code of Civil Procedure, prescribing the period of four years, which did not elapse in this case. Here there was a delay of only three years and a little less than two months, which is not, of itself, sufficient to raise any presumption or inference that the sureties on the bond would be prejudiced thereby. Hence it was incumbent on them to show, if they could, that some circumstance, such, for instance, as insolvency of the principal, occurred during the delay, from which loss may have been occasioned to them. Nothing having been shown, it follows, as matter of law, that the lapse of time alone was not laches.

This court on the appeal in the former action expressly held that it did not appear whether or not there was unreasonable delay on the part of the plaintiff in seeking a settlement of the account, and therefore the case was remanded, with permission to bring another action. And, as already shown, in the present action the court below finds that there was no evidence presented by either party in reference to the cause of the delay, and nothing to show that the defendant was injured or his rights affected in consequence thereof, and that the plaintiff was not guilty of laches, under the circumstances, in the delay in demanding an accounting of her guardian. There having been no evidence, as shown, to support the plea of laches, the case is in no better position, as far as that defense is concerned, than in the former action.

In this connection the question may well be suggested whether the sureties on the bond can in any event urge a delay by the ward in instituting proceedings to compel an accounting by the guardian, after she arrives at age, as sufficient laches to bar an action against them upon the bond, unless in cases where the conduct of the ward has in some way misled them, or caused them to delay such proceedings. They have an equal right with the ward to institute proceedings for an accounting. It is the duty of the guardian to render the account, and for the performance of that duty they have become his guarantors, so that in some respects his duty is their own. But, in the view we take of the case, it is not necessary to decide this question, and we leave it without expressing any opinion.

Judgment affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

On Rehearing.

In bank.

PER CURIAM. Rehearing denied.

BEATTY, C. J. (dissenting). Having recorded my dissent from the order denying a rehearing of this cause, I desire to say that such dissent was not based upon any divergence of views as to the only question discussed in the department opinion, viz., the question whether the defendant had established his defense, based upon the equitable doctrine of laches. That defense was only one of several separate defenses pleaded in the answer, and seems to have been abandoned in the trial court, as it certainly was on the appeal. The plea, and the only plea, upon which the defendant rested his case in this court, was the three-year statute of limitations (subdivision 1, § 338, Code Civ. Proc.), and to that his argument was exclusively devoted. His propositions were: First. The duty of a guardian to pay over to his ward the balance found due on settlement of his final account is a purely statutory duty, and an action thereon is barred at the expiration of three years after it accrues; that is to say, three years after such settlement, and at the same time that the action is barred against the guardian, an action upon the collateral obligation of his surety is barred. To sustain this proposition he cited the well-considered decision of this court in bank upon rehearing of the case of County of Sonoma v. Hall, 132 Cal. 589, 62 Pac. 257, 312, 65 Pac. 12, 459, which clearly does sustain the entire proposition. His second proposition was that, since the action against a guardian's surety is barred in three years after settlement of the account, the ward is held to reasonable diligence in procuring such settlement; that she cannot keep her cause of action alive indefinitely by neglecting to take a step which she is free to take the day she comes of age, and consequently that, this plaintiff having neglected for more than three years after she reached her majority (April 30, 1897) to institute any proceeding to compel such settlement, the statute began to run at the expiration of that period, viz., April 30, 1900, and had fully run before the action was commenced, which was July 29, 1904. This is the doctrine of Barnes v. Glide, 117 Cal. 1, 48 Pac. 804, 59 Am. St. Rep. 153, to the advantage of which this court expressly held that the defendant was entitled in deciding the former appeal. 143 Cal. 231, 77 Pac. 65. The facts of the Barnes v. Glide Case, of course, were different from the facts of this, but the general doctrine which applies to the one applies with equal force to the other, and is clearly stated by Justice Harrison in Williams v. Bergin, 116 Cal. 60, 47 Pac. 878, as follows: "The rule is well settled that when the plaintiff's right of action depends upon some act which he has to perform preliminarily to commencing suit, and he is under no restraint or disability in the performance of such act, he cannot suspend indefinitely the running of the statute of limitations by a delay in performing such preliminary act, and that, if the time within which such act is to be performed is indefinite or not specified, a reasonable time will be allowed therefor, and the statute will begin to run after the lapse of such reasonable time. What is a reasonable time will depend upon the circumstances of each case. A party cannot, by his own negligence or for his own convenience, stop the running of the statute. Palmer v. Palmer, 36 Mich. 487, 24 Am. Rep. 605; Atchison, etc., R. R. Co., v. Burlingame, 36 Kan. 628, 14 Pac. 271, 59 Am. Rep. 578; Ball v. Keokuk, etc., Ry. Co., 62 Iowa, 751, 16 N. W. 592; High v. Board of Com'rs, 92 Ind. 580; Bills v. Silver King Min. Co., 106 Cal. 21, 39 Pac. 43; Thomas v. Pacific Beach Co., 115 Cal. 136, 46 Pac. 899. The rule rests upon the principle that the plaintiff has it in his power at all times to do the act which fixes his right of action."

This doctrine has been uniformily sustained in its application to a number and variety of cases in this state, and in other states. See 13 Am. & Eng. Ency. of Law (1st Ed.) p. 726. Usually it has been applied in this state to cases in which a previous demand on the part of plaintiff was necessary to perfect the cause of action, as in Bills v. Silver King Min. Co., 106 Cal. 21, 39 Pac. 43. In that case I stated in my concurring opinion the rule as to what is to be deemed, if unexcused, an unreasonable delay in taking the necessary preliminary step by the plaintiff to perfect his cause of action, as follows: "As to what is a reasonable time, that is ordinarily determined by the analogy of the statutory periods of limitation. If the cause of action is barred by the lapse of two years after it becomes complete, then the demand must be made within two years after the right to make it accrues, or a valid excuse must be shown for the failure to make it within that time." This statement of the rule in my concurring opinion has since been adopted by the court, and has thus become the settled rule of decision here, as in other states. Meherin v. S. F. Produce Exchange, 117 Cal. 217, 48 Pac. 1074. And it has been applied, not merely to the case of demand of payment, or of a deed, or other act due upon demand, but to a case in principle precisely the same as this. The case of Dennis v. Bint, 122 Cal. 40, 54 Pac. 378, 68 Am. St. Rep. 17, was an action to recover lands claimed by the defendants under an invalid sale in probate. In such a case the action by the administratrix was held to be barred in three years after settlement of her final account. It was commenced before the settlement of her account; but it was said, with reference to her right of action: "In our opinion the administratrix was allowed under the amendment of 1880 a reasonable time in which to obtain settlement of her final account, and that, failing in this, the statute began to run, and were she the plaintiff here it could be pleaded against her with effect. What is such reasonable time must depend in general on the circumstances of each estate; but here it is apparent that much more than a reasonable time expired more than three years prior to the commencement of the action. There is no novelty in this proposition. It follows from the principle of quite extensive application that one cannot avoid the statute of limitations by delay in taking action incumbent upon him. Thus it was held that the executor of a will probated in Illinois, who had unreasonably delayed to take out ancillary letters of administration in New York, was not entitled to the benefit of the statute of the latter state which excepted from the general statute of limitations a certain period 'after the granting of such letters.' Kirby v. Lake Shore, etc., R. R. Co., 120 U. S. 130, 7 Sup. Ct. 430, 30 L. Ed. 569. And see Bauserman v. Blunt, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316, approving Bauserman v. Charlott, 46 Kan. 480, 26 Pac. 1051; Mickel v. Walraven, 92 Iowa, 423, 60 N. W. 633; Thomas v. Pacific Beach Co., 115 Cal. 136, 46 Pac. 899. If this be not the correct view of the statute, and if the right to sue can be preserved to the administrator and those whom he represents for 10 years by failure, without excuse, to settle his final account, then it may be preserved in like manner for 50 years, or indefinitely."

All these and other cases decided here and in other jurisdictions were cited by counsel for appellant in his printed argument in support of the second proposition that the plaintiff could not wait an unreasonable time to institute proceedings to compel a settlement of her guardian's account; that a period of more than three years was an unreasonable time, and consequently that the three-year statute had fully run. I think his defense was clearly established, and that the judgment of the superior court should have been reversed. But, whether this be so or not, there can be no doubt that he was entitled to a hearing upon the case which he submitted to our judgment. It is a matter of no practical consequence, in view of the modification of that part of the department opinion relating to the supposed "law of the case," to note the mistake of fact upon which it was founded; but I think the modification should have been more extensive. The statement still remains that the former case presented the same fact appearing here, viz., that plaintiff delayed, without excuse, for more than three years to take any step to compel an accounting. That fact was pleaded in the answer in the other case as part of the separate defense of laches, but, of course, was deemed denied, and, since there was no finding upon the issue, it did not appear from the record, which consisted of the judgment roll alone, that three years, or even a single day, had elapsed before proceedings were commenced. And this state of the record, showing a failure to find a fact material to the plea of the statute of limitations, was the sole occasion for what I said in my opinion regarding that plea and the doctrine of Barnes v. Glide.

I concur: HENSHAW, J.

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BANK OF VISALIA et al. v. DILLONWOOD LUMBER CO. et al. (Sac. 1,160.)

(Supreme Court of California. Sept. 30, 1905.)

1. TRUSTS — CREATION — CORPORATIONS — EMPLOYMENT CONTRACT.

Where L. was employed by the stockholders of a corporation to undertake the control of its business, to the extent of financing it and placing it on a profitable basis, at a monthly salary, with certain other advantages to accrue to him if the enterprise was successful, but no property was placed in his hands in trust for any purpose, and the corporation continued to transact business in its own name, the agreement did not constitute a trust, though L. was designated as "trustee" for the corporation.

2. ASSIGNMENT FOR BENEFIT OF CREDITORS—PRIORITIES OF CLAIMS—CLAIM OF TRUSTEE.

Where a transfer by a corporation in trust for creditors did not provide for any preference in favor of the trustee for money advanced, except that there was given "to the principal creditors" mentioned therein the right to determine the order in which the "principal debts" should be paid, and the principal creditors thereafter, including the trustee, agreed on an order which gave the trustee a preference, such creditors having only authority to bind themselves, neither the trust agreement nor the agreement between the creditors entitled the trustee to preferred payment over claimants for labor and supplies either for money advanced or salary earned prior to the assignment.

3. SAME—CLAIMS FOR WAGES—PREFERENCE—STATUTES.

Code Civ. Proc. § 1204, providing for a preferred claim on behalf of laborers in all assignments of property, is not limited to insolvency proceedings or to assignments for the benefit of creditors, specified in Civ. Code, § 3449 etc., but applies also to the winding up of a corporation's business and the application of its assets to the payment of its debts by a trustee, to whom such assets were conveyed for such purpose.

4. SAME—LABOR AND SUPPLIES TO TRUSTEE.

Where a deed of trust conveyed the property of a corporation to a trustee to manage the business and pay debts, first the running expenses, including the necessary counsel fees, etc., persons performing labor and furnishing supplies to the trustee under the trust were entitled to a preferred claim therefor.

5. SAME—TRUSTEE—COMPENSATION—TIME.

Where a deed of trust for the benefit of creditors provided that the trustee should receive $150 a month to conduct the business, and it did not appear that the trustee rendered any service after October 1, 1901, when the business ceased as a going concern, to which time he was allowed a salary, it was not error for the court to refuse to allow his claim for further compensation till the rendition of a decree for the distribution of the proceeds of the corporation's property.

6. APPEAL — RECORD — BURDEN OF SHOWING ERROR.

Where it does not appear from the record that certain items claimed by appellant not to have been allowed were not embraced in amounts for which allowance was made, it will be presumed that the amount to which he was entitled was allowed him.

7. SAME—WAIVER OF OBJECTIONS.

Where, in a suit to wind up the affairs of an insolvent corporation and distribute the proceeds of its assets, all parties entered into a stipulation authorizing the court to make a sale of the corporation's property and to divide the proceeds, such stipulation constituted a waiver of an objection that the complaint was demurrable for want of facts.

8. TRUSTS—CONSTRUCTION—POWER OF TRUSTEE—AUTHORITY TO MORTGAGE.

A trust deed executed by a corporation conveyed its property to a trustee, to "conduct and carry on the sawmill and lumber business" of the corporation as trustee, and from such "business" to first pay the running expenses, and from the "property" or the product thereof to pay the indebtedness of the corporation. It also provided that the trustee should have power to sell, mortgage, or dispose of any part of the real or personal property for any and all of such purposes. *Held*, that such deed did not create two trusts, one of the "business" and the other of the property; and hence, though the trustee had power to mortgage "to pay" the indebtedness then existing, he had no power to mortgage "to secure" such indebtedness.

9. CORPORATIONS — INSOLVENCY—CREDITORS — RELIEF AGAINST STOCKHOLDERS — CROSS-COMPLAINT.

A creditor of an insolvent corporation was not entitled to any relief against stockholders, in an action for a sale and distribution of the corporate assets, where the liability of such stockholders was not pleaded by the creditor in a cross-complaint.

10. APPEAL—ISSUES AND PROOF—THEORY OF CAUSE.

Where appellant's claim against an insolvent corporation and its trustee was tried on the theory that the complaint charged a contract between the parties for the payment by the corporation of a certain price per 1,000 for all lumber hauled by claimant's engine, and there was no allegation in the complaint of any indebtedness based on the reasonable use of the engine, or any attempt to prove it, claimant could not object on appeal to a finding that neither the corporation nor its trustee entered into any agreement to pay any sum for the use of the engine, in that it was not a finding that defendants did not use the engine in their business or were not liable for such use.

Department 2. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by the Bank of Visalia and others against the Dillonwood Lumber Company and others to settle the affairs of defendant company, an insolvent. From a decree determining the order of payment of creditors, the Holt Manufacturing Company, George M. Perine, and A. J. De Laney, in his individual capacity and as trustee, etc., appeal. Affirmed.

Stanton L. Carter, Maurice E. Power, Samuel Rosenheim, and E. T. Cosper, for appellants. Charles G. Lamberson, Roth & McFadzean, Hudson & Pryor, Dixon L. Phillips, and H. P. Brown, for respondents.

LORIGAN, J. This action was brought by various creditors of the Dillonwood Lumber Company, a corporation, to enforce their claims against the property of the corporation, all of which it had assigned to the defendant A. J. De Laney as a trustee for their benefit. The complaint charged that the trustee had failed to comply with the terms of the trust, and that certain of his acts were in violation of its provisions, and asked that they be declared void, that he be removed and a new trustee appointed, that the trust property be sold and the proceeds applied to the payment of the debts of the Dillonwood Lumber Company in the order and preference that the court might deem proper. The trust agreement, under the provisions of which the merits of the several appeals taken by appellants are to be determined, was executed by the Dillonwood Lumber Company and A. J. De Laney on June 19, 1901. After reciting that the company had that day conveyed to De Laney its real and personal property, it was agreed and declared that the said De Laney held all said property in trust for the following uses and purposes: "The said A. J. De Laney is to conduct and carry on the sawmill and lumber business of said Dillonwood Lumber Company, in said county of Tulare, as trustee, and from said business said A. J. De Laney is to first pay the running expenses thereof and all other necessary expenses, including necessary counsel fees, and from said property, or the product thereof, said A. J. De Laney is to pay, as soon as he can, the present indebtedness of said Dillonwood Lumber Company, * * * as shown by the books of said Dillonwood Lumber Company; and said A. J. De Laney shall have the right and power to sell any and all of said real and personal property to carry on and conduct said business and to pay said indebtedness, and may mortgage, hypothecate, and otherwise deal with or dispose of said property, or any part thereof, in any manner and to any extent he may elect, for any or all of said purposes, except as otherwise herein provided; and, upon said debts being paid in full, said A. J. De Laney shall reconvey to said Dillonwood Lumber Company any and all of the property he may then hold belonging to said corporation; * * * and provided, further, that said Dillonwood Lumber Company may terminate this trust upon paying off such indebtedness or the amount thereof due, or causing the same to be paid, together with all expenses incurred by said A. J. De Laney as aforesaid, and shall thereupon be entitled to a reconveyance of all said property then held by said A. J. De Laney. Said A. J. De Laney * * * shall carry on and conduct said business in a businesslike manner, and shall be allowed for his compensation as part of the necessary expenses thereof the sum of $150 per month and necessary traveling expenses during the existence of this trust. It is expressly agreed and understood that the principal present debts of said corporation shall be paid in the order and manner to be agreed upon by the principal creditors of said corporation; said principal creditors being the following named, to wit: Bank of Visalia, Fresno Agricultural Works, O. R. Cross & Company, Central Lumber Company, G. M. Perine, C. A. Canfield, and A. J. De Laney. And, in case said creditors do not agree within 10 days after said creditors shall have been notified of this trust, then said A. J. De Laney shall determine the order and manner of the payment of such debts. * * * And it is further agreed and understood that said A. J. De Laney shall not sell or have the power to sell any of said real property or any of said personal property constituting the plant necessary to carry on and conduct said sawmill and lumber business without the consent of said Dillonwood Company. And it is further agreed and understood that said A. J. De Laney, as such trustee, shall carry on and conduct said sawmill and lumber business as herein provided in the name of the said Dillonwood Lumber Company, by said A. J. De Laney, trustee." Within ten days after the execution of said trust agreement, the principal creditors, with the exception of G. M. Perine, entered into the written agreement provided for under said trust, whereby they agreed that the indebtedness due to each of them should be paid pro rata, except that the claim of G. M. Perine for $3,000 and interest and the claim of A. J. De Laney for $4,200 and interest should be paid in preference to the claims of said parties entering into said trust agreement; and said parties in writing ratified and accepted said agreement of trust. The defendant G. M. Perine had at all times full knowledge of the execution of the trust agreement, assented thereto, and agreed to the terms and conditions thereof. This trust agreement, although executed on June 19, 1901, was not recorded till September 3, 1901; but from the time of its execution up to the commencement of the action said De Laney acted as trustee under its provisions.

The Dillonwood Lumber Company was engaged in the business of manufacturing and selling lumber in Tulare county during the years 1890 and 1891, operated a sawmill for that purpose and was the owner of a large amount of real and personal property used in connection with its business. This was all transferred to A. J. De Laney, as trustee, for the purposes of the trust. Prior to the trial of the cause, by stipulation entered into by the parties to the action, all of the property of the corporation referred to in the trust conveyance was sold by order of the court and the proceeds placed under its control, to be distributed in favor of the parties to the action found entitled thereto. These parties (a large number, and all creditors of the corporation) embraced mainly persons who had performed labor or furnished supplies for the corporation before or during the time De Laney was trustee, together with the principal creditors specially mentioned in the trust agreement and the creditors' agreement entered into subsequent thereto. In ultimately disposing of the cause, it was found that the fund derived from the sale of the corporate property would be inadequate to pay all the allowed claims of the creditors, and the court determined that certain of them were entitled to preferential payments. It was found that some of the plaintiffs had performed labor for the corporation within 60 days prior to the assignment of the property to De Laney as trustee, and as to them decreed that they were entitled, under the provisions of section 1204 of the Code of Civil Procedure, to first preferential payment. It was also found that, while the defendant De Laney was operating the lumber mill of the corporation under the terms of the trust, certain other plaintiffs performed labor for or furnished necessary supplies to him as trustee, and decreed that they were entitled, under the terms of the trust agreement, to next preferential payment. As to the other plaintiffs, the court found that they were ordinary creditors, with no preferential rights. As to the defendant and appellant A. J. De Laney, De Laney asserted a preference in the case above all the other creditors for $4,200, the amount mentioned in the agreement entered into between himself and the principal creditors subsequent to the execution of the trust agreement. This the court denied, giving him preference only as against the other creditors who with himself had entered into such agreement giving him a preference over them. The effect of this was to deny him any participation in the fund which had then become exhausted by the prior preferences. De Laney made claim to other preferences, which were denied. The court also refused to allow him the full amount of compensation claimed as trustee, and, it is further claimed, failed to allow him other amounts to which he was entitled, on account of all of which matters he complains on this appeal, and they will be particularly considered presently. As to the defendant and appellant George M. Perine, the court found that De Laney, as trustee, had given a mortgage on the trust property to said Perine to secure an indebtedness due from the Dillonwood Lumber Company; that as to a portion of such indebtedness the court found Perine was not entitled to any preference under the trust agreement; and that De Laney had no authority to make the mortgage to secure it, and to that extent decreed such mortgage to be void. Perine complains of the findings and decree in this respect. As to the plaintiff and appellant the Holt Manufacturing Company, the court found against it as to a portion of its claim, and it appeals for that reason. All the appellants moved for a new trial, which was denied, and they appeal from the order of denial and from the judgment.

As to the merits of the appeal of the defendant De Laney:

His principal contention is that the court should have decreed him a preference above all the other creditors to the extent of $4,200. He bases this right on the terms of the trust agreement, the principal creditors' agreement, and on the fact that this sum was furnished by him for the benefit of and to sustain the business of the Dillonwood Lumber Company between February 28, 1901, and June 19, 1901, when it is claimed he was acting as trustee for the corporation. Upon the latter proposition it is certain, from the evidence, that during the period named there was no trust existing for the benefit of creditors. The true situation in that respect was that about February 28, 1901, the stockholders of the corporation induced appellant to undertake the control of the corporate business to the extent of financing it and placing it on a profitable basis. For these services he was to be paid $150 per month, with certain other advantages to accrue to him if the enterprise was successful. There was nothing in the nature of this transaction which fixed upon him the capacity of trustee. He was simply the superintendent or business manager of the corporation, a position which the corporation and himself were pleased to designate as that of "trustee." There was in fact no trust to which the appellation could be applied. No property had been placed in his hands in trust for any purpose, and the Dillonwood Company continued to transact business in its own name until June 19th, when appellant, under the trust agreement of that date in question here, became trustee. Until June 19th he was not a trustee, either in fact or law, and the advances made by him to the corporation prior to that date, aggregating $4,200, were made while acting as agent or manager of the corporation, and for the futherance of its business.

Neither is there any merit in his claim that he was entitled to such preference under the trust agreement or the principal creditors' agreement. The trust agreement does not itself provide for any preference in his favor, except that there is given to the principal creditors mentioned in it the right to determine the order in which the principal debts shall be paid. The principal creditors so mentioned, including appellant, agreed upon an order which gave preference to appellant; but it was only an agreement as to the order in which their debts should be paid. Their action in this respect could not affect the laborers or persons furnishing supplies, or other creditors not participating in the transaction nor acquiescing in the agreement of the principal creditors. These latter had no authority to bind any one save themselves. It is not pretended that the laborers or supply men who were given preference by the court over appellant ever consented to or acquiesced in the trust agreement or this agreement of the principal creditors, or that they had any knowledge of their existence till their claims for labor and supplies had accrued and the mill closed down about August 29, 1901, at which date the corporation practically ceased doing business. They did not even have constructive notice of the trust agreement, as that was not recorded until September 3, 1901, several days after the mill closed down. Appellant's right to preference is to be measured by the terms of his agreement with the other principal creditors, and we cannot perceive how, under the law and the terms of the trust agreement itself, he was entitled to any preference for the payment of the $4,200 over the laborers and supply men. The law fixed the right of some of the plaintiffs to a preference as laborers, and the trust agreement fixed the rights of the other plaintiffs, who performed labor or furnished supplies to the appellant as trustee while conducting the business under the trust. It is quite clear that the Dillonwood Lumber Company, at the time of the assignment of its property to De Laney as trustee, was unable to pay its debts, and that the assignment to him as trustee was for the purpose of providing for their payment. This is apparent from the terms of the trust agreement itself, which, aside from investing the trustee with powers for that express purpose, and as evidencing in its general terms that that was the main and controlling purpose of the assignment, declares that, when the debts shall have been paid, the trustee shall reconvey the property to the corporation. And, if it were necessary to consider it as adding anything to what appears to be the express purpose of the trust agreement in that regard, the court found that the assignment was made with that particular object in view. It is provided by section 1204 of the Code of Civil Procedure that "in all assignments of property made by any person to trustees or assignees, or on account of the inability of the person at the time of the assignment to pay his debts * * * the wages of * * * laborers employed by such person or any other person who * * * performs work to the amount of one hundred dollars each, and for services rendered within sixty days previously, are preferred claims and must be paid by such trustees or assignees before any other creditor or creditors of the assignor." As the assignment of its property by the corporation to De Laney as trustee was for the purpose of providing for the payment of its debts, the court properly applied the provisions of this section in enforcing the claims of the creditors under the trust, so as to give preference, in an amount not exceeding $100, to the laborers who had performed labor for the corporation within 60 days prior to the assignment to appellant as trustee.

It is insisted that this provision only applies to insolvency proceedings, or to assignments for the benefit of creditors which are made as provided for in section 3449 et seq. of the Civil Code. No such limitation is placed on its application by the language of section 1204 itself. If it had been intended to apply only to particular classes of assignment, the Legislture would have so limited it in terms. But it did not. It is made applicable to "all assignments." It could apply to assignments other than such as follow proceedings in insolvency, or which are made for the benefit of creditors, as provided in section 3449, Civ. Code—for instance, to such assignments as the one we are now considering—and we see no reason for placing a limitation upon the general language of the section which would exclude the latter class.

As to the next preference made by the court in favor of persons performing labor for or furnishing supplies to the trustee under the trust. It is not questioned but that they were necessary running expenses of the business, entailed while it was being managed under the trust agreement, and, this being so, it only needs further to be said that their payment preferable to the claims of general creditors, including that of appellant, is expressly provided for by the trust agreement itself.

It is next insisted by appellant that the court should have allowed him as a preference his claim for salary for the period between February 28, 1901, and June 19, 1901, during which period he claims he was acting as trustee. But, as we have seen, appellant was not trustee during that period. This salary for which he claims he should have had a preference was the compensation agreed on between the corporation and himself to be paid monthly for his services as manager of the business. The court allowed his claim for it, and gave him judgment therefor, but without preference. This was proper. He was only a general creditor as to this claim.

He insists, also, that the court should have allowed him $150 as his salary under the trust agreement from June 19, 1901, till the rendition of the decree in the lower court. The court did allow him as a preferred claim compensation at the rate fixed in the trust agreement from June 19, 1901, till October 1, 1901. The mill closed down in the latter part of August, 1901, and the allowances made included salary for more than a month after that time. It does not appear from the record when this action was commenced; but it is asserted in respondents' brief to have been commenced October 8, 1901, and this date is not questioned in the reply briefs of any of the appellants. The trust agreement provided for the payment of $150 per month to conduct the business. The business as a going concern had ceased in August, and after October 1, 1901, the record does not show anything to have been done by appellant which would warrant us in saying that the allowance as rendered was not all he was entitled to.

Another point urged by appellant is that the court failed to allow him at all certain amounts which he claims it was conceded by all parties he was entitled to. Aside from the amounts which the court allowed appellant as preferred claims and the nature of which is clear from the record, the court allowed him, jointly with other creditors, subsequent preferences in two amounts, $727 and $294, and a general judgment for an additional $6,637.45. It is not clear what the items composing these several amounts consisted of. It was stipulated upon the trial that defendant had paid out, for hay bought of J. T. McCutcheon for use in the business subsequent to June 19, 1901, the sum of $196, and that he had paid judgments for labor performed in the business subsequent to the same date amounting to $368.75. He was entitled to allowance for these amounts, and contends that he did not receive them. We cannot say, however, from the record, that they were not allowed him. They may have been allowed, and proper preference not given; but even this latter point cannot be determined from the record. The entire matter is one which the record does not clearly present, or the suggestions of counsel upon either side satisfactorily enlighten us about. Of course, appellant should have all that it was conceded he was entitled to; but the presumption is that the court allowed it to him, and, if he did not obtain it, it was incumbent on him to present on this appeal a record which would show that such allowance was in fact not made. We cannot say that these items which he insists he was not allowed were not embraced in the amounts for which allowance was made. If that were not so, it was the business of appellant to show that fact from the record, and this he has not done.

These are the only matters relative to De Laney's appeal which, we think, call for discussion. He asserts that other alleged errors were committed by the court in determining the amounts which he was entitled to be allowed in his capacity as trustee, but we think that the conclusion the court reached disallowing them was correct.

As to the appeal of George M. Perine:

This appellant makes a preliminary attack upon the pleadings, questioning the right of the plaintiffs to maintain this action and the sufficiency of the complaint as stating a cause of action. He is the only appellant in the case who does this. No demurrer to the complaint was filed or objection raised on the trial to the admission of evidence under it by any of the parties. These objections are now for the first time urged. We will not discuss their merits, because we think that, as far as any attack on the pleadings is concerned, all parties are precluded from doing so by their stipulation, under which they authorized the court to make a sale of the property of the corporation and provided for the disposition to be made of the proceeds. It is found by the court that all the parties to the action had, pending the trial of the case, stipulated that the court might order all the property mentioned in the trust agreement and involved in the action to be sold; that the court had made such order, and now had the proceeds from the sale under its control; that it had been further "stipulated and agreed between all the parties to this action that there should first be paid out of said amount the sum of $2,313.53 to N. P. Dillon, * * * and that the remainder of said amount remaining in the hands of the clerk be distributed among the parties entitled thereto." We think that under this stipulation appellant cannot now be heard to urge the objections he presents. Such a stipulation, conferring power upon the court to sell the trust property, directing the payment of a fixed sum to a designated creditor, and providing for the distribution of the remainder among the parties to the action entitled thereto, could only be entered into on the theory that the parties signing it were properly in court under pleadings sufficient to authorize the court to determine their respective claims. This is obviously the theory upon which the stipulation was signed, and the effect of it upon appellant is that by entering into it he then waived the objections which he now endeavors to interpose on appeal.

As to the other points made by this appellant:

At the time of the execution of the trust agreement of June 19, 1901, the Dillonwood Lumber Company was, and for some time prior thereto had been, indebted to appellant for money loaned it in the sum of $3,000. This was the amount referred to in the principal creditors' agreement, to which we have heretofore referred as executed subsequent to the trust agreement, and in the creditors' agreement it is provided that appellant be given a preference, together with De Laney, before the other principal creditors as to the payment of their debts. Subsequent to the execution of these agreements De Laney, as trustee, applied to appellant for a loan of $3,000. Appellant agreed to advance this amount, provided De Laney, as trustee, should execute a chattel mortgage upon the property of the corporation, which he had in trust, to secure the payment of the $3,000 mentioned in the principal creditors' agreement, which the corporation then owed him, together with the $3,000 to be advanced. De Laney agreed to do this, and on August 14, 1901, appellant advanced the additional $3,000. Through some delay the promised chattel mortgage was not executed until August 29, 1901, nor recorded until September 3, 1901. Subsequently De Laney paid off a portion of this latter advance, leaving due thereon $2,059.99. The court found as to this latter amount that under the trust agreement De Laney was authorized to execute the chattel mortgage to secure its payment, and that, the property mortgaged having been sold under order of court, appellant was entitled to a preferential payment of that amount subsequent to the payment of the labor claims and claims for supplies heretofore referred to in considering De Laney's appeal. As far as the mortgage purported to secure the payment of the $3,000 indebtedness existing on July 19, 1901, when the trustee agreement was executed, and which is referred to in the principal creditors' agreement, the court held that De Laney had no power or authority under the trust agreement to execute it, that it was void to that extent, and that he was not entitled to preference to such amount by reason of it.

It is insisted by appellant that the trust agreement of June 19, 1901, fully empowered De Laney, as trustee, to mortgage the property of the company, not only for the sum advanced August 14, 1901, but also for the principal indebtedness existing when the trust agreement was executed, and that appellant was a preferred creditor under the mortgage for the full amount, and that none of the plaintiffs—laborers or supply men—were entitled to preference over him. In this regard he claims that the trust agreement created two separate and distinct trusts, and divided the assets of the corporation into two separate and distinct classes; that the first trust embraced the proceeds of the business—the manufacture and sale of lumber—as carried on by its trustee, and from these alone the claims for labor and necessary supplies could be paid; that the second trust embraced the property constituting the plant of the company necessary to carry on the milling business, and was by the terms of the trust agreement appropriated to the payment of the indebtedness of the company then shown on its books; that as the mortgage to appellant was on the plant of the corporation, which was not charged with a trust in favor of the laborers and supply men, the proceeds of its sale under order of the court should have been devoted to paying all the indebtedness of appellant which it secured; and that no portion of it should have been applied, in preference to his claim, to the payments of the claims of laborers and supply men, which, under the first provision of the trust agreement, he contends, could only be paid from the proceeds of the business itself. This point, while equally available under a similar construction of the trust agreement to the appellant De Laney as to his claim to preferred payment to the extent of $4,200, was not specially made by him. We mention this, not as affecting the merits of the claim as now urged by this appellant, Perine, but as a reason why no discussion of it is made in disposing of De Laney's appeal. We do not, however, think that the trust agreement bears this construction. It does not speak of the business of manufacturing and selling lumber, or of any proceeds thereof to be devoted solely or at all to payment of expenses. It speaks of the sawmill and lumber business of the corporation. This embraced all that pertained to such business —timber lands, plant, and everything else used in connection with it—and in the assignment of its property to the trustee the property is referred to as all the property "used by it in its sawmill and lumber business." It was the general business in which the company was engaged which was conveyed to the trustee, with power to conduct and carry it on, and it was "from said business" that the running expenses and other necessary expenses were to be first paid. These would ordinarily be paid from the usual product of such business—manufacturing lumber; but there is nothing in the trust agreement which confines their payment to proceeds derived from such a source. It is obvious that the corporation transferred all its property, which comprehensively constituted a sawmill and lumber business, to the trustee to pay the general creditors of the corporation. This the trustee could do, if possible, from the actual manufacturing and sale of lumber, or by a sale of the "real estate or * * * the personal property constituting the plant necessary to carry on and conduct said sawmill and lumber business" with the consent of the corporation, or he could mortgage all said property without such consent to carry on and conduct the business, or to pay the indebtedness to the general creditors. These powers conferred had reference to the business of the corporation generally as including all the property used in connection with it in the manufacture and sale of lumber, and not to the actual manufacture and sale itself, and it was the running expenses and other necessary expenses entailed in the general conduct of such sawmill and lumber business which the trust agreement provided should be paid first; and no particular fund or source of payment was designated for that purpose in the trust agreement. Appellant's contention that separate and distinct trusts were created is based principally upon the use of the word "business" in the clause referring to preferential payment of expenses and the use of the word "property" in the clause referring to payment of the general creditors. We think, however, that no importance is to be attached to the use of these terms. Taking the general context of the trust agreement into consideration, it is evident that the words are used as of interchangeable meaning. As to the mortgage itself, as far as it undertook to secure the payment of the indebtedness of $3,000 existing at the time the trust agreement was executed, little need be said. The authority of the trustee to make it must be found in the trust agreement itself, and no such power is conferred by that instrument. Authority is given to mortgage for the purpose of conducting the business and to pay indebtedness then existing. He had no power to mortgage to secure such indebtedness, and this was the only purpose of the mortgage. The trust agreement did not provide for securing by mortgage one creditor in preference to another, and the effect of the execution of the mortgage in favor of this appellant, particularly complained of by the respondents—labor and supply men—is that it undertook, against the express terms of the trust agreement, to give appellant a preference over them. The trust agreement itself provided for all the preference that should be given. No authority was conferred on the trustee to create a preference in favor of appellant by executing a mortgage securing this indebtedness, and the attempt to do so was to that extent void, and the mortgage created no lien for this sum in appellant's favor.

This disposes of what we deem to be the principal points made by this appellant. Additional grounds are urged for a reversal. Some of these are disposed of in considering the appeal of De Laney. Certain of the plaintiffs were stockholders of the Dillonwood Lumber Company, and were given a preference as laborers over the mortgage of appellant, and he complains that he was not given preference over them. The pleadings, however, did not warrant this preference in his favor. If he desired any relief against these stockholders, he should have asserted it by cross-complaint, under which the liability of these stockholders and appellant's rights against them could have been determined. This he did not do. The other points urged by appellant have, in our opinion, no merit.

As to the appeal of the Holt Manufacturing Company:

This appellant is one of the plaintiffs, and alleged in the complaint that the Dillonwood Lumber Company and De Laney, as trustee, became indebted to it for certain merchandise sold and delivered to them at their request (for which judgment was ultimately given by the lower court), "and the further sum of $1,100 for the use of a traction engine used by said Dillonwood Lumber Company and said A. J. De Laney as trustee." The court found that neither of the defendants entered into any agreement to pay appellant $1 per 1,000 feet of lumber hauled, or any other sum, for the use of a traction engine. It is insisted that this finding does not respond to the issue, as it is not a finding that the defendants did not use the engine in their business, or that appellant was not entitled to compensation for its use. An examination of the bill of exceptions accompanying this appeal shows that the case of this appellant was tried on the theory that the complaint alleged a contract between the parties for the payment by defendants of $1 per 1,000 feet for all lumber hauled by said engine. There was no allegation in the complaint of any indebtedness based upon the reasonable use of the engine, or any attempt made to prove it. The issue assumed to have been made under the pleadings and actually tried was that a contract, as we have stated it above, was made by the parties. As this was the issue actually tried, the finding of the court was responsive to it. The further point is made that the finding is contrary to the evidence. We have examined the evidence, and, in our judgment, it fully sustains the finding.

We discover no reason for disturbing the judgment or the orders appealed from, and they are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

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147 Cal. 715

VESTAL v. YOUNG et al. (Sac. 1,134.)

(Supreme Court of California. Sept. 16, 1905.)

1. Waters and Water Courses—Public Lands—Irrigation Ditches.

Where defendants had acquired a right of way for an irrigation ditch across certain land, when it was unoccupied public land of the United States, as authorized by Rev. St. U. S. §§ 2339, 2340 [U. S. Comp. St. 1901, p. 1437], they had no right by reason of such easement, after plaintiff acquired title to the land, without his consent to construct an additional ditch on a different line varying from 1 to 20 feet distant from the line of the old ditch.

2. Same—Injunction—Findings.

Where, in an action to restrain the construction of an additional drainage ditch across plaintiff's land, the court found that defendants, by virtue of their easement to maintain the original ditch, were not entitled to maintain the second ditch, located at some distance from the original and on a different line, such findings sufficiently disclosed the particulars in which plaintiff would be obstructed in his rights to the free use and possession of his land or injured in his property by the maintenance of such additional ditch.

3. Same—Right to Injunction.

An injunction will be granted to prohibit the continuance of action that obstructs a landowner in the free use and enjoyment of his land, irrespective of other damage, where such action, if continued, will ripen into an easement.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 101, 102; vol. 48, Cent. Dig. Water and Water Courses, §§ 260, 261.]

4. Same—Pleading—Variance.

Where, in a suit to restrain the maintenance of an additional irrigation ditch, the only allegation in the complaint with reference thereto was that in the early part of the year 1900 defendants made and constructed the ditch complained of, the finding that about six rods of such new ditch was constructed in 1896 was not objectionable, as without the issues; the variance being immaterial, within Code Civ. Proc. § 470, declaring that, where the variance is not material, the court may direct the fact to be found according to the evidence, etc.

5. Trial—Findings of Court—Failure to Make.

It was not error for the court to fail to find on certain issues tendered by defendant's answers, where, so far as the allegations were material, they were covered by the findings made.

6. Pleading—Amendment—Time for Application—Statutes.

Under Code Civ. Proc. § 1054, providing that, when an act to be done as provided in the Code relates to the pleadings in the action, the time allowed by the Code may be extended on good cause shown, but such extension shall not exceed 30 days without the consent of the adverse party, applies only to cases where time is allowed by some provision of the Code, and does not apply to an application for an extension of time to amend a complaint.

7. Same—Extension of Time.

Where time was given to amend a complaint, the court had jurisdiction before the expiration of the time so given to grant successive orders extending the time.

Department 1. Appeal from Superior Court, Lassen County; F. A. Kelley, Judge.

Action by W. A. Vestal against Charles Young and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

W. M. Boardman, Boardman & Boyd, and T. B. Dozier, for appellants. N. J. Barry, for respondent.

ANGELLOTTI, J. This is an appeal by defendants from a judgment enjoining them from using or maintaining a certain ditch constructed by them upon and across certain land of plaintiff in Lassen county, from carrying or conducting water across said land by means of said ditch, and from entering upon said land for the purpose of repairing said ditch, and also awarding plaintiff $5 damages and his costs. The facts of the case, as shown by the findings of the court, are very simple. Plaintiff acquired his land by patent from the United States on April 18, 1883, and has ever since owned and possessed the same. While this land was still unoccupied land of the government, viz., about the year 1865, the defendants or their grantors constructed across this land a flume ranging from 2 to 3 feet in width and about 16 inches in depth, and diverted water from Pitt river into said flume, and by means thereof conducted the water across this land to their own adjoining lands, where they used it for a beneficial purpose. This use of the flume by defendants was continous from the year 1865 to the year 1896, and there is no question in the case as to the right of defendants to continue such use and exercise and enjoy all the incidents thereof. In the year 1896 defendants, without plaintiff's consent, constructed on plaintiff's land about 6 rods of ditch on a line different from, and from 1 to 20 feet distant from, the flume line. In the year 1900 defendants, without plaintiff's consent, extended the 6 rods of ditch to a ditch 4 feet in width and 3 feet in depth, extending across the northern portion of plaintiff's land for about one-fourth of a mile on a line distant from 1 to 20 feet from the flume line, but extending in the same general direction. Ever since then defendants have carried their water across plaintiff's land by means of said ditch, and threaten to continue so to do, and have discontinued the use of their flume, with the exception of about 5 rods at the intake of the water from the river. The trial court found that "by reason of such acts and threatened acts of defendants the plaintiff is and will be obstructed in his rights to the free use and possession of his said lands, to which he is entitled as the owner in fee simple thereof, and that such acts of defendants will, if continued, ripen into an easement." This action was commenced September 26, 1900.

1. There can be no doubt that the facts detailed above, shown by the findings, fully sustain the judgment as to the injunction. The right of defendants in regard to plaintiff's land, whatever its source, was simply to continue the use thereof they were enjoying at the time he acquired the land. They were then maintaining a flume across the same for the purpose of carrying the water, which, it may be assumed, they had lawfully appropriated, and for which they consequently had a right of way over the land, under the provisions of the act of Congress of July 26, 1866. 14 Stat. 253, c. 262; Rev. St. U. S. §§ 2339, 2340 [U. S. Comp. St. 1901, p. 1437]. This right of way had at the time plaintiff acquired his land been definitely fixed and located along a certain line, and the method of use thereof, viz., a flume, apparently finally adopted. For many years after the acquirement by plaintiff of his land, the use along this line and in this manner was continued and acquiesced in by all the parties.

We need not here discuss the question as to whether defendants might lawfully have constructed a ditch of the same size as their flume along their flume line. See, however, Allen v. San Jose Land & Water Co., 92 Cal. 138, 28 Pac. 215, 15 L. R. A. 93; Barrows v. Fox, 98 Cal. 63, 66, 32 Pac. 811. They constructed this ditch upon another line, and for this purpose they appropriated to their use different land of plaintiff. The precise location of the right of way had been as definitely and finally fixed by the acts of the defendants as it would have been had the metes and bounds been set forth in an instrument of grant. See 14 Cyc. pp. 1161, 1205. Defendants had acquired the right to that precise location and no other. The remainder of plaintiff's land was his, free from any right of defendants. We know of no principle of law that would warrant defendants in subjecting, without his consent, another and different portion of his land to their use, even although they abandoned their former location. It is elementary that the location of an easement of this character cannot be changed by either party without the other's consent after it has once been finally established, whether by the express terms of a grant or by acts of the parties tantamount in their effect. See Jagui v. Johnson, 27 N. J. Eq. 526, 552. The granting of a right over one portion of a person's land gives the grantee no right over any other portion. Where such a grantee attempts to exercise his right over some other portion by subjecting such portion to his use without the consent of the owner, he deprives the owner of the free use and possession thereof, and his acts, if continued the requisite time, will ripen into an easement, and the owner will be permanently deprived of his property. That such a result injuriously affects the rights of the owner cannot well be questioned. As was said in Burris v. People's Ditch Co., 104 Cal. 248, 37 Pac. 922: "It is well settled that the owner of an easement cannot change its character, or materially increase the burden upon the servient estate, or injuriously affect the rights of other persons." It is entirely immaterial in this connection that the new line was only from 1 to 20 feet distant from the old line. It was upon property of plaintiff, over which defendants had no right whatever; and the principle is the same as if the new line had been hundreds of feet away from the old one.

It is suggested that the trial court did not find in what particulars the plaintiff will be obstructed in his rights to the free use and possession of his land, or injured in his property, by the maintenance of the ditch. The facts found and detailed above sufficiently show this. By the maintenance and use of the ditch plaintiff is deprived of the free use and possession of his real property without right, and will be permanently deprived thereof, if such maintenance and use are continued. This alone is sufficient to entitle plaintiff to the relief by injunction granted. It is the settled law of this state that, irrespective of other damage, an injunction will be granted to prohibit the continuance of action that obstructs one in the free use and enjoyment of his land, where such action, if continued, will ripen into an easement. See Ewing v. Mott, 90 Cal. 231, 237, 27 Pac. 194; Walker v. Emerson, 89 Cal. 456, 458, 26 Pac. 968; Moore v. Clear Lake W. W., 68 Cal. 146, 150, 8 Pac. 816; Conkling v. Pac. Imp. Co., 87 Cal. 296, 305, 25 Pac. 399; Henne v. Lankershim (Cal.) 79 Pac. 591.

2. It is contended that the findings are without the issues, in so far as it is found that a portion of this ditch, viz., about 6 rods, was constructed in the year 1896; the only suggestion of the complaint in this regard being that "in the early part of the year 1900 * * * defendants * * * made and constructed" the ditch complained of. The variance as to the small portion of ditch constructed in 1896 was immaterial, and the court properly found according to the evidence. Code Civ. Proc. § 470.

3. Complaint is made that the court failed to find upon certain issues tendered by defendants' answers. In so far as the allegations are material here, they appear to be covered by the findings heretofore stated.

4. What has already been said disposes of the contention that the demurrers to the amended complaint should have been sustained. The allegations of such complaint as to the invasion of plaintiff's rights and the effect thereof were substantially the same as the findings of the court in regard thereto.

5. It is contended that two motions to dismiss the action, made by defendants prior to the filing of their answer, should have been granted. The first motion was made prior to the filing of the amended complaint, and the second thereafter. Both motions were made upon substantially similar grounds, and were based upon the same facts. The original complaint was filed September 26, 1900. A demurrer thereto was served and filed November 9, 1900. On December 21, 1900, according to the original minute entry: "Counsel for plaintiff confesses demurrer, and asks that he be given 30 days' time in which to amend complaint. Counsel for defendants consents to said request. Whereupon the court orders that counsel for plaintiff be, and he is hereby, given 30 days in which to amend complaint in said action." Within the life of this order the judge made another order granting plaintiff 30 days' further time within which to serve and file his amended complaint. Within that time, to wit, on February 20, 1901, the judge made another order granting an additional 30 days. The amended complaint was filed on March 21, 1901. The first motion was made March 9, 1901, the ground thereof being that under section 1054, Code Civ. Proc., the judge had no authority to extend the time in which to file an amended complaint beyond 30 days; that his second and third orders were consequently void; that defendant, having failed to amend within the first 30 days, was in default; and that the action must therefore be dismissed. The second motion was on the further stated ground that plaintiff had failed to prosecute his action. There was some dispute as to whether the minutes correctly stated the proceedings, and the court ordered the same corrected, so as to leave out the statement that plaintiff confessed the demurrer, and to show simply that plaintiff had asked leave to file an amended complaint within 30 days, which request was granted.

We deem it entirely immaterial whether the original minute entry was or was not correct in this respect. We know of no statutory provision limiting the power of the trial court as to the time that may be given to a plaintiff to serve and file an amended complaint. Section 1054, Code Civ. Proc., relied upon by defendants, has no application. That section is limited by its terms to cases where time is allowed by some provision of that Code for the doing of some act, and was designed to enable the court or judge to grant additional time to that allowed by the Code, upon good cause shown. In granting the power to so extend the time allowed by the Code, it was thought proper to limit it to 30 days. But the time within which one may file an amended complaint, when permitted by the court so to do, is not specified by any provision of law, and is a matter resting entirely within the discretion of the court. Where there is any abuse of this discretion, probably a remedy would be found on appeal; but, in the absence of a statutory provision forbidding it, we cannot hold that a court is without power to grant more than 30 days for the filing of an amended complaint. The second and third orders extending the time were not, therefore, void. Nor can we see that there was any prejudicial error in the granting of such orders. The motion for dismissal on the ground of want of prosecution was addressed to the discretion of the court, and there was no error in denying the same.

These are the only points requiring notice on this appeal. The judgment is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

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147 Cal. 721

VESTAL v. YOUNG et al. (Sac. 1,162.)

(Supreme Court of California. Sept. 16, 1905.)

1. Appeal — Order Denying New Trial — Scope of Review.

Alleged error in the denial of a motion to dismiss the action before trial, in the overruling of a demurrer to the amended complaint, that the findings of the court were without the issues, and that the findings did not support the judgment, was available only on appeal from the judgment, and could not be considered on an appeal from an order denying a new trial.

2. Waters and Water Courses—Easements —Irrigation Ditch—Change of Location —Injunction.

Where, after defendants had acquired an easement over plaintiff's land for an irrigation ditch, they commenced the construction of another ditch some distance from the original one, it was immaterial to plaintiff's right to restrain such acts that the land taken from such additional ditch had no appreciable value.

3. SAME—PUPLIC LANDS—ACQUISITION SUBJECT TO EASEMENT—RIGHTS OF PURCHASER.

That defendants acquired a right of way over public unoccupied land for an irrigation ditch did not entitle them, as against one acquiring the land from the government subject to their easement, to change the location of such ditch on the land; the purchaser from the government having taken the land subject only to the right of way as it existed at the time of his purchase.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, §§ 20, 261.]

4. EVIDENCE—SIMILAR FACTS.

In a suit to restrain defendants from changing the location of an irrigation ditch over plaintiff's land, which defendants had an easement to maintain, evidence in respect to the construction of defendant's ditch on the land of another was immaterial.

Department 1. Appeal from Superior Court, Lassen County; F. A. Kelly, Judge.

Action by W. A. Vestal against Chas. Young and others. From an order denying defendants' motion for a new trial, they appeal. Affirmed.

W. M. Boardman and T. B. Dozier, for appellants. N. J. Barry, for respondent.

ANGELLOTTI, J. This is an appeal by defendants from an order denying their motion for a new trial in the same action in which the judgment has been this day affirmed. Vestal v. Young et al. (Sac. 1,134) 82 Pac. 381. Several of the points made upon this appeal, viz.: (1) The motion to dismiss the action made before the trial should have been granted; (2) the demurrer to the amended complaint should have been sustained; (3) the findings of the court are without the issues made by the pleadings; and (4) the findings do not support the judgment—were available only on the appeal from the judgment, and cannot be considered on the appeal from the order denying a new trial. They were, in fact, considered and disposed of on the appeal from the judgment.

1. It is contended that the evidence was insufficient to support certain findings of the court, but a careful consideration thereof discloses no particular wherein it was insufficient to support the findings substantially stated in the opinion on the appeal from the judgment; and, as there shown, the findings warranted the judgment. Much reliance appears to be placed upon the fact that it was not shown that there was any appreciable value to the land appropriated for the ditch. This is entirely immaterial. It was plaintiff's land, however poor it might be, and the fact that it apparently has no great present value will not justify one who has no legal right thereto in appropriating the same. Plaintiff has the right to use it for any purpose that he may see fit, and anything that deprives him of the free and unobstructed use thereof is an invasion of his rights, against which the law will protect him. Here an injunction against the maintenance of the ditch by defendants is the only adequate means of preventing the acquirement by prescription by defendants of an absolute right to the use of said land for their purposes. There was sufficient evidence to support the conclusion that the ditch was constructed upon an entirely different line from that occupied by the flume, and from 1 to 20 feet distant therefrom. It cannot be successfully contended that this was not a material difference. It subjected to defendants' use land of plaintiff that was not properly subject thereto. There can, of course, be nothing in the contention that, because defendants acquired their right of way over public unoccupied lands of the United States, they have the right, as against one acquiring the land from the government subject to their easement, to change the location thereof upon his land. He took his land subject only to the right of way as thus located. See McGuire v. Brown, 106 Cal. 660, 39 Pac. 1060.

2. Certain errors are alleged in regard to the admission of evidence over the objection of defendants. The evidence so admitted was of such a nature that, if it be assumed that the trial court erred in each ruling assigned, it still remains that the conclusion of the court upon the issues material to the judgment could not have been affected by the evidence. The court did not err in refusing to admit testimony on the part of defendants in respect to the construction of their ditch on the land of Bolar. What defendants had done on other land than that of plaintiff could not affect the determination of the issues between plaintiff and defendants.

3. What has already been said here and in the opinion on the appeal from the judgment disposes of all points made under the contention that the motion for a nonsuit should have been granted.

The order denying a new trial is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

(147 Cal. 725)

SMITH et al. v. GOETHE et al. (Sac. 1,376.)

(Supreme Court of California. Sept. 16, 1905.)

1. TRUSTS — RESULTING TRUSTS — PURCHASE BY LENDER WITH MONEY LENT.

Where an administrator, having mortgaged certain property jointly with his intestate to secure their joint debt, thereafter negotiated a loan on a mortgage of the same property and other property belonging to the estate for the purpose of paying his individual indebtedness and also that of the estate, the money so loaned became in equity the property of the borrower, and its subsequent use by the lender to purchase the joint mortgage was in legal effect a purchase of the mortgage for the borrower, so far as it affected the property of the estate.

2. ADMINISTRATORS—ALLOWANCE OF CLAIMS—RANK.

The administrator, under such circumstances, was entitled to use such mortgage for the purpose of fixing the rank of the mortgage debt as a claim against the estate, and to secure him against subsequent liens on the property of the estate, if any, and to hold it as a mortgage upon the property of the estate to the extent of the moneys advanced by him on behalf of the estate in making the purchase.

3. SAME—ADVANCEMENTS BY ADMINISTRATOR.

Where an administrator had no funds on hand, and was not chargeable with any funds of the estate whatever, no duty rested on him to advance money to the estate or to purchase claims against it and discharge them.

[Ed Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 1132.]

4. PRINCIPAL AND AGENT.

Where intestate was jointly liable with his administrator for a debt secured by their joint mortgage, which was thereafter purchased with the proceeds of a loan made to the administrator on property belonging to him and to the estate by the lender, the latter would be regarded as the agent of the administrator in his individual capacity in purchasing the mortgage, and as such could acquire no rights superior to those which would have accrued to him had he attempted to have made such purchase as against the estate, and hence the estate was not deprived of its right to redeem by a foreclosure of such mortgage by the purchaser.

5. TRUST—MORTGAGES—FORECLOSURE — JUDGMENTS—ESTOPPEL.

Where an involuntary trustee has acquired the apparent legal title to the property of the beneficiary under a mortgage foreclosure sale, such judgment and sale will not estop the beneficiary from establishing the trust.

6. ADMINISTRATORS—RENTS AND PROFITS—APPLICATION TO DEBTS.

Where an administrator acquired title to certain property belonging to the estate, subject to certain liens, it was his duty as administrator to apply the rents accruing from the property of the estate on its debts.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 1053.]

7. LIENS—ENFORCEMENT—REDEMPTION — INTERLOCUTORY JUDGMENT.

In a suit to redeem certain property from liens and for an accounting, it was not essential that an interlocutory decree should be rendered from which an appeal could be taken as provided by Code Civ. Proc. § 963, as such section only gives the right of appeal from such decree when one is made.

8. TRUSTS—ESTABLISHMENT—DECREE.

Where an administrator mortgaged separate parcels of real estate, some belonging to himself personally and others belonging to the estate, it was the duty of the court, in an action to establish a voluntary trust as to those parcels belonging to the estate and to compel a conveyance on payment of the liens which had been satisfied by defendant, to determine the amount necessary to redeem each separate parcel.

Department 1. Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Action by S. B. Smith, as administrator of the estate of Ann Thomas, deceased, and others, against H. J. Goethe and others. From a judgment in favor of the estate, and from an order denying defendants' motion for a new trial, they appeal. Reversed.

Rehearing denied October 16, 1905.

Devlin & Devlin, for appellants. A. L. Shinn and P. S. Driver (White & Miller, of counsel), for respondents.

SHAW, J. This is an appeal by the defendants from a judgment in favor of the estate of Ann Thomas and from an order denying their motion for a new trial. The present plaintiffs are the administrators representing the estates of Ann Thomas and Frank Thomas, respectively. The action was begun by Frank Thomas, in his own behalf and as administrator of the estate of Ann Thomas, then deceased. Frank Thomas died after the judgment appealed from was entered, and his successor and personal representative have been substituted as plaintiffs. Judgment was given in favor of the defendants against Frank Thomas, and in favor of the estate of Ann Thomas against the defendants. No appeal has been taken by Frank Thomas, or his representative, from the judgment against him, and the rights of the estate of Ann Thomas, as against the defendants, are alone concerned.

A general demurrer to the complaint was overruled, and the sufficiency of the facts stated to give a cause of action in favor of the estate of Ann Thomas is the first question presented for our consideration. The facts alleged are in substance as follows: Ann Thomas died on April 25, 1895, the owner of the south 45 feet of lot 8 of a certain block in Sacramento, which for convenience is designated as "parcel 5," and of the undivided one-half, as joint owner with Frank Thomas, of four other parcels in the same block, situated in lots 1 and 8, and for convenience designated as "parcels 1, 2, 3, and 4." Prior to her death she and Frank Thomas had jointly executed a deed of trust to certain parcels to secure a debt of $2,000 due to the Farmers' & Mechanics' Bank and a mortgage to one Cadwallader of $3,400. It is alleged that the deed and mortgage each included all of the five parcels of land. Frank Thomas and Maggie Thomas were the sole heirs at law of Ann Thomas. Soon after her death Frank Thomas was appointed administrator of her estate, and continued to act as such thereafter during all of the transactions involved in the case. He became personally indebted to other parties, and to secure his personal debts he thereafter executed mortgages upon his interest in all of the said five parcels of land, and included therein two other parcels owned by him in another block in the city; but, as his rights are not concerned, it is unnecessary to refer to these parcels further. On April 5, 1900, for the purpose of discharging part of the indebtedness of himself and the estate of Ann Thomas, Frank Thomas borrowed from Curtis, Carmichael & Brand, a corporation, the sum of $8,400, and as security therefor executed to Brand, as trustee for said corporation, a deed absolute in form to all his interest in the said seven parcels of land, and at the same time and as part of the same transaction executed a written contract with Carmichael, who was acting in behalf of and for said corporation, so far as his duty under the contract was concerned. This contract in legal effect provided that Carmichael should act as agent for Thomas to lease or rent all of the interest of Frank Thomas in all of said real property, collect the rents accruing thereon, insure the improvements, and apply said rents, first, to paying his commissions for making the loan, and as agent in collecting such rents; second, to pay the insurance premiums; third, to pay the interest or principal of the prior mortgages on the property aforesaid; fourth and fifth, to pay repairs and taxes and other paramount liens; sixth, to pay interest on the loan of $8,400; and that the contract of agency should continue until all indebtedness to the corporation was discharged. Thereupon Frank Thomas delivered to said Carmichael corporation the possession and control of all the above-mentioned real estate, including that of the estate of Ann Thomas, as well as his own, for the purpose of collecting the rents and applying the same to the payment and satisfaction of the said debts of the estate and of Frank Thomas; and thereafter that corporation and the H. J. Goethe Company, its successor, continued to control and manage all of said property, and to collect the rents thereof, under and in pursuance of the agreement aforesaid. The $8,400 loaned to Frank Thomas was apparently not delivered to him. It is alleged that it was used by the Carmichael corporation in the purchase of liens against the property aforesaid, including the mortgage to Cadwallader (alleged to cover parcels 1 to 5, inclusive), and that assignments of said liens were taken to Carmichael, as agent for his corporation, as security for the said sum of $8,400. The H. J. Goethe Company subsequently became the owner of other liens on the property, the amounts whereof were unknown to plaintiff. Carmichael, in his own name, sued to foreclose the Cadwallader mortgage, joining as defendants to the action Frank Thomas, individually and as administrator of the Ann Thomas estate, and the H. J. Goethe Company. On October 25, 1901, while the foreclosure suit was pending, the Carmichael corporation sold and transferred to the H. J. Goethe Company the mortgage to Cadwallader, the $8,400 mortgage of Frank Thomas, and all its other claims and demands against Frank Thomas, for $9,500, and agreed that the H. J. Goethe Company should thereafter be entitled to all rents due or collectible from the property covered by the mortgages. Judgment of foreclosure of the Cadwallader mortgage was obtained in the name of Carmichael for the corporation after this agreement and transfer to the H. J. Goethe Company, and the judgment was thereupon assigned to the H. J. Goethe Company in fulfillment of the agreement to transfer. From and after October 25, 1901, the H. J. Goethe Company collected the rents of said property and applied the same to its own use. That company had full notice of all the rights of the estate of Ann Thomas at the time it made the agreement with and purchase from the Carmichael corporation. On November 14, 1901, the trustees named in the trust deed aforesaid, in execution of the trust, sold parcels 3, 4, and 5 of the real estate, including the interest of Frank Thomas therein, as well as that of the estate, to the H. J. Goethe Company for $2,157.74; said company being at the time in the control and management thereof, pursuant to the transfer of October 25, 1901, made by the Carmichael corporation. On December 7, 1901, on foreclosure sale under the judgment foreclosing the Cadwallader mortgage, parcels 1 to 5, inclusive, of the real estate, were sold to the H. J. Goethe Company. It is then averred that "by virtue of" the mortgages and liens held by the H. J. Goethe Company, and of the "money advanced by said company in purchasing" parcels 3, 4, and 5 at the trustee's sale, the estate of Ann Thomas became indebted to said company in an amount to plaintiffs unknown, which was wholly unpaid; that plaintiffs had made due effort to settle with the said company and redeem the said property from the mortgages, liens, and obligations against it held by said company, but that said company claimed to own the said property in fee and denied the plaintiffs' right to redeem; and that plaintiffs are able and willing, and offer, to pay to said company all moneys due it upon such redemption. The prayer is for an accounting of the rents and profits received by the H. J. Goethe Company, for a determination of the amount owing by plaintiffs to that company, for a conveyance of the property by that company to the estate, upon payment of the amount due, and for general relief. We have stated the averments of the complaint according to their legal effect, and have treated a statement of an act by or transfer to an agent as if it were alleged to have been done or received by the principal.

The purpose of the action obviously is to charge the defendants as involuntary trustees of the estate of Ann Thomas, deceased, with respect to the interest of the estate in the real property, to ascertain the amounts for which as such trustees the defendants have a lien or charge upon such interest, and to obtain a reconveyance upon payment thereof. There are no allegations that there was any fraudulent intent or bad faith towards the plaintiffs on the part of either of the defendants, and the case must be considered as free from that element. The defendants are purchasers with notice, and consequently have only such rights against the estate as the Carmichael corporation would have had if there had been no transfer by it to the defendant corporation. The $8,400 which the Carmichael corporation loaned to Frank Thomas became in equity the property of Thomas as soon as it was thus loaned. Its subsequent use by the Carmichael corporation to purchase the Cadwallader mortgage was in legal effect a purchase of that mortgage for Thomas, so far as it affected the property of the estate. The corporation could, by such purchase, acquire no greater rights against the estate than Frank Thomas would have had if he had purchased the property directly with his own funds. The mortgage was made jointly by himself and the deceased to secure their joint debt. His own land was bound for the moiety of the debt owing by the estate, and he was also personally bound therefor as joint debtor. Hence, with respect to the half which the estate ought to pay as between the two joint debtors, he was in the position of a surety for the estate, with his land mortgaged for its benefit. In such case he would have the right to use the mortgage for the purpose of fixing the rank of the mortgage debt as a claim against the estate, and as a protection against subsequent liens by other parties upon the property of the estate, if there were any, and, generally, to hold it as a mortgage upon the property of the estate to the extent of the moneys advanced by him on behalf of the estate in making the purchase. In other words, he would be entitled to subrogation, as against the estate, to the rights of Cadwallader, the mortgagee. 11 Am. & Eng. Enc. of Law, p. 119. It is not claimed that he had on hand, or as administrator was chargeable with, any funds of the estate whatever. No duty rested on him, under such circumstances, to advance money to the estate, or to buy claims against it and discharge them. He could obtain no additional advantage for himself, as against the estate, by so doing, nor make the purchase operate to the disadvantage of the estate; but we perceive no reason why he should not be protected by allowing him the benefit of the debt and lien according to the status they had acquired prior to his purchase. But he would not be permitted, while acting as administrator, to bring an action against himself to foreclose a lien thus obtained, or cause it to be done in the name of an agent, and, after obtaining a decree of foreclosure and purchasing the property of the estate at the foreclosure sale, to thereafter hold such property as his own. He was a trustee of the property of the estate for the benefit of the creditors and heirs. A trustee "may not obtain any advantage over" the beneficiaries "by the slightest * * * adverse pressure of any kind." Civ. Code, § 2228. He "may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner." Civ. Code, § 2229. Neither he nor his agent can take part in any transaction concerning properties in which he has an interest, present or contingent, adverse to the beneficiary, except by consent of the beneficiary, or order of the proper court. Civ. Code, § 2230. The trustee cannot enforce any claim against the trust property which he purchased after his appointment as trustee. Civ. Code, § 2263. The rule concerning such transactions is thus stated in Pomeroy's Equity Jurisprudence, vol. 3 (3d Ed.) § 1077: "As long as the confidential relation lasts the trustee or other fiduciary owes an undivided duty to his beneficiary, and cannot place himself in any other position which would subject him to conflicting duties, or expose him to the temptation of acting contrary to the best interests of his original cestui que trust. This prohibition operates irrespectively of the good faith or bad faith of such dealing. It is therefore a gross violation of his duty for any trustee or director, acting in his fiduciary capacity, to enter into any contract with himself connected with the trust or its management. Such a contract is voidable, and may be defeated or set aside at the suit of the beneficiary. * * * If, however, the trustee's act, in violation of this rule, is not done in bad faith, and the beneficiary has received any benefit therefrom, it cannot be avoided without a restoration to the trustee of what has been thus received." Further, the same author says: "Courts of equity have carefully refrained from defining the particular instances of fiduciary relations in such a manner that other and perhaps new cases might be excluded. It is settled by an overwhelming weight of authority that the principle extends to every possible case in which a fiduciary relation exists as a fact, in which there is confidence reposed on one side, and resulting superiority and influence on the other." 2 Pom. Eq. Jur. (3d Ed.) § 956. The consequent application of these rules to the present case is that, if the administrator, Frank Thomas, had himself purchased the property of the estate at the foreclosure sale, whether decreed in a suit by the original mortgagee, Cadwallader, or in a suit as above set forth, he would not be allowed to claim title thereto adversely to the estate, but would stand charged in respect to the title as trustee of the estate, and would be compelled to reconvey it to the estate upon payment to him of the amount equitably due him from the estate on account of the joint debt. The Carmichael corporation, and Carmichael, its agent, in buying the mortgage with his money and foreclosing the same, must be regarded as the mere agents of Frank Thomas, and as such they could acquire no rights superior to those which would have accrued to him, had he attempted to do the same thing in person. Of course, he could not have sued himself as administrator; but, by procuring another to do it for him, the nature of the transaction and its effect in equity is not changed. The agent who acted in his stead stands charged as trustee precisely as he would have been if the original mortgagee had foreclosed, and he, while he was the administrator, had bought at the foreclosure sale. The H. J. Goethe Company, having notice of all the facts, is in no better position, so far as its rights under the mortgage foreclosure are concerned, and is bound to reconvey on payment of the amount justly due upon the portion of the debt owing by the estate to Frank Thomas. The case is in many respects similar to Raynor v. Mintzer, 67 Cal. 159, 7 Pac. 431. In that case the parties were chargeable as trustees because of their actual fraud, and in this case because of the legal relation of Frank Thomas to the estate; but the principle applies to all trustees alike, and in that case, as in this, the purchase was made by the intervention of a third person at the instance of the parties charged. We think the complaint states a good cause of action, so far as the transaction of the Cadwallader mortgage is concerned.

In view of what has been said, it is scarcely necessary to add that neither the statutory right to redeem from the foreclosure sale nor the effect of the judgment of foreclosure as an estoppel against the estate of Ann Thomas can operate to diminish or take away the right of that estate to charge the defendant company as trustee, for its benefit, of the apparent legal title by that means obtained. By the principles of equity, to which we have referred, it would be obliged to hold any legal title to the property of the estate obtained by the attempt to enforce payment of these debts as a title in trust for the benefit of the estate. The case of Raynor v. Mintzer, supra, is authority for this proposition. Where the trust relation exists, the party charged as trustee cannot by any circuitous method, without the consent of the cestui que trust, free himself from the obligations arising therefrom. The same principles of equity apply to the title of the H. J. Goethe Company, under the trustee's sale, of parcels 3, 4 and 5. It was at the time of that sale in possession of the interest of Ann Thomas in the property, having obtained such possession from the Carmichael corporation, with full notice of the rights of the estate and the trust obligations of that corporation concerning the same. It does not clearly appear whether the agreement under which possession of the interest of Ann Thomas in the property was delivered to the Carmichael corporation was written or parol, express or implied. It is in substance stated, however, that the rents thereof were to be collected by that corporation and applied in satisfaction of the debts of that estate and of Frank Thomas. It was the duty of Frank Thomas in his fiduciary capacity as administrator to apply the rents accruing from the property of the estate upon its debts. Perhaps this would require the application to be made upon the debts generally, rather than upon these particular debts; but the defendants cannot insist upon this, nor take advantage of any lack of authority in Thomas to make the particular application which he directed, and, besides, it does not appear that the estate owed any other debts. From these facts it is necessarily implied that the portion of the rents arising from the interest of the estate would be applicable solely to the payment of the mortgage to Cadwallader and the debt secured by the trust deed. The Carmichael corporation was, therefore, in possession of the property of the estate as trustee for the purpose of collecting the rents and applying the same, in part at least, upon the debt secured by the trust deed, and the H. J. Goethe Company, having notice of the trust relation at the time it acquired possession, would be bound by the same obligations, and would hold under the same trust. The transferee having notice of the facts, neither party to the transfer of possession could gain any additional rights adverse to the estate by means thereof. This constructive trust, imputed where confidential relations exist, does not depend upon the fairness or unfairness of the unauthorized disposition which the trustee attempts to make of the trust property, nor upon the existence of an intention to create a trust by the unauthorized transaction. Alaniz v. Casenave, 91 Cal. 41, 27 Pac. 521; Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788; 3 Pom. Eq. Jur., supra. Hence it is immaterial whether the sale was or was not for a fair price, or whether the transfer to the Carmichael corporation for the purpose of having the rents applied on the debts was beneficial to the estate or not. It is immaterial whether Frank Thomas had or had not authority, as administrator of the estate, to make such a disposition of its property. If he acted without authority, the party who gained the unlawful possession thereby will not be allowed to dispute the trust obligations arising from the transaction by implication of law. The Goethe Company, being in possession under this trust to pay the debt secured by the trust deed out of the rents received, was occupying a fiduciary relation to the estate, and by the principles above stated would be precluded from purchasing at the trustee's sale and claiming the title thus obtained free from the obligations of the trust. The fact that Frank Thomas, as heir of Ann Thomas, had inherited the title to one-half of her lands, subject to administration, is immaterial, so far as the trust here involved is concerned. His right as heir is subordinate to the rights of the estate. The most that the defendant corporation could ask by reason of their acquisition of such right would be to have a clause inserted in the decree to the effect that if, upon final settlement of the estate of Ann Thomas, there should remain for distribution any part of the interest of Frank Thomas, as such heir, in any part of this land or its proceeds, the said defendant would be entitled thereto. It follows that the facts stated also constitute a good cause of action to redeem the property of the estate from the sale under the trust deed, and that the demurrer was properly overruled.

It is claimed that the court should have made an interlocutory order declaring the right to redeem, and directing an accounting as to the amount necessary to be paid for that purpose. This claim is made upon the ground that since, by amendment to section 963 of the Code of Civil Procedure, such an interlocutory order, if made, would be appealable, the effect is to make it imperative upon the court in all actions to redeem to make the interlocutory order, so as to give the opportunity to appeal. Obviously the amendment was not so intended, and has no such effect. It recognizes the fact that, although such practice is not contemplated by the Code of Civil Procedure, yet by the practice in equity the court in its discretion may make such an order, and it merely gives the right of appeal therefrom in case the order is made. The court is not bound to follow this practice, and in many cases it should not do so. Generally it will be found fully as convenient and conducive to justice, and less expensive to all parties, to proceed with the trial of all the issues before making findings or rendering judgment upon any fact, and in such cases the proper course would be to proceed with the findings and judgment as in any ordinary action. But, in any event, it is a matter of discretion, and the amendment of the Code has not changed the rule.

The court made a general finding that all the allegations of the complaint were true, but made certain specific exceptions, which are important, because they show that the judgment given is not supported by the facts. According to these findings and the evidence, the trust deed embraced only parcels 3, 4, and 5, and the Cadwallader mortgage covered only parcels 1 and 2. These were the only liens upon the interest of the estate of Ann Thomas. It was further found that the amount necessary to be paid to the Goethe Company by the estate of Ann Thomas to redeem the entire property was the sum of $6,549.82, which sum included the amounts due on both of the liens aforesaid. Judgment was given to the effect that upon the payment of that sum the Goethe Company should reconvey to the Ann Thomas estate all of the five parcels, including the interest obtained by that company from Frank Thomas by his absolute deed, as well as that of Ann Thomas, deceased, as to which latter alone it is charged with the trust. This is manifestly wrong, both in the amount required to be paid and in the interests required to be conveyed. It was also improper to combine the two liens and require a payment of both to obtain a reconveyance of the property covered by either. The liens, so far as the estate of Ann Thomas is concerned, are and have been entirely separate and distinct, and are upon different parcels of land. The right of the estate to redeem from either, and the corresponding obligation of the defendant, are not dependent upon the payment of the other. The defendant corporation had acquired absolutely the interest of Frank Thomas in all the land in satisfaction of the debts due it from him, including other debts for which Ann Thomas never became liable; and that corporation was under no obligation to convey that interest to the estate of Ann Thomas, either upon payment of the debt or upon any other condition whatever. If that interest in any parcel had any value in excess of the one-half of the joint debt for which such parcel was bound, the Goethe Company was entitled to the benefit of it. (Of course, we do not here refer to the interest of Frank Thomas as heir of Ann Thomas.) After ascertaining that the interest of Frank Thomas and his part of the joint debts were thus disposed of absolutely, the court should have considered and settled the case with regard to the estate of Ann Thomas in the same manner as if the lien of the trust deed had covered only parcel 5 and her half interest in parcels 3 and 4, and had been for one-half of the amount due thereon at the time of the transfer of possession to the Carmichael corporation, and should have adjusted the account by applying the rents accruing from her interest upon the amount due upon the one-half of the original debt, which in equity, as between Ann Thomas and Frank Thomas, she should have paid, and should have pursued a similar course concerning the debt and land covered by the Cadwallader mortgage. The defendant corporation is entitled only to the rights which Frank Thomas would have had against the estate if he had attempted to acquire the title himself; that is, to hold the interest of the estate in the respective properties as security for the respective moieties of the debts due from the estate. The two accounts should have been stated separately. In the Cadwallader mortgage account the Goethe Company should have been credited with one-half of the amount actually paid for the mortgage by the Carmichael corporation out of the $8,400 loaned to Frank Thomas, with one-half of all reasonable expenses paid and incurred by that corporation and the defendants for repairs, taxes, insurance, and otherwise, upon parcels 1 and 2, and with accruing interest on the amounts paid, and it should have been charged with one-half of the rents received from said parcels by it and the Carmichael corporation from the time the latter took possession up to the time of trial. In the trust deed account the credits should consist of one-half of the amount paid at the trustee's sale, one-half of all reasonable expenses paid or incurred, for repairs, taxes, insurance, and otherwise, upon parcels 3 and 4 for the time above mentioned, and all such expenses for that period upon parcel 5, and accruing interest, and the charges should consist of one-half the rents from parcels 3 and 4 and all the rents from parcel 5 for the same period. The rents in each account should be applied first on expenses and then upon interest, the balances, if any, to go on the principal at the dates they may occur. When the respective amounts were thus ascertained, the judgment should have been to the effect that, upon payment of the amount found due from the estate upon the Cadwallader mortgage, the defendants should convey to the estate, or to the administrator or heirs for its use, the one-half undivided interest in parcels 1 and 2, and that, upon payment of the amount found due from the estate on account of the debt secured by the deed of trust, it should in like manner convey the one-half interest in parcels 3 and 4 and the whole of parcel 5. The findings furnish no details from which the respective amounts due from the estate on the respective liens can be determined, and a new trial will be necessary. We need not express any opinion concerning the sufficiency of the evidence to support the findings. In view of the material variances between the allegations and the proofs, as above pointed out, it will be necessary for the plaintiff representing the estate of Ann Thomas to amend his complaint, and leave to amend it generally should be given.

The judgment in favor of the plaintiff Frank Thomas, as administrator of the estate of Ann Thomas, deceased, against the defendants, and also the order denying the defendants' motion for a new trial as against said plaintiff, are reversed; but such reversal shall not affect the judgment against Frank Thomas personally.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

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1 Cal. App. 435

BAUM v. ROPER et al.

(Court of Appeal, First District, California. Aug. 17, 1905.)

1. EJECTMENT—WRIT OF POSSESSION—ISSUANCE BEFORE ENTRY OF JUDGMENT.

A writ of possession, issued after rendition of judgment in ejectment, though before entry thereof, may be executed.

2. LIS PENDENS—PURCHASERS PENDING SUIT.

One not a party to an ejectment suit, but who went into possession of the premises after the suit was brought, is subject to removal under the writ of possession issued under the judgment for plaintiff, he not having clearly shown that he did not obtain possession from one of the defendants, the tenant of the other defendant, or enter under the title of the other defendant, though by deed he had obtained, not only that title, but another, that of one not a party to the suit, which on its face was an inferior record title.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Ejectment by Clara Baum, administratrix, against Edward Roper and others. From an order refusing stay of execution of the writ of possession, J. W. Reay, Jr., not a party to the action, appeals. Affirmed.

T. M. Osmont, for appellant. W. B. Kollmyer and Naphtaly, Freidenrich & Ackerman, for respondent.

HALL, J. This is an appeal by J. W. Reay, Jr., from an order refusing to stay the execution of a writ of possession issued under a judgment in ejectment in favor of plaintiff and against defendants. Julius Baum brought an ejectment suit on the 14th day of April, 1892, against Edward Roper and wife, Kate Roper, and David J. Spence, to recover possession of a parcel of land situate at the southeast corner of Turk street and Van Ness avenue in the city and county of San Francisco, fronting 50 feet on Van Ness avenue and 109 feet on Turk street. Pending suit Julius Baum died, and Clara Baum, as administratrix of his estate, was substituted as plaintiff. Kate Roper also died, and her administrator was substituted. Findings of fact and conclusions of law were signed February 5, 1897, and filed the next day, in favor of plaintiff and against all the defendants. Judgment was entered and recorded in accordance therewith February 10, 1897; but, as is afterwards found by the court, the clerk, in entering said judgment, through misprision and inadvertence omitted the name of the defendant Spence therefrom. On the 4th day of April, 1901, a writ of possession was issued out of the court, and the sheriff was proceeding to execute the same, when J. W. Reay, Jr., on the 9th day of April, 1901, obtained an order on affidavits to show cause why the execution of said writ should not be stayed. The order to show cause was discharged, and the sheriff directed to execute the writ forthwith May 28, 1901. On May 29, 1901, the judgment was by order of the court amended nunc pro tunc as of the 10th day of February, 1897, so as to in terms run against David J. Spence.

Appellant, J. W. Reay, Jr., was not a party to the suit, but pending the same succeeded by mesne conveyances to the interest of Spence in the premises, and among other things now insists that he cannot be evicted as grantee of Spence, for the reason that, when the writ was issued and when the order to show cause was heard and determined, no judgment had been entered against Spence. Before considering the main contention of appellant, it is convenient to dispose of the contention just mentioned. While it is true that an appeal will not lie from a judgment until it has been entered (Spencer v. Troutt, 133 Cal. 605, 65 Pac. 1083), the judgment in other respects gets its force and vitality from its rendition, and not from its entry. The rendition of the judgment is the judicial act of the court; its entry is the ministerial act of the clerk. In Los Angeles County Bank v. Raynor, 61 Cal. 145, the court said: "But it is urged that the record shows that the judgment was not entered when the execution was issued, nor was it necessary that it should have been. The enforcement of a judgment does not depend upon its entry or docketing. These are merely ministerial acts, the first of which is required to be done for putting in motion the right of appeal from the judgment itself, and of limiting the time within which the right may be exercised (section 681, Code Civ. Proc.), or in which the judgment may be enforced (section 685, Code Civ. Proc.), and the other for the purpose of creating a lien by the judgment upon the real property of the debtor (section 671, Code Civ. Proc.). But neither is necessary for the issuance of an execution upon a judgment which had been duly rendered. Without docketing or entry execution may be issued on the judgment and land levied upon and sold (Hastings v. Cunningham, 39 Cal. 144); and the deed executed by the sheriff, in fulfillment of the sale, not only proves the sale, but also estops the defendant from controverting the title acquired by it." To the same effect are Janes v. Bullard, 107 Cal. 132, 40 Pac. 108; Freeman on Judgments, vol. 1, § 38; Estate of Wood, 137 Cal. 129, 60 Pac. 900; and In re Cook's Estate, 77 Cal. 232, 17 Pac. 923, 19 Pac. 431, 1 L. R. A. 567, 11 Am. St. Rep. 267. In Crim v. Kessing, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491, it was held that the making and filing of findings of fact and conclusions of law constitute the rendition of judgment. In this case findings of fact and conclusions of law were filed February 6, 1897, long before the issuance of the writ of possession. On the second appeal of this case (78 Pac. 466), taken shortly after the actual entry of judgment as to Spence, the court held that it could not consider the objection that the evidence did not support the decision of the trial court, inasmuch as the appeal had been taken more than four years after the rendition of the judgment. The judgment having been rendered, although not entered, as against Spence, before the issuance of the writ of possession, the writ could be executed either against Spence or his grantee.

The main contention of appellant, however, is that he cannot be dispossessed under the writ; for, although he entered into possession of the premises after suit brought, he entered as grantee of one A. W. Reay, who was not a party to the suit, and was in possession when the suit was brought, and so remained until his death in 1899. The discussion of this contention requires a somewhat fuller statement of the facts disclosed by the record before. In 1877 Julius Baum (the original plaintiff in this action) brought a suit in ejectment for the premises in controversy here against J. W. Reay (father of appellant), and in November, 1887, recovered judgment against J. W. Reay for the same, which judgment was on appeal affirmed prior to the beginning of the present suit. April 8, 1885, J. W. Reay conveyed to A. W. Reay a portion of the premises, having a frontage of 6 feet on Van Ness avenue by 109 feet on Turk street, with a width in the rear of 48 feet. Deed was recorded July 18, 1887. May 6, 1891, Edward Roper (one of the defendants in the present action) conveyed a one-half interest in the premises in question to A. W. Reay. This deed was not recorded. March 2, 1892, Edward Roper conveyed to David J. Spence the premises in question; deed recorded the next day. (The claim of title by Roper was from a different source from that of J. W. Reay.) April 4, 1892, Baum commenced this action against Roper, his wife, and Spence. March 6, 1893, Spence deeded the premises to A. W. Reay; deed not recorded. February 10, 1897, judgment was rendered for plaintiff against defendants in this suit, and subsequently, to wit, June 24, 1899, A. W. Reay deeded premises to J. W. Reay, Jr. (appellant). April 4, 1901, after affirmance of judgment on first appeal by defendants in Baum v. Roper et al., 64 Pac. 128, the writ of execution was issued. It will thus be seen that appellant, subsequent to the rendition of judgment in this suit, and pending an appeal therefrom, obtained through his deed from A. W. Reay, the J. W. Reay title (which had long before been finally determined to be invalid as against Baum) to about one-half the premises, the Roper title to an undivided one-half, and the Roper-Spence title to the entire premises.

Under what circumstances a person not a party to a suit in ejectment, who entered pending the suit, may be dispossessed under a writ issued on a judgment against the defendants, has been considered by the Supreme Court of this state in numerous cases. In Scheerer v. Goodwin, 125 Cal. 154, 57 Pac. 789, which was an action brought by the plaintiff to restrain the sheriff from dispossessing him under a writ on a judgment in a suit in ejectment to which he was not a party, the court said: "Under the judgment in the action of Goodwin v. Scheerer, supra, the sheriff was authorized to remove from the land the defendants in that action, and all persons found thereon whose possession was derived under the defendants, or either of them; and, in the absence of any showing to the contrary, it will be presumed that all persons coming into possession of the premises subsequent to the commencement of that action came in under the defendants therein. * * * Upon the issue of their right to remain in possession the burden is upon them to show affirmatively that their possession is rightful and under a title that has not been determined in the action, and that such possession was not taken by collusion with the defendants in the judgment"—citing Long v. Neville, 29 Cal. 131; Leese v. Clark, 29 Cal. 664; Wetherbee v. Dunn, 36 Cal. 147, 95 Am. Dec. 166. In Leese v. Clark, supra, the court, repeating language used in Long v. Neville, supra, said: "Prima facie all who come into possession after action brought must go out, for the presumption is, nothing to the contrary appearing, that they came in under the defendant." In the same case the court also said: "The fruits of a successful litigation cannot be wrested from the prevailing party, and the process of the courts evaded upon a mere claim set up under suspicious circumstances, resting upon affidavits alone, unless the case made by that kind of proof is reasonably satisfactory." To the same effect is Cal. Q. M. Co. v. Redington, 50 Cal. 160, where the court said: "It is incumbent upon a party seeking relief in a summary proceeding of this character to make out a clear case, free from ambiguity. A plaintiff in ejectment who recovers a judgment, perhaps after a protracted and expensive litigation, ought not to be deprived of the fruits of it, except in a case free from all reasonable doubt. The opportunity for collusion is so great, and the fraud is often so difficult of detection, that courts are reluctant to grant such relief on ex parte affidavits, except in cases clearly made out, and free from any reasonable suspicion of fraud or collusion." See, also, Sampson v. Ohleyer, 22 Cal. 201. So in this case, as appellant confessedly entered after suit brought, if it can be fairly deduced from the evidence in the record that he entered under or in collusion with either Spence or Roper, or, indeed, if he has not clearly and satisfactorily shown that he did not enter under or in collusion with either of them, the order of the trial court was right, and he must go out.

There is much evidence in the record that seems incompetent and immaterial, but certain salient points are quite clear. J. W. Reay, A. W. Reay, and Mrs. Kate Roper were brothers and sister, and J. W. Reay, Jr., is the son of J. W. Reay. It may be conceded that at the time of the bringing of this action A. W. Reay actually resided on and was in possession of the premises, and so continued till his death in 1899. It is equally certain that Edward Roper and wife also resided on the premises and were in possession thereof at the beginning of the suit, and Roper so continued until after the death of A. W. Reay. The evidence also shows that the Ropers at the commencement of the suit were in possession as tenants of Spence, who at that time had a claim of title to the entire premises previously derived from Roper, which on its face was a better record title than the one-half interest then held by A. W. Reay (also derived from Roper), for the reason that the Spence title was under a recorded deed, while the other was under an unrecorded deed. After the bringing of this suit both these titles, as well as the J. W. Reay title to a portion of the premises (which by final judgment had been determined to be worthless as against Baum) passed to appellant by deed from A. W. Reay. Appellant in his affidavit states "that shortly after the death of the said Alfred W. Reay this deponent repaired said premises, papered the rooms, and made other repairs thereto, and thereupon rented both of said houses to tenants, who immediately entered thereon, and they and their successors have ever since occupied and held said premises under this deponent and as tenants of his, and are now in the occupation thereof as such tenants." J. W. Reay, in his affidavit, states that "Edward Roper removed from said premises, and from said city and county of San Francisco, very shortly after the death of said Alfred W. Reay, and has not resided on said property, or in said city and county, since said date." From the foregoing two statements it is a very fair inference that the last person in the actual occupation of the premises before the entry of appellant was Edward Roper, defendant in this action and tenant of Spence, also defendant in this action. It is significant that appellant, in his affidavit, makes no mention of the vacating of the premises by Roper. From the foregoing circumstances it is a very fair deduction that appellant received the actual possession of said premises from defendant Roper (the then only actual occupant thereof), the tenant of defendant Spence, and that he entered under the title derived from Spence. At any rate, he has not clearly shown that he did not obtain possession from Roper or enter under the Spence title. Such being the case, under the authorities above quoted and the well-established law, he ought to go out under the writ.

The order appealed from is affirmed.

We concur: HARRISON, P. J.; COOPER, J.

1 Cal. App. 406

McKENZIE v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO et al.

(Court of Appeal, First District, California. Aug. 12, 1905.)

1. Certiorari—Office of Writ—Correction of Jurisdictional Errors.

The writ of certiorari will only be granted where an inferior tribunal or board exercising judicial functions has exceeded its jurisdiction, and there is no appeal, nor any plain, speedy, and adequate remedy. It is not a writ of error, and cannot be used to determine whether the inferior tribunal or board has regularly pursued its authority, nor to correct irregularities or mistakes of law in its proceeding, nor to determine whether or not the evidence was sufficient to support the order, resolution, or matter complained of.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Certiorari, §§ 1-4.]

2. Schools—Provisions of General Law—Conflict with City Charter—Effect.

General laws passed by the Legislature in regard to the common schools, and prescribing the duties of boards of education in counties and cities, are paramount, and control conflicting provisions of city charters; but such charters may contain additional provisions, or provide for matters not enumerated in the general law, so long as such provisions are not in conflict with the general law.

3. STATUTES—CONSTRUCTION.

The charter of a city and the general law should be construed together by the court, and made to harmonize, so as to give effect to each, if possible.

4. SCHOOLS—REMOVAL OF TEACHERS—POWERS OF BOARD.

Pol. Code, §§ 1791, 1793, authorizes boards of education to dismiss teachers for certain causes. The charter of the city and county of San Francisco authorizes the board of education, "in addition to the powers conferred by the general laws," to dismiss teachers for the same causes. It further provides that charges against teachers must be formally made by the superintendent, and shall be finally passed upon by the board, after giving the accused teacher due hearing, and authorizes the board to investigate charges against any person in the employ of the school department, and to take testimony in such investigations. *Held*, that the board of education may investigate charges against a teacher, although not preferred by the superintendent, and may hear evidence and remove the teacher pursuant to such charges.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Schools and School Districts, §§ 301, 302.]

5. SAME—SUPERINTENDENT OF SCHOOLS—NATURE OF OFFICE—DUTIES.

The superintendent of schools is a public officer, whose duties are specifically prescribed by Pol. Code, § 1543, and additional duties cannot be imposed upon him by a city charter.

6. SAME—DUTIES OF SUPERINTENDENT.

Pol. Code, § 1543, requiring the county superintendent of schools "to superintend the schools of the county," does not make it the duty of such superintendent to prefer charges against teachers.

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Application by Margaret McKenzie for a writ of certiorari against the board of education of the city and county of San Francisco and others. From a judgment granting the writ as prayed, defendants appeal. Reversed.

Rehearing denied by Court of Appeal, September 11, 1905; by Supreme Court, October 11, 1905.

City Attorney Long, for appellants. S. V. Costello and Campbell, Metson & Campbell, for respondent.

COOPER, J. This was an application by respondent as petitioner to the superior court for a writ of certiorari for the purpose of vacating and annulling an order or resolution made by defendants in their official capacity as the board of education of the city and county of San Francisco, dismissing the petitioner from her position as teacher in the school department of the public schools of said city and county. The appellants, having made a return to the writ setting forth the proceedings in full, the court, upon motion of petitioner, made an order granting the writ as prayed, and judgment was accordingly entered. This appeal is from the judgment.

The writ of certiorari will only be granted when an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy. It cannot be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer. It is not a writ of error. Its purpose is not to consider errors or irregularities committed in the exercise of an admitted jurisdiction, nor to correct mistakes of law in conducting a proceeding of which the inferior tribunal, board, or officer had jurisdiction. Nor can it be used for the purpose of determining whether or not the evidence was sufficient to support the particular order, resolution, or matter complained of, provided the law and the machinery employed were such as to give the inferior tribunal jurisdiction.

In this case the defendants, as a board of education, heard and determined charges against the petitioner in regard to her unfitness to teach. They had jurisdiction to hear and determine said charges, if properly made. Pol. Code, §§ 1791, 1793; Kennedy v. Board of Education, 82 Cal. 490, 22 Pac. 1042. This is not controverted by respondent; but it is claimed that the board of education never acquired jurisdiction, because the method provided by the charter of the city and county of San Francisco as to making the charges is the only method provided and the source of the power of the board to act, and that the charges were not made as provided by the charter. If the charter of the city and county of San Francisco were the only law upon the question, there would be much force in respondent's contention. The Legislature, under the Constitution, has provided a general system in regard to the common schools, and prescribed the duties of boards of education in counties and cities and counties of the state. The general laws passed by the Legislature are paramount, and, in case any provision of the charter of any city conflicts with the general laws as to matters pertaining to the public schools, the charter must give way to the general law. But the charter of a city, or city and county, may make additional provisions, or provide for matters not enumerated in the general law, provided such provisions are not in conflict with the general law. Kennedy v. Miller, 97 Cal. 434, 32 Pac. 558. It is the duty of the court in all cases to consider the different provisions of the charter of a city or city and county and the general law, so as to make them harmonize, if possible, and give effect to each if it can be done. We find no difficulty in this case in so harmonizing them, and holding that the board of education had jurisdiction upon the written charges made by citizens.

The laws of the state provide that boards of education may dismiss teachers for insubordination, immoral or unprofessional conduct, profanity, or evident unfitness to teach. Pol. Code, §§ 1791, 1793. The charter of the city and county of San Francisco provides (article 7, c. 3, §§ 1–5): "In addition to the powers conferred by the general laws of the state, the board of education shall have power * * * to promote, transfer, and dismiss teachers; but no teacher in the department at the time of the adoption of this charter, or who shall be hereafter appointed, shall be dismissed by the department, except for insubordination, immoral or unprofessional conduct, or evident unfitness for teaching. * * * Nothing in this section shall be construed to prevent the board from removing teachers holding only special certificates or serving a probationary term. Charges against teachers must be formally made by the superintendent after due investigation, and shall be finally passed upon by the board after giving the accused teacher due hearing. * * * To investigate charges against any person connected with or in the employ of the school department, and to take testimony in such investigations."

While the above-quoted provisions attempt to make it the duty of the superintendent to make formal charges against teachers, they do not make it essential that the board of education investigate only in cases where the superintendent makes the charges. The board is not prohibited from acting in cases where no formal charges are made by the superintendent. On the other hand, it is expressly stated that these powers conferred on the board of education are "in addition to the powers conferred by the general laws of the state." And after the use of the clause attempting to make it the duty of the superintendent to make formal charges, in subdivision 5 of section 1 of the chapter of the charter pertaining to the matter, the board is given power "to investigate charges against any person connected with or in the employ of the school department, and to take testimony in such investigations." This does not confine the board to charges made by the superintendent, but is broad enough to include any charges for which a teacher may be removed. The superintendent might decline to make the formal charges, but that does not deprive the board of the power of investigating charges made by some one else. Such was not the intent of the framers of the charter. If such were the law, it might, in many cases, leave the board powerless to remove a teacher for immorality, intemperance, or any other cause. The superintendent might, through favoritism or corrupt influences, refuse to make any formal charges, and, according to petitioner's contention, the board would be powerless.

Not only this, but the superintendent of schools is a county officer. The charter of the city cannot impose duties upon him as such county officer. His duties are prescribed by section 1543, Pol. Code, and we look in vain in that section for any language making it his duty to prefer charges against teachers. Counsel for petitioner claims that the duty is included in the words "to superintend the schools of the county." To superintend the schools does not mean "to make charges against teachers," any more than it could be held to mean that the superintendent should prosecute all teachers or pupils in his county for violation of the criminal laws.

As our conclusion is that the board of education did not exceed its jurisdiction, this inquiry need go no further. The judgment is reversed, and the trial court directed to dismiss the petition.

We concur: HARRISON, P. J.; HALL, J.

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1 Cal. App. 410

McKENZIE v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO et al.

(Court of Appeal, First District, California. Aug. 12, 1905.)

SCHOOLS — TEACHERS — REMOVAL—NECESSITY OF FORMAL CHARGE.

The board of education of the city and county of San Francisco has jurisdiction to hear testimony against a teacher, although no formal charges have been presented against her by the county superintendent.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Schools and School Districts, §§ 301, 302.]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Application by Margaret McKenzie for writ of mandate against the board of education in and for the city and county of San Francisco and others. From a judgment denying the application, petitioner appeals. Affirmed.

Rehearing denied by Court of Appeal, September 11, 1905; by Supreme Court, October 11, 1905.

S. V. Costello and Campbell, Metson & Campbell, for appellant. City Attorney Long, for respondents.

COOPER, J. This is an application by petitioner for a writ of mandate against respondents, as the board of education of the city and county of San Francisco, to compel said board to restore her to her position as teacher in the public schools of said city and county. The trial court denied the petition, and judgment was accordingly entered in favor of respondents. From the judgment petitioner prosecutes this appeal.

The contention of appellant is that the board of education had no jurisdiction in the matter of hearing testimony, for the reason that no formal charges had been presented against her by the county superintendent. This contention has been disposed of against appellant in the case of Margaret McKenzie v. Board of Education of City and County of San Francisco et al. (No. 128) 82 Pac. 392, this day decided; and for the reasons therein stated the judgment in this case is affirmed.

We concur: HARRISON, P. J.; HALL, J.

1 Cal. App. 401

FRENCH v. PACIFIC ELECTRIC RY. CO.

(Court of Appeal, Second District, California. Aug. 11, 1905.)

1. CARRIERS — INJURY TO PASSENGER — INSTRUCTIONS.

In an action against a street railroad for injuries sustained by a passenger while alighting from a car, a charge that the burden is on plaintiff to show that the injury was caused by the act of defendant in operating the instrumentalities employed in its business, and that, if this be shown, there is a presumption of negligence, which throws upon defendant the burden of showing that the injury was sustained without negligence, was not subject to the objection of withdrawing from the jury the issue whether the car started while plaintiff was alighting therefrom, or whether he voluntarily left the car while it was in motion, or to any other objection, when considered with other instructions that a passenger who voluntarily alights from a moving car assumes the risks thereof, and cannot recover for injuries sustained, and that, if plaintiff alighted from the car while it was in motion, and was thereby injured, he was guilty of such negligence as to preclude a recovery.

2. SAME.

Nor, in view of the above instructions, and the fact that the only issue was whether the car started while plaintiff was alighting therefrom, or whether he voluntarily left the car while it was in motion, was it error to refuse a charge that "in a case of this character the burden of proving negligence rests on plaintiff, and he must prove the negligence alleged in the complaint by a preponderance of evidence."

Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by C. W. French against the Pacific Electric Railway Company. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

Rehearing denied by Supreme Court October 6, 1905.

Bicknell, Gibson, Trask, Dunn & Crutcher and Norman S. Sterry, for appellant. John W. Kemp, for respondent.

SMITH, J. This is a suit for damages alleged to have been suffered by the plaintiff from injuries caused by his being thrown to the ground while alighting from one of defendant's cars. There was evidence on the part of the plaintiff tending to show that while alighting from the car, after it had stopped, the car was suddenly started forward, and that he was thereby thrown violently to the street. On behalf of defendant, there was evidence tending to prove that plaintiff alighted while the car was in motion. The court instructed the jury (among other instructions) as follows: "You are instructed that the burden of proof is upon the plaintiff to show that the injury to a passenger was caused by the act of the carrier in operating the instrumentalities employed in its business. If this be shown by a fair preponderance of all the evidence, then there is a presumption of negligence which throws upon the carrier the burden of showing that the injury was sustained without any negligence upon his part." And the following instruction, asked for by the defendant, was refused: "The Court instructs the jury that the plaintiff in this action seeks to recover damages sustained by reason of injuries to him on account of the alleged negligence of the defendant, its agents and employés, and you are instructed that in a case of this character the burden of proving negligence rests upon the plaintiff, and he must prove the negligence alleged in the complaint by a preponderance of evidence." The case was tried by a jury, and verdict was for the plaintiff. The appeal is from the judgment entered on the verdict and from an order denying the defendant's motion for a new trial.

The sole errors complained of are the giving of the former, and the refusal of the latter, of the instructions quoted. As to the instruction given, it is urged by the appellant, and is not denied, "that there was but one issue in the case, viz., was the car started while the plaintiff was alighting therefrom, as he claimed, or did he voluntarily alight therefrom while it was in motion, as the defendant claimed?" The objection urged by the appellant to the instruction is, in effect, that it took this issue from the jury. But this is obviously not the case. If the plaintiff was injured by alighting from the car while it was in motion, or if there was any contributory negligence of any kind proven, then the injury was not caused "by the act of the carrier in operating the instrumentalities employed in its business," and the instruction could have no application. Accordingly, the jury were explicitly instructed, in effect, that a passenger who voluntarily alights from a car when in motion assumes the risks thereof, and cannot recover for any injuries sustained thereby; and that, if the jury believe from the evidence that the plaintiff alighted from the car while in motion, and was thereby injured, then he was guilty of such negligence as to preclude a recovery; and there were other explicit instructions to the same effect. The jury therefore could not have been misled as to the issues submitted to them. Nor, as the law is established in this state, do we think any objection can be urged to the instruction. McCurrie v. S. P. Co., 122 Cal. 558, 55 Pac. 324, and cases cited; Babcock v. Los Angeles Traction Co., 128 Cal. 173, 60 Pac. 780; Harrison v. Sutter Street Ry. Co., 134 Cal. 549, 66 Pac. 787, 55 L. R. A. 608; Osgood v. Los Angeles, etc., Co., 137 Cal. 280, 70 Pac. 169. It is unnecessary, therefore, to examine critically the cases cited from other states. But it may be observed that the instruction involved in Chicago Street Ry. Co. v. Catline, 70 Ill. App. 97, was essentially different from the one given in this case, and that under the authorities cited the decision in D. & R. G. R. Co. v. Fotheringham (Colo. App.) 68 Pac. 978, cannot be regarded as law in this state.

As to the instruction refused, we see no error; or, at least, no error of which the appellant can complain. There was, as claimed by the appellant, but one issue in the case, and on this issue the jury were fully instructed by the instructions given at the request of defendant already referred to. To have given the instruction asked for would, therefore, have served only to confuse the jury as to the only issue before them. The case of Kahn v. Triest Rosenberg Cap Co., 139 Cal. 345, 73 Pac. 164, and the case of Patterson v. San Francisco and San Mateo Ry. Co. (Cal.) 81 Pac. 531, have no application. It may be admitted that, had the instruction been given, it might (in view of the ambiguous nature of the term "burden of proving") have been so construed as to not be in conflict with the instruction given. Scott v. Wood, 81 Cal. 400, 22 Pac. 871. But in its most natural construction, and in the construction that would most probably have been given to it by the jury, it would be contradictory; and, as there was but the one issue before the jury, it could have but served to mislead them.

The judgment and order appealed from are affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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1 Cal. App. 423

PEOPLE v. TAGGART.

(Court of Appeal, Second District, California. Aug. 15, 1905.)

CRIMINAL LAW—CIRCUMSTANTIAL EVIDENCE—INSTRUCTIONS—HARMLESS ERROR.

An instruction in a criminal case that, where the evidence is entirely circumstantial, yet is not only consistent with the guilt of defendant, but inconsistent with any other rational conclusion, it is the duty of the jury to convict, though such evidence may not be as satisfactory to their minds as the direct testimony of credible eyewitnesses would have been, while erroneous, not only in authorizing a conviction on evidence less "satisfactory" than in the case of direct evidence, whereas Code Civ. Proc. § 1835, defining "satisfactory" evidence to be such "as ordinarily produces moral certainty or conviction in an unprejudiced mind," provides that such evidence alone will justify a verdict, but also in declaring it to be the jury's duty to convict if the "evidence" (not the facts) be inconsistent with any other rational conclusion than guilt—is harmless, the circumstantial evidence of defendant's guilt being at least "satisfactory," as defined by the Code, and being uncontradicted, and the improbability of a different result but for the instruction being such as to produce an abiding conviction to that effect.

Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Joseph H. Taggart was convicted of grand larceny, and appeals. Affirmed.

Byron Waters and N. A. Bailie, for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Deputy Atty. Gen., for the People.

SMITH, J. The defendant was convicted of the crime of grand larceny, and appeals from the judgment and from an order denying his motion for a new trial.

The only error complained of is the following instruction to the jury: "Where the evidence is entirely circumstantial, yet is not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eyewitnesses would have been." It is said by the appellant's attorneys that this instruction was first given in People v. Cronin, 34 Cal. 202, and that it has been approved in some later cases, cited by them. But the instruction is taken, not from the instructions in People v. Cronin, but from the opinion of the court on page 202; and in looking over the cases citing this case, as given in Palm's Citations, we have not been able to find any in which this instruction was involved, except the cases of People v. Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50, where it is held to be erroneous, and in People v. Rushing, 130 Cal. 453, 454, 62 Pac. 742, 80 Am. St. Rep. 141, where it is, in effect, so held. In the former case, indeed, it is said: "The vice of this instruction is generally corrected, as it was in this case, by special instructions to the effect that every fact essential to sustain the hypothesis of guilt and to exclude the hypothesis of innocence must be fully proved;" and in the latter case this forms part of the instruction given. But in the case at bar there is no such qualifying instruction. It is, indeed, urged by the attorney for the state that the qualifying instruction referred to in the cases cited "offers but meager support if the main instruction is prejudicial." But in this we do not agree. The vice of the instruction here is, not merely that the jury are instructed that in the case of circumstantial evidence they may convict upon evidence less "satisfactory" than in the case of direct evidence (as to which see Code Civ. Proc. § 1835), but also that, if the "evidence" be inconsistent with any other rational conclusion than the defendant's guilt, it is the duty of the jury to convict. But the law is that the jury is the sole judge of the credibility of the evidence, and therefore, though the evidence be inconsistent with the theory of the defendant's innocence, yet they may acquit him. This defect is pointed out in the opinion in People v. Dole, where it is said: "In cases of circumstantial evidence facts should be proved which are * * * inconsistent with any reasonable hypothesis of innocence, and every single fact from which the deduction of guilt is to be drawn must be proved by evidence which satisfies the minds and consciences of the jury," etc. Or, as elsewhere expressed, to justify the jury in finding the defendant guilty "the law requires that the facts (not merely the evidence) * * * be * * * inconsistent with any other rational conclusion." People v. Murray, 41 Cal. 67. Having regard, therefore, to this vice in the instruction, it can readily be perceived that the error might be cured—as it was in fact cured in the cases cited—"by special instructions to the effect that every fact essential to sustain the hypothesis of guilt and to exclude the hypothesis of innocence must be fully proved." In People v. Eckman, 72 Cal. 585, 14 Pac. 359, and People v. Sansome, 84 Cal. 454, 24 Pac. 143, cited in the briefs, the instruction involved was that, "to convict upon circumstantial evidence, it should be such as to produce nearly the same degree of certainty as that which arises from direct testimony." But this instruction is free from the principal vice to which the instruction now under consideration is obnoxious. The cases are therefore not similar.

I have no doubt, therefore, that the instruction is erroneous, and that ordinarily the error would be material. But in the present case the circumstantial evidence of defendant's guilt was, if not absolutely conclusive, at least "satisfactory," in the sense of the term as defined by the Code—that is to say, it was such as "ordinarily produces moral certainty or conviction in an unprejudiced mind" (Code Civ. Proc. §§ 1835, 1826); and it stood entirely uncontradicted. Assuming, therefore (as we must), that the jury was composed of men at once unprejudiced and of average common sense and judgment, we are justified, under the authorities, in believing (as we do) that the result would not have been different had the instruction been omitted. Code Civ. Proc. § 475; Green v. Ophir Co., 45 Cal. 526, 527; Est. of Briswalter, 72 Cal. 110, 13 Pac. 164; Est. of Spencer, 96 Cal. 449, 450, 31 Pac. 453. The cases cited are, indeed, civil cases, but we see no reason why the same principle should not apply in criminal cases.

Nor are the provisions of the Code of Civil Procedure cited to be disregarded. They have, indeed, as to certain matters, specifically indicated in the decision, been held unconstitutional (San Jose Ranch Co. v. San Jose Land & Water Co., 126 Cal. 325, 58 Pac. 824), but the question now before us does not seem to be affected by that decision, for here not only does it not appear that "a different result would have been probable if [the] error * * * had not occurred," but the contrary; and the improbability of a different result upon the omission of the instruction is so strong as to produce in us an abiding conviction to that effect.

We are of the opinion, therefore, having regard to the particular case, that, notwithstanding the error of the court below, the judgment and order should be affirmed; and it is so ordered.

We concur: GRAY, P. J.; ALLEN, J.

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1 Cal. App. 420

PEOPLE v. TURNER.

(Court of Appeal, Second District, California. Aug. 15, 1905.)

1. WITNESSES—IMPEACHMENT.

The impeachment of a witness by showing that he had made statements in conflict with his testimony cannot be met by evidence that at other times he made statements in harmony with his testimony.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1260.]

2. CRIMINAL LAW—HEARSAY.

Testimony that witness had learned from conversation with another that defendant was one of the robbers is hearsay.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 973.]

3. SAME—DECLARATIONS.

Declaration of the person robbed, made in the presence of defendant on his arrest, that he was the robber, is not admissible against him, he having at once flatly denied the charge; such a declaration being admissible only for the purpose of showing conduct in connection with it evidencing guilt.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 937, 942.]

Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Ben F. Turner was convicted of larceny, and appeals. Reversed.

Rowen Irwin and Emmons & Irwin, for appellant. U. S. Webb, Atty. Gen., C. N. Post, Asst. Atty. Gen., and J. C. Daly, Deputy Atty. Gen., for the People.

GRAY, P. J. The defendant stands convicted of the larceny of $50 from the person of one Smith. The evidence tended to disclose something very much in the nature of a highway robbery. The defendant appeals from the judgment, and from an order denying him a new trial, and his principal contention is that the court erred in permitting the prosecution to prove certain hearsay statements identifying defendant as having taken part in the larceny charged. The question arises this way: The conviction of defendant depends almost altogether upon the testimony of the complaining witness, Smith; he being the only witness who identified the defendant as assisting in the robbery. To impeach and weaken the force of Smith's testimony in this regard, the defendant called the city marshal of Bakersfield, Ed Tibbet, who testified that about two hours after the alleged larceny Smith had, in substance, declared that he could not identify any of the parties that robbed him. The defense also called a brother of Ed, Bert Tibbet, who testified that in the evening of the same day of the robbery, or larceny, Smith had expressed himself as unable to identify the defendant as being concerned in the robbery. Smith had been intimately acquainted with the defendant for a long time before the robbery. Thereafter, the prosecution was permitted to show on the cross-examination of Bert Tibbet, and by the testimony of James McKamy, a constable, that on the day following the larceny the complaining witness did state in their presence that the defendant was one of the parties who robbed him. The prosecution was also permitted to show by the testimony of McKamy, that Smith subsequently stated, in the presence of defendant and to him, that he (the defendant) was one of the persons concerned in the robbery, and that defendant denied it, and also denied having been with Smith at the Palace Dance Hall in the neighborhood of 3 or 4 o'clock, just previous to the alleged larceny.

In the foregoing we think the court erred to the prejudice of the defendant. The impeachment of a witness by showing that he has made statements in conflict with his present testimony cannot be met by the party calling such witness, with evidence that at other and different times the impeached witness has made statements in harmony with his present testimony, and to permit the introduction of testimony of this latter character is prejudicial to the party against whom it is received. Mason v. Vestal, 88 Cal. 396, 26 Pac. 213, 22 Am. St. Rep. 310. Particularly is this the rule where, as here, there is nothing to show that the witness did not have the same motive or interest to deceive when he made the confirmatory statement that he may have had when he testified to the fact. People v. Rodley, 131 Cal. 254, 63 Pac. 351; Mason v. Vestal, supra.

We are of opinion, also, that it was error to permit the city marshal to testify to any information that he had received from conversation with the barkeeper, Silva, as to "who one of the parties were that had robbed the complaining witness." The answers of the city marshal to the questions asked him by the district attorney were well calculated to leave the impression that Silva had told the marshal that the defendant was one of the parties engaged in the robbery. Of course, this was hearsay, and prejudicial to the defendant.

We are also of opinion that the testimony of McKamy to the effect that Smith, soon after the arrest of defendant, stated that "he was one of them, he was the fellow," in the presence of and to the defendant, should have been excluded. The defendant denied this charge of Smith at once. It is not the declaration made in the presence of a defendant that can be taken as evidence against him. It is only his conduct in connection with the declaration that can be looked to for evidence of guilt, and if he flatly denies the charge there can be no evidence in this of guilt, and therefore the whole matter should be excluded, lest the jury may infer, from its being admitted, that they are warranted in treating it as evidence against the defendant. People v. Teshara, 134 Cal. 544, 66 Pac. 798; People v. Philbon, 138 Cal. 530, 71 Pac. 650. Of course, where the act constituting the crime is clearly shown, and the only question is as to whether the act was done with a criminal intent, the fact that the defendant denies the commission of the alleged criminal act may tend to show criminal intent and consciousness of crime. People v. Cole, 141 Cal. 88, 74 Pac. 547. Indeed, even where the defendant flatly denies the criminal act, yet if he goes on to make exculpatory statements, for instance, as to his whereabouts at the time, and these statements can be shown to be false, then the statements, together with their falsity, may be shown, on the theory that falsehood in the matter is an indication of conscious guilt. In such a case, it is the falsehood only that tells against the defendant.

The district attorney seems to have insisted on the introduction of all the foregoing testimony upon some theory that, all these statements having been made by Smith in the presence of the witness Bert Tibbet, they in some way tended to discredit his testimony as to what he claimed to have heard the complaining witness say on the day of the larceny or robbery. But, as we read the record, all these declarations of Smith to the effect that the defendant assisted in the robbery were made on the day he was arrested, being the day after the robbery, and do not tend to contradict or discredit the testimony of Bert Tibbet as to Smith's statements made on the day that he was robbed.

The judgment and order are reversed, and the cause remanded for a new trial.

We concur: ALLEN, J.; SMITH, J.

1 Cal. App. 414

PEOPLE v. HILL.

(Court of Appeal, Second District, California. August 15, 1905.)

1. Criminal Law—Appeal.

An appeal from a verdict of guilty, or from an order denying a motion in arrest of judgment, is not authorized.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2586, 2591.]

2. Murder in First Degree.

Though defendant sincerely believed deceased had a few dollars of defendant's money, for defendant to shoot him because of his refusal to surrender it shows an "abandoned and malignant heart," and constitutes murder in the first degree.

3. Criminal Law—Admissions of Defendant—Instructions.

An instruction that evidence of admissions or statements of defendant made to witnesses should be received with caution and viewed with scrutiny, and that in considering it the circumstances surrounding defendant and the probability or improbability of defendant having made the statements should be considered, even if erroneous, is not prejudicial, whether it applies to admissions of defendant to officers after his arrest and placed in evidence through them, or to some statement of defendant previously made and relied on by him in his defense.

4. Same—Evidence—Instructions.

The quoted language in an instruction that in considering the weight and effect to be given defendant's evidence, while the jury may consider his manner and the probability of his statements, taken in connection with all the evidence in the case, and, "if convincing and carrying with it a belief in its truth, act on it"; if not, they may reject it—is not erroneous.

5. SAME—EXPLAINING OBJECT OF LAW—INSTRUCTIONS.

Refusal of an instruction stating the object of the law in permitting persons charged with crime to testify is not error; it not being necessary.

6. MURDER—EVIDENCE.

Where defendant shot a street car conductor on his refusal to surrender a $5 gold piece which defendant claimed to have given him by mistake for a nickel, evidence that the conductor did not have a $5 gold piece, in connection with evidence that in defendant's first account of the matter he had made statements in conflict with his testimony as to when he first discovered his loss of the money, is admissible, as tending to show he was acting in bad faith in making his claim for money.

7. SAME—CONFLICTING STATEMENTS.

Where defendant shot a street car conductor on his refusal to surrender a $5 gold piece which defendant claimed to have given him by mistake, it is not error to permit evidence to stand tending to show conflicting statements of defendant as to when he discovered his loss of the money.

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Archie Hill was convicted of murder, and appeals. Affirmed.

J. G. Rossiter, C. L. Shinn, and H. H. Appel, for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Deputy Atty. Gen., for the People.

GRAY, P. J. The defendant was convicted of murder in the first degree, and sentenced to imprisonment for life. He appeals from the judgment, from an order denying him a new trial, from an order denying his motion in arrest of judgment, and from the verdict of the jury. The appeals from the order denying the motion in arrest of judgment and from the verdict are unauthorized by law, and may therefore be ignored. The defendant shot and killed Wilbur L. Carlton, a street car conductor, in the city of Pasadena. The killing was the culmination of a dispute between defendant and the conductor as to whether defendant had, on a previous trip, by mistake, given the conductor a $5 piece, thinking it was a nickel.

1. The appellant contends that the evidence, taking the worst view of it for defendant, establishes no greater crime than that of manslaughter. The evidence was very conflicting. The testimony of one set of eyewitnesses to the controversy and shooting showed that the defendant shot the conductor without any previous hostile demonstrations or threats on the part of the latter, and because the latter denied receiving the $5, and refused to restore it to defendant. Another set of witnesses testified to facts showing that the conductor violently beat the defendant in the face and on the head, and pushed him off the rapidly moving car, and that defendant shot only after the beating had progressed for some time, and just as the defendant was losing his hold on the car—perhaps accidentally. What theory should be adopted from this evidence, and what witnesses should be believed, was for the jury to determine. We cannot interfere with the verdict, where there is, as in this case, a substantial conflict in the evidence; one line of it pointing clearly to guilt of the crime of which the defendant stands convicted, and the other line pointing to a lesser crime, or, perhaps, to justification on the ground of self-defense. Of course, on the theory of the truth of the witnesses who testified to the absence of hostile threats and demonstrations on the part of the conductor prior to the shooting, the defendant was guilty of murder in the first degree. However sincerely defendant may have believed that the conductor had $4.90 of defendant's money, yet, for the latter to shoot the former because of his refusal to surrender this money shows an "abandoned and malignant heart," and constitutes murder in the first degree.

2. The following instruction is complained of: "You are instructed that the evidence of certain witnesses as to oral admissions or statements of defendant, alleged to have been made to them, should be received with [great] caution and viewed with scrutiny, and that in considering such testimony you should take into consideration the surrounding circumstances and surroundings of defendant, and the probability or improbability of his having made such statement." Certain oral admissions of defendant, made to the officers soon after his arrest, had been placed in evidence through the testimony of the officers. This instruction must be understood as applying to those admissions, and, thus understood, we cannot see how it can be regarded otherwise than as favorable to defendant. If it were conceded to be erroneous, it could not have harmed the defendant; and this would be so, even if it were directed at some statement that the defendant had previously made, and upon which he relied at the trial to aid his defense. People v. Wardrip, 141 Cal. 232, 74 Pac. 744.

3. The jury were instructed as follows: "In considering the weight and effect to be given to the evidence of the defendant, while you may consider his manner, and the probability of his statements, taken in connection with all the evidence in the case, and, if convincing and carrying with it a belief in its truth, act upon it; if not, you have the right to reject. But this does not mean that you have a right to arbitrarily reject it. And, in judging of the defendant who has testified before you, you are in duty bound to presume that he has spoken the truth; and, unless that presumption has been legally repelled, his evidence is entitled to full credit." The appellant com-

plains of this instruction, but there is no merit in such complaint. People v. Wells, 145 Cal. 138, 78 Pac. 470. The language, "if convincing and carrying with it a belief in its truth, act upon it," is found in the instruction in the Cronin Case, 34 Cal. 196, and that case has been often affirmed upon this point.

4. The instructions given as to the law of self-defense were aptly applied by the court to the facts in the case, were full and complete, and there was, therefore, no necessity for giving the further instructions on that point requested by defendant.

5. The court refused to instruct the jury as follows: "The object of the law in permitting parties charged with crime to testify in their own behalf is not merely to enable them to disclose facts wholly within their own knowledge, but to explain their own acts and motives with which they were performed, and to explain, if need be, what they meant, or intended to be understood as meaning, by what they may have said or done at the time of the alleged criminal occurrence." There is nothing in this proposed instruction that would enlighten any person of ordinary intelligence, and nothing in it necessary to be stated to a jury. The court made no mistake in refusing it.

6. Further objections are made to the giving of certain instructions, and to the refusal to give certain others. We have carefully examined the same, and are of opinion that none of them are of sufficient importance to warrant a discussion. The instructions given were full and fair upon every point involved in the case, and were pertinent to the case as made by the evidence, and this was sufficient.

7. Complaint is made that the prosecution was permitted to prove that the conductor, when taken to the hospital, had not a $5 piece on his person. It is urged now that the material thing was, not whether the defendant did in fact give the $5 piece to the conductor, but the important fact to ascertain as bearing on his motives is whether he thought he had delivered it. We take it that, if it could be demonstrated that the defendant had not in fact delivered any $5 piece to the conductor, and it was also shown, as some evidence indicated, that in his first account of the matter he had made statements in conflict with his testimony given at the trial as to the time when he first discovered that he had parted with the $5 piece, all this would tend to show that the defendant was acting in bad faith as to his $5 claim. We think it was proper to show that the conductor was not possessed of a $5 piece, because that fact, taken with the other evidence, tended to show that he had not received a $5 piece from defendant. And his nonreceipt of the piece, taken with the other evidence, tended to show that defendant's claim as to the $5 piece was not in good faith. In this connection, we should not overlook the fact that the defendant was armed with a deadly weapon. Surely the defendant was in a better position than any other person to know whether he had lost a $5 piece, and, if he claimed to have given it to a person to whom he knew he did not give it, this might justify the argument that he was hunting for trouble of a nature that would bring into use the deadly weapon with which he went armed.

8. There was no error in permitting the evidence to stand which tended to show conflicting statements of defendant as to the time when he discovered the loss of his $5.

We can discover no error in the record. The judgment and order denying a new trial are affirmed.

We concur: **ALLEN, J.**; **SMITH, J.**

(148 Cal. 13)

WILSON v. FISHER, Auditor. (S. F. 4,396.)

(Supreme Court of California. Sept. 29, 1905.)

1. Elections—Contest—Appeal—Statutes.

Code Civ. Proc. § 1127, provides that whenever an election is annulled or set aside by the judgment of a superior court, and no appeal has been taken within 10 days thereafter, the commission, if any is issued, is void and the office vacant. *Held*, that the term "commission," as so used, included a "certificate of election" issued to petitioner as superintendent of schools, so that, on no appeal being taken within 10 days after judgment declaring petitioner's certificate of election invalid in a contest regularly instituted, as authorized by Code Civ. Proc. §§ 1111–1127, the judgment rendered petitioner's certificate finally ineffectual as evidence of title to the office.

2. Same—Application of Statute.

Code Civ. Proc. § 1127, declaring that whenever an election is annulled by a judgment of the superior court, and no appeal is taken within 10 days, the commission is void, applies only to contests specified in the title of which the section is a part, and has reference only to contests in regard to offices "to be exercised" in "a county, city and county, city or any political subdivision of either," as provided by section 1111, in every which case, except that of the office of judge of the superior court, the only "commission" is their certificate of election.

3. Same—Salary Pending Appeal.

Pol. Code, § 936, provides that, when the title of the incumbent of any office of the state is contested by proceedings instituted in any court for that purpose, no warrant can thereafter be drawn or paid for any part of his salary until such proceedings have been finally determined, except in case of one who holds the certificate of election or commission of office and discharges the duties of the office, who shall receive the salary as if no contest was pending. *Held* that, where a judgment annulling petitioner's certificate of election to the office of superintendent of schools of a county had become final by his failure to appeal within 10 days, as required by section 1127, Code Civ. Proc., he was not entitled to recover salary pending an appeal subsequently taken.

In Bank. Petition by S. B. Wilson for writ of mandate against John P. Fisher, as auditor of El Dorado county. Writ denied.

W. F. Bray, for petitioner. C. A. Swisler, for respondent.

ANGELLOTTI, J. This is a proceeding instituted in this court to obtain the issuance of a writ of mandate requiring the defendant, as auditor of El Dorado county, to draw his warrant for the salary of plaintiff, Wilson, as superintendent of schools of said county, for the month of July, 1905. Plaintiff has been holding said office ever since January, 1903, and discharging the duties thereof, under a certificate of election issued in pursuance of a declaration that he had been duly elected to said office, made by the board of supervisors of said county on their canvass of the returns of the general election of November 4, 1902. A contest of his right to said office was regularly instituted, under the provisions of title 2, part 3, of the Code of Civil Procedure, relating to the contesting of certain elections (sections 1111–1127) by one T. E. McCarthy, who had been a candidate for the same office at said election. Upon the first trial of said contest judgment was entered confirming the election of plaintiff; but upon appeal to this court such judgment was reversed and the cause remanded for further proceedings. McCarthy v. Wilson, 82 Pac. 243. A new trial of the contest was thereupon had in the superior court, resulting in a judgment, entered June 12, 1905, annulling and setting aside the election of plaintiff herein, and declaring the contestant, McCarthy, to have been duly elected at said election. On June 17, 1905, notice of the entry of said judgment was served on the plaintiff herein. No appeal was taken by plaintiff herein from said judgment within 10 days after the entry of said judgment, or within 10 days after the service on him of the notice of entry thereof; but on June 29, 1905, he served and filed his notice of appeal from said judgment, and on July 1, 1905, he filed his undertaking on appeal.

The claim of defendant is that, by reason of the failure of plaintiff to take an appeal from the judgment annulling and setting aside his election within 10 days from the service of notice of the entry of said judgment upon him, the certificate of election theretofore issued to him became void, and the office vacant, and that consequently he is not now entitled to any salary for the month of July, 1905. This claim is based upon section 1127 of the Code of Civil Procedure, which is as follows, viz.: "Whenever an election is annulled or set aside by the judgment of the superior court, and no appeal has been taken within ten days thereafter, the commission, if any has issued, is void, and the office vacant." We think that there can be no doubt that, under the plain terms of this statute, its effect is to render a judgment of the superior court annulling and setting aside an election in a proceeding brought under the provisions of title 2, part 3, Code Civ. Proc., final upon the question as to the validity of any commission or certificate of election that may have been issued to the incumbent whose election has thereby been set aside, unless an appeal be taken from such judgment within 10 days from the entry thereof; in other words, that such judgment, after the lapse of 10 days without appeal taken therefrom, finally renders such certificate ineffectual as evidence of title to the office. There can be no question that the word "commission," as used in this section, includes a "certificate of election" issued by the clerk of a county upon the declaration of election made by the board of supervisors thereof, sitting as a canvassing board. There is no material difference, in effect, between a "commission" and a "certificate of election." They both simply constitute official notice of election or appointment to the person named therein (People v. Perkins, 85 Cal. 509, 512, 26 Pac. 245; People v. Shaver, 127 Cal. 347, 350, 59 Pac. 784), and evidence of title to the office (Bledsoe v. Colgan, 138 Cal. 34, 36, 39, 70 Pac. 924). As to all officers elected by the people, "whose commissions are not otherwise provided for," the Governor of the state must issue a "commission" (Pol. Code, § 891, subd. 1), and this commission constitutes the only tangible evidence of title to the office. In the case of persons elected by the people to an office to be exercised in a single county, or subdivision thereof, the only commission provided for by law, except in the single case of a person elected to the office of judge of the superior court, is what is called a "certificate of election," to be issued by the county clerk under the seal of the superior court. Pol. Code, §§ 1283, 1284. It has never been doubted that this certificate constitutes a commission, within the meaning of subdivision 1, section 891, Pol. Code, so as to obviate the necessity of the issuance of a commission by the Governor, and is the legal evidence of the person's title to the office. Section 1127, Code Civ. Proc., is, of course, applicable only to the contests specified in the title of which it is a part, and that title has reference only to contests in regard to offices "to be exercised" in "a county, city and county, city, or any political subdivision of either" (section 1111, Code Civ. Proc.), in every which case, except in that of the office of judge of the superior court, the only commission is the "certificate of election." The language of the section clearly shows that the word "commission," therein used, was intended to cover any such official evidence of title to the office as had been issued by the proper authority, whether the same be technically known as a "commission" or a "certificate of election." Under the express terms of this statute, if no appeal be taken within 10 days, this official evidence of title to the office is finally invalidated and annulled, rendered of no further legal force or effect, and a subsequent appeal could not operate to restore it to its original status. An appeal only operates, at most, in the absence of express provision to the contrary, to preserve the status existing at the time of the appeal.

The only question involved in this proceeding being the question as to whether plaintiff is now entitled to the salary claimed, it is unnecessary, in view of other provisions of the law, to determine further as to the effect of this section. It being determined that his certificate of election to such office has been finally annulled and is void, it follows, under section 936, Pol. Code, that if his subsequent appeal, taken after the expiration of the 10 days, is effectual for any purpose, and the contest may therefore be held to be still pending, no warrant can be drawn for any part of his salary until the contest has been finally determined. That section in effect provides that, when the title of the incumbent of any office in the state is contested by proceedings instituted in any court for that purpose, no warrant can thereafter be drawn or paid for any part of his salary until such proceedings have been finally determined, except in the single case of one "who holds the certificate of election or commission of office, and discharges the duties of the office," who shall receive the salary of the office "the same as if no such contest or proceeding was pending." To entitle him to salary during the pendency of a contest involving his title to the office, the incumbent must bring himself within this exception to the general rule declared by the section; in other words, he must not only be the incumbent discharging the duties of the office, but he must also hold the certificate of election or commission of office. Bledsoe v. Colgan, 138 Cal. 34, 70 Pac. 924. This means, of course, a certificate of election or commission of office that is in force, and not one that has been irrevocably nullified. One cannot be said to hold the certificate of election or commission of office, where the effect of a judgment of the superior court has been to finally render what was originally such a certificate or commission of no further legal force or effect. The plain intent of section 936, Pol. Code, was to allow the payment of salary pending contest only to the incumbent who possesses such legal evidence of title to the office as is furnished by a certificate of election or commission of office, and, when the certificate once held by him has been finally rendered void, it no longer constitutes such evidence.

It has been suggested that the effect of section 1127, Code Civ. Proc., is to make a judgment of a superior court annulling and setting aside an election in a proceeding of this character final for all purposes unless an appeal be taken within 10 days. As to this, however, as already stated, it is unnecessary to express an opinion here. Of the effect of the judgment in this case upon the certificate of election or commission of office, and consequently upon the right of the incumbent to salary, we have no doubt, and that is sufficient for all the purposes of this proceeding. The case of Wilson v. Fisher, 140 Cal. 188, 73 Pac. 850, is, of course, not applicable here. The incumbent there was held entitled to his salary pending an appeal from a judgment in his favor. His election had there been confirmed, and his certificate of election was in full force. In Anderson v. Browning, 140 Cal. 222, 73 Pac. 986, a case more nearly in point, as there was an appeal by the incumbent from a judgment annulling and setting aside his election, the appeal was taken within 10 days from the date of the judgment, and the effect of the appeal taken within the prescribed time was to stay the operation of the judgment and continue the certificate in force unimpaired during the pendency of the appeal.

The alternative writ heretofore issued must be discharged, and the proceeding dismissed; and it is so ordered.

We concur: BEATTY, C. J.; McFARLAND, J.; SHAW, J.; HENSHAW, J.; LORIGAN, J.; VAN DYKE, J.

147 Cal. 758

SOUTHERN CROSS GOLD MIN. CO. OF KENTUCKY v. SEXTON et al.

(Sac. 1,185.)

(Supreme Court of California. Sept. 20, 1905.)

1. MINES—APPLICATION FOR PATENT—CERTIFICATE—ASSESSMENT WORK—FORFEITURE FOR NONPERFORMANCE.

Where, after an application for a patent to a mining claim and full payment of the price, the purchasers received their final certificate of purchase in due form, their claims were not subject to forfeiture for nonperformance of assessed labor, nor were they subject to forfeiture or to relocation as long as such certificate remained uncanceled.

2. SAME—NOTICE TO ADVERSE CLAIMANTS—PUBLICATION—ERRORS.

Where by mistake of the officers of the Land Department the published notice to adverse claimants of an application for a patent to certain mining claims did not contain a legally sufficient description of the premises, but notwithstanding this a final certificate of purchase was issued to the claimants, and 10 years after an order was made by the Commissioner of the Land Office requiring publication of a supplemental notice to cure such defect, an order subsequently entered, after such publication, canceling the certificate of purchase as of the date of the republication order, was erroneous.

Department 2. Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by the Southern Cross Gold Mining Company of Kentucky against William Sexton and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Rehearing denied October 20, 1905.

John M. Fulweiler, for appellants. Tuttle & Tuttle, for respondent.

HENSHAW, J. Defendants, as the owners of certain mining claims, applied to the United States Land Office for a patent. Within due time after the publication of the notice of the application, plaintiff filed its protest and adverse claim to the issuance of the patent, the Land Office suspended all proceedings in the matter of the application, and plaintiff then regularly commenced its suit upon the equity side of the court for the determination of the adverse and conflicting claims. It obtained judgment, and the defendants appeal.

It appears that prior to 1884 the appellants and their predecessors in interest had made valid mining locations on the premises in controversy, and were in the lawful possession of the mining claims on the 6th day of January, 1885. On this day they filed in the United States Land Office at Sacramento their application for a patent for the mining claims, together with the necessary and proper papers and proofs required by law and the rules of the Land Office. On the 6th of January, 1885, the officers of the Land Office made an order for the publication of the notice of application for the patent, and the notice for publication was drafted by the land officers and delivered to the printer and publisher of the designated newspaper to be published for the statutory length of time. The plat and field notes posted and filed in the land office show a legally sufficient description of the premises in controversy, but in the published notice of application for a patent there was an error in the omission of a connecting line with its course and distance. No adverse claims of any kind were presented. The necessary final proofs were made. The applicants paid the full price required by law, and received their final certificate of purchase in due form of law. The final proofs and papers and evidence of payment were forwarded to the General Land Office at Washington, where they remained unquestioned until the 23d day of July, 1895. No patent, however, had been issued. On the 23d day of July, 1895, an order was made by the Commissioner of the Land Office, in which all these matters were set forth, directing that a "supplemental notice of the application for a patent" be published for the statutory period, to cure the defect in the former published notice; it being stated in the letter and order that "in view of the above omission the locus of said claim could not be ascertained by parties who might have desired to protect interests of their own by filing adverse claims." From time to time extensions were regularly granted to the applicants within which to perform the acts required by the last decision, and the publication was actually commenced on the 14th day of December, 1900, and ended on the 15th day of February, 1901. The original complaint in this action was filed on the 22d day of December, 1900. The second amended complaint, upon which trial was had, was filed February 5, 1902. During all of this time the final certificate of purchase remained unrecalled and uncanceled. In November, 1901, this respondent, as adverse claimant, moved the department, asking that the final receipt or certificate be canceled. The Commissioner, on November 22, 1901, formally denied the motion. It then appealed, and the Secretary of the Interior, on April 22, 1902, reversed the decision of the Commissioner, and in it not only ordered the certificate canceled, but declared that it must be treated as canceled of date July 23, 1895, when the Commissioner called for the publication of a supplemental notice; the honorable Secretary using this language: "The original notice being fatally defective, it was rejected for that reason. Under the law, when the notice fell, the entry fell also. It no longer had any basis to support it. It must be treated, therefore, as though it had been canceled of record at the time the notice was finally adjudicated to be insufficient. The adjudication of the insufficiency of the notice was equivalent to a determination that the entry had been erroneously allowed, and should be canceled." On July 9, 1900, plaintiff made its entry upon the property and its discovery of a lode, and caused notices of location to be posted and recorded. The defendants, relying upon their certificate of purchase, had performed no labor upon the lands since its issuance. It is undisputed that as long as the certificate remained uncanceled the claims were not forfeited for nonperformance of labor and were not subject to relocation. Richter v. Riley, 22 Cal. 639; Combs v. Jelly, 28 Cal. 498. It appears, moreover, that the appellants had furnished in 1885 accurate descriptions of their claims, sworn to by the United States Surveyor General, and that the error in the original published notice was exclusively the error of officers of the United States in not properly copying the description correctly made by the Surveyor General.

The situation thus presented is that appellants, having done all in their power to do, and having made final proof and payment and received their final certificate of purchase, were, 10 years after the date of it, informed by the Commissioner of the Land Office that there must be published a supplemental notice of their application for a patent or their certificate would be canceled. In the order so promulgated it was set forth that the original publication was not sufficient to give notice to adverse claimants of the locus of the land. The adverse claimants thus referred to could have been those, and those only, whose claims existed at and prior to the time of the original application. Appellants proceeded duly to comply with the orders of the department, and the supplemental notice required was published. Application was made to the department during this time for a cancellation of their certificate, and the application was denied. They relied, as they had a right to rely, during all of this time, upon the fact that the certificate relieved them from the necessity of performing annual labor upon their claims. Subsequently the Secretary, without a hearing given to the appellants, ordered the certificate canceled as of a date many years previous, the legal effect of which, if this retroactive order of cancellation of the Secretary is to be deemed valid in point of law, being to strip the appellants of all their rights, through no fault of their own, with no charge of fraud gainst them, and while they were relying upon the security of their uncanceled certificate of purchase, which the department, upon application, had formally refused to cancel. "It is a well-established principle," says the Supreme Court of the United States in Lytle v. Arkansas, 9 How. 314, 13 L. Ed. 153, "that, where an individual in the prosecution of a right does everything which the law requires of him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him." This principle is peculiarly applicable to a case like the present, where an appeal is made to the equity side of the court. We think the honorable Secretary was without power to order a retroactive cancellation, so as to cut out the right of the original entryman who was without fault, and to clear the way for the jumping of his claims by one who not only never asserted an adverse claim at the time of the original entry and application, but who makes his entry 15 or more years later, basing his right wholly upon the default of the appellants to perform annual labor. The officers of the Land Department are not above the law. As is said in Hosmer v. Wallace, 47 Cal. 461, they cannot constitute themselves an imperium in imperio; and, as said in Johnson v. Towsley, 13 Wall. 72, 20 L. Ed. 485, "courts of equity have a power to inquire into and correct mistakes, injustice, and wrong in judicial and executive action when it invades private rights." We believe that the Secretary, in promulgating the order for retroactive cancellation of the certificate without notice to the bona fide owners thereof, under the circumstances presented without controversy in this case, acted arbitrarily and in excess of his powers, and, as matter of equity, his ruling cannot be given judicial effect. For, as is said in Parsons v. Venzke, 164 U. S. 89, 17 Sup. Ct. 27, 41 L. Ed. 360, the jurisdiction of the Land Department "is not an arbitrary or unlimited one, to be exercised without notice to the parties interested, nor one beyond judicial review under the same conditions as other orders and rulings of the Land Department." This language was itself used in reference to the power of the Commissioner of the General Land Office or the Secretary of the Interior to cancel and set aside a pre-emption entry. Appellants had a perfect right, under the orders and rulings of the department, the original error having arisen through no fault of theirs, to rely upon the certificate of purchase, and, thus relying, to refrain from doing annual labor upon their claims until such time as notice was brought home to them that they could no longer rely upon the security of their certificate because it had been canceled, and it was not within the power of the department, under the indicated circumstances, to order a retroactive cancellation in impairment of the appellants' rights.

The cancellation must therefore, in point of law and equity, be deemed to have been made and to be effective from the date of the Secretary's letter, and the judgment appealed from is therefore reversed.

We concur: McFARLAND, J.; LORIGAN, J.

(147 Cal. 754)

NORRIS v. LILLY et al. (Sac. 1,191.)

(Supreme Court of California. Sept. 19, 1905.)

1. DEEDS—CONSIDERATION—FUTURE SUPPORT.

Where defendants contracted to maintain and support plaintiff during every alternate two months of his natural life and pay all his existing debts and obligations in consideration of a conveyance of certain real estate, and for a long period of time performed services and paid money thereunder, the deed was based on a sufficient consideration.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 33.]

2. CONTRACT—VALIDITY—SPECIFIC PERFORMANCE.

Where defendants agreed to furnish support to plaintiff, and to pay certain of his debts for the remainder of his life, in consideration of a conveyance of certain land, which was made to them, and defendants performed a portion of such contract, it could not be held invalid because it was not a proper subject of specific performance.

3. FRAUDS, STATUTE OF—PAROL CONTRACT—PART PERFORMANCE.

A parol contract by defendants to furnish certain support and pay certain debts of plaintiff in consideration of a conveyance of real estate, having been partially performed by defendants and the land having been conveyed, was not within the statute of frauds.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 287, 314.]

Department 2. Appeal from Superior Court, Butte County; John C. Gray, Judge.

Action by J. M. Norris against Sarah Lilly and another. From a decree in favor of plaintiff, defendants appeal. Reversed.

Warren Sexton and R. H. Latimer, for appellants. J. M. McGee, for respondent.

HENSHAW, J. Plaintiff sued for a cancellation of a deed to certain real property which he had made to defendants, and for the recovery of the value of certain personal property, farming utensils, and the like, which were upon the land at the time of the conveyance. His complaint alleged that he was an old man, 74 years of age, and that, induced by the promises of the defendants that they would provide support and maintenance for him during every alternate two months of his natural life and would pay all his existing debts and obligations, he executed to them a deed of all his realty. He alleged that the promises and representations were made in bad faith with intent to deceive and defraud him of his property, that the promises were made without any intent on the part of defendants to perform them, and that in fact they had wholly failed and neglected to provide him with support and maintenance, nor had they paid any of his debts. The answer denied the bad faith and fraud. It agreed with the complaint upon the question of the moving consideration for the deed, and averred complete performance upon the part of defendants—the payment of his debts and his maintenance and support until plaintiff refused further to accept such support and maintenance. The performance of defendants' contract is alleged to have continued from the winter of 1896 until October, 1902. They specifically aver a payment of doctor's bills, funeral expenses, etc., on behalf of the plaintiff in excess of the sum of $135, and, finally, they allege that they never have refused to comply with any of the terms of the contract, and stand ready and willing at all times to perform them all. Such, in brief, are the pleadings in the case, and upon them the court rendered its judgment that the deed of plaintiff to defendants be canceled, that the defendants execute a deed of conveyance of the property to plaintiff, and that plaintiff have his costs of suit. From the judgment so rendered on the pleadings the defendants appeal.

From the argument of the respondent upon this appeal it appears that the trial court based its decision and judgment upon the case of Grimmer v. Carlton, 93 Cal. 189, 28 Pac. 1043, 27 Am. St. Rep. 171, and in effect held that, putting out of consideration the issue raised upon the question of fraud, the contract itself, being one that could not be specifically enforced against the defendants, made the deed void, or, at least, voidable, and subject to cancellation at the instance of the grantor without any further evidence upon the matter. It is but just to the learned judge of the trial court to say that his ruling in this regard draws support from the case to which we have adverted. That case itself, however, is at variance with other adjudications of this court, as well as with the whole current of authority upon the subject, and cannot longer be considered as an authoritative expression of the law. The mere fact that a contract is not specifically enforceable does not render it either void or voidable. An agreement to do any act or series of acts which the promisor, but for his agreement, was under no obligation to perform, has always been deemed an ample consideration for any contract, transfer, or conveyance, whether the doing of such act or acts could be specifically enforced or not. If in such a case as this, the promisor had refused to execute the contract, an action for rescission would lie, but this rescission would involve a cancellation of the deed only upon terms meet in equity. In the very case here pleaded, if the defendants, after the payment of this money and after years of personal service, had refused to proceed further with the contract, plaintiff unquestionably would have been entitled to rescind; but in rescinding the court in equity would take cognizance of the value of the services rendered and the moneys paid, the value of the occupation of the land by the promisors, and reach its conclusion under the evidence as to the terms upon which a cancellation of the deed would be decreed. Under the case, however, presented by these pleadings, issue was squarely joined upon the question of the breach of the contract, and, if it be that defendants have performed the obligations imposed upon them and stand ready for a continued performance of them, plaintiff has no cause of action whatever. This contract was executed by the plaintiff by his deed. The consideration of the defendants was oral, but such oral consideration is not in dispute between the parties, and is sufficient to support the contract. Hays v. Montgomery, 118 Ind. 91, 20 N. E. 646; Nichols, etc., v. Burch (Ind. Sup.) 27 N. E. 737. And if any doubt could exist upon this point, the continued performance of the contract by the promisors, as alleged, is sufficient execution to take the case out of the statute of frauds. Such, indeed, was held to be the case in Manning v. Franklin, 81 Cal. 205, 22 Pac. 550, where the whole contract, involving the erection of a dwelling house upon the one hand for a life estate to be granted upon the other, was held to be taken out of the statute of frauds by a part performance in the erection of the building and the rendering of the personal services. Grimmer v. Carlton, as we have said, seems to have entertained the mistaken notion that a contract such as this was void because not specifically enforceable, whereas, in truth, such a contract, in the absence of fraud, is absolutely valid, and is no more voidable because not capable of specific performance than would be any other of the myriad forms of like contracts which are daily entered into and daily performed, and for the breach of which upon the part of the promisor the promisee has his action for rescission or for damages, as the circumstances may justify and warrant. It is only necessary upon this proposition to refer to the footnote to the case of Grimmer v. Carlton, as reported in 27 Am. St. Rep., at page 171, and also to the footnote to Devlin on Deeds, par. 807, where the same case comes under review. That case having been decided upon the mistaken proposition of law that the contract was void, it is, perhaps, superfluous to point out that issues in this action are joined upon all the vital matters, and that, where issue is joined upon any single material proposition, a judgment on the pleadings is improper. Widmer v. Martin, 87 Cal. 88, 25 Pac. 264; Ghiradelli v. McDermott, 22 Cal. 539; Botto v. Vandament, 67 Cal. 332, 7 Pac. 753.

For the foregoing reasons, the judgment is reversed, and the cause remanded.

We concur: McFARLAND, J.; LORIGAN, J.

147 Cal. 747

WARD LAND & STOCK CO. v. MAPES.

(Sac. 1,167.)

(Supreme Court of California. Sept. 19, 1905.)

1. Trover and Conversion—Ownership of Property—Question for Jury.

Where, in an action to recover the value of cattle sold to defendant under an execution against H., plaintiff claimed that the cattle had been sold to H. under a conditional sale, and plaintiff's manager testified that H. agreed to pay for the cattle if he took them, and H. denied that he made any agreement to pay for the cattle in case he did not take them, whether the transaction amounted to an absolute sale of the cattle or was a mere agreement to sell was for the jury.

2. Same—Instructions.

Where, in an action for the value of certain cattle alleged to have been sold to H. under a conditional sale, the only important condition about which there was any controversy was that the title should not pass to H. until the price was paid or secured, concerning which the court properly charged that if the sale was understood to be a conditional sale, and that the title was not to pass to H., then the jury should find for plaintiff, but, if it was intended and agreed that title should pass or vest in H. unconditionally, then the jury should find for defendant, it was immaterial that the court's definition of a "conditional sale," as used in some of the instructions given, was too broad.

3. Trial—Misleading Requests.

In an action to recover the value of cattle alleged to have been sold to H. under a conditional sale, a requested instruction containing a statement concerning the policy of the law in reference to secret liens and charges on personal property and the requirements of the law in reference to chattel mortgages or pledges of personal property to secure indebtedness, not being applicable to the evidence in the case, was properly refused as misleading.

4. Foreign Corporations — Actions—Articles of Incorporation—Filing.

Civ. Code, § 299, providing that no foreign corporation shall maintain any action until it shall have filed a certified copy of its articles of incorporation in California, does not prevent a corporation not having complied with such section from commencing an action, and hence an objection for such disqualifiation was not sustainable where the corporation filed a certified copy of its articles prior to the filing of its amended complaint.

Department 1. Appeal from Superior Court, Lassen County; F. A. Kelley, Judge.

Action by the Ward Land & Stock Company against George W. Mapes. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Rehearing denied October 20, 1905.

Goodwin & Goodwin and Garoutte & Goodwin, for appellant. N. J. Barry, for respondent.

VAN DYKE, J. This action was brought to recover the alleged value of cattle sold to the defendant on execution as the property of E. H. Hamlin, Jr., by the defendant on the 26th of April, 1901. The plaintiff claimed that the cattle so sold belonged to it, whereas the defendant claimed that the cattle belonged to Hamlin. The verdict in the court below went for the plaintiff, in the sum of $4,358.72⅙, for which sum judgment was thereupon rendered, together with interest and costs. The appeal was taken from the judgment within 60 days, upon a bill of exceptions containing the evidence. The plaintiff is a corporation organized in the state of Nevada, engaged in the business of raising and selling live stock, particularly cattle. The corporation was managed and controlled by O. M. and A. M. Ward. In the latter part of the winter of 1900–01, the plaintiff brought two bunches of cattle to Honey Lake Valley, Lassen county, this state, to be fed for beef and sold. E. H. Hamlin was then engaged in buying beef cattle as the agent of W. & P. Nichols, bankers of Dutch Flat, Placer county, Cal., the cattle to be disposed of by Hamlin in certain markets controlled by him. In order to meet the demands of his market it was necessary for Hamlin to secure cattle ahead, place them on feed, and be prepared to meet the demands of his market as they arose. Plaintiff made an agreement with Hamlin in reference to the sale of cattle, and set a price upon the cattle of different grades, and Hamlin agreed to pay for the feeding of the cattle and was to have the right to take the cattle out for market in such numbers as he desired as his needs required; but it is claimed on the part of the plaintiff and respondent that under the agreement made between it and Hamlin before he took any cattle out of the corral he should place a check covering the value of the cattle taken out in the Nevada Bank, at Reno, Nev., or pay the amount to one of the Ward brothers; and that it was agreed that the title to the cattle was at all times to remain in the plaintiff until payment was made by Hamlin, as stated. Hamlin became indebted to the defendant on account of feed sold to him, and, the defendant supposing the cattle in question to have been bought by Hamlin from the plaintiff and that they were Hamlin's cattle, in an action based on such indebtedness the cattle were attached, and after judgment recovered were sold upon execution, as already stated.

The contention on the part of the appellant is that the sale of the cattle by the plaintiff to Hamlin was an absolute sale, and they therefore became the property of Hamlin, notwithstanding the purchase price had not been paid. On the trial, in Hamlin's testimony, he says: "I made no agreement to pay for these cattle in case I did not take them." And O. W. Ward, one of the managers of the plaintiff, says: "He agreed to pay for them if he took them." Whether the transaction between the plaintiff and Hamlin amounted to an absolute sale of the cattle, or was a mere agreement to sell, generally termed a "conditional sale," was a question to be ascertained and found by the jury from the evidence produced at the trial. "An agreement to sell is a contract by which one engages, for a price, to transfer to another the title to a certain thing." Civ. Code, § 1727. It is shown in this case that the plaintiff and Hamlin agreed upon the price of the different grades of stock to be sold, and that, when the prices thus fixed should be paid by Hamlin, then such stock so paid for became his. A similar question arose in Van Allen v. Francis, 123 Cal. 474, 56 Pac. 339, and the court in discussing that case says: "The nature of the contract between plaintiffs and Van Allen first invites consideration. By appellants it is insisted that it shows an absolute sale of the property; by respondent, that the contract is one of conditional sale. We think the latter construction is the true one. Conditional sales are recognized in this state to the fullest extent [citing a long list of cases]. And it is well settled that even bona fide purchasers from the person to whom the personal property is delivered under an executory contract of sale get no valid claim to the property [citing cases]." Benjamin on Sales, 320, says: "Where the buyer is by contract bound to do anything as a condition either precedent or concurrent on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." Without reviewing the evidence in detail in this case, it is enough to say that it is sufficient to support the verdict.

Appellant's counsel in his brief takes exception to instructions given by the court numbered 4, 5, 7, and 8. It is contended that the definition of a conditional sale given in some of these instructions is too broad, and conflicts with that given in the others, and that the phrase "conditional sale" is used in others without qualification or definition, and that, consequently, the instructions were misleading and could only have served the purpose of mystifying the jury. It may be conceded that if the case involved a contract of sale containing conditions not affecting, or not preventing, an immediate transfer of the title, and there had been, on the trial, a controversy over some such conditions, some of the instructions given would have been confusing, and possibly erroneous. But the only condition of the contract of sale in question which was at all important, or about which there was any controversy at the trial, was the condition that the title to the cattle should not pass to Hamlin until the price was paid or secured. The quesion of the existence of this condition was the decisive point of fact in the case to be decided by the jury. Concerning this the court, in instruction 7, properly instructed the jury as follows: "(7) If you find from the evidence that the sale of the cattle by plaintiff to Hamlin was intended, agreed, and understood to be a conditional sale, and that the title to the cattle was not to pass or vest absolutely or unconditionally in Hamlin, then you should find for plaintiff. But if you find, from the evidence, that it was intended, agreed, and understood by plaintiff and Hamlin that the title to the cattle was to pass to and vest in Hamlin absolutely and unconditionally, then you should find for the defendant." In view of the issues and the evidence given at the trial, all the references to a "conditional sale" in the other instructions must have been intended by the court, and would necessarily have been understood by the jury, to refer to the condition concerning the transfer of title, which had been the chief subject of dispute. When so understood, all the instructions on the subject were substantially correct. It must be presumed that the jury was composed of intelligent men, and as such they could easily understand the distinction between an absolute sale and one with a condition to be complied with before the title passed, to which their attention was called by the instructions.

It is also contended by appellant's counsel that the court erred in refusing to give the following instruction No. 3 asked defendant: "(3) The court instructs you that conditional sales as defined by the court are enforced by the courts of this state when clearly established, but that the policy of the law is against upholding secret liens and charges upon personal property, and that in this state neat cattle can be pledged or mortgaged to secure the payment of a debt upon the observance by the parties of certain formalities designed by the law to insure good faith and to give notice to the world of the character of the transaction. These provisions are, as to pledge, that the party to be secured must retain the possession of the property pledged, or some person other than the pledgor, or must retain such possession for him, and, as to a mortgage, that it must be signed and acknowledged by the mortgagor, and must have attached thereto an affidavit by the mortgagor and mortgagee that the same is made in good faith and without any design to hinder, delay, or defraud creditors of the mortgagor, and it must be immediately recorded with the recorder of the county in which the property affected is situated. These provisions cannot be evaded by any mere shuffling of words. And therefore the court instructs you that where it is clear from the whole transaction that the ownership of the property was intended to be transferred for all practical purposes, and that the seller only intended to reserve a security for the price, any characterization of the transaction by the parties, or any mere denial of its legal effect, will not be regarded. The question, it is true, is one of intention, but the intention must be collected from the whole transaction, and not from any particular feature of it; and if you believe from the evidence that the Ward Land & Stock Company intended by its agreement to transfer to E. H. Hamlin, Jr., or through him to W. & D. Nichols, the ownership of the cattle on the James Mapes place for all practical purposes, and that its intention in making the agreement was only to reserve a security for the price, then the court instructs you that title passed from the corporation, and you must find for the defendant." A great portion of this offered instruction is taken up with a statement concerning the policy of the law in reference to secret liens and charges upon personal property and the requirements of the law in reference to chattel mortgages or pledges of personal property as security for indebtedness. These questions are entirely outside of the evidence in the case, and calculated to mislead the jury. The policy of the law in reference to any particular question may aid the court in its interpretation or construction of the law in any question that may arise in any case before it; but this is not the duty of the jury. It is the province of the jury to arrive at and determine the ultimate facts from the evidence produced in the case. Portions of the instruction in question, if detached from the objectionable portions referred to, might have been properly given; but they are embraced substantially in those given, and, consequently, the appellant suffered no harm in the refusal of the judge to give the instruction in question.

The plaintiff, as already stated, is a corporation organized in the state of Nevada, and is a foreign corporation as to this state, and had not filed its articles of incorporation in this state, as required of foreign corporations, prior to the commencement of the action; but it did do so prior to filing its amended complaint. The language of the law is that the foreign corporation which has not complied with said act shall not "maintain or defend any action or proceeding in any court of this state until such corporation shall have complied with the provisions of section 1 of this act." Upon this state of the case, appellant contends that a compliance with the act in question is a condition precedent to the commencement of the action, and therefore that the action should have been dismissed. This question, however, was directly decided by this court adversely to the contention of appellant in California Sav. & L. Soc. v. Harris, 111 Cal. 133, 43 Pac. 525. In the opinion in that case it was said: "At the commencement of this action the plaintiff had not filed the certified copy with the county clerk of Madera county; but it did file it with that officer several months before defendant filed his amended answer setting up this defense, so that at the time this defense was pleaded by the defendant the plaintiff had complied with the statute. The defense pleaded by the defendant was therefore unavailing to him to prevent the plaintiff from thereafter maintaining the action. Section 299, Civ. Code, does not declare that the plaintiff shall not commence an action in any county unless it has filed a certified copy in the office of the county clerk, but merely declares that it shall not maintain an action until it has filed it. To maintain an action is not the same as to commence an action, but implies that the action has already been commenced." Appellant's counsel intimate that the case just cited was not well considered, and suggest that the subsequent case of Keystone, etc., Co. v. Superior Court, 138 Cal. 738, 72 Pac. 398, practically overruled the former case. This latter case involved a different question, however. The Paraiso Oil Company, a foreign corporation, had filed its petition in voluntary insolvency in the superior court of the city and county of San Francisco, and the Keystone Driller Company, its creditor, made application for a writ of prohibition to prohibit the superior court from entertaining said petition in insolvency or acting upon the case. In the opinion, passing upon the question, it is said: "By the very terms of the insolvent law, a corporation whose residence is outside of the state cannot become a voluntary insolvent, inasmuch as the petition must be filed in the county in which the petitioner resides. Insolvency Law, § 2. This privilege of becoming a voluntary insolvent can be availed of only by a resident of the state, whether a natural or artificial person. The act itself declares that it is for the relief of insolvent debtors, as well as for the protection of creditors. The state is under no obligations to relieve a foreign corporation from its obligations, particularly of a class of the Paraiso Oil Company, very appropriately designated by counsel as a 'tramp corporation.' The only mention of 'foreign corporations' that is made in the insolvency law is in section 16, which is part of chapter 3, entitled 'Involuntary Insolvency.'" And it was held that said foreign corporation could not become a voluntary insolvent, and that the superior court of the city and county of San Francisco had no jurisdiction to entertain its petition in that behalf, or to proceed further in the matter, and this court, therefore, ordered a peremptory writ of prohibition to issue. The case of California Sav. & Loan Soc. v. Harris, already cited, was not referred to in the latter case, and there is nothing to show that there was any intention to overrule or qualify it. In Ryan Live Stock & Feeding Co. v. Kelly, 81 Pac. 470, decided August, 1905, by the Supreme Court of Kansas, the same question was raised as in the case at bar, and the court there say: "The plaintiff in this case is a private foreign corporation, and it was conceded upon the trial that it had not at the commencement of the action complied with the corporation laws of the state of Kansas; but it was proven that prior to the trial in the case it had complied therewith, and had received a certificate from the Secretary of State evidencing that fact. The sole question presented in this case is whether the corporation, not having filed a statement and procured the certificate required by law before the commencement of the action, could comply with the law thereafter, and maintain the action. The court below decided this question in the negative, and dismissed the action. Its judgment is reversed"—citing in support of the opinion a number of cases to the same point. The court, therefore, had jurisdiction to try the cause.

Judgment affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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147 Cal. 763

Ex parte DREXEL. (Cr. 1,261, 1,262.)
Ex parte HOLLAND.

(Supreme Court of California. Sept. 23, 1905.)

1. CONSTITUTIONAL LAW—LIBERTY—POLICE POWER—RIGHT TO CONTRACT.

The provisions in the fourteenth amendment to the federal Constitution and in Const. Cal. art. 1, § 1, guarantying liberty, prohibit the Legislature from prohibiting or interfering with the right of the citizen to make contracts touching the acquisition, protection, management, and enjoyment of property, which do not wrongfully affect the rights of others or the public safety, health, or morals.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 157.]

2. SAME—TRADING STAMPS AS CONTRACTS—PROHIBITING USE—VALIDITY.

A trading stamp given by a merchant to a customer buying goods, which entitles him after accumulating a certain number to use them to the extent of their face value in payment for other goods of the merchant or goods of one who has agreed to redeem them, has none of the characteristics of a lottery or a gambling scheme, but is a contract which the Legislature cannot prohibit, or with which it cannot interfere under the guise of regulation under its police power, and the anti-trade stamp or coupon act (St. 1905, p. 67), attempting to do so, is void.

3. SAME—ELEMENT OF CHANCE.

The anti-trade stamp or coupon act (St. 1905, p. 67), prohibiting the issuance of trading stamps by a merchant to a customer buying goods, is not valid, because it prohibits the giving of a trading stamp "for anything unidentified or unselected by the purchaser at or before the time of sale," and which at the time of sale shall not be "completely identified beyond the necessity of any further selection"; there being no element of chance in the transaction, whether the purchaser is allowed to make his selection when ready to do so, or whether he be compelled at the time of the purchase to limit his choice.

4. SAME.

The act cannot be sustained on the ground that it is proper as protecting the holders of trading stamps from the fraud of those who issued them.

In Bank. Separate applications for writs of habeas corpus by Charles F. Drexel and by J. C. Holland against Jeremiah F. Dinan, chief of police of the city and county of San Francisco, for the discharge of the petitioners from an alleged imprisonment. Petitioners discharged.

W. C. Van Fleet, Mastick, Van Fleet & Mastick, H. G. W. Dinkelspiel, and H. M. Anthony, for petitioners. Lewis F. Byington, Dist. Atty. (John Garber, Allen G. Wright, Charles A. Son, and John Garber, of counsel), for respondent. Geo. S. Hupp, amicus curiæ.

McFARLAND, J. These two causes are submitted together and involve the same questions. Each is a petitioner upon habeas corpus to be discharged from what is alleged to be an illegal imprisonment. Each petitioner is imprisoned upon a charge of misdemeanor for violating a certain act of the Legislature of this state, approved March 7, 1905, which may be generally designated as the "Anti-Trade Stamp or Coupon Act" (St. 1905, p. 67); and each contends that said act is invalid and is violative of section 1 of article 1 of the Constitution of California, which declares that all men have the inalienable rights "of enjoying and defending life and liberty, acquiring, possessing and defending property, and pursuing and obtaining life and happiness," and of section 1 of article 14 of the Constitution of the United States. If said act of March 7th is constitutional, then each petitioner should be remanded; if unconstitutional, then each should be discharged.

It is not necessary to enter here upon a wide discussion of the personal rights of citizens which are guarantied by the constitutional provisions above noticed. They are established and declared by numerous decisions of many American courts. It is sufficient to quote the following declarations from two or three of the leading cases, each aptly stating the law upon the subject. The law as established in other states is very clearly expressed in Young v. Commonwealth, 101 Va. 853, 45 S. E. 327, where the Supreme Court of Virginia say: "The word 'liberty,' as used in the Constitution of the United States and the several states, has frequently been construed, and means more than mere freedom from restraint. It means, not merely the right to go where one chooses, but to do such acts as he may judge best for his interest, not inconsistent with the equal rights of others; that is, to follow such pursuits as may be best adapted to his faculties, and which will give him the highest enjoyment. The liberty mentioned is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purpose above mentioned. These are individual rights, formulated as such under the phrase 'pursuit of happiness,' in the Declaration of Independence, which begins with the fundamental proposition that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness"—citing many cases. And the court further declare that a statute prohibiting, regulating, or interfering with private business can be upheld only under the police power, and that the police power can be rightfully exercised only when the statute in question is for the protection of the public safety, the public health, or the public morals. Its language on this subject is as follows: "It has been repeatedly held that the only authority which a state or municipality has for enacting legislation of this character grows out of what is known as its 'police power.' This has been generally defined to be that power which a state or municipality has to enact laws or ordinances which pertain to the public safety, the public health, or the public morals. The proposition above stated is so universally recognized that it does not require the citation of authorities. It follows, therefore, that, unless the statute in question is one which in some way provides for the public safety, pertains to the public health, or concerns the public morals, it is not a valid exercise of the police power." In our own state this court, in Ex parte Jentzsch, 112 Cal. 468, 44 Pac. 803, 32 L. R. A. 664, say as follows: "It may be suggested in passing that our government was not designed to be paternal in form. We are a self-governing people, and our just pride is that our laws are made by us, as well as for us. Every individual citizen is to be allowed so much liberty as may exist without impairment of the equal rights of his fellows. Our institutions are founded upon the conviction that we are not only capable of self-government as a community, but, what is the logical necessity, that we are capable, to a great extent, of individual self-government. * * * The spirit of a system such as ours is therefore at total variance with that which, more or less veiled, still shows in the paternalism of other nations. * * * In brief, we give to the individual the utmost possible amount of personal liberty, and, with that guarantied him, he is treated as a person of responsible judgment, not as a child in his nonage, and is left free to work out his destiny as impulse, education, training, heredity, and environment direct him. So, while the police power is one whose proper use makes most potently for good, in its undefined scope and inordinate exercise lurks no small danger to the republic. For the difficulty which is experienced in defining its just limits and bounds affords a temptation to the Legislature to encroach upon the rights of citizens with experimental laws, none the less dangerous because well meant." We will indulge in only one more quotation on this general subject, which is taken from a recent decision of this court in bank. Ex parte Hayden, 82 Pac. 315. In the opinion in that case many leading authorities are cited. The court, speaking through Mr. Justice Henshaw, say: "Putting out of consideration, therefore, the fundamental right of the government to subject private property to taxation and to take such property in time of public calamity or peril, the right of the state to impose burdens upon such property where the business is legitimate and innocuous—in other words, to regulate harmless vocations—is found in the police power alone. Young v. Commonwealth (Va.) 45 S. E. 327; Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780. The police power, deriving its existence from the rule that the safety of the people is the supreme law, justifies legislation upon matters pertaining to the public welfare, the public health, or the public morals. Cooley, Const. Lim. (7th Ed.) p. 837; Ruhstrat v. People, 185 Ill. 133, 57 N. E. 41, 49 L. R. A. 181, 76 Am. St. Rep. 30. But the Legislature, under the guise of police regulations, cannot enact laws which do not pertain to one or the other of these objects, and which impose onerous and unnecessary burdens upon business and property. By this court it has been said (Ex parte Whitwell, 98 Cal. 73, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152): 'But it is not true that, when this power is exerted for the purpose of regulating a business or occupation which in itself is recognized as innocent and useful to the community, the Legislature is the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue such business or profession. As the right of a citizen to engage in such a business or follow such a profession is protected by the Constitution, it is always a judicial question whether any particular regulation of such right is a valid exercise of legislative power. * * * This principle is stated very forcibly in the case of Mugler v. Kansas, 123 U. S. 661, 8 Sup. Ct. 297, 31 L. Ed. 205, in the following language: "The courts are not bound by mere forms, nor are they to be misled by mere pretense. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."'" See, also, Stimson Mill Co. v. Braun, 136 Cal. 122, 68 Pac. 481, 57 L. R. A. 726, 89 Am. St. Rep. 116; Ex parte Kelso (Cal.) 82 Pac. 241.

The law, therefore, being settled that the Legislature cannot prohibit or seriously interfere with the right of the citizen to make harmless contracts touching the acquisition, protection, management, and enjoyment of property—contracts which do not wrongfully affect the lawful rights of others, or the public safety, health, or morals—the remaining question in these cases at bar is whether trading stamps or coupons constitute contracts which are outside the protection of the constitutional principles above declared. Neither of the complaints in these cases contains a copy of the stamp or coupon which the petitioner is charged with issuing, and the act of the Legislature in question does not definitely describe such stamp or coupon. But the general character of trading stamps or coupons is a matter of common knowledge. They are somewhat different in form; and one in common use is substantially this: Each time a customer purchases goods from a merchant and pays for them in cash, the merchant gives him a memorandum in writing—called a stamp or coupon—which expresses in money value a small percentage of the price of the goods bought and paid for, and entitles him, after he has accumulated a certain number of such coupons, to use them, to the extent of their face value, in payment for any other goods of the merchant which he may afterwards desire, or goods of some other person or trading company who has undertaken to redeem the coupons. There is generally issued with the stamp or coupon a catalogue of articles from which the holder of the coupon may afterwards select; and such, as we understand it, was the fact in the cases at bar. And such a stamp or coupon, whether or not accompanied by such a catalogue, is prohibited by the act in question. (There is a reference in the act to property which at the time of the purchase is "unselected or unidentified," which the respondent contends distinguishes it from other anti-trading stamp acts which have been declared unconstitutional; and this contention will be noticed hereafter.) We see nothing in such a stamp or coupon which is outside of the constitutional rights of citizens to make contracts concerning property, nothing which wrongfully interferes with the lawful rights of other persons, and nothing which the police power can reach as touching the public safety, the public health, or the public morals. Of course, contracts containing lotteries, advantages dependent upon chance, or any kind of gambling scheme, may be regulated or suppressed. But a trading coupon has none of these characteristics, it is not a lottery, its redemption does not depend upon chance, and it has no element of gambling of any kind. Its holder selects what goods he wants. He is not compelled to take what chance may give him, or to get nothing if the throw of the dice, or the event of some other gambling devise, shall so determine. It is, therefore, a contract which, under the principles above stated, the Legislature has no constitutional power to prohibit, or to seriously interfere with under the guise of regulation; and as the act in question undertakes to do this it is unconstitutional and void.

The view above stated is amply supported by the current of judicial authority. Anti-trading stamp statutes have been passed in many states, and they have been almost invariably held unconstitutional by the courts. A leading case on the subject is People v. Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465. The act of the Legislature under review in that case provided that "no person shall sell, exchange or dispose of any article of food or offer or attempt to do so upon any representation, advertisement, notice or inducement that anything other than what is specifically stated to be the subject of the sale or exchange, is or is to be, delivered or received or in any way connected with or a part of the transaction as a gift, prize, premium or reward to the purchaser." The act was held void, and in an elaborate discussion the court, after stating the constitutional rights of citizens as hereinbefore declared, said, among other things, as follows: "It is quite clear that some or all of these fundamental and valuable rights are invaded, weakened, limited, or destroyed by the legislation under consideration. It is evidently of the kind which has been so frequent of late, a kind which is meant to protect some class in the community against the fair, free, and full competition of some other class; the members of the former class thinking it impossible to hold their own against such competition, and therefore flying to the Legislature to secure some enactment which shall operate favorably to them or unfavorably to their competitors in the commercial, agricultural, manufacturing, or producing fields. By the provisions of this act a man owning articles of food which he wishes to sell or dispose of is limited in his powers of sale or disposition. A liberty to adopt or follow for a livelihood a lawful industrial pursuit, and in a manner not injurious to the community, is certainly infringed upon, limited, perhaps weakened or destroyed, by such legislation." And, further: "It cannot be truthfully maintained that this legislation does not seriously infringe upon the liberty of the owner or dealer in food products to pursue a lawful calling in a proper manner, or that it does not, to some extent at least, deprive a person of his property by curtailing his power of sale, and, unless this infringement and deprivation are reasonably necessary for the common welfare, or may be said to fairly tend in the direction or to that result, the legislation is invalid, as plainly violative of the constitutional provision under discussion. * * * The learned counsel for the people claim that the act is a valid exercise of the police power, in furtherance of the policy of the state to prohibit the setting up of lotteries and the sale of lottery tickets. A careful reading of the statute fails to show any such purpose. * * * It says nothing as to any lottery, and does not confine its prohibition to the giving away or distribution of any other article of property by virtue of any scheme founded upon chance. The act, in effect absolutely prohibits the giving away of any other thing with the food sold and as part of the transaction of sale, wholly regardless of the means used to effect the giving away or delivery of such other article." Afterwards another anti-trading stamp act was passed by the Legislature of the state of New York, which prohibited the giving of trading stamps redeemable by any person other than the one issuing them; and this act was held unconstitutional in People v. Dycker, 72 App. Div. 308, 76 N. Y. Supp. 111, where the court said: "Just what there is in the thing prohibited, differing from the thing expressly authorized, that makes it inimical to the public welfare and general safety, does not appear. This record does not disclose any element of chance in the transaction. Even the possibility of some of the stamps never being offered for redemption is largely eliminated by there being no time or boundary limit to the collection of the stamps, and nothing in the arrangement preventing holders of small lots of stamps from combining with others to make a sufficient number for redemption. The transaction is not a species of lottery, and does not appeal to the gambling instinct [citing cases]. * * * The mere fact that the stamps are redeemable by an agent of the principal or by a third person does not seem to affect the transaction, so far as public safety and the general welfare of the community is concerned, or make it differ from the transaction declared to be within the prohibition of the Constitution by the Gillson Case. * * * If the giving and redeeming of trading stamps is at any time so conducted as to be in fact a lottery or a gambling scheme, it can be punished under the provisions of the Penal Code relating to lotteries and gaming, as the same are therein fully defined, and the acts as so defined prohibited." And another anti-trading stamp act was held unconstitutional in People v. Zimmerman (App. Div.) 92 N. Y. Supp. 497. In Pennsylvania an act purporting to be for the suppression of "lottery gifts by storekeepers and others to secure patronage" was held to be unconstitutional, as far as it undertook to suppress ordinary trading stamps, in Commonwealth v. Moorehead, 7 Pa. Co. Ct. R. 513; the court saying: "A mere chance to draw a prize, a ticket which may bring the holder a prize worth one cent, or one worth $100, or nothing, the result depending on chance, is one thing. A memorandum or check entitling him to demand and receive money or another article of like value to be selected by himself is a very different kind of thing." Similar decisions have been made in Rhode Island (State v. Dalton, 46 Atl. 234, 48 L. R. A. 775), in Alabama (State v. Shugart, 35 South. 28), in Virginia (Young v. Commonwealth, 45 S. E. 327), in Vermont

(State v. Dodge, 56 Atl. 983), in North Carolina (City of Winston v. Beeson, 47 S. E. 457, 65 L. R. A. 167), in Georgia (Hewin et al. v. City of Atlanta, 49 S. E. 765, 67 L. R. A. 795), in New Hampshire (State v. Ramseyer, 58 Atl. 958), and in Colorado by a very recent decision of the county court of Teller county, in a case entitled "People v. Beer." The opinion in this case is given in full in petitioner's brief, but it is probably not yet published, as no reference is given to any publication.

Petitioners also present a certified copy of a recent decision of the United States Circuit Court in and for the Western District of Washington, holding that a statutory provision exactly similar to the one here under review is unconstitutional. It was a habeas corpus case, and by the decision it is declared that: "Being fully advised in the premises, the court finds that 'An act making it a misdemeanor to sell or exchange property under the representation, advertisement, notice or inducement that an unidentified, unknown, unselected, or chance prize, premium or premium gift, or that a stamp, trading stamp, coupon, or other like device, entitling the holder to receive a prize, premium or premium gift, or that the redemption of such a stamp, trading stamp, coupon or other like device so given is to be part of the transaction, or to sell or exchange any trading stamp, stamp, coupon, or other like device, to aid such sale or exchange as aforesaid, and providing a penalty therefor,' is unconstitutional and void, and is in violation of the rights of petitioner secured to him by the fourteenth amendment to the Constitution of the United States; that the petitioner's arrest and imprisonment is illegal."[1] In Ex parte McKenna, 126 Cal. 429, 58 Pac. 916, the unconstitutionality of the statute here in question was, we think, satisfactorily declared. In that case there was involved the validity of an ordinance which imposed a license tax upon merchants doing business to a certain amount who did not use trading stamps, and a tax eight times greater upon merchants doing business, no matter how small, who did use such stamps. The ordinance was held invalid, and the court in bank, speaking through Beatty, C. J., said: "In support of the ordinance, it is contended that the trading stamp device is a lottery in disguise, and therefore immoral. But we cannot see that it has any resemblance to a lottery. There is in it no element of chance, and nothing in the nature of gaming. It appears to be simply a device to attract customers, or to induce those who have bought once to buy again, and in this aspect is as innocent as any form of advertising. And, besides, if it were a lottery in disguise—a mere device to cloak a gambling scheme—it would be unlawful, and not the subject of a license. The ordinance, therefore, cannot be upheld on this ground. It is not an ordinance to prohibit an immoral practice, or to regulate a hazardous or offensive business, or the conduct of a lawful game or public exhibition. It is, under the guise of a revenue measure, an evident attempt to put an end to the issue and redemption of trading stamps by levying a discriminating and prohibitory tax upon the dealers who resort to that method of attracting customers."

Respondent's counsel cite a few cases which, they contend, go directly to the subject of trading stamps, and support the validity of the act here in question, notably, State v. Hawkins, 95 Md. 146, 51 Atl. 850, 93 Am. St. Rep. 328, Humes v. City of Ft. Smith (C. C.) 93 Fed. 857, and Lansburgh v. Dist. of Columbia, 11 App. D. C. 512. With respect to these cases, we do not deem it necessary to consider the suggestion of petitioners that they are distinguishable from the mass of cases above cited. Whatever they may hold, they are not of sufficient consequence to ruffle the great current of authority which runs the other way. The statute in question here makes it a misdemeanor to issue a trading stamp or coupon for "anything unidentified by or unselected by the purchaser at or before the time of the sale," and which, at the time of the sale, shall not be "completely identified beyond the necessity of any further or other selection"; and it is contended by respondent that this feature of the statute takes it out of the principle declared in many of the authorities above cited. We do not see any merit in this contention. There is still no element of chance or gambling in the transaction, whether the purchaser is allowed to make his selection when he is ready to do so, or whether he be compelled, at the time of the purchase, to then and there limit his choice to some one article which he might not want when, in the future, he has accumulated sufficient coupons to be used. Usually a list of articles from which a selection may be made accompanies the coupon; but, whether so or not, he is in either event forced by the statute to make his selection at the time he receives his first coupon. This requirement destroys in a great measure the efficiency of the system, and has no relation whatever to the protection of the public safety, the public health, or the public morals. On this point respondent relies greatly on the Maryland case of State v. Hawkins, supra. That case was afterwards construed by the criminal court of Baltimore to refer only to the case where the article to be obtained by the holder of the stamp "was to be determined by some lot or chance." State v. Frankel, decided September 12, 1902, cited in petitioners' closing brief, where the opinion is quoted in full. If this construction be correct, then the Hawkins Case is not out of harmony with the current of decisions; but, if it necessarily goes to the extent claimed by respondent, then we cannot approve it.

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[1] Quotation from decree. No written opinion.—Ed.

We see no force in the contention that the act is proper as protecting the holders of trading stamps from the fraud and deceit of those who issue them. Of course, the value of any contract depends upon the good faith of each contracting party; and the contracts evidenced by trading stamps are no more subject to the failures of those issuing them to comply with their promises than are any other valid contracts. Such failures would soon end the business.

The act in question has a clause prohibiting the coupon when the selection of the property "will depend upon chance or hazard in any manner whatever"; but this clause need not be here considered, because there is no averment in the complaint, nor is it claimed, that there is here any chance or hazard involved, unless the general nature of the business of issuing trading stamps inherently includes chance or hazard, and, as we have before stated, it does not. Indeed, an ordinary trading stamp or coupon is, in substance, a mere form of allowing discounts on cash payments, and its issuance is entirely harmless and within the constitutional right of contract. It may be distasteful to certain competitors in business; but the latter should remember that, if a statute suppressing it be upheld, then other oppressive statutes might be enacted unlawfully interfering with and hampering business and the right of contract, to which these competitors would strenuously, but vainly, object.

Our conclusion is that the said act of March 7, 1905, so far as it undertakes to make the issuance of trading stamps and coupons such as were used by the petitioners herein a misdemeanor, is unconstitutional and void. The petitioners, Charles F. Drexel and J. C. Holland, are discharged from custody.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; LORIGAN, J.; SHAW, J.; VAN DYKE, J.; HENSHAW, J.

147 Cal. 774

Ex parte WEST. (Cr. 1,263.)

(Supreme Court of California. Sept. 23, 1905.)

In Bank. Application for writ of habeas corpus by Charles P. West against Jeremiah F. Dinan, chief of police of the city and county of San Francisco, for the discharge of petitioner, held under an alleged illegal imprisonment. Writ granted.

W. C. Van Fleet, Mastick, Van Fleet & Mastick, H. G. W. Dinkelspiel, and H. M. Anthony, for petitioner. Lewis F. Byington, Dist. Atty. (John Garber, Allen G. Wright, Charles A. Son, and John Garber, of counsel), for respondent. Geo. S. Hupp, amicus curiæ.

PER CURIAM. This cause is entirely within and governed by the decisions in the cases of Ex parte Drexel and Ex parte Holland (this day decided) 82 Pac. 429; and upon the authority of those cases the petitioner, Charles P. West, is discharged from custody.

148 Cal. 7

WOOLWINE v. STORRS. (S. F. 4,005.)

(Supreme Court of California. Sept. 28, 1905.)

1. LIMITATIONS—EXTENSION OF NOTE—ACKNOWLEDGMENT OF DEBT—FINDINGS—EVIDENCE.

In an action on a note, evidence *held* to sustain findings that a requested extension of the debt sufficient to suspend the statute of limitations had not been granted, and that there had been no written acknowledgment of the debt by deceased within four years prior to the commencement of the action.

2. BILLS AND NOTES—EXTENSION.

A written request for an extension of a note was ineffective in the absence of an acceptance.

3. LIMITATION OF ACTIONS—NEW NOTE—EFFECT.

Where, after maturity of a note on which testator was jointly and severally liable, he gave a new note for a part of the debt, due in four months, which note was subsequently fully paid before the commencement of an action on the original note, the mere giving of the additional note did not suspend the holder's right of action on the original note against testator for the remainder of the indebtedness.

4. SAME—ACTION—EVIDENCE.

In an action on a note, it was not error for the court to sustain an objection to a question asked of the holder's agent as to whether he remembered having had a conversation with the maker concerning the original guaranty and the demand for payment; such evidence not being material on the issue as to the extension of the note, so as to toll the statute of limitations.

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by W. P. Woolwine against H. E. Storrs, as executor of the will of S. Merrill, deceased. From a judgment in favor of defendant, and from an order denying plaintiff's motion for a new trial, he appeals. Affirmed.

Lawler & Allen and Lawler, Allen & Van Dyke, for appellant. Aylett R. Cotton, for respondent.

ANGELLOTTI, J. This is the same suit as that of Pierce et al. v. Merrill et al., in which on a former appeal a judgment for the plaintiff was reversed. 128 Cal. 464, 61 Pac. 64, 79 Am. St. Rep. 56; 128 Cal. 473, 79 Am. St. Rep. 63. The present plaintiff is the assignee of the former plaintiffs, and has been substituted for them. The defendant, Storrs, has been substituted as executor of the will of the deceased defendant, Merrill. The case was tried on the answer of the defendant, Storrs, and judgment was entered in his favor. The appeal is from the judgment and from an order denying the plaintiff's motion for a new trial. The other defendants are not parties to this appeal, or to the judgment appealed from.

The original defendants were sued as guarantors of a note of the Semi-Tropic Land & Water Company; the amount of the note being $50,000, the date June 1, 1889, and the date of maturity June 1, 1891. The suit was commenced January 31, 1896, more than four years after the maturity of the note; the theory of the plaintiff apparently being that the liability of the defendants on their guaranty did not accrue until other security given by the makers of the note, consisting of a mortgage, had been exhausted. It was held upon the former appeal that upon the facts stated in the complaint the liability of the defendants on their guaranty accrued at the maturity of the note, and that therefore the demurrer, based on the statute of limitations, should have been sustained. The court said: "If plaintiffs relied upon a written acknowledgment of indebtedness within four years prior to the commencement of the action, or upon any other other fact, to take the case out of the statute of limitations, they should have pleaded the same in their complaint." 128 Cal. 472, 61 Pac. 66, 79 Am. St. Rep. 56. Upon the going down of the remittitur plaintiff, in order to take the case out of the operation of the statute of limitations, so amended his complaint as to allege a request by the maker of the note and defendants for an extension of one year from May 21, 1891, within which to pay the balance remaining unpaid on said note, and the granting of the same by the owners of the indebtedness. The request was made on May 21, 1891, when the principal debt had become due, under the provisions of the note, by default in the payment of interest, and notification to the maker and guarantors that the holders declared the same due and demanded payment. The request was in writing, a copy of which was set forth in the complaint, and was as follows, viz.: "Office of Semi-Tropic Land & Water Co. Samuel Merrill, Pres. Geo. H. Bonebrake, Vice P. F. C. Howes, Treas. Jos. L. Merrill, Secy. Robert D. Wade, Supt. Palace Hotel. San Bernardino Co., May 21, 1891. Henry Pierce, Esq., San Francisco: Our Semi-Tropic L. & W. Co. ask a year's extension. Messrs. Bonebrake, Howes, and Merrill pledge that the payment shall come at that time without fail and without litigation or expense. Yours, S. Merrill, Prest." It was alleged that, pursuant to and in reliance upon this writing, the holders of the note granted an extension of one year from May 21, 1891, within which to pay the balance due.

It is clear that the above letter could not, standing alone, have operated to save plaintiff's demand against defendant from the bar of the statute for a longer period than four years from its date. If, taken in connection with the existing circumstances and the previous demand for payment, the letter be considered as a sufficient acknowledgment of an existing indebtedness of Merrill, under section 360, Code Civ. Proc., its utmost effect as such an acknowledgment was simply to waive so much of the period of limitations as had already run in Merrill's favor, and give a new period of four years, commencing at that date, May 21, 1891, within which action might be brought against him. It could only be in the event that the requested extension was agreed to by the holders of the note that any extension might be effected. If no such extension was effected, there was, of course, no moment of time after June 1, 1891, when the statute was not running, or when the holders of the note could not have maintained an action against Merrill upon his guaranty. The allegations of the amended complaint in regard to the granting of an extension were denied by the amended answer, and the trial court found that such requested extension was not granted. If this finding is sufficiently supported by the evidence, it necessarily disposes of plaintiff's contention in this behalf. We are unable to see how it can be held that this finding is not supported by the evidence. It is not claimed that there was any written assent to the proposition contained in the letter, and, if it be assumed that an oral assent would have been sufficient, a perusal of the record shows that there was no oral agreement for the extension requested thereby. It affirmatively appears that the proposition contained in the letter, viz., that a year's extension on the $50,000 note should be granted, was not accepted; for it is shown that Mr. Pierce, who was managing the matter for the holders, continued to press the matter to the extent of threatening a foreclosure "if they did not come to time," so that on May 23, 1891, two of the guarantors, Merrill and Bonebrake, gave their personal note for $25,000, payable four months after date, in order that the same might be negotiated, and the holders thereby enabled to at once obtain a portion of the amount due, which note was negotiated by the holders, and payment insisted on by them in accordance with its terms. This note was partially paid at or about its maturity, and a new note given for the balance by the Semi-Tropic Land & Water Company, which was ultimately paid in full.

The utmost that the record shows in favor of plaintiff's claim in this behalf is that in consequence of other arrangements, utterly inconsistent with the proposition for an extension of the note for a year, including the giving of the $25,000 note above referred to and payments on the same and on the new note given in its place for the balance due thereon, until in 1893 the same was fully satisfied, the holders of the $50,000 note did in fact refrain from bringing suit upon their accrued cause of action thereon for nearly three years from May 21, 1891, when they instituted the proceeding for a foreclosure of their mortgage for the balance then due. There is nothing in this to compel even the conclusion that the holders of the $50,000 note ever orally agreed to forbear suit for any time, or to indicate anything more than that they were satisfied to refrain from pressing their accrued cause of action so long as satisfactory arrangements for the speedy payment of a large portion of the indebtedness were made. Much less does it tend to show the agreement for an extension of the note alleged by the amended complaint, which was the only agreement alleged by plaintiff for the purpose of taking the case from the operation of the statute, and consequently the only agreement within the issues. Upon the evidence the trial court was necessarily compelled to find that the alleged agreement for a year's extension was never made, and this was, in effect, the finding under discussion. The above-mentioned allegation as to the request for an extension of time and the granting of the same was the only allegation of matters affecting the running of the statute, except that there was an allegation to the effect that defendant Merrill was absent from the state of California between June 2, 1891, and June 2, 1895, for a period of more than 8 months, and also one to the effect that prior to April 27, 1895, and within 4 years prior to the commencement of the action, said Merrill had made, signed, and delivered to plaintiff's predecessors a certain writing wherein he unconditionally admitted his liability. Upon both these matters the findings were against plaintiff. The unchallenged finding as to absence from the state was that Merrill was absent for not more than 6 months and 20 days, and this action was not commenced until the expiration of 4 years and 8 months from the time the cause of action accrued. There is no evidence whatever in conflict with the finding that there was no written acknowledgment of the indebtedness by Merrill within 4 years prior to the commencement of the action.

It is urged that the letter of May 21, 1891, contains a promise on the part of Merrill to pay the debt at the expiration of one year from its date, and that such promise was enforceable at any time within four years after the expiration of the year, but manifestly the promise therein contained was conditioned upon the acceptance of the proposition for a year's extension, and was enforceable only in the event of such acceptance. It is further urged that by the taking of the four-month $25,000 note of Merrill and Bonebrake on May 23, 1891, an extension of at least four months was granted on the $50,000 note, which, added to the period of Merrill's absence from the state would bring the action within time. The evidence does not show any express agreement for such extension. The mere taking of this note would not have the effect of suspending the right of the holders of the note to maintain an action against Merrill for the remainder of the indebtedness, and what is here sought to be recovered was included in such remainder; for the $25,000 note was fully satisfied before the commencement of the foreclosure action. A sufficient answer, however, to the contention in this behalf, is that no such agreement for an extension of four months is embraced within the issues made by the pleadings. The findings already discussed being sufficiently sustained by the evidence, it follows, in view of what was decided upon the former appeal, that it must be held that plaintiff's claim against Merrill's estate is barred by the statute of limitations, and that therefore no recovery can be had thereon.

The trial court did not err in sustaining the objection to the question asked Pierce as to whether he remembered having had any conversations with Merrill on or about May 2, 1891, or shortly subsequent thereto, concerning the original guaranty and the demand for payment made April 27, 1891. The question was not such as to indicate that it called for any competent evidence material to the issues being tried, or for any evidence material upon the issue as to the extension for a year. Counsel for appellant stated to the court, in effect, that the question was merely preliminary, and it is apparent that it was never suggested that there was anything said in any conversation prior to the letter of May 21st that could have affected the determination of the question as to whether an agreement for the extension alleged in the amended complaint was made. The ruling of the court admitting certain testimony on the question of the assignment of the indebtedness to plaintiff was not prejudicial, for the court found for plaintiff upon that issue.

It is unnecessary to consider any other point made on this appeal by either party.

The judgment and order are affirmed.

We concur: BEATTY, C. J.; SHAW, J.; LORIGAN, J.; McFARLAND, J.; HENSHAW, J.

VAN DYKE, J., being disqualified, does not participate in the foregoing.

(147 Cal. 739)

MATTESON et al. v. WAGONER et al.

(Sac. 1,144.)

(Supreme Court of California. Sept. 18, 1905.)

1. ACTION—MISJOINDER OF CAUSES.

A complaint to rescind certain notes and a mortgage for fraud alleged that the borrowers secured the loan by promising to pay off a prior lien on the land with the proceeds, without any intention to do so, but, instead, used the money to purchase and discharge liens on other land, and still had a portion of the money in their hands, and that they were insolvent, and that the land mortgaged was not worth the amount of the loan in addition to the lien thereon. The complaint prayed a cancellation of the notes and mortgage, a judgment against the borrowers for the amount of the loan, with interest, and a lien on the land purchased with part of the proceeds and also on the tract released from a mortgage by a part of the money. *Held* not objectionable, as stating more than one cause of action.

2. Parties—Purchasers Pendente Lite.

Where an amended complaint to cancel certain notes and a mortgage for fraud, and to impose liens on certain land, alleged that subsequent to the beginning of the action defendant B. had purchased part of the land on which plaintiffs desired the lien, with full notice of plaintiffs' claims and rights, B. was properly made a party defendant.

3. Pleading—Demurrer.

A complaint will be held sufficient on demurrer for want of facts, if it appears from the facts alleged that plaintiff is entitled to any relief against defendants, though the facts may not be clearly stated, or may be mingled with other irrelevant facts, and though plaintiff may have demanded relief to which he was not entitled.

4. Contracts—Rescission—Fraud.

Where defendants procured a loan from plaintiff, evidenced by note and mortgage, on the promise to pay off a prior lien on the property mortgaged with the proceeds of the loan, without any intention to perform such promise, and after obtaining the money used it for other purposes, plaintiff was entitled to rescind the contract for fraud, as provided by Civ. Code, § 1572.

5. Same—Diligence—Pleading.

Where an action to rescind a contract for fraud was begun November 25, 1895, less than five months after it was made, and the complaint alleged that a considerable time elapsed after July 3, 1895, before the fraud was discovered, and it did not appear that the delay had resulted in any injury to defendants, the complaint was not demurrable for failure to show that the contract was rescinded and the action begun promptly on the discovery of the fraud, as required by Civ. Code, § 1691.

6. Same—Waiver of Fraud.

Where, in an action to rescind a contract by which defendants procured a loan from plaintiff on their agreement to use the proceeds to pay off a prior lien on lands mortgaged to secure the same, which agreement they did not intend to keep, the complaint alleged the receipt by plaintiff of $165 paid on account of interest on the loan, but did not allege whether such payment was received after the discovery of the fraud and with an intention thereby to affirm the contract, or that plaintiff was then aware of the effect of the acceptance of the money, it was not demurrable for want of facts on the ground that such receipt amounted to a waiver of the fraud.

7. Same—Return of Consideration.

Where, in an action to rescind a contract for fraud, plaintiff was entitled to retain a payment made under the contract, whether it was rescinded or not, he was not bound to tender a return thereof as a condition of his right to rescind.

8. Limitations of Actions — Relief on Ground of Fraud.

Plaintiff loaned certain money to defendants W. on their promise to pay off a prior lien on property mortgaged to secure the loan, which promise they had no intention to, and did not, keep, but with a portion of the proceeds of the loan paid off a mortgage on another tract of land, which, after action brought by plaintiff to rescind the contract, B. purchased, with notice of plaintiffs' claim of lien thereon, on April 26, 1897. Plaintiffs filed a supplemental complaint to declare such lien as against B. on July 20, 1901, but did not allege that B.'s purchase was not discovered at the time it was made. *Held*, that plaintiffs' cause of action against B. was barred by either Code Civ. Proc. § 338, subd. 4, limiting actions for fraud to three years, or by section 343, requiring actions for relief not otherwise provided for in the Code to be brought within four years.

9. Lis Pendens—Purchaser Pendente Lite.

Where a lis pendens is duly filed, a purchaser pendente lite is bound by the judgment, though not made a party to the action.

Department 1. Appeal from Superior Court, Nevada County; F. J. Nilon, Judge.

Suit by Albert Matteson and another against T. J. Wagoner and others. From a judgment in favor of defendants, plaintiffs appeal. Judgment affirmed as to defendant Elam Biggs, and reversed as to the other defendants.

John Caldwell and C. W. Kitts, for appellants. A. D. Mason, for respondents.

SHAW, J. The plaintiffs appeal from a judgment in favor of the defendants upon demurrers to the second amended and supplemental complaints. With respect to the defendants, other than Biggs, we think the demurrers were improperly sustained. The complaint alleges in substance that on July 3, 1895, the defendants T. J. Wagoner and Louisa J. Wagoner were the owners of a tract of land of 160 acres or thereabouts, upon which there was an existing lien of more than $3,000, secured by a trust deed; that the Wagoners requested of the plaintiffs a loan of $3,300, for which they were to give their notes, bearing interest at 10 per cent. per annum, payable one year after date, and secured by a mortgage upon the said tract of land, and offered that, if the plaintiffs would make the said loan upon said security, they (the Wagoners) would, upon receiving the money on the loan, forthwith pay the same upon and in discharge of the pre-existing lien on the land and cause the same to be released, thus leaving the plaintiffs' mortgage as a first lien thereon, and affording the plaintiffs ample security for its payment; that said promise was made without any intention on the part of said defendants to perform the same, and with the intention of using said money for other and different purposes; that the plaintiffs accepted the proposition of said defendants and agreed to make the loan upon the terms proposed. In pursuance of this agreement, the mortgage and notes were executed and delivered to the plaintiffs, who thereupon, in reliance upon the promise of said defendants that they would take the money and pay the same in discharge of the prior lien and procure its release, delivered to the said defendants the $3,300 so agreed to be loaned upon said mortgage, to be used in discharging the prior lien according to the agreement. The defendants did not pay the money upon the prior lien, except the amount of about $400 thereof, and they have entirely failed to obtain a release of the prior lien. The land upon which the plaintiffs' mortgage was taken is not worth more than $4,000, and the defendants T. J. and Louisa Wagoner are insolvent. As soon as plaintiffs learned that the prior lien had not been released or the money paid thereon, they demanded that the prior lien be forthwith released or said money returned. Prior to the beginning of the action they offered to cancel and return the notes and mortgage given by said defendants to them. It is alleged that said notes and mortgage have not been paid, except that said defendants had paid $165 on account of interest thereon. It is further alleged that the said defendants used $1,750 of the said money in payment of a mortgage upon a different tract of land containing about 50 acres, and about $2,000 thereof in the purchase of another tract known as the "Hubie Ranch," and that they have $1,000 of it still remaining in their hands. The allegations of the supplemental complaint will be considered hereafter. The prayer of the complaint is that the mortgage and notes given to the plaintiffs be canceled; that the plaintiffs recover of the defendants the Wagoners the sum of $3,300 so loaned, with 10 per cent. interest thereon from January 3, 1896; and that they have a lien declared upon the Hubie ranch and also upon the track described in the mortgage for $1,750, which was released with a part of the money. The demurrers to the second amended and supplemental complaint assign as grounds of demurrer that it did not state facts sufficient to constitute a cause of action, that the cause of action was barred by the statute of limitations, and that there was a misjoinder of causes of action and parties. So far as the Wagoners are concerned, it cannot be claimed that the cause of action was barred by the statute of limitations, nor that there is a misjoinder either of actions or of parties. The original complaint was filed November 23, 1895, less than five months after the mortgage was made, and the amended complaint is substantially the same as the original. The complaint does not state more than one cause of action, and the defendant Biggs was properly made a party upon the allegation that subsequent to the beginning of the action he purchased the part of the land upon which the plaintiffs desired to have the lien for $1,750 declared; the purchase being made with full notice of the plaintiffs' claims and rights.

In determining whether or not the complaint is sufficient, as against the demurrer upon the ground that it does not state facts sufficient to constitute a cause of action, the rule is that if, upon a consideration of all the facts stated, it appears that the plaintiff is entitled to any relief at the hands of the court against the defendants, the complaint will be held good, although the facts may not be clearly stated or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he is not entitled under the facts alleged. There appears to be some confusion in the minds of counsel in regard to the precise nature of the cause of action attempted to be stated. It is clearly not an action to foreclose the mortgage, nor to recover upon the notes the amount due thereon according to their terms. At the time the action was begun neither notes nor mortgage were yet due. It is plainly an action in equity to rescind the contract by which the loan was made, and secure a restoration of the money obtained from the plaintiffs thereon, upon the ground that the contract was induced and the money obtained by fraud. The right to rescind is clear. A promise made without any intention of performing it constitutes fraud, and if by means of it a party has been induced to alter his position to his injury, it is ground for relief in equity. Civ. Code, § 1572. A contract obtained by such means may be rescinded. Civ. Code, §§ 3406, 1689; Newman v. Smith, 77 Cal. 22, 18 Pac. 791; Lawrence v. Gayetty, 78 Cal. 126, 20 Pac. 382, 12 Am. St. Rep. 29; 2 Pom. Eq. Jur. (3d Ed.) § 910. Rescission must be made promptly on the discovery of the fraud. Civ. Code, § 1691. It is claimed that there was not sufficient diligence shown in offering to rescind and beginning suit after discovery of the fraud. The complaint does not give the date of the discovery of the fraud, nor of the offer to rescind. But ambiguity and uncertainty on these points are not made grounds of demurrer, and, so far as the general ground is concerned, we think the complaint shows sufficient diligence. It is alleged that a considerable time elapsed after July 3, 1895, before discovery of the fraud, and the action was begun November 25, 1895, less than five months after the money was loaned. It does not appear that the delay which may have occurred after the discovery was, or could have been, at all injurious to the Wagoners, and such a short delay does not of itself constitute such laches as to defeat the action.

It is urged that the mortgage transaction was affirmed and ratified after discovery of the fraud. By this we suppose respondent means that the receipt of $165, paid on account of interest, was an affirmance of the contract and a waiver of the fraud. If this payment had been received as interest on the loan after the discovery of the alleged fraud, and with the intention thereby to affirm the contract, the plaintiffs being then aware of the effect of their acceptance of the money, it would doubtless constitute a waiver of the fraud and an election to treat the contract as valid, and would defeat the action. These facts, however, do not all appear from the complaint. Indeed, they are properly matters of defense, and would more appropriately appear by way of answer. If a complete defense appears on the face of the complaint, the defendant may avail himself thereof by means of a demurrer; but where a part, only, of the necessary facts appear, it will not render the complaint demurrable. The allegation that defendants had paid $165 on account of the interest on the mortgage does not, taken alone, show an election to affirm.

It does not appear when it was paid, nor that plaintiff then knew of the fraudulent character of the promise to procure the release of the prior lien, nor that it was accepted by plaintiffs with a conscious knowledge of its legal effect on the transaction and an intention to affirm the same. Neither of these facts can be presumed in favor of the defense, at least in the absence of anything showing knowledge of the fraud at the time of accepting the payment. If the defendant desires to avail himself of such a defense, he must aver the facts in his answer.

It was not necessary, under the circumstances of this case, as alleged, to offer to return the $165 as a condition precedent to rescission. In Richards v. Fraser, 122 Cal. 461, 55 Pac. 247, it is said: "One who attempts to rescind a transaction on the ground of fraud is not required to restore that which in any event he would be entitled to retain"—quoting from Kley v. Healy, 127 N. Y. 561, 28 N. E. 593. In Kelley v. Owens, 120 Cal. 511, 47 Pac. 371, in treating of this subject it is said that an offer to restore is not necessary, "where it clearly appears that the defendant could not possibly have been injuriously affected by a failure to restore." The same rule was followed in Gilson v. Gilson, 47 Cal. 601, and Wilson v. Moriarty, 77 Cal. 596, 20 Pac. 134. In Kley v. Healy, supra, the New York Court of Appeals says that, if there are any circumstances of hardship upon the defendant arising from such failure to restore, "such conditions as might be essential to the protection of the defendant could be inserted in the judgment ultimately recovered." This is authorized by section 3408 of the Civil Code. The doctrine here stated is fully supported by the New York cases. Fisher v. Bishop, 108 N. Y. 30, 15 N. E. 331, 2 Am. St. Rep. 357; Gould v. Cayuga Nat. Bank, 86 N. Y. 81; Guckenheimer v. Angevine, 81 N. Y. 394; Allerton v. Allerton, 50 N. Y. 670. See, also, Judge v. Stone, 44 N. H. 601. The decision in Marten v. Burns Wine Co., 99 Cal. 356, 33 Pac. 1107, is contrary to this rule; but, in view of the subsequent decisions above cited, it cannot be considered a precedent. The case at bar comes clearly within the rule. If the plaintiffs fail in the present action, they will be entitled to retain the $165 as a payment of interest on the notes. If they succeed in the action, they will be entitled to retain the $165 as a partial restoration of the sum loaned, and to have judgment for the balance. The defendants, therefore, cannot possibly be injured. The law does not require idle acts (Civ. Code, § 3532), and nothing would seem more idle than to require the plaintiffs, as a mere formal prerequisite to trial and judgment, to offer to return to defendants that which defendants would in no event be entitled to keep, and which, defendants being insolvent, plaintiffs could not hope to recover. The prayer for relief is no part of the statement of fact, and the fact that too much is asked for does not affect the cause of action stated. Under the prayer for general relief the court can give such judgment as plaintiffs show themselves entitled to, and as may be necessary to effect justice between the parties and protect the rights of both. The discrepancies in the amounts of money alleged to have been paid out by the Wagoners, which make it appear that they have used more money than they received, show carelessness on the part of the pleader, but they do not affect the substantial merits of the cause of action.

The demurrer of Biggs to the amended and supplemental complaint should have been sustained, upon the ground that the action is barred either by subdivision 4 of section 338 or by section 343 of the Code of Civil Procedure. The cause of action stated, as against Biggs, was either an action for relief on the ground of fraud, and therefore barred within three years from the time the action was begun against him, as provided in section 338, or an action for relief not otherwise provided for in the Code, and therefore barred within four years after the cause of action accrued, as provided in section 343. The allegations of the supplemental complaint are that on April 26, 1897, Biggs purchased of the Wagoners the tract of land described in the $1,750 mortgage, above referred to, upon which the plaintiffs desire to have a lien declared, and that he purchased this property with full notice of the rights and claims of the plaintiffs. The cause of action existed and was complete against Biggs on April 26, 1897, at the time he made the purchase. There is no allegation that the plaintiffs did not discover the fact of this purchase at the time it was made, and, if ignorance thereof would prevent the running of the statute, it should have been alleged; for it cannot be presumed in favor of the plaintiffs that they did not discover it until less than three years prior to the time of filing the supplemental complaint. The supplemental complaint was not filed until July 20, 1901, which was more than four years after Biggs' purchase. Prior to the time of filing this supplemental complaint it cannot be said that any action was pending against Biggs. The statute of limitations began to run as soon as the cause of action against him was complete; that is, on April 26, 1897, and it continued to run without interruption until the filing of the supplemental complaint. The time provided by either section above referred to had therefore expired before any action was begun against Biggs. It does not appear that any notice of action was filed, and under such circumstances he has a right to invoke the bar of the statute. Lawrence v. Ballou, 50 Cal. 258; Jeffers v. Cook, 58 Cal. 151; Spaulding v. Howard, 121 Cal. 198, 53 Pac. 563; Newman v. Marvin, 12 Hun, 242; Shaw v. Cock, 78 N. Y. 194; Magaw v. Clark, 6 Watts, 528; Brown v. Goolsby, 34 Miss. 437; Gray v. Trapnall, 23 Ark. 510. If a notice of action was duly filed, he would be bound by the judgment, although not made a party to the action.

As to the defendant Biggs, the judgment is affirmed. The judgment is reversed as to the defendants T. J. and Louisa J. Wagoner, with costs, and the cause remanded, with directions to the court below to overrule their demurrer.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

148 Cal. 1

CHURCHILL v. RUSSELL et ux.

(Sac. 1,193.)

(Supreme Court of California. Sept. 26, 1905.)

1. STATUTE OF FRAUDS—WATERS AND WATER COURSES — IRRIGATION — TRANSFER OF RIGHTS.

A transfer of a right to a certain amount of the waters of a stream for irrigation purposes is an agreement for the transfer of an estate in real property, within the statute of frauds.

2. SAME—PART PERFORMANCE.

Where plaintiff's grantor, while the owner of the waters of a stream, orally agreed in 1888 to convey to defendants 20 inches of water of such stream for irrigation purposes, to induce them to purchase the interest of another in certain adjoining land and to acquire such land from the United States, and pursuant to such agreement defendants purchased and acquired the land, used such amount of water to irrigate the same for a period of 14 years, and made valuable improvements upon the land, there was such part performance of the contract to convey such water right as saved the same from the operation of the statute of frauds.

3. WATERS AND WATER COURSES—EQUITABLE INTEREST — BONA FIDE PURCHASERS — NOTICE.

Where defendants had acquired a mere equitable right to certain waters of a stream from plaintiff's grantor, they were not entitled to rely thereon in a suit by plaintiff to restrain the diversion of such water, in the absence of proof and a finding that plaintiff purchased with notice, actual or constructive, of defendants' rights.

Department 2. Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by J. Churchill against J. F. Russel and another. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Rehearing denied October 25, 1905; Beatty, C. J., dissenting.

Gillis & Tapscott, for appellant. R. S. Taylor, for respondents.

LORIGAN, J. This action is brought to restrain the defendants from diverting the waters of Butte creek, in Siskiyou county. There is no question in the case but that the predecessor in title of the lands to which said water right is appurtenant, Charles B. Boyes, as early as 1877 appropriated for purposes of irrigation the waters of said stream to the extent of 1,000 inches, measured under a 4-inch pressure, which is practically the full flow of said stream in the irrigation season, and that the appellant succeeded to said water right by purchase from the original proprietor of the Boyes ranch and this water right appurtenant thereto, unless by reason of the facts alleged in the answer of defendants, and found by the court to be true, the judgment in their favor that they are the owners, by a right prior to the plaintiff, of 20 inches thereof, is warranted. In their answer the defendants, while in effect admitting that as early as 1877 Charles B. Boyes had appropriated the waters of said creek, alleged, as a defense to the claim of plaintiff as his successor in interest to all said waters and as a basis for their asserted claim that they were the owners of 20 inches thereof, facts which the court found supported by the evidence, and upon which it made the following finding: "That since the year 1888, defendant Meta A. Russell has been the owner of and in the possession of the N. E. ¼ of section 24, township 45 N., of range 2 W., Mt. Diablo meridian. That said land is agricultural land, and needs water to irrigate the same. That in the year 1888 Charles Boyes, the predecessor of plaintiff, as an inducement to said Meta A. Russell to take up said land as a homestead, promised and agreed that, if she would do so, then she should always have and own and use at all times 20 inches, measured under a 4-inch pressure, of the said waters of Butte creek. That, relying upon such promise, said defendant took up said land as a homestead and purchased the improvements thereon, belonging to one Snell, and thereafter took and used said 20 inches of water each and every year for the period of 14 years, and made valuable improvements upon said land." Upon this finding a judgment declaring the defendants to be the owners of said water to the extent of their claim to 20 inches was entered, and plaintiff appeals from said judgment and from an order denying his motion for a new trial.

The principal, though not the only, attack in the case, is made upon this finding. It is insisted, not only that it is not supported by the evidence, but that, even if so supported, it furnishes no warrant in law for the judgment based upon it. As far as the first point is concerned, it is enough to say that the finding is supported by the direct evidence of the defendant J. F. Russell, which was substantially sufficient to warrant the court in making it. This would make any further reference to the evidence on this subject unnecessary, if it were not for the other point made by appellant as to the legal sufficiency of the finding to support the judgment.

The evidence, briefly stated, shows that after Boyes had appropriated the waters of Butte creek, including the 20 inches in controversy, and prior to August, 1888, one Snell was in the occupancy of the quarter section mentioned in the quoted finding as a squatter. The defendant J. F. Russell had in contemplation the purchasing of Snell's right and interest in the land—possession and improvements—for the benefit of his codefendant, and went to see Boyes in relation to it. Upon this subject he testified: "Before we bought the Snell place, I went to see Charlie Boyes; and I told him I was thinking of purchasing the Snell place, so that my wife could take it up—she and I was not married then—and I told him I didn't want it unless I had some water to go with it, and he said he didn't want Snell there, and, if I would get him off, he said, 'I will give you 20 inches of water.' And I says: 'Will you give it to us for all time?' And he said, 'Yes, the title to it.' And that is the title I have of it." Immediately after this interview, and as a result of their agreement, the defendants in August, 1888, purchased Snell's possessory right to the land, went into possession, and the defendant Meta Russell made a homestead entry upon it as public land of the United States. They forthwith constructed a ditch and conducted therein from Butte creek to and upon their premises the 20 inches of water which Boyes had agreed to convey to them. This land upon which they had settled, though agricultural land, required water for irrigation, and without it profitable crops could not be raised thereon. The defendants immediately commenced improving their property, utilizing this water for that purpose. There was but comparatively little land cleared off when they took possession—some 11 acres. In 1889 they cleared off and broke up some 30 acres additional and planted it to hay and grain. In 1891 they set out a small orchard. The following year more land was cleared, bringing the cultivable land up to near 50 acres. All this land, aside from the orchard, was planted in part to grain and hay, and part to timothy and clover, and produced profitable crops through the use of this water. Subsequent to 1892 additional land was cleared off and brought under cultivation, said water also being used in irrigating the same up to the commencement of this action—some 14 years—and improvements of a permanent character were placed upon the premises by the defendants. It is unnecessary to particularize further as to these matters, because what we have especially referred to is sufficient for the consideration of the point made by appellant relative to the agreement between Boyes and defendants and the right of the defendants to the 20 inches of water in question which they claim under it. Boyes died in 1890. Plaintiff purchased the Boyes ranch, to which the appropriated waters of Butte creek were appurtenant, probably about 1895. The date is uncertain from the testimony. This action was commenced in 1901. There was no conveyance in writing of the 20 inches of water in question made by the original appropriator, Boyes, or any one else, to defendants. Whatever interest the defendants acquired to it rested in parol, and the point made by appellant is that the interest which the defendants asserted in the water right so appropriated by Boyes is an estate in real property, and that the agreement for the conveyance thereof, not being in writing, is within the statute of frauds, and void.

That the interest asserted by defendants to have been acquired under the agreement with Boyes is an estate in real property, and that an agreement for the conveyance of such an interest is within the statute of frauds, is the settled law of this state. Hayes v. Fine, 91 Cal. 398, 27 Pac. 772. And, were this the only matter for consideration relative to the finding, it is obvious that the appellant's contention would be unanswerable. But, although the court finds that the agreement is in parol, still the other facts found by it show such an execution of a parol agreement as, under the authorities, takes it out of the statute. It is found by the court that the agreement with reference to the acquirement of the land by defendants and their right, if they did so, to the absolute ownership of 20 inches of the water theretofore appropriated by Boyes, was in fact made, that defendants performed in every particular their part of the agreement, and that they actually took possession of the quantity of water agreed on, conducted it to their land, and utilized it thereon until the commencement of this action under the circumstances and conditions particularly disclosed by the evidence to which we have referred, and which are in general terms stated in the finding in question. Had the defendants brought an action against Boyes during his lifetime for a specific performance of the agreement, by compelling a conveyance to them of the interest in the water right which they now claim, and the court had made the same finding which it made in the case at bar, which, save as to the 14 years' use, the evidence would have fully justified, there could be no question but that they would have been entitled to a decree for specific performance. The statute of frauds could not have been there interposed as a barrier. Neither can it be interposed here. Performance on the part of defendants of their part of the agreement, their possession of the water under it, together with the equitable considerations which are disclosed by the finding, create a perfectly equitable title in defendants to this water right, which they could effectually assert against appellant, notwithstanding the agreement between his predecessor and the defendants rests in parol. Without referring to the general authorities in support of the conclusion we have reached that the facts in this case, as found by the court, take the agreement in question out of the statute of frauds, the cases of Flickinger v. Shaw, 87 Cal. 129, 25 Pac. 268, 11 L. R. A. 134, 22 Am. St. Rep. 234, and Blankenship v. Whaley, 124 Cal. 300, 57 Pac. 79, discuss the same general principles involved here, with reference to parol contracts for the conveyance of water rights, and sustain the view we have announced in the case at bar.

But, while satisfied that the objection of appellant to the legal sufficiency of this finding, considered by itself, to support the judgment, is not well taken, we are satisfied that for another reason urged by appellant—the absence of an essential finding—the judgment will have to be reversed. It is nowhere averred in defendants' answer, nor is it found by the court, that appellant, when he purchased the Boyes ranch and the right to the waters of Butte creek as appurtenant thereto, had any notice of the equitable interest of defendants to any part thereof. It is conceded in the answer that the legal title to all of such water right, including the interest therein now claimed by defendants, was originally vested in Boyes, and that plaintiff succeeded to the legal title therein which Boyes had acquired. The only interest which the defendants acquired, and which they asserted in the 20 inches thereof, accrued subsequently, and was an equitable one. Proof of its existence rested solely in parol. There was nothing of record to charge the plaintiff with knowledge of its existence or the claim of defendants thereto. The legal title to the entire water right being then in Boyes, the plaintiff, having acquired it by purchase from him, took it free from any equitable claim of defendants, unless plaintiff purchased it with actual or constructive notice of their equitable rights. Under these circumstances it was necessary for the defendants, in asserting their equitable interest, to allege and prove, and for the court to find, the existence of such notice in order to support their equitable claim. This proposition is so familiar that no citation of authorities is necessary to support it. No such averment or finding of notice was made, and, as it was not only essential for the court to find that at the time of the purchase by plaintiff of the legal interest of Boyes in the water right, an equitable interest therein in fact existed in favor of defendants, but also that plaintiff purchased with either actual or constructive notice of it, the failure of the court to find upon this essential matter of knowledge renders the findings which were made insufficient of themselves to support the judgment.

Other findings, besides the one which we have heretofore discussed, are challenged as also unsupported by the evidence. It is unnecessary to give this claim any extended consideration. All these findings are to the effect that plaintiff is entitled to the waters of Butte creek, except as to the 20 inches which have been used by defendants. The point made is that the evidence does not sustain this exception. But, as we have held that the evidence supported the principal finding in favor of defendants, it necessarily follows that it supports the exception referred to in the other findings. These are the only points presented on the appeal which have been urged or which require consideration.

As the judgment cannot be supported in the absence of a finding as to the knowledge of plaintiff of the existence of defendants' equitable interest in the waters of Butte creek at the time plaintiff acquired the legal title of the original appropriator, Boyes, thereto, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: HENSHAW, J.; McFARLAND, J.

147 Cal. 782

PEOPLE v. ELDRIDGE. (Cr. 1,204.)

(Supreme Court of California. Sept. 25, 1905.)

1. Murder—Escape—Conspiracy—Evidence.

In a prosecution for murder of a prison guard, evidence *held* to sustain a finding that the homicide was committed by one of defendant's fellow prisoners in carrying out a conspiracy to escape to which defendant was a party.

2. Witness — Impeachment — Conviction of Felony.

Under Code Civ. Proc. § 2051, authorizing proof of conviction of a felony to impeach a witness, either by the evidence of the witness himself or by the record of his conviction, evidence is admissible, not only to show that the witness had been convicted of one or several felonies, but also to prove the name of the particular felony or felonies of which he had been convicted.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1127.]

3. Criminal Law—Instructions.

Where, in a criminal prosecution, several instructions as to a conspiracy in which it was charged defendant participated were given, the refusal to give other instructions on the same subject was not error.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2011.]

In Bank. Appeal from Superior Court, Sacramento County; E. E. Gaddis, Judge.

Harry Eldridge was convicted of murder, and he appeals. Affirmed.

Thomas H. Christiansen and C. H. S. Bidwell, for appellant. U. S. Webb, Atty. Gen., J. C. Daly, Deputy Atty. Gen., and A. M. Seymour, Dist. Atty., for the People.

LORIGAN, J. During an outbreak which occurred on July 27, 1903, among a number of the convicts in the State Prison at Folsom, inaugurated with a view of effecting their escape, and in which the defendant participated, W. L. Cotter, one of the prison guards, was stabbed and killed by a convict named Andy Myers. Some of the convicts engaged in the outbreak succeeded in escaping from prison, the defendant among them. A year subsequently he was recaptured at Seattle, Wash., brought back to this state, tried for the murder of Cotter, convicted, and sentenced to be hanged. He appeals from the judgment, and from the order denying his motion for a new trial.

The theory upon which defendant was convicted was that the killing of Cotter was committed by Myers in consummation of an unlawful conspiracy to escape from prison, to which conspiracy Myers, in common with defendant and the other convicts engaged in the outbreak, were parties. There is no question made in the case but that a conspiracy was entered into among the convicts to escape from prison, that the defendant was a party to it, that he participated in the outbreak made as a result of such conspiracy, and that, in the general assault which was made upon the prison officials at that time, the guard, Cotter, was killed by Myers. It is, however, insisted by appellant that there was not sufficient evidence produced before the jury to show that Myers was a party to the conspiracy, or was conversant with its object or purpose; the claim of appellant's counsel being (to state his position as he assumes it) that there was nothing in the evidence to show but that Myers "was acting independently, taking advantage of the mêlée to vent a grudge on Mr. Chalmers or Mr. Cotter, and that Mr. Cotter received a death wound at that time."

While it is true, as contended by counsel for appellant, that there was no direct evidence of any express agreement entered into by Myers to join with the defendant and the others in their unlawful scheme to escape, still it was not essential that there should be evidence produced before the jury of such express agreement, in order to establish the fact that he was a party to the conspiracy. It is competent to prove that one was a party to a conspiracy for the commission of crime by circumstantial as well as by direct evidence. That a conspiracy to commit crime was explicitly or formally agreed to is rarely capable of being proved by direct evidence, and must be developed from such circumstances as reasonably tend to prove its existence. As these criminal combinations are uniformly entered into in secret, and hence are rarely susceptible of direct proof, the law, on account of the necessity of the case, has deemed it wise and proper that circumstantial evidence of their existence should be permitted. As was said by this court in People v. Donnolly, 143 Cal. 398, 77 Pac. 179: "The ultimate fact here, of course, was the conspiracy on the part of the defendant with the other parties named in the commission of the crime; but it is not necessary, in order to establish that fact, to prove that the parties met and actually agreed to jointly undertake such criminal action. From the secrecy with which unlawful undertakings are adopted it would be generally impossible to make such proof by direct testimony. Evidence is indirect, as well as direct, consisting of inferences and presumptions; and it is Code law that upon the trial of a case evidence may be given of any facts from which the facts in issue are presumed, or are logically inferable; and the jury, by the exercise of their judgment or reason, warranted by a consideration of the usual propensities or passions of men, may make such deductions or draw such inferences from the facts proven as will establish the ultimate fact or facts in issue." Having in mind these principles of law, we find that the evidence in the case established—aside from the fact, of which there can be no question, that a conspiracy to escape from the prison existed between the defendant and other convicts who participated in the outbreak—that on the morning of July 27, 1903, while the convicts were proceeding on their way to prison work, issuing in line from one of the small wicket gates of the prison for that purpose, and being counted by the gatekeeper, Chalmers, as they passed, a sudden rush from the line was made by defendant, Myers, and some 10 or 12 others. Nearly all of them were armed with either knives or razors. A number of them, including defendant, immediately made for the office of the captain of the guard, and the prison officials found therein were, after a struggle, made prisoners. Other convicts speedily assailed the guards outside the prison and overpowered them. In making these assaults and overcoming the resistance of the officials, the convicts used the weapons with which they were armed, inflicting severe injuries upon several of them. Myers rushed from the line with the others, and with drawn knife, assisted by another convict named Leverone, who accompanied him, assailed the prison gatekeeper Chalmers. In the struggle that ensued, the guard, Cotter, started to the assistance of Chalmers, and was stabbed and killed by Myers. It is unnecessary to detail what took place subsequent to the killing of Cotter—the procurement of arms from the prison armory by the convicts and their escape from the prison, taking with them the officials they had overpowered, as a protection against being fired on by the other guards—as Myers does not seem to have participated in these subsequent proceedings, and neither he nor Leverone escaped.

It is quite apparent from the evidence to which we have referred, and we are satisfied that the jury were warranted in finding, that the outbreak was the result of a carefully considered plan, in which, evidently, the details of the work necessary to be accomplished in order to secure escape were agreed on, and that the particular part Myers and Leverone were to take in it, as well as the particular parts that the other convicts in groups were to take, was prearranged. The rush was made from the line by all the convicts engaged in the outbreak at the same moment. There was no hesitancy or confusion accompanying it. As they rushed out they quickly formed into groups, the members of each group immediately proceeding to the particular task which had been assigned to them, and the office, the guards, and the gatekeeper were simultaneously assailed. In order to secure the success of their attempt to escape, it was necessary, in any scheme which was devised for that purpose, that provision should be made for overpowering the gatekeeper, as well as the other officials. He was not attacked by any other of the convicts except Myers and Leverone, the first, principal, and more persistent assault being made by the former; and, if it were not part of the conspiracy that these particular convicts should attack him, an important detail of the scheme for escape was evidently overlooked—an omission which, from the otherwise apparent completeness of its details and the prompt and concerted manner in which they were executed, cannot be reasonably supposed. The assault of Myers upon both the gatekeeper, Chalmers, and the guard, Cotter, was obviously made in furtherance of the success of the conspiracy which certainly existed among all the other convicts engaged in the outbreak, and it was only a logical and reasonable inference for the jury to make from all the evidence in the case that Myers himself was one of the conspirators. All the evidence warranted the jury in drawing that inference, while there is not a particle of evidence in the case that Myers entertained any grudge or animosity against either Chalmers or Cotter for any reason, either imaginary or real. This is the only point made in the case upon the sufficiency of the evidence to sustain the verdict.

It is insisted that the court erred in the admission of certain evidence over the objection of appellant. This is predicated on the fact that the court permitted the prosecution, on cross-examination of many of the witnesses of appellant—principally prisoners under sentence at the State Prison when the outbreak occurred—to inquire of them, after each had answered that he had been convicted of a felony, as to what the felony was. In the case of People v. Chin Hane, 108 Cal. 607, 41 Pac. 700, this court sanctioned such an inquiry in the following language: "In order to impeach the credibility of a witness, including a defendant when he testifies, the witness may be asked if he has ever been convicted of a felony. The details and circumstances comprising the offense should not be gone into. But, in view of the statute (section 2051 of the Code of Civil Procedure), which allows the proof of the fact to be made either by the evidence of the witness himself or by the record of conviction, it would appear that not only the fact of the conviction could be shown, but the name of the particular felony of which the witness had been convicted." The Hane Case was cited approvingly on the same point in People v. Putnam, 129 Cal. 258, 61 Pac. 961. It is claimed, however, by appellant that it does not appear from the opinion of the court in the Hane Case that this point was before the court on that appeal, and hence the rule announced there, that such an inquiry was proper, was obiter dictum. While it is true that the opinion in the Hane Case does not specifically state that any point was made on appeal to which the rule announced was pertinent, yet, from the record on appeal and the briefs of counsel on file in this court in that case, which we have examined, it appears that the point was in fact presented for determination, and was undoubtedly intended to be, and was, disposed of by the rule announced with reference to it. But, if it be conceded that the opinion of the court on this point in the Hane Case was but obiter, we are satisfied that, to the extent which we have quoted its language, it correctly states the rule upon the subject, and that it was proper for the lower court in the present case to have permitted the inquiry which is complained of. But it is further complained in the same connection that the court erroneously permitted the prosecution to show that some of the witnesses had been convicted twice of felony. We perceive no valid objection to allowing such proof. None is suggested by counsel for the appellant. Section 2051 of the Code of Civil Procedure, which permits proof of the fact that a witness has been convicted of a felony to be given for the purpose of impeaching him, places no limitation upon the number of felonies of which it may be shown he has been convicted, and, considering the purpose of allowing the proof at all, it is obvious that no such limitation could have been intended.

It is claimed that the court erred in refusing to give certain instructions asked by defendant, and numbered 41, 47, and 55 in the transcript. We do not set them forth, because their consideration does not involve any proposition of law. The instructions tendered dealt with the question of Myers' connection with the conspiracy, and the duty of the jury, should they find he was not so connected, or entertained any reasonable doubt on the subject, to acquit the defendant. This proposition was presented in a large number of separate instructions tendered by the defendant, varying from each other only in phraseology. Defendant's instructions, numbered 27, 29, 33, 34, 35, 36, 43, and 45, which were given by the court, were full and complete on this subject. They presented the same proposition of law which was embraced in the instructions which were refused, and this is all to which the defendant was entitled. A court is not required to give all the instructions asked by a party. It is sufficient if the instructions which are given clearly embrace the same proposition for the guidance of the jury which the refused instructions contained.

There are some other errors assigned, principally relative to the admission of evidence over the objection of defendant. All of these appear to be without substantial merit, and on that account we make no particular reference to them.

The judgment and order appealed from are affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; SHAW, J.; VAN DYKE, J.; ANGELLOTTI, J.; HENSHAW, J.

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1 Cal. App. 492

GRINNELL v. HILL.

(Court of Appeal, Second District, California. Aug. 28, 1905.)

BILLS AND NOTES—DEFENSES—FRAUD.

In an action on a note, an answer alleging that plaintiff, who was on friendly terms with defendant, represented to him that he had purchased shares of a corporation at 25 cents a share, which was less than its market value, and would sell one-half of his purchase to plaintiff at the price he had paid for it, and that the stock would not be issued until some time in the future, at which time, if defendant should so elect, plaintiff would return to him the note given for the stock and take it in his own name; that in fact plaintiff had paid but 10 cents a share, which was the full market value of the stock; and that, before the time when plaintiff represented the stock was to be issued, defendant demanded the return of his note, which plaintiff refused—stated a defense.

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by H. S. Grinnell against John S. Hill. From a judgment for defendant, plaintiff appeals. Affirmed.

Stearns & Sweet, for appellant. M. L. Ward, for respondent.

SMITH, J. This is a suit upon a promissory note, of date December 27, 1900, for the sum of $625, given for 2,500 shares of Famosa Oil & Investment Company. In the answer, besides the allegations as to the familiar and friendly, if not confidential, relations existing between the parties, it is alleged that the defendant was induced to purchase the stock, and to give the note sued on, by certain fraudulent representations, set forth specifically in the answer, which were, in effect, first, that the plaintiff represented to the defendant that he had purchased 5,000 shares of the stock referred to in the note at 25 cents a share, which was less than its market value, and that on account of the friendly relations existing between them he was willing to let the defendant have one-half of the stock purchased at the price he had paid for it; second, that the plaintiff had in fact purchased the stock at the price of 10 cents a share, which was its full market value; third, that, the defendant saying that he had not the money to invest, the plaintiff proposed to him to give his note, representing to him that the stock could not be issued prior to about the 15th day of September, 1901, at which time the plaintiff, if the defendant should so elect, would return the note to him and have the stock issued to himself; and, fourth, that about the 1st of July, 1901, the defendant having discovered the falsity of the plaintiff's representations, rescinded the contract and demanded the return of the note, which the plaintiff refused to return. There was ample evidence to sustain all of the facts alleged. The case was tried by a jury, who returned a verdict for the defendant, and the plaintiff appeals from the judgment thereon entered, and from an order denying this motion for a new trial.

Numerous points are urged by the appellant for the reversal of the judgment and the order appealed from; but they may be all summed up in the general proposition that the facts above alleged do not constitute a defense to the action. But the contention is too obviously untenable to require serious consideration; the case being, in our opinion, one of aggravated fraud. Civ. Code, § 1572; Dow v. Swain, 125 Cal. 674, 58 Pac. 271; Langley v. Rodriguez, 122 Cal. 580, 55 Pac. 406, 68 Am. St. Rep. 70.

The judgment and order appealed from are affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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1 Cal. App. 426

DUNLAP v. PLUMMER et al.

(Court of Appeal, Second District, California. Aug. 16, 1905.)

NOTES—DEFENSES—RIGHT TO RESCISSION.

The answer of P., in an action by the assignee of a note executed by W. and P. to R., alleging that he received no consideration for the note, that it was given for an antecedent debt of W. to B., that P. signed it at the request of W. and B. and in ignorance that it was to secure a pre-existing debt, that W. was insolvent at the time to the knowledge of R., that plaintiff paid no consideration for it, and that at and for a long time prior to the time of signing it he was mentally incapacitated for transacting business, so that he did not comprehend what he was doing, or the nature and obligation of the contract, or the liability he was assuming, is sufficient to constitute a defense; the facts alleged warranting a rescission.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by T. Dunlap against Eugene R. Plummer and another. Judgment for plaintiff. Defendant Plummer appeals. Reversed.

Dunnigan & Dunnigan, for appellant. Stephens & Stephens, for respondent.

ALLEN, J. Plaintiff declares upon a promissory note executed to one Wright, plaintiff's assignor, by one Wakeley and appellant, Plummer. Wakeley suffered default. Plummer answered, alleging that he received no consideration for the note; that the same was given by Wakeley for an antecedent debt due Wright; that appellant signed the same at the request of said Wakeley and said Wright, and in ignorance of the fact that it was to secure a pre-existing debt; that Wakeley was insolvent at the time, and Wright knew it; that plaintiff paid no consideration for the assignment to him. For a further answer he alleges that at the time of such signing and for a long time prior thereto he was mentally incapacitated for transacting business; that his mind was so impaired that he did not comprehend what he was doing, and did not understand the nature and obligation of the contract, or the liability he was incurring. When the case was called for trial, appellant moved for a continuance, that he might procure the deposition of an absent witness by whom alone he could establish the mental condition and incompetency set out in his answer. It is conceded that this affidavit was sufficient in form, and that due diligence had been used in an attempt to procure the deposition. The motion was denied, and the case proceeded to trial, and judgment went for plaintiff. The motion for a new trial being denied, appellant appeals from the judgment, and from the order denying such new trial.

The sole question presented, as conceded by counsel, is as to the sufficiency of the answer to constitute a defense to plaintiff's action; for, if the answer was sufficient, then appellant was, by this action of the court, prevented from an opportunity to present evidence in support thereof. We are of opinion that the answer was sufficient. While the contract was only voidable, the appellant not being shown by the answer to be a person entirely without understanding, yet it was a contract which he might have rescinded under the Code. That right of rescission is exercised when a party who desires to rescind gives seasonable notice of such intent, and when a consideration has been received, returns the same, placing the other party in statu quo, thus terminating the contract. He may sue for a rescission and obtain a judgment of court decreeing his release upon such terms as the court may deem just. Moore v. Moore, 56 Cal. 92. This right also includes the defensive right which authorizes him, if the other party seeks by action to enforce the contract, to set up and establish such matters as would justify a decree of rescission, which is the effect of a judgment in defendant's favor upon such an answer as is before us. Toby v. Oregon Pac. R. Co., 98 Cal. 498, 33 Pac. 550; Field v. Austin, 131 Cal. 382, 63 Pac. 692. The mere fact that a party does not avail himself of the right to rescind or sue, therefore, is not to be taken as barring him from his right of defense, when the other party seeks to enforce a contract which is voidable, or where the consideration has wholly failed or failed in part. And where no intervening rights or equities are involved, and where, as in this case, no prejudice could possibly exist by reason of delay, this defensive right is still open. The allegations of the answer are sufficient, if established, to warrant a decree of rescission. They certainly are sufficient as a defense, where the contract is sought to be enforced.

Judgment and order reversed, and cause remanded for a new trial.

We concur: **GRAY, P. J.**; **SMITH, J.**

1 Cal. App. 587

FRESE v. MOORE.

(Court of Appeal, First District, California. Sept. 15, 1905.)

1. Shipping—Charters—Contract for Cargo—Assignment.

Where plaintiff chartered a vessel from the owners, who also contracted to furnish plaintiff with a cargo of sawed lumber at a specified basis price, to be shipped to a port in Australia on certain specified terms, and the covenants of the charter and contract were such as another could perform as well as plaintiff, the charter and contract were transferable without the consent of the owners of the vessel.

2. Same—Burden of Obligation.

Under Civ. Code, § 1457, declaring that the burden of an obligation may be transferred with the consent of the party entitled to its benefit, but not otherwise, a charterer of a vessel, holding a contract from the owners for a cargo in addition, could not release himself from performance of such charter and contract by an assignment thereof without the consent of such owners.

3. Same—Suretyship.

Where plaintiff, having a charter party and contract for cargo of a vessel for a certain voyage, transferred the same to defendant without the consent of the other party to the charter and contract, he became a surety for the transferee to secure the latter's faithful performance of plaintiff's obligations.

4. Same—Discharge of Charter—Liability of Assignee.

Where plaintiff, having a charter party and contract for cargo for a certain voyage at a specified rate, assigned the charter and contract to defendant at a higher freight rate, and defendant without plaintiff's consent released the owners from such contract, he was liable to plaintiff for all the benefits which plaintiff would have obtained if the contract had been performed as contemplated.

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by W. Frese against J. J. Moore. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Affirmed.

E. B. Young, for appellant. Nathan H. Frank and S. Bloom, for respondent.

COOPER, J. Appeal from judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial. The facts upon which the question as to whether or not the defendant is liable are in substance as follows: On November 3, 1897, the plaintiff (as party of the second part) entered into a contract with the Brunette Sawmill Company (as party of the first part) by the terms of which plaintiff chartered from said company the American barkentine Wrestler for a voyage from Frazer river, in British Columbia, to Freemantle, in Australia. The company agreed to furnish for plaintiff to said vessel at designated loading place or places a full cargo of sawed lumber at the basis price of $7 net for rough merchantable, payable when cargo should be loaded. The charter party or contract contained the following clauses: "The said party of the second part agrees to pay to said party of the first part, or agent, for the use of said vessel during the voyage aforesaid, in cash, without discount, at current rate of exchange on day of settlement, on the right and true delivery of cargo at port of discharge, for each one thousand feet board measure of lumber and/or timber delivered at fifty (50/—) sterling. * * * Vessel to pay a commission at port of loading of (5) five per cent. on amount of charter, in U. S. gold coin, at the exchange of $4.86 per £ sterling to W. Frese & Co., or order, to be consigned to charterer's agent at port of discharge (inward only) free of commission at port of discharge. * * * While at Puget Sound or British Columbia, as above, vessel to be consigned to charterer's agent, outward, and if in ballast also inward, free of commission, but paying them usual fee for doing custom-house business (not to exceed $25), and also to clear in the name of charterers. * * * To the true and faithful performance of each and all of the foregoing agreements, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators, and assigns, each to the other in the penal sum of estimated amount of charter." The above shows not only a charter party, but a contract by the owners of the vessel to furnish a cargo of lumber for the vessel at a specified rate per thousand feet, and by plaintiff to pay, not only the freight as per the charter party, but $7 per thousand for the cargo of lumber when loaded on the vessel. On December 4, 1897, without the consent of the company, the plaintiff agreed to recharter to defendant the vessel, and assign the contract and charter party on the following terms: "57/6 to Freemantle, West Australia, other terms as per original charter party, copy herewith, combined with the cargo of lumber, at the basis price of $7.00 net for rough merchantable, difference of freight between the above and the original rate of 50/— to be paid to us in cash on completion of loading, less the usual 6½% (six and one-half per cent.)." On December 9, 1897, the plaintiff wrote to the mill company, informing it of the transfer to defendant of the charter party and the cargo, and in the letter stated as the reason for the transfer: "We did so because our constituents, not knowing your mill and the quality of lumber you turn out, instruct us to draw only 80% of the f. o. b. price, leaving 20% guaranty of good delivery. We decline to entertain this proposition." December 14th the company wrote to plaintiff acknowledging the receipt of his letter, and stated to plaintiff: "But cannot consent to the transfer of the charter party. However, as the party who purchased the cargo has refused to comply with the terms, we will release you from the charter party, as the owners of the Wrestler contemplate selling her on her arrival here." On December 21, 1897, the plaintiff again wrote to the company, declining to accept the release from the charter party, and calling attention to the fact that he had sold to the defendant, and in the letter stated: "We of course are responsible to you for the strict fulfillment of contract as signed by us." December 21, 1897, the defendant wrote to the company, informing it of the transfer by plaintiff of the charter party and the right to the cargo of lumber to him, and asking for certain changes as to freight rates and place where the vessel was to land. On the receipt of the above letter, December 23d, the company telegraphed to defendant: "We canceled charter on 14th instant with Frese, account purchaser refusing cargo on our terms." Defendant immediately telegraphed to the company that he held indorsed charter party and had promised cargo, and that the charter must be carried out. On the following day, December 24th, the company again telegraphed to defendant stating: "Frese cannot recharter without our consent, which we refuse. Charter canceled." Defendant then on the same day wrote the company, calling attention to the various correspondence and telegrams, and stated that he had purchased the cargo and charter party from plaintiff, and in the letter said: "What you mean by stating that Frese & Co. could not recharter the vessel without your consent is a conundrum to us. A charter party can be transferred the same as any other negotiable document, be it promissory note, bill of exchange, or anything else, and is an everyday occurrence, and till we received your message we never heard of the right to do so being questioned, and we cannot think that you were serious in believing that such could not be done. * * * Trusting that you will understand your position, and that there will be no more difficulty and annoyance about the transaction, we are," etc. On the 28th the defendant again wrote to the company, inclosing specifications for the cargo and insisting on the company keeping its contract, and in the letter defendant said: "This morning we are in receipt of your wire as follows: 'Wrestler awaiting your orders to load. We refuse sell cargo on terms made Frese, he having already canceled.' To say that we are surprised at your actions in this matter would be putting it mildly, and that any responsible and respectable institution would try the various ways that you have tried to get out of this contract is astonishing. First it is one thing, and then it is another, one of which is as flimsy as the other. In fact, your own telegrams to us would show in a court of justice that you yourselves know that you had no grounds wherewith to cancel the charter party or the lumber contract with Frese & Co." On January 1, 1898, the lumber company wrote to defendant, acknowledging telegrams and letters and stating that it could not agree with defendant, and continuing: "However, we cannot supply the cargo your specifications call for and wired you as follows: 'Refuse to supply cargo; will charter you Wrestler to Sydney at 38/—. You buy cargo in Vancouver, and give you option for recharter coals from Sydney'—which we think is a very fair offer. Our mill is shut down at present, undergoing repairs." On January 8, 1898, defendant wrote to the company, agreeing to charter the Wrestler on certain terms named in the letter, to load at Hastings Mills, Vancouver to Sydney, and in this letter defendant, without consulting plaintiff, stated: "And we agree to release both the Wrestler and the Brunette Sawmill Company from all our interests in the charter party entered into with W. Frese & Co., for a voyage to Freemantle, under date November 3d, 1897, as well as our interests in the cargo of lumber which went with the charter party." Defendant, after releasing the sawmill company from the first charter party and contract, entered into a new charter party with the company by which he shipped to Sydney, instead of Freemantle, 564,000 feet of lumber, which at the rate of profit per thousand that Frese & Co. would have made, had the defendant held the sawmill company to its contract, would amount to $961.08, being the amount with interest for which plaintiff recovered judgment.

We are of opinion that plaintiff was entitled to judgment. His charter party and agreement to purchase lumber were property which he had a right to sell upon such terms as he saw fit. Defendant purchased the charter party and right to purchase the cargo of lumber for a consideration which he agreed to pay. The consideration was the difference in the freight rate in the original charter party and the rate named in the recharter. Defendant has not paid plaintiff. He purchased plaintiff's property, and must, under the circumstances, pay the amount he agreed to pay. The charter party and contract did not require any personal skill on the part of plaintiff, was one the covenants of which the defendant could perform as well as plaintiff, and was transferable. Civ. Code, §§ 1044, 1459; Cutting Packing Co. v. Packers' Exchange, 86 Cal. 574, 25 Pac. 52, 10 L. R. A. 369, 21 Am. St. Rep. 63. It was not necessary for the plaintiff to obtain the consent of the company in order to transfer the charter party and contract. Of course, the burden of the obligations could not be transferred without the consent of the company. Civ. Code, § 1457; Cutting Packing Co. v. Packers' Exchange, supra. Plaintiff did not attempt to transfer the burden of the obligations, but took the pains to inform the company that he was responsible for the strict fulfillment of contract signed by him. Defendant, by the assignment of the charter party and contract, assumed its burdens on his part as to plaintiff. Plaintiff was not released by the company, and was still responsible to the company as surety to the effect that the defendant would faithfully carry out the charter party and contract. There was an implied contract on the part of defendant to plaintiff that he would carry out the plaintiff's contract which he had purchased. Cutting Packing Company v. Packers' Exchange, supra. The indorsement and transfer of the contracts to defendant transferred all of the plaintiff's rights thereunder. Civ. Code, § 1459; Myers v. South Feather W. Co., 10 Cal. 579; McCarthy v. Tecarte L. & W. Co., 110 Cal. 691, 43 Pac. 391; Allen v. Randolph, 4 Johns. Ch. 693. It follows that, when defendant released the company, the release was conclusive as to plaintiff. Plaintiff could not maintain an action against the company upon obligations which he had transferred and assigned to defendant. His remedy, therefore, was against defendant. After having transferred the obligations to defendant for a valuable consideration, defendant could not relieve himself of the payment of the consideration by releasing the company.

Defendant contends that he was not liable to plaintiff for the freight under the recharter and assignment until the cargo was delivered, and, as it was never delivered, and the company refused to deliver it, the event never happened upon which defendant's liability depended. It is a conclusive answer to this contention that defendant by his own act released the company from its obligation to deliver the cargo of lumber. Defendant will not be allowed to take advantage of his own wrong. By his own act he prevented the performance of the obligation of the company to deliver the lumber, and the plaintiff is entitled to all the benefits he would have obtained if the contract had been performed by the company. Civ. Code, § 1512. If the defendant had not released the company, and if after due diligence on his part he had failed to enforce the contract with the company, a different question would be presented; but, after plaintiff sold to defendant the charter party and contract for a consideration, the defendant was bound to act in the utmost good faith in the matter.

The judgment and order are affirmed.

We concur: HARRISON, P. J.; HALL, J.

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1 Cal. App. 432

PEOPLE v. GREEN.

(Court of Appeal, Second District, California. Aug. 16, 1905.)

1. Indictment—Conviction of Offense Included in Charge—Assault with Intent to Rape—Simple Assault.

Assault with intent to ravish, involving a continuous violent assault by defendant upon prosecutrix, includes in its commission a simple assault, of which the jury, when so authorized by an instruction, may convict defendant, although the evidence is amply sufficient to authorize a conviction of assault with intent to ravish.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 588.]

2. Criminal Law—Appeal—Harmless Error—Instructions.

Instructions relating only to the offense of assault with intent to ravish, with which defendant was charged, were harmless, where defendant was acquitted of that offense and convicted only of simple assault.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3161.]

Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Harry Green was convicted of simple assault, and appeals. Affirmed.

Lafayette Gill, for appellant. U. S. Webb, Atty. Gen., C. N. Post, Asst. Atty. Gen., and J. C. Daly, Deputy Atty. Gen., for the People.

GRAY, P. J. On a charge of assault with intent to commit rape upon a girl under the age of consent, the defendant was convicted of simple assault, and sentenced to 45 days in the county jail. He appeals from the judgment, and from an order denying him a new trial.

At the request of defendant, the jury were instructed that they could find the defendant guilty of simple assault. The evidence consisted principally of the testimony of the prosecutrix, setting forth facts which, if fully believed, should have satisfied the jury that the defendant was guilty of the very crime charged in the information, and the testimony of defendant in denial of the more material parts of the testimony of the prosecutrix. It is clear that, if the defendant had been convicted of the greater crime of assault with intent to commit rape, such verdict would, on appeal, have been treated as supported by the evidence. It is also clear that the evidence of the attempt to ravish contained in the record showed that such attempt was instituted with a violent assault and battery, and involved a continuous violent assault from its beginning up to the time the attempt was abandoned, on the approach of the mother of the girl. It is clear on the testimony of the prosecutrix that the defendant assaulted her, and it was none the less an assault because the defendant may have intended also to effect a sexual connection with her. An assault with intent to ravish, committed as indicated by the testimony of the prosecutrix herein, always includes an assault. It was for the jury to say whether this assault was accompanied by the intent necessary to constitute the higher crime. By finding the defendant guilty of simple assault, the verdict shows us that the jury saw fit to believe only that part of the story of prosecutrix that established an assault, and rejected everything that indicated an intent to ravish, refusing to draw any inference of a felonious purpose on the part of defendant. This the jury had the power to do. There is no rule of law requiring the verdict of a jury to be absolutely consistent, according to the ideas of the appellate court. It is the province of the jury to draw their own conclusions from the evidence, and where, as here, they are instructed that they may do so, it is for them to say that the defendant is guilty of one crime, and not guilty of another, as they see fit. And this court will only interfere with a verdict of guilty of assault where there is no evidence showing that an assault was committed. An indecent assault always embraces a simple assault, on the theory that the greater includes the less.

Complaint is made as to many instructions of the court in relation to the age of the prosecutrix, defining the higher crime charged, as to the consent or want of consent of the prosecutrix, as to sexual intercourse with other men, etc. All these instructions related only to the higher offense. The defendant was acquitted of that offense, and we are at a loss to understand how instructions relating only to a crime of which defendant was acquitted can be said to have harmed him. Therefore we will not stop to consider whether such instructions were erroneous or otherwise. There was no instruction given relating to the crime of simple assault that was in any degree erroneous. In instruction 11, given at the request of defendant, the jury were given clearly to understand that they must be satisfied beyond a reasonable doubt of his guilt before they could convict him of simple assault. In instruction 5 they were also told that, "to warrant a conviction of the defendant, he must be proved to be guilty so clearly and conclusively that there is no reasonable theory upon which he can be innocent." The appellant is mistaken in assuming that the court did not inform the jury that, before they would be warranted in convicting of assault, they must be satisfied from the evidence that such an offense was committed. Nor was there anything contained in any of the instructions that would mislead, or confuse, or lead the jury into error concerning the crime of which the verdict convicts him. Appellant is also mistaken in his assumption that instruction 10 as proposed by him was intended to apply to a simple assault, or to in any way guide the jury in its determination as to whether they would return a verdict of guilty of simple assault. The word "assault" in that instruction is never used by itself, but in all instances in connection with "to commit rape upon," or "to have sexual intercourse with, the prosecutrix by the defendant." It applies only to the higher crime charged in the information, and, as we have already seen, the defendant having been acquitted of that crime, the giving or refusing of it, or the qualifying of it by the court, worked no injury to the defendant.

The judgment and order are affirmed.

We concur: SMITH, J.; ALLEN, J.

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1 Cal. App. 472

ELLIS et al. v. DOHERTY.

(Court of Appeal, Second District, California. Aug. 24, 1905.)

PLEADINGS—ISSUES RAISED—FINDINGS.

A complaint alleged that defendant was indebted to plaintiffs for money delivered to defendant for plaintiffs' use and benefit, and further alleged nonpayment by defendant of a balance due. Defendant admitted the receipt of the money, and alleged payment to plaintiffs' creditors except a certain sum, which by agreement with plaintiffs he paid to himself, and denied that there was any balance due, other than a specified sum less than that claimed by plaintiffs. *Held*, that the answer presented an issue which warranted the court in finding, according to the evidence, that there was no agreement that defendant should pay himself the sum alleged by him, but that the agreement was that defendant should have such sum, if sufficient profit should result from the transaction out of which the agreement arose.

Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by B. F. Ellis and another against J. Doherty. From a judgment for plaintiffs, defendant appeals. Affirmed.

Smith & Allen, for appellant. Edwin Baxter and T. F. Allen, for respondents.

ALLEN, J. Plaintiffs in their amended complaint, and for a third cause of action, allege that defendant is indebted to them in the sum of $43,244.59, upon an account for lawful money delivered by the plaintiffs to defendant for plaintiffs' use and benefit, which sum defendant promised and agreed to pay; the nonpayment of which, except the sum of $41,315.57, is alleged, and that there was unpaid the sum of $1,929.02, with interest from May 13, 1902. Defendant in his answer admits receipt of such money, but avers that he paid out of the same to other parties, creditors of plaintiffs, the sum of $41,495.32, and that by agreement between plaintiffs and defendant he paid to himself $1,000, and denies that any balance in excess of $749.27 is in his possession. Upon the trial the court found that the defendant had not paid out of said moneys any sum in excess of $41,315.57; that there was no agreement that defendant should pay himself $1,000, but, on the contrary, the agreement was that, after the payment to plaintiffs of $4 per day each, for time employed in the construction of a building in connection with which plaintiffs' money was received by defendant, if sufficient profit remained growing out of such construction, that defendant should have $1,000. The court finds that, when the building was completed and the per diem due plaintiffs deducted, there remained but $200 of profit applicable to the payment of defendant's demand. It was further found that, pending the action, defendant had paid plaintiffs $729.02; and judgment was rendered for $1,000, which was the balance found by the court remaining in defendant's hands, after crediting him with the $200. From this judgment defendant appeals, the sole question presented by appellant being that the findings and judgment do not rest on the pleadings. There is no merit in this contention. The answer, setting up the agreement by which defendant was to pay himself out of the funds $1,000, presented an issue, and in its determination the court properly found the facts in relation to the agreement under which the payment, or any payment, was due defendant. The findings are within the issues, and they support the judgment, and the judgment is affirmed.

We concur: GRAY, P. J.; SMITH, J.

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1 Cal. App. 454

HENTIG v. WILLIAMS et al.

(Court of Appeal, Second District, California. Aug. 18, 1905.)

TRUSTS — MORTGAGE BY TRUSTEE—LIABILITY OF BENEFICIARY.

Where, after land is conveyed to W. for the benefit of herself and H., it is decreed in a suit against W. by B. that the land should be conveyed to B., unless redemption was made from execution sale under a judgment which was a lien on the land before the conveyance to W., and to obtain money to redeem W. gives a mortgage on the land, the interest of H. in the land is subject to his proportion of the mortgage.

Appeal from Superior Court, Los Angeles County; Frank F. Oster, Judge.

Suit by F. H. Hentig against C. B. Williams and others. Judgment for plaintiff. Defendants appeal. Modified.

Rehearing denied September 15, 1905.

Bower & Hutchinson and C. E. Bower, for appellants. F. G. Hentig and J. L. Murphey, for respondent.

SMITH, J. This suit was brought to enforce a resulting or constructive trust in an undivided half of the lot of land described in the complaint, conveyed by one Zeigler to the defendant Mary Williams. The defendants Johnson and Heidel were joined as mortgagees. The plaintiff had judgment, from which all the defendants appeal. The record contains a bill of exceptions, setting forth the evidence, with specifications of insufficiency of the evidence to justify the findings. The appeal of the defendants Williams was taken within 60 days after the entry of the judgment. The appeal of the other defendants was made after the expiration of that period.

The complaint sets forth at length all the particulars of the transactions involved, all of which are denied by the joint answer of the defendants; and in the separate answer of the defendant Mary Williams her account of the transaction is set up. The court finds all the allegations of the complaint to be true; all the allegations in the joint answer of the defendants to be untrue, except one, which is of no materiality; and the allegations of the separate answer of defendant Mary Williams to be untrue. It also finds specifically the facts as to the various transactions involved in the suit. To all and singular of such findings, or nearly all, objection is made that the evidence was insufficient to justify them; and it is also claimed that some of them are contradictory. Many of these objections are to immaterial matters, and whether they be well founded or not need not be considered; but on one material point relating to the mortgage of the defendant Heidel, the objections made are well taken. As to the rest of the findings, though the evidence is conflicting, they are fully supported by the evidence.

Briefly stated, the case as shown by the findings is this: Prior to the execution of the deed from Zeigler to the defendant Mary Williams, one Mrs. Casenave was indebted to Hentig and Williams in several small sums, and was proposing to sell cèrtain lands belonging to her to Zeigler, who, in part payment of the purchase money, was to convey to her the lands in controversy; and with reference to this land, it was agreed between her and Hentig and Williams that the lands of Zeigler should be taken as part of the purchase money, upon their agreement to raise the sum of $600 thereon by mortgage, and to pay the same to Mrs. Casenave, which was done. Afterwards it was agreed between the parties that the land should be conveyed to Mrs. Williams for the benefit of Hentig and Williams, and that the mortgage thereon should be executed by her. Accordingly, the conveyance was made to Mrs. Williams, who took with full notice of the facts; and contemporaneously with the deed, or a few days thereafter, the mortgage on the lot was executed by Mrs. Williams to one McConnel for the sum of $600, which was paid to Mrs. Casenave. This mortgage was afterwards assigned to the defendant Mrs. Johnson, and is now held by her; and by the decree of the court the interest of the plaintiff and the defendants Williams is made subject to her mortgage. The defendant Mrs. Johnson, therefore, has no cause to complain, and the judgment as to her must be affirmed.

The only serious question in the case is as to the mortgage of the defendant Mrs. Heidel, as to which the facts disclosed by the evidence are as follows: Prior to the date of the transaction involved, one Bamberger held a judgment against Mrs. Casenave for the sum of $834, which constituted a lien upon her lands, and in order to complete the transaction it was necessary that this judgment should be satisfied. Accordingly, it was agreed between him and Williams, as the agent of Mrs. Casenave, that Bamberger would take the sum of $433.56 in satisfaction of the judgment, and that to carry out this agreement he would deposit the acknowledgment of satisfaction with the Title Insurance & Trust Company, in escrow, to be delivered to Williams upon the payment of the amount agreed upon. Accordingly, the acknowledgment of satisfaction was executed, and, with escrow instructions, was delivered to Williams to be delivered to the trust company; but Williams fraudulently filed the satisfaction of judgment with the county clerk, and did not deliver it to the trust company, and thus the conveyances of Mrs. Casenave and of Zeigler were effected. Thereafter, February 9, 1901, upon the discovery by Bamberger of the fraudulent satisfaction of the judgment, he by appropriate proceedings had said satisfaction vacated; and afterwards, March 11, 1901, the land was sold under execution and purchased by Bamberger for $250. Following this transaction, a suit was commenced by Bamberger against Mrs. Casenave and the defendants Williams, setting up the above facts, which resulted in a judgment for the plaintiff therein, of date November 27, 1901, adjudging that the title to the land in question was held by the defendant Mary Williams in trust for the said plaintiff, and that, in case no redemption should be made, a deed should be executed to him accordingly. The rendition of this judgment is found by the court, and the judgment itself, with an agreed statement of the record, appears in the bill of exceptions. It is also found by the court that the mortgage to Mrs. Heidel, which was for the sum of $200, was executed by Mrs. Williams, March 18, 1902, and that with the sum so obtained she settled the claim of Bamberger under his judgment and purchase for the sum of $218.50. It is, indeed, also found "that the plaintiff * * * was in no way responsible for or chargeable with said Bamberger judgment, or any part thereof," and, in effect, that no benefit was received by the plaintiff from the money borrowed from Mrs. Heidel. But the contrary appears from the facts specifically found. Upon these facts it appears that upon the vacation of the satisfaction of Bamberger's judgment against Mrs. Casenave it became a lien upon the land in controversy, and that the judgment of Bamberger against Mrs. Williams, the plaintiff's trustee, was binding upon plaintiff. The money paid, therefore, by Mrs. Williams, for the removal of this lien and the satisfaction of the judgment, was expended for the common benefit of the plaintiff and the defendants Williams, and the former is chargeable with his proportion thereof. The judgment must therefore be modified by adjudging the interest of the plaintiff in the land to be subject, not only to the mortgage of Mrs. Johnson, but also to the payment to Mrs. Williams of one-half the sum of $218.50, with legal interest thereon from the 18th day of March, 1902 for the use and benefit of the defendant Mrs. Heidel.

The judgment appealed from is reversed, and the cause remanded, with directions to the lower court to modify the judgment as above indicated, and that the judgment, so modified, shall stand affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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1 Cal. App. 474

WOOD et ux. v. LOS ANGELES TRACTION CO.

(Court of Appeal, Second District, California. Aug. 25, 1905.)

1. DAMAGES — PERSONAL INJURIES—EXCESSIVENESS.

In an action for injuries to a passenger, evidence *held* insufficient to show that a verdict for $2,000 was excessive, or that the jury were influenced by anything outside of the evidence.

2. TRIAL — EXPERT TESTIMONY—CAUTIONARY INSTRUCTIONS—REVERSIBLE ERROR.

In an action for injuries to a passenger, refusal to give a cautionary instruction as to the weight to be given expert medical evidence was not reversible error.

3. EVIDENCE — PRESUMPTIONS — FAILURE TO CALL WITNESS.

Where, in an action for injuries to a passenger, it appeared that she had been visited by four different physicians, one of whom, at least, was in defendant's employ, and two of them were merely called in consultation with the physician who had charge of the case, who was called as a witness, defendant having failed to call the others, it was not error for the court to refuse to charge that, where a party offers weaker or less satisfactory evidence, when it appears that stronger and more satisfactory evidence was within his power, the evidence offered should be viewed with distrust.

4. SAME.

Where the court charged that each item of damage claimed by plaintiff must be shown to a reasonable degree of certainty by a preponderance of the evidence, and that the law authorizes such reasonable damages as the jury deem plaintiff entitled to under the evidence, an instruction that in reaching a verdict the jury should not only consider all the evidence, but also all surrounding circumstances, and draw all inferences from such circumstances and from the testimony as may be reasonably drawn, was not objectionable, as authorizing the consideration of facts in addition to the evidence.

Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by F. G. Wood and wife against the Los Angeles Traction Company. From a judgment in favor of plaintiffs, and from an order denying defendant's motion for a new trial, it appeals. Affirmed.

E. E. Millikin, for appellant. S. P. Mulford and Harris & Harris, for respondents.

GRAY, P. J. This is an action by a husband and wife to recover damages for an injury suffered by the wife as a passenger upon the defendant's street car, by reason of a collision between two of defendant's cars. The plaintiffs had a verdict and judgment for $2,000. At the trial of the case the liability of the defendant for the injury was conceded; the only thing contested being the amount of damages the plaintiffs were entitled to recover. The defendant appeals from the judgment and from an order denying it a new trial.

The evidence in the case showed that in the collision Mrs. Wood was hurled violently from the car and struck the street upon her head and shoulder; that she received a severe cut of the scalp, through to the skull and about 2½ inches in length; that she sustained a severe injury to her arm and shoulder, and apparently a concussion of the brain, which rendered her stupid and unable to recognize her immediate relatives and friends for some hours thereafter; that she was confined to her bed and under the care of physicians for about three weeks after the injury; that her arm continued in a paralyzied and lifeless condition, as she described it; and that she was compelled to wear bandages thereon for three months after the accident. She testified that at the time of the trial, nearly a year after the accident, she could still feel the effects of the injury, and that she did not have the same use of her arm that she had before the injury, and that still at times she could feel sharp shooting pains, from which she could locate the very spot of the scar in her head, and that she had resulting swelling of the glands of her neck from the injury that she had received to the side of her head. She also testified that she suffered much wakefulness and loss of sleep since the injury; that prior thereto she had been a good sleeper, but a poor sleeper since; and the evidence also showed that the shock which she had received had apparently permanently affected her memory. This, perhaps, is not a very full statement of the evidence; nor does it seem necessary to state the evidence fully. It is sufficient to say that with a doctor's and nurse's bill of about $300, and the injuries already indicated, we can see nothing in the verdict for no more than $2,000 that would warrant any interference on the part of the court, or the indulgence of any presumption that the jury, in returning a verdict for that amount, must have been influenced by anything other than the evidence.

Appellant contends that the court erred in refusing to give, at the request of defendant, the following instructions: "And you are further instructed, in this connection, that the opinion evidence of medical experts should always be examined with great caution, and weighed carefully in connection with all the other evidence in the case, and that in weighing the evidence you have a right to exercise your judgment in the light of your own general knowledge upon the subject or subjects concerning which the evidence has been introduced." We are aware that the Supreme Court of this state has held, where it was objected that an instruction similar to the above was improperly given, that the instruction was proper, and have refused to reverse a case for the giving of it. Haight v. Vallet, 89 Cal. 245, 26 Pac. 897, 23 Am. St. Rep. 465. But similar instructions in other cases have been criticised by our Supreme Court as an unwarranted interference with the province of the jury; the theory being that to single out a particular class of evidence, or the testimony of particular witnesses, and tell the jury that it should be examined with great caution, might lead the jury to infer that the court had a poor opinion of such evidence. Our attention has not been called to any case where a judgment has been reversed for the refusal to give an instruction of this character. It is clearly intimated in one case (People v. Barthleman, 120 Cal. 13, 52 Pac. 112) that such an instruction ought not to be given, though the court in that case declines to reverse the judgment on account of its having been given. Section 2061 of the Code of Civil Procedure provides for certain cautionary instructions that may be given in proper cases to the jury. It provides, however, for no instruction to the effect that great, or any, caution should be used in examining expert evidence. Nor does the Code of Civil Procedure anywhere authorize the giving of a cautionary instruction as to expert evidence; and in this condition of the law we think that a case should not be reversed for the refusal to give a cautionary instruction of this character. Indeed, it is held in People v. Ruiz, 144 Cal. 251, 77 Pac. 907, and in People v. Wardrip, 141 Cal. 229, 74 Pac. 744, that a case should not be reversed for a refusal to give certain of the cautionary instructions particularly authorized by the subdivisions of said section 2061; and on the authority of those cases it is clear that no material error was committed in the refusal to give the instruction now under discussion.

It is also contended that the court should have given instructions requested by the defendant to the effect that, where a party offers weaker and less satisfactory evidence, when it appears that stronger and more satisfactory evidence was within his power, the evidence offered should be viewed with distrust. It was held in the case of People v. Cuff, 122 Cal. 591, 55 Pac. 407, that the giving of such an instruction as this in a criminal case was error. In that case Kauffman v. Maier, 94 Cal. 283, 29 Pac. 481, 18 L. R. A. 124, was cited; the same principle having been applied there in a civil case as was applied in the case of People v. Cuff. In the last-mentioned case it is said: "The danger lurking in these subdivisions of the section is found in the fact that they attempt to deal with the weight and effect of evidence—matters for the jury, and not matters for legislative action. The aforesaid section of the Code declares that the principles stated in the various subdivisions thereof may be given by the court to the jury upon all proper occasions. In criminal cases the proper occasions are so few, and the improper occasions are so many, that it were best they should be given rarely, if at all." We do not think the present case is one presenting a proper occasion for giving the instruction requested. It appeared that the plaintiff was visited by four different physicians, and that one of these physicians at least, if not more, was in the employ of the defendant. Two of them were merely called in consultation with the physician who had charge of the case. Dr. Jenkins was the attending physician, and he made some 50 visits upon Mrs. Wood during the time that he was treating her for the injuries. He was called as a witness, and we cannot see how his testimony can be said to have been less satisfactory than would have been the evidence of physicians who saw the patient only once or twice, and who undoubtedly received most of the knowledge they possessed concerning the symptoms of her case secondhand from Dr. Jenkins. There was nothing in Dr. Jenkins' evidence, as it appears in the record, that would indicate that anything different or more satisfactory might have been obtained from any of the other physicians; and, if the defendant had been possessed of any notion that any more satisfactory expert evidence, or direct testimony, could have been obtained from any of the other three doctors, it was the defendant's privilege to call the same. This is not a case of the suppression of any evidence, as we view it from the record. Nor is it a case of the offering of weaker and less satisfactory evidence, when it appeared that stronger evidence was within the power of the party offering it. So far as we can see, the testimony of the other three doctors was equally "within the power" of both parties, and the instructions requested, if they affected the jury at all, might have been taken as reflecting quite as severely on the defendant as on the plaintiff. We think, however, that, as there is nothing to indicate that the testimony of the four doctors, added together, would have been stronger and more satisfactory than was the testimony of the one attending physician, it would have been idle to give the instructions. We think they were properly refused.

The court, at the request of plaintiffs, instructed the jury as follows: "You are instructed that in reaching a verdict in this case it is your duty, not only to take into consideration all the evidence given by the witnesses and weigh the same with care, but to take into consideration, in weighing such evidence and in reaching a conclusion, all of the surrounding circumstances, and draw all the inferences from such circumstances and from the testimony of witnesses as may be reasonably drawn." It is objected that in this instruction the jury were told that it was their duty, not only to take into consideration all the evidence given by the witnesses, but also to take into consideration something beyond that and in addition to the evidence. We hardly think the instruction, standing alone, would bear that construction, but are of opinion that the jury would understand that the court, in referring to "the surrounding circumstances," meant only such circumstances as might be developed by the evidence. But, be that as it may, the instructions should all be read and construed together. In addition to the instruction complained of, the jury were told that "the existence of each item of injury or damage claimed by the plaintiffs must be shown to a reasonable degree of certainty by the preponderance of the evidence." They were also told that the law "authorizes you to give such reasonable damages as in your honest and candid judgment you deem the plaintiffs entitled to under the evidence." Listening to these instructions, we think the jury could not fail to understand that their verdict was to be based upon the evidence, and upon that alone.

We see no error in the record, and the judgment and order appealed from are affirmed.

We concur: SMITH, J.; ALLEN, J.

1 Cal. App. 524

In re JEFFREYS' ESTATE.

ABBOTT v. KERRIGAN et al.

(Court of Appeal, First District, California. Aug. 31, 1905.)

WILLS — CONSTRUCTION—"BOOKS AND PAPERS."

A bequest of all testator's books and papers was insufficient to convey a bank deposit, evidenced by bank books, especially where such interpretation would render other provisions of the will nugatory.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Judicial accounting by Frank H. Kerrigan and others, executors of the estate of Albert Jeffreys, deceased, and others. From a final decree of distribution, William M. Abbott appeals. Affirmed.

Rehearing denied September 23, 1905.

L. A. Gibbons, for appellant. Chas. W. Slack and J. J. Lermen, for respondents.

HALL, J. This is an appeal by William M. Abbott from a decree of distribution, and the only question involved is as to the proper construction of the will of Albert Jeffreys, deceased. The will is holographic, and is as follows: "My will. April 10th, 1902. I owe William M. Abbott $600, which I wish paid. To the Rev. M. D. Connolly I give the sum of $1,000. To William M. Abbott I give all my books and papers. To Eugenie M. St. Paul I give the rest and residue of my estate of every kind and nature. [Then follows a statement naming two persons to whom he leaves nothing, a provision as to persons who may claim to be heirs, the appointment of executors, a revocation of former wills, waiver of bonds, and a provision for sale of real estate without order of court.] Albert Jeffreys."

The appellant contends that under the clause, "To William M. Abbott I give all my books and papers," there passed to him 14 certain bank books, and in consequence the moneys on deposit represented by such books. The court below ordered distribution of a large number of books, consisting mostly of law books, a promissory note, and a certificate for 143 shares of stock, to appellant, $1,000 to Rev. Connolly, and the residue of the estate, consisting of an interest in four parcels of land, one typewriter, and $1,661.97, to Eugenie M. Roberts, described in the will as Eugenie M. St. Paul, but since married to Roberts. The money, to wit, the $2,661.97, thus distributed, was what was left of the deposits represented by the bank books. At the death of the testator the 14 bank books represented deposits in various banks to the credit of testator, aggregating upwards of $8,700. If the contention of appellant be correct, this entire sum of money passed to him, and should not have been charged with the payment either of expenses of administration, debts, or the legacy to Connolly until the property given to the residuary legatee had been exhausted. Civ. Code, §§ 1359, 1360. It must be confessed that a bank book is a book, and yet the average mind, we think, would not ordinarily understand that by a bequest of "all my books" a testator meant to bequeath money in bank. Appellant himself does not seem to have realized the full possibilities of his case until late in the proceedings of this estate, for he seems to have remained silent while the executor appropriated upwards of $6,000 out of the bank deposits to the payment of expenses of administration and debts. There was left for distribution but $2,661 out of the $8,700 on deposit at the death of the testator; and, as we have shown, if appellant's contention be correct, recourse should have first been had to the real estate and typewriter, which passed under the residuary clause, for the payment of all expenses and debts. While bequests of books are quite common, and many persons leave bank books among their effects, we have been cited to no case, and we know of none, where a court has held that under a bequest of "books" or "all my books," bank books, and, in consequence, bank deposits, passed.

We are cited to Perkins v. Mathes, 49 N. H. 107, as sustaining appellant's contention. In that case it was held that under "all my books and papers of every description" a promissory note passed. Unless this construction had been adopted, nothing would have passed to the particular legatee save a Bible, some ordinary books, and a manuscript, all of very little pecuniary value. In the companion case (Mathes v. Smart, 51 N. H. 438), construing the same words in the same will, it was held that two bank books showing deposits in the Newmarket Bank did not pass, and the court said: "In Perkins v. Mathes we were influenced not a little by the consideration that, unless the promissory notes were to be regarded as comprehended in the bequest of books and papers, there was in reality no bequest of practical value to the plaintiff." Indeed, in Perkins v. Mathes the court said: "A testator is to be considered as intending a benefit to the object of his gift." In Webster v. Wiers, 51 Conn. 569, it was held that the words, "I give to M. all my household effects, books, and papers of value, and everything the house contains," did not pass a bank book showing a deposit of $2,500, although found in the house. In Jackson's Ex'r v. Piscataqua Savings Bank et al., 70 N. H. 283, 47 Atl. 613, it was held a bank book showing deposits in the name of Nathaniel Jackson, Jr., where testator had retained the book in his possession till death, and did not by making the deposit intend a gift, did not pass by a bequest of "certain books marked with his name"; there being found three ordinary books marked "Nathaniel Jackson." "Words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained." Civ. Code, § 1324. Applying this rule to the words in question, would the ordinary man understand by the words "my books," used in ordinary conversation, that the speaker meant bank books? If a man should say, in ordinary conversation, "I am the possessor of 100 books," would any listener suppose for a moment that he meant to include in such statement "bank books"? We think that the answer to both these questions is obviously "No," notwithstanding the definition of the word "book" given in dictionaries is broad enough to include bank book. "The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative" (Civ. Code, § 1325); "and a testator is to be considered as intending a benefit to the object of his gift" (Perkins v. Mathes, supra; Wallace v. Wallace, 23 N. H. 149).

If the construction of this will asked by appellant be adopted, the residuary legatee would receive nothing, and the residuary clause would have no effect; for the entire residue, including the $1,661 in money distributed to said legatee, amounted in value to but $2,160. The inheritance tax charged to said legatee was $108, which is the tax on a valuation of $2,160. The real estate and typewriter, which, according to the theory of appellant, constitute the residue of the estate, therefore, were worth but $700. This would not be sufficient to pay the Connolly legacy of $1,000, not to mention the $600 debt owing by testator to appellant and by the will directed to be paid, and the other debts and expenses of administration, all of which, under the law, are first chargeable against the property given to the residuary legatee before resort could be had to any property given to appellant. Civ. Code, §§ 1359, 1360. Neither Connolly nor Mrs. Roberts could have properly received anything from this estate, if the contention of appellant be correct; for, exclusive of the $8,700 represented by the bank books, the entire estate seems to have consisted only of the typewriter and real estate, valued at $700, about $600 received from the employers of testator, and some rentals from the real estate, while the debts and expenses of administration seem to have exceeded $6,000. It is true that the debts and expenses seem to have been paid by the executor out of the moneys in bank; but, if the contention of appellant be correct, these moneys should not have been resorted to until the property given to the residuary legatee had been exhausted. Civ. Code, §§ 1359, 1360. Thus it is seen that if the lower court had adopted the construction asked by appellant, and such construction had been fully carried out in the settlement of this estate, both the bequest to Connolly and to Mrs. Roberts would have been rendered nugatory, and the rule laid down in section 1325, Civ. Code, as well as the rule followed in Perkins v. Mathes, supra, violated. Where a testator leaves among his effects a large number of law books and other ordinary books, we do not think that a court ought to assume that by a bequest of "all my books and papers" a testator meant to give several thousand dollars on deposit in banks, although such deposits are evidenced by bank books, especially where, as in this case, such an interpretation would render of no effect other provisions of the will.

The decree of distribution is affirmed.

We concur: HARRISON, P. J.; COOPER, J.

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1 Cal. App. 515

SANTA ROSA BANK v. STRIENING et al.

(Court of Appeal, Third District, California. Aug. 31, 1905.)

1. Appeal—Motion to Dismiss—Determination.

A motion to dismiss an appeal for failure to file briefs within the time required must be determined by the facts existing at the time the notice of motion was given.

2. Court Rules — Application — Briefs — Filing.

Where appellant's brief was not filed within 30 days after the transcript was filed, as required by Supreme Court rules 2, 5 (64 Pac. vii, viii), applicable to the Appellate Court, nor within the time as extended by various court orders, nor until after notice of motion to dismiss had been given, the appeal would be dismissed, though briefs were filed prior to the hearing of the motion.

Appeal from Superior Court, Sonoma County; A. G. Burnett, Judge.

Action by the Santa Rosa Bank against John M. Striening and others. From a judgment in favor of plaintiff, defendant H. B. Schindler appeals. Dismissed.

G. Gunzendorfer and L. W. Juillard, for appellant. James W. Oates, for respondent.

CHIPMAN, P. J. Motion to dismiss the appeal on the ground that appellant failed to file his brief in time. The transcript was filed May 16, 1904. Time in which to serve and file brief was extended by counsel for respondent to and including July 13, 1904. On July 13, 1904, counsel for appellant filed application in the Supreme Court asking 20 days' further extension of time to file brief, which was granted on that day. On August 2, 1904, that court granted 20 days' further time from and after that date, and on August 25, 1904, that court granted 15 days' further time from that date, and in the order stated that "no further extension of time will be granted." Under these orders the time in which to serve and file points and authorities expired on September 9, 1904. The cause was transferred to this court on January 30, 1905, and was placed upon the present August calendar. On August 14, 1905, respondent served notice of motion to dismiss on appellant's attorneys, and filed said notice in this court on August 24, 1905, and on the latter day appellant filed in this court his points and authorities. Appellant had sent to the clerk's office his points and authorities on August 18th, but, not having previously served same on respondent's attorney, they were not filed until evidence of such service was furnished, which was on August 24, 1905.

Rule 5 of the Supreme Court (64 Pac. viii), which is made a rule of this court, provides that, if the points and authorities of appellant be not filed within the time prescribed (which, by rule 2 [64 Pac. vii], is 30 days after the transcript is filed), the appeal may be dismissed on motion, upon notice given. If, however, the points and authorities "be on file at the time such notice is given, that fact shall be sufficient answer to the motion." In McCabe v. Healey, 139 Cal. 30, 72 Pac. 359, it was decided that a motion to dismiss must be determined by the facts existing at the time the notice of motion was given; and the right of the respondent to have the appeal dismissed under the rules cannot be affected or destroyed by any subsequent filing and service of the appellant's points and authorities.

Conceding, without deciding, that the court has discretion to refuse to dismiss the appeal, notwithstanding the rule above stated, upon a sufficient showing, we do not think such showing has been made. The motion is granted, and the appeal is dismissed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

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1 Cal. App. 521

PEOPLE v. PROCTOR.

(Court of Appeal, First District, California. Aug. 31, 1905.)

1. Larceny—Proof—Sufficiency.

Defendant proposed marriage to prosecutrix, and was accepted. He represented that he had property which he was trading for a new house, and that he needed a specified sum in addition to what he had in bank to make the deal. The prosecutrix agreed to loan him money, for which he agreed to give a bill of sale as security. The loan was made, but his representations were false. *Held*, that he was not guilty of larceny; title to the money loaned being transferred to him.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Larceny, § 35.]

2. Same—False Pretenses—Distinguished.

Where one parts with the possession of and title to personalty by means of false representations knowingly made, the crime is not larceny, but that of obtaining money by false pretenses.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. False Pretenses, § 25; vol. 32, Cent. Dig. Larceny, § 35.]

Appeal from Superior Court, Alameda County; Henry A. Melvin, Judge.

William Proctor was convicted of larceny, and appeals. Reversed.

Aldrich & Gentry, for appellant. U. S. Webb, Atty. Gen., for the People.

COOPER, J. Defendant is charged in the information with the crime of grand larceny, committed on the 19th day of December, 1904, by feloniously stealing, taking, and carrying away $108 in gold and silver coins, the property of Emeline Tyson. He was found guilty as charged, and sentenced to a term of six years in San Quentin. His motion for a new trial was denied, and he prosecutes this appeal from the judgment and order denying his motion.

The facts relied on to sustain the verdict are stated by the prosecuting witness, Emeline Tyson, and are in substance as follows: Emeline Tyson was past 76 years of age on Friday, December 16, 1904, when she first met defendant at Niles Station and had a moment's conversation with him. He came to her house, which was about one mile from the station, the following morning, and sold her a pair of spectacles. While there they engaged in a general conversation. He told her that he had been a widower for about 15 years, had traveled around a great deal, but was tired of living that way; that she was just the woman he had been looking for; that it was a case of "love at first sight." His love making seems to have been agreeable, as he promised to call again that (Saturday) evening. He did not, however, call on Saturday evening, but did call Sunday morning, and made an excuse for not having called Saturday evening. He called again Sunday evening, and the prosecuting witness gives an account of the transaction in the following language: "He asked me to marry him, and I told him I would if I found him to be a perfect gentleman and able to take care of me. He said he was plenty able to do it; that he had an old house and lot in Oakland that he was trading off for a new house. He said he had $550 in the bank, and needed $60 more to make the deal, or he would lose the bargain. He said he wanted the new house for us to live in. Then I agreed to let him have the money. He said he would give me good security for it; that he had a bill of sale of an auto worth $500; and that he would give me a bill of sale as security. I promised then to try and get the $60 for him the next morning. I saw him the next morning (Monday) at my home. He said he had just received a letter from his sister in the East, and that they had sold out and she was coming on, and that he would soon have a lot of money. He said he was giving me good security, and would have the money on the 15th of January. He said, 'You just as well make it out now $108. I want a little Christmas money, too, and I am giving you good security for it, and will pay it back on the 15th.' His sister was coming, and would have a lot of money. Then I got the money, and let him have it, $108 lawful money of the United States. Then he gave me the bill of sale to an automobile. When he paid this money back on the 15th of January I was to give him back the bill of sale." The witness further testified in cross-examination: "There was no agreement on his part to use any of this money for me. I was simply lending him so much money, and he was going to give me this false bill of sale. I would not have let him have this money on this bill of sale if he had not have been going to marry me. The only reasons I had for handing this money to this defendant upon that 19th day of December, 1904, were that we were engaged to be married, that he said he would give me good security, this bill of sale of a fine automobile, and that he would be plenty able to pay it back on the 15th of January."

The only question that need be discussed is as to whether or not the verdict of larceny is supported by the facts as stated. Larceny is the felonious stealing or taking away of the personal property of another. The title to the property is not changed, but remains in the party from whom the property was taken. Where the owner parts with the possession and title by reason of false and fraudulent representations, knowingly and designedly made, the crime is not larceny, but that of obtaining money by false pretenses. The distinction that runs through the books, as stated by the judges and text-writers, is that, to constitute larceny, the owner of the property stolen must not have intended to part with the title to it, while in false pretenses he did intend to part with the property and the title thereto, but the intention was brought about by fraudulent circumstances. If the transaction has not been completed, and the owner did not intend to part with title to the property, and the defendant procured the possession by means of false and fraudulent representations, the crime is larceny. The court below correctly stated the law to the jury in its instruction, wherein it said: "If you find from the evidence that the money, which is the subject of the alleged larceny in this action, was obtained by the defendant from the prosecuting witness, Emeline Tyson, and that the said Emeline Tyson voluntarily gave the money to the defendant, and that she (Emeline Tyson) did not expect to get any part of this money back from the defendant, and that said Emeline Tyson intended to part with the ownership as well as the possession of said money, and that at the time the money was so obtained it was understood by the said Emeline Tyson that said money was to be used by the defendant on his own account, then the defendant is not guilty of larceny, even though you should find that the defendant fraudulently obtained the money by means of false pretenses. You must judge of the intent which governed the acts of the complaining witness, Emeline Tyson, in handing over the money, by the knowledge possessed by her at the time she handed over the money, and not by any facts which she may have learned afterwards." The prosecuting witness loaned the money to defendant. She parted with the possession and title to it. She believed at the time that defendant was to be her future husband. She believed him him to be a perfect gentleman, and that the automobile was good security. She was the victim of misplaced confidence and affection, but defendant did not commit larceny in getting her money.

The judgment and order **are** reversed.

We concur: HARRISON, P. J.; HALL, J.

1 Cal. App. 501

PEOPLE v. BOWERS.

(Court of Appeal, First District, California. Aug. 30, 1905.)

1. Criminal Law — Appeal — Conflicting Evidence.

Where a conviction is based on conflicting evidence, and a new trial has been denied, the appellate court will not set the same aside on the mere ground that the evidence is insufficient to sustain the verdict.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3068, 3084.]

2. Homicide—Arsenical Poisoning—Symptoms—Evidence.

Where, in a prosecution for homicide, it was claimed that deceased died from arsenical poisoning, and there was evidence that he was afflicted with purging and vomiting, symptoms of arsenical poisoning, evidence that the clothing and bed linen used by deceased during his illness, and shortly before his death, were in a dirty and soiled condition, was admissible, as tending to corroborate the evidence of such symptoms.

3. Same.

Such evidence was also admissible to rebut testimony that defendant was kind and attentive to the comfort of deceased, her husband, during his last illness.

4. Same—Motive.

In a prosecution of defendant for murdering her husband, evidence of amorous conduct between defendant and L. immediately prior and subsequent to the killing was admissible to establish a motive.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 326.]

5. Criminal Law—Examination of Experts—Medical Books.

Where, in a prosecution for homicide, it did not appear, except from the statements of defendant's attorney, that the jury could have known that the district attorney was in fact reading from a medical book, or from any book, while asking a question of an expert witness with reference to the progress of arsenical poisoning, and the question was asked as that of the district attorney, the fact that part of it was read from a medical book did not constitute error.

6. Same—Witnesses—Objections.

Where a physician had testified that he had been a physician and surgeon for several years past, and had given testimony without objection as an expert along medical lines, an objection to a hypothetical question that no proper foundation had been laid therefor and that it was not based on the facts presented and was incompetent as assuming a province of the jury was insufficient to raise the question that the witness had not shown himself qualified to testify as an expert.

7. Homicide—Evidence—Conspiracy.

Defendant's sister procured arsenic from a druggist on a forged prescription in defendant's handwriting, written on paper torn from a book belonging to defendant and in her possession. Deceased, who was defendant's husband, died five days subsequent to the getting of the arsenic, and nearly four grains of arsenious acid was found in his stomach after death. *Held*, that such facts were sufficient to authorize the admission of evidence of a druggist that defendant's sister presented to him on a certain day a prescription for arsenic signed by a certain doctor, and that he sold thereon an ounce of arsenic or arsenious acid.

Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

Martha E. Bowers was convicted of murder in the first degree, and she appeals. Affirmed.

Rehearing denied by Supreme Court, October 11, 1905.

C. W. Lynch, F. G. Drury, Lynch & Drury, H. J. McIsaac, and Coldwell & Borland, for appellant. U. S. Webb, Atty. Gen., for the People.

HALL, J. Defendant was convicted of the crime of murder in the first degree for the killing of her husband, and was sentenced in accordance with the verdict to imprisonment for life. This is an appeal from the judgment and from the order denying her motion for a new trial.

The first point urged as ground for a reversal of the judgment and order is that the evidence was insufficient to sustain the verdict. In cases where there is simply a conflict of evidence on the question as to whether or not the defendant is guilty, this court cannot interfere with the verdict of the jury and the determination of the trial court thereon on motion for a new trial. People v. Buckley, 143 Cal. 375, 77 Pac. 169; People v. Fitzgerald, 138 Cal. 40, 70 Pac. 1014; People v. Donnolly, 143 Cal. 394, 77 Pac. 177. In People v. Gonzales, 143 Cal. 605, 77 Pac. 448, the rule is laid down thus: "This court cannot interfere with the verdict of a jury, nor with the action of the court below in refusing a new trial, on the ground that the evidence is insufficient to justify the verdict, unless there was such a lack of evidence as to satisfy us that the court below abused its discretion in denying the new trial." In the case now before the court the evidence is largely circumstantial, and is set forth in 488 pages of the transcript. No good purpose will be subserved by discussing in detail the evidence. Such a discussion would necessarily be an argument as to what inferences should or could be drawn from the evidence. Suffice it to say that after a careful examination of the evidence in the transcript we are of the opinion that under the rules above set forth the contention of appellant on this point cannot be sustained. The evidence was sufficient to sustain the verdict, and the court did not err, so far as this point is concerned, in denying the motion for a new trial.

It is next urged that the court erred in admitting, over the objection of the defendant, testimony to the effect that the clothing and bed linen used by deceased during his illness shortly before his death were in a dirty and much soiled condition. This testimony was clearly proper. It tended to corroborate other testimony to the effect that deceased was afflicted with purging, and vomiting, symptoms, as the evidence showed, of arsenical poisoning, from which it was claimed that deceased died. One of the witnesses testified that the soiling of the bed sheets was the result of vomiting and purging. Prior to the introduction of the evidence complained of defendant had drawn out testimony to the effect that during the illness of deceased, which lasted upwards of two months, defendant had appeared, at least in the presence of the witness, to be kind and attentive to the comfort of her husband. From the condition of the bed linen, etc., inferences might well be drawn that defendant was not really anxious for the comfort or recovery of her husband, as her conduct in the presence of witnesses would indicate.

It is contended that the court erred in admitting, over the objections of defendant, evidence that defendant and one Lervy had before the death of deceased visited and drank together in certain saloons; that on one occasion she had sat on Lervy's lap and they had kissed each other, and placed their arms around each other while so doing; and that on the night of the day on which deceased died and the following night she and Lervy slept in the same room. It cannot be denied that evidence of the existence or want of a motive for the commission of any particular crime is often of much importance in determining whether or not the defendant committed the crime charged. Especially is this so in cases depending on circumstantial evidence, such as this was. Indeed, the defendant procured the court to substantially so instruct the jury. The testimony now under discussion, taken as a whole, tended to show that Mrs. Bowers and Lervy were lovers. Some of it, standing alone, might be said to be too remote and inconsequential to furnish any such inference; but it should all be considered. Proof that they were lovers furnished a motive why defendant might desire the death of her husband. The evidence was properly admitted.

It is also contended that the court erred in permitting the district attorney, over the objection of defendant, "to read on cross-examination of witness Dr. Stephens extracts from medical works, and to ask the witness whether what was so read corresponded with his own judgment." The witness had given testimony as to the symptoms and effects of arsenical poisoning, and following such testimony the transcript contains the following: "Q. Is this a correct statement, Doctor: While the poison is being eliminated, the process which begins very soon after it is taken, it generally causes fatty degeneration of the liver, heart, and kidneys, the symptoms of which are often very prominent? Mr. Drury: We object to the question as incompetent, irrelevant, and immaterial, improper, and hearsay. It appears that the district attorney is reading from certain medical books and asking this witness questions therefrom. Mr. Byington: I am making it my own question, if your honor please. The Court: Objection overruled. To which ruling of the court defendant then and there duly excepted. It will thus be seen that, except for the statement of the attorney for defendant, the transcript does not show that the jury could have known that the district attorney was in fact reading from a medical book, or from any book. He had not so stated, and so far as we can see from the transcript the book, if in fact he was reading his question from a book, was entirely out of sight of the jury. On the objection being made the district attorney said, "I am making it my own question," which in fact it was in form. It was held in Lilley v. Parkinson, 91 Cal. 655, 27 Pac. 1091, that it is not competent upon the examination of medical witnesses to read to them extracts from medical works and ask them whether what is so read corresponds with their own judgment, when it is apparent that the sole object of so doing is to place before the jury the opinion of the author of the books referred to. In the case just cited extracts were read from a book shown to be a standard work on surgery, and witnesses asked if what was read corresponded with their own judgment, and the court said, "The only effect of these questions and answers was to place before the jury the opinion of the author of the book referred to, and it is also apparent that this was the object sought." But from the record before us we cannot say that the rule laid down in Lilley v. Parkinson was violated. While the course adopted by the district attorney cannot be commended, we do not think it justifies a reversal, or that actual error has been shown.

Defendant urges that the court erred "in permitting Dr. McLaughlin, a witness for the prosecution, to testify as an expert without it being shown, first, that he was a regularly graduated and licensed physician of any medical school; and, second, that he was an expert in the general subject under discussion." The objection as it appears in the transcript was to a long hypothetical question, and was thus stated: "We object to that question on the ground that no proper foundation has been laid, and upon the ground that it is not based upon the facts presented; also upon the ground that it is incompetent, and inasmuch as it assumes the province of the jury." The witness had testified that he was and had been a physician and surgeon for several years past, and had already given testimony without objection as an expert and along medical lines, covering in narrative form 4½ pages of the transcript. Under these circumstances we do not think that the objection was either well taken, or was in fact pointed at the matter now urged as the ground of objection. The objection to the hypothetical question put to Dr. Harrison was properly overruled. We think that the facts assumed in the question might fairly be inferred from the evidence in the case.

It is lastly urged that the court erred in allowing the prosecution to introduce certain testimony of one Mr. Peterson, a druggist, to the effect that one Mrs. Sutton presented to him August 20, 1903, a certain prescription for arsenic, signed "McLaughlin, M. D.," and that he gave her thereon an ounce of arsenic; that is to say, an ounce of arsenious acid. The contention of defendant on this point is without merit. About four grains of arsenious acid were found in the stomach of deceased after his death, which occurred five days subsequent to the getting of the arsenic. Mrs. Sutton was the sister of defendant. The prescription was in the handwriting of defendant, and on paper torn from a book belonging to her and in her possession. Defendant was in sole attendance on deceased from August 20th to his removal to the hospital on the day of his death. These facts sufficiently connected Mrs. Bowers with the getting of the arsenic to allow of the introduction of this evidence. Whether Mrs. Sutton was a co-conspirator of Mrs. Bowers, or simply her innocent agent, the fact that the prescription on which the arsenic was obtained was forged by Mrs. Bowers sufficiently connects her with the obtaining of the arsenic to allow of the proof of the getting of the same.

After an examination of all the points urged by the defendant as ground for a reversal, we have found no error in the record.

Judgment and order are affirmed.

We concur: HARRISON, P. J.; COOPER, J.

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1 Cal. App. 507

PEOPLE v. FITZGERALD.

(Court of Appeal, First District, California. Aug. 30, 1905.)

1. Homicide—Murder in Second Degree—Evidence—Sufficiency.

Evidence on a trial for murder *held* to support a conviction of murder in the second degree.

2. Same—Evidence—Admissibility.

Where, on a trial for murder, it did not appear that any statement was made by decedent to his wife shortly before the homicide, and the question asked a witness as to what statement, if any, was made by decedent to his wife contained no intimation as to the nature of the statement sought to be shown, it was not error to sustain an objection to the question.

3. Same—Evidence—Instructions.

Where, on a trial for murder, there was no evidence as to the relative strength and activity of defendant and decedent, an instruction that, in determining whether defendant had reason to apprehend that he was about to receive bodily injury from decedent at the time of the killing, the jury might consider the relative strength and activity of the parties, was properly refused.

4. Criminal Law—New Trial—Newly Discovered Evidence—Affidavits.

The record in a criminal case should show that, on the hearing of a motion for a new trial on the ground of newly discovered evidence, the affidavits in support thereof were offered or read by defendant.

5. Same—Motion for New Trial—Newly Discovered Evidence—Sufficiency.

The affidavits in support of a motion for a new trial in a murder case on the ground of newly discovered evidence tended to impeach a witness for the state by showing that on account of intoxication he could not have known the facts. At the trial, on cross-examination of the witness, he testified that he had drunk nothing but coffee on the morning of the homicide. There were many persons present at the homicide who testified. Defendant called some of them, including the witness sought to be impeached. *Held*, that the court properly denied the motion.

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Christopher Fitzgerald was convicted of murder in the second degree, and he appeals. Affirmed.

E. D. Edwards and E. A. Williams, for appellant. U. S. Webb, Atty. Gen., for the People.

COOPER, J. Defendant was tried upon the charge of murder in killing, with malice aforethought, one Charles Slater on the 18th day of September, 1904. The jury returned a verdict of murder in the second degree. Defendant made a motion for a new trial, which was denied, and judgment was entered directing that he be imprisoned for 10 years in the state prison at Folsom. This appeal is from the judgment and order denying a new trial.

The main contention of appellant is that the evidence does not support the verdict. The evidence shows that deceased and defendant were fellow laborers at McKenzie's mill, in Fresno county, at the time of the homicide. There had been no previous trouble between them, and they had been on friendly terms prior to the killing. On Sunday morning, the day of the homicide, deceased had been drinking, but appears to have been in a humorous mood and trying to entertain his companions in various ways. He was telling stories, joking, scuffling with his fellow laborers, and pretending to auction off the property of every one. He had torn the mosquito netting off of defendant's bed, and had his feet up on the bed. Defendant requested him to take his feet off of his bed, and deceased appears to have complied with the request. Defendant then, with the assistance of one Kleeper, removed the bed some distance away. Up to this time no angry words were used by either party. After this, while deceased was being shaved, his chair either fell or was pushed over by some of the boys, and he rolled upon the ground. He appears to have been lying on the ground telling a humorous story when defendant passed. Deceased arose and ran after him, overtaking him, and pushed or struck him, after which he returned and wrestled with one Lewis. While the manner of deceased was rough and boisterous, he appears to have been good-natured, and to have been more in play than otherwise. Defendant appears, however, to have become impatient and angry because of the annoyances to which he was subjected and the acts and conduct of deceased. In his own language, he states: "I then went on in the Barnes cabin, and started to shave outside by the door. Then I saw Klepper and several of the boys taking Slater away, and he tried to get away from Klepper; but they took him down to his own house. I then went back to the Long cabin, got my rifle, loaded it, and said: 'If he don't let me alone, I will put a half ounce of lead in him. If he wants a shooting scrape, he can get it.' I then went into the Barnes cabin with the rifle, laid it down in the northwest corner of the cabin, and went outside and commenced shaving." Deceased almost immediately afterwards came up unarmed, in an intoxicated condition, to defendant's cabin. Defendant went inside, deceased following after him, and defendant said twice in rapid succession, "Get out of here," and simultaneously raised the rifle which he had loaded for the purpose, and fired the bullet which passed through the body of deceased, causing almost instant death. Deceased exclaimed with his last breath, "My God, boys, what did he do that for?" The shooting appears to have been wholly unnecessary. Defendant had prepared the deadly rifle, and, not in necessary self-defense, he fired the shot at an unarmed man in an intoxicated condition. The jury, in its mercy, gave the defendant the benefit of his condition of mind caused by the annoyances to which he had been subjected. It reduced the degree, and thus in effect found that the killing was not willful, deliberate, and premeditated. The judge also appears to have dealt leniently with the defendant. The evidence fully supports the verdict.

The witness Watson testified to the effect that a short time before the homicide deceased was between two of the cabins and his wife was trying to get him away. The defendant's counsel then asked the witness the following question: "At the time Mrs. Slater was there, what, if any, statement was made by Mr. Slater to Mrs. Slater?" The court correctly sustained an objection to the question. It does not appear that any statement was made, and no intimation is made in the question as to the nature of the statement sought to be elicited. If the statement was made, and was as to some matter not connected with the homicide, it was clearly inadmissible.

The court refused to instruct the jury: "In determining whether the defendant had reason to apprehend that he was about to receive bodily injury from the deceased at the time the fatal shot was fired, the jury may take into consideration the relative size, strength, and activity of the respective parties." There was no evidence in the record as to the relative strength and activity of the parties. Not only this, but the record does not show that the instruction was requested by defendant.

The last contention of defendant is that the court erred in denying his motion for a new trial on the ground of newly discovered evidence. We find certain affidavits in the record, but there is not a word showing or tending to show that they were offered or read by defendant on his motion for a new trial; but we have examined them, and find nothing that would have justified the court in granting a new trial on this ground. They are all to the point that defendant has discovered evidence which would tend to impeach the witness Michael Fitzgerald (who testified for the prosecution), by showing that at the time of the homicide Fitzgerald was intoxicated to such an extent that he could not have known the facts concerning the homicide. The defendant's counsel, in cross-examination of the witness Fitzgerald, asked him if he had been drinking that morning, and the witness answered, "Nothing but coffee." If it was true that the witness was intoxicated to such an extent as to affect his credibility, it could easily have been shown at the trial. There were many parties present at the homicide, and who testified. Defendant called some of them, among whom was Michael Fitzgerald, the witness sought to be impeached. It is said in People v. Warren, 130 Cal. 685, 63 Pac. 86: "A motion for a new trial upon the ground of newly discovered evidence is looked upon with suspicion and disfavor, and the party who relies upon such a ground must make a strong case both in respect to diligence on his part and as to the truth and materiality of the evidence; and if he fails in either respect his motion must be denied."

The judgment and order are affirmed.

We concur: HARRISON, P. J.; HALL, J.

1 Cal. App. 494

NICOLS v. BOARD OF POLICE PENSION FUND COM'RS OF CITY & COUNTY OF SAN FRANCISCO.

(Court of Appeal, First District, California. Aug. 29, 1905.)

MUNICIPAL CORPORATIONS—OFFICERS—POLICE PENSION FUND—BENEFICIARIES—RIGHT TO RECOVER BENEFITS—LIMITATIONS.

Act March 4, 1889 (St. 1889, p. 56, c. 62), provides for a police pension fund by directing that certain public money shall be set apart in the custody of the city treasurer, and styles the board of management trustees, and those entitled to its benefits beneficiaries. Section 7 (page 57) gives a widow of a deceased member of the police department, on conditions specified, a designated sum from the fund. Section 14 (page 60) provides that on the last day of June in each year the surplus of the fund exceeding the average amount per year paid out on account of the fund during three years next preceding shall become a part of the general fund of the municipality. *Held*, that the board charged with the management of the fund are not trustees under an express trust for the persons entitled thereto, and limitations begin to run from the time of the accrual of a right to a pension, and not from the repudiation of the claim by the board; and a widow of a policeman, who waited over five years after his death before demanding her pension, was barred by limitations.

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Application for a peremptory writ of mandate by Margaret J. Nicols against the board of police pension fund commissioners of the city and county of San Francisco to compel defendants to issue a warrant on the fund in favor of the petitioner. From a judgment of dismissal, entered on sustaining a demurrer to the petition, the petitioner appeals. Affirmed.

Wm. M. Madden, for appellant. P. V. Long, City and County Atty., for respondents.

HARRISON, P. J. Mandate. The petitioner alleges that Watson Nicols, now deceased, was appointed a police officer and member of the police department of the city and county of San Francisco June 9, 1871, and from that time continuously and duly served as a regular officer in actual service in said department until he was retired from active service as hereinafter stated, and was a member of the said police department continuously from the time of said retirement until his death; that in September, 1889, while serving as a policeman in said city and county, he became physically disabled while in, and in consequence of, the performance of his duty as such policeman; that on September 30, 1889, the defendants, under and in pursuance of the provisions of the act of March 4, 1889 (St. 1889, p. 56, c. 62), duly and regularly retired him from active service, and placed him upon the police relief and pension roll of said police department, and granted him a pension, from the police relief and pension fund created under the provisions of said act, of $57.50 per month from the 1st day of October, 1889, and that he received the said pension from that time until his death; that the petitioner and the said Watson Nicols intermarried July 17, 1883, and from that date continuously to the time of his death were husband and wife; that said Watson Nicols died in the city and county of San Francisco January 29, 1890, from natural causes, leaving the petitioner as his surviving widow; that as his widow she is entitled under the provisions of the aforesaid act of March 4, 1889, to the sum of $1,000 from the aforesaid police relief and pension fund; that on March 22, 1895, she presented to the defendants her claim as the widow of said Watson Nicols for said sum of $1,000, and demanded of the defendants that they order the same paid to her out of said pension fund, and issue a warrant to her therefor; that the defendants refused and still refuse so to do. Wherefore she asked the superior court to issue a peremptory writ of mandate, requiring the defendants to comply with her said demand. Her petition therefor was filed in the superior court July 10, 1895. To this petition the defendants demurred, specifying, among other grounds of demurrer, that her cause of action is barred by the statute of limitations. The court sustained the demurrer and ordered the proceeding dismissed, and from the judgment entered thereon the petitioner has appealed.

The provision in the act of March 4, 1889, upon which the appellant relies for recovery, is as follows, viz.: "Sec. 7. Whenever any member of the police department of such county, city and county, city or town shall, after ten years and less than 20 years of service, die from natural causes then his widow or children, or if there be no widow or children then his mother or unmarried sisters, shall be entitled to the sum of one thousand dollars from such fund." St. 1889, p. 57, c. 62. As the plaintiff did not commence the present action until more than five years after the death of her husband, it is evident that her right of recovery is barred by the statute of limitations, unless for some reason it is taken out of the operation of the statute. It is therefore contended on her behalf that under the terms of the aforesaid act the pension fund thereby created is held by the defendants under an express trust in favor of those for whom it is created, and consequently that the statute of limitations did not begin to run against her claim until a repudiation of the trust on the part of the defendants. This contention is based upon the proposition that by the terms of the act the defendants are constituted a "board of trustees," and those for whose benefit the fund is authorized are styled "beneficiaries." We are unable to accept this construction of the act. Whether a fund created for the benefit of certain designated persons is impressed with a trust which can be enforced in their favor will depend upon the terms under which it is created and the provisions made with reference to its disbursement, rather than upon the designation given to the disbursing agents or to the recipients of the fund. The "pension fund" authorized by the act is not characterized in any of the provisions for its creation and management with the elements of a trust, and the mere designation of those who are to disburse it as a "board of trustees," and those for whom it is to be distributed as "beneficiaries," is insufficient to require such construction. Persons invested with the management or control of a fund may be styled a "board of trustees," without holding any relation of trust to the fund other than such as exists in all cases where one person has the management or control of property belonging to another; and any person who derives an advantage from the beneficence of another is with equal propriety styled a "beneficiary" as one for whose benefit a trust is created.

The defendants are not made the custodian of the pension fund, but have been appointed by the Legislature to ascertain and designate the persons who are entitled to the payments authorized by the act, and in so doing are in the exercise of a public duty imposed upon them by the Legislature. The Legislature has directed that certain public moneys shall be set apart in the treasury for the purpose of making these payments, and the moneys so set apart are at all times public moneys in the custody of the treasurer of the county. The "two dollars per month" which the petitioner alleges was retained by the treasurer from Nicols' pay as a member of the police department, and paid into said fund, was not a contribution to the fund by Nicols, but, as was said in reference to a similar provision in the act of 1878, in Pennie v. Reis, 132 U. S. 464, 10 Sup. Ct. 149, 33 L. Ed. 426, "was money of the state retained in its possession for the creation of this very fund." In this case the Supreme Court of the United States, in construing the act, held that a member of the police department has no vested right or right of property in the money authorized by the act to be paid upon certain contingencies or the happening of certain events until such contingencies or events shall occur; thus refuting the proposition that the fund is held under an express trust in favor of the designated beneficiaries. The provision of section 14 (page 60), of the act that on the last day of June of each year all surplus of said fund exceeding the average amount per year paid out on account of the said fund during the three years next preceding shall be transferred to and become a part of the general fund of the city and county, and "no longer under the control of said board or subject to its order," is a direction of the Legislature for the disposition of the fund, and is inconsistent with the proposition that it is held by the board under an express trust in behalf of those to whom it is to be paid. It is not an unreasonable inference from this provision of the act that it was the intention of the Legislature that all claims against the fund should be presented for payment within one year after the right to receive such payment had accrued. The relation of the petitioner to the fund is not unlike that which exists in behalf of a beneficiary under the provisions governing a benevolent or fraternal association. Upon the happening of the event at which such beneficiary is entitled to receive the benefit provided in the articles of association a right of action accrues in his behalf, which, like any other right of action, must be enforced within the period provided by the statute of limitations. Kauz v. Great Council, etc., 13 Mo. App. 341. It would not be seriously contended that, if Nicols had neglected to seek payment of his monthly pension for more than five years after his right to it had accrued, his right would not be barred by the statute of limitations. The act, however, makes no distinction between the different classes of beneficiaries in the relation to the fund, and it must be held that the petitioner's right of recovery was barred by the statute of limitations.

The judgment is affirmed.

We concur: COOPER, J.; HALL, J.

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1 Cal. App. 529

In re DELLOW'S ESTATE.

(Court of Appeal, First District, California. Sept. 1, 1905.)

1. APPEAL—JUDGMENT—TIME.

Where an appeal from a judgment is taken more than 60 days from the rendition thereof, the sufficiency of the evidence to sustain the judgment cannot be reviewed.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1888.]

2. APPOINTMENT OF GUARDIAN — INFANTS — —ISSUES.

Where both parents of certain minors were dead, the paramount issue to be determined on an application for guardianship was the best interests of the child in respect to its temporal, mental, and moral welfare, as provided by Civ. Code, § 246.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Guardian and Ward, § 23.]

3. SAME—EVIDENCE.

On cross-petitions for appointment as guardian of certain minors, evidence *held* to sustain the finding.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Cross-petitions by Rose A. Shields and by Flora Dellow to be appointed guardian of the persons and estates of Eleanor Louisa Dellow and Vincent Alexander Dellow, minors. From a judgment denying petition of Flora Dellow, and appointing her cross-petitioner, and from an order denying Flora Dellow's motion for a new trial, she prosecutes separate appeals. Affirmed.

N. H. Frank, for appellant. John M. Burnett and William Rix, for respondent.

HALL, J. There are two appeals in this case—one by Flora Dellow from a judgment of the trial court denying her petition to be appointed guardian of the persons and estates of Eleanor Louisa Dellow and Vincent Alexander Dellow, minors, and granting the petition of Rose A. Shields to be appointed guardian of the same children; and another from an order denying appellant's motion for a new trial—both before us on one record.

The appeal from the judgment was taken more than 60 days after the rendition of judgment, and therefore the sufficiency of the evidence to sustain it cannot be considered on the appeal from the judgment. This is conceded to be true by counsel for appellant in his brief, and it is not contended that the findings do not support the judgment. So the judgment must be affirmed.

As to the appeal from the order denying the motion for a new trial, it is urged by the respondent that the record does not show what motion was in fact made, nor upon what grounds the motion was predicated; that though a notice of intention to move for a new trial was filed, and a bill of exceptions settled containing such notice and specifications as to insufficiency of the evidence to support certain findings, the only record as to what motion was in fact made is contained in the clerk's entry in these words: "[Title of Court and Cause.] October 7, 1904. Motion for new trial ordered denied. W. J. Kennedy, D. C. C." However, as we think the action of the lower court must be sustained on the merits, we do not think it necessary to pass on the technical point thus raised.

At the time of the application for guardianship the boy, Vincent, was aged three years, and the girl, Eleanor, was aged eight years. The mother of the children died when the boy was four months old, and the father died October 7, 1903, five days before the filing of the petition by appellant. The estate of the children consists in an insurance on the life of their father in the sum of $3,000, payable in equal shares to the children. Appellant, Flora Dellow, is an aunt of the children and their only relative in this state, while respondent is in no way related to the children, but had had the care and custody of the girl for some time before the death of the father, and immediately upon his death took the custody of the boy from another stranger, and had the custody of both at the time of filing the petition. The court heard the two petitions together, and made findings of fact, and denied the petition of appellant, and granted that of respondent. Appellant moved for a new trial, and we are now considering her appeal from the order denying such motion.

The bill of exceptions contains a stipulation that it contains all the testimony admitted in the case. Among other things the court found "that it is for the best interests of said minors that said Rose A. Shields should be appointed guardian of their persons and estates." The parents both being dead, this, under our statute, was the paramount issue to be determined by the trial court. Section 246, Civil Code, provides that, "in awarding the custody of a minor, or in appointing a general guardian, the court or officer is to be guided by the following considerations: (1) By what appears to be for the best interests of the child in respect to its temporal and its mental and moral welfare." If the finding above quoted is supported by the evidence, it is of no consequence whether the finding, also made by the court, "that said J. A. Dellow [father of the children] requested that said Rose A. Shields should have the care and custody of said minors, and should act as their guardian," is supported by the evidence or not. In the Matter of the Guardianship of Lewis, a Minor, 137 Cal. 682, 70 Pac. 926, the court said: "The question as to which one of these two parties was the proper party to be appointed guardian over the person of this child was essentially a question of fact for the trial court, and that court having decided it, and there being substantial evidence to support that decision this court will not interfere by setting aside the order for lack of evidence." In the case just referred to the prevailing party was the grandmother and the appellant was the father.

The evidence in the case now before us shows both petitioners to be worthy people. Appellant was obliged to work to support herself. She believed that her brothers and sisters in England would assist her to support the children. She came here from England at the request of her brother, the father of the children, and cared for them until, because of his drinking habits, she left his home. Respondent is the godmother of one of the children; and, upon appellant leaving the home of the father of the children, she, at his request, took the girl, and promised to take the boy when he became older. She is a dressmaker, and also takes lodgers, and has resided in the same block for 11 years. She testified that she was financially able to take care of the children, and that she could and would maintain them without using any of the money which may come to them from the insurance on the life of their father. She is of the same religious faith as was the mother of the children, is the godmother of one, as before stated, and her sister of the other child. Both petitioners were before the judge of the trial court, and their manner and appearance were open to his observation. Under these conditions we cannot say that the finding under consideration is not sustained by the evidence; and, as it is the controlling factor in the case, the order appealed from, as well as the judgment, must be affirmed.

It is so ordered.

We concur: HARRISON, P. J.; COOPER, J.

1 Cal. App. 516

BRADLEY v. BUSH.

(Court of Appeal, Second District, California. Aug. 31, 1905.)

1. Bills and Notes — Transfer — Indorsement—Liability of Indorser.

Where the payee of mortgage notes executed by a corporation indorsed and delivered them to the corporation under an agreement that the latter should deliver them to a stockholder to secure advances to the corporation, which the corporation did, the payee was not liable to the holder as an indorser.

2. Evidence—Declarations of Decedent.

In an action on the notes by the administrator of the stockholder against the payee and indorser, it was error for the court to exclude declarations by intestate to the custodian of the notes at the time he received them, denying that he had bought the notes and stating that, as he was a large stockholder in the corporation maker, he had made advances of money to the corporation, and that the notes were to be surrendered.

Appeal from Superior Court, Kings County; W. M. Conley, Judge.

Action by Richard Bradley, as administrator, etc., of the estate of James A. Bradley, deceased against E. E. Bush. Judgment in favor of plaintiff, and defendant appeals from an order denying his motion for a new trial. Reversed.

Rehearing denied by Supreme Court October 30, 1905.

Charles G. Lamberson, Hudson & Pryor, R. J. Hudson, and John F. Pryor, for appellant. H. Scott Jacobs and H. W. Bradley, for respondent.

SMITH, J. Appeal from an order denying the defendant's motion for a new trial. This is a suit by the administrator of an alleged indorsee against the defendant as maker and indorser of two promissory notes of the Sunset Vineyard Company, of date January 25, 1892, for the sum of $1,000 each. The notes became due on January 1, 1898, and on nonpayment were duly protested, and notice of dishonor given to the defendant. The complaint alleges that the defendant, on or before February 1, 1894, for value received, duly indorsed, transferred, and delivered said promissory notes to the deceased, Bradley, the indorsee, and that at the time of his death he was the owner and holder of the notes. The answer "denies each and every material allegation" of the complaint; and as the case seems to have been tried upon the theory of the sufficiency of this denial, all of the allegations of the complaint are to be regarded as denied, with the exception of the execution of the promissory notes, which are set out at length. It is also affirmatively alleged that the note sued on was secured by a mortgage on real property, that there was no consideration for the alleged indorsement and transfer; and for separate defense, in effect, that the notes in question were 2 of 30 promissory notes made to defendant by the Sunset Vineyard Company as part of the purchase price of certain lands sold to it by the defendant, which at the time of the indorsement had been set to vineyard and were being operated as such by the company, which owned no other land, and that the company, of which Bradley was a large stockholder, was at that time heavily indebted and pressed by its creditors, and it thus became necessary for them to raise a large amount of money, which could be borrowed only from Bradley; and, further (in terms): "That plaintiff's intestate, James A. Bradley, shortly prior to the indorsement of the notes sued on by defendant, complained to defendant (who was a stockholder and director of the company) that the Sunset Vineyard Company had paid a sum for its real estate greatly in excess of its value, and desired defendant to surrender some of the notes given to him as part of the purchase price for said land, and the said James A. Bradley wanted and was anxious to continue the raising of grapes and in pursuing the business of the corporation, as aforesaid; that it was then proposed by said James A. Bradley to defendant, Bush, that, if he (Bush) would surrender the two notes in this action sued upon, said Bradley would advance to the corporation, Sunset Vineyard Company, the face value of said notes, with interest, which said proposition was accepted by defendant, Bush, and thereupon said Bush indorsed said notes, and the moneys realized thereon were applied to the payment of the debts of the said corporation and the further carrying on of its business." The court found that the allegations of the complaint were true, that the notes were secured by mortgage as alleged in the answer, that it was not true that there was no consideration for the defendant's indorsement, and (in the language of the answer) that the allegations of the defendant's special defense were true; and, on these findings, judgment was entered for the plaintiff.

The only witnesses who testified in the case were the plaintiff and defendant. The former testified that he received the notes after the death of his intestate from "Mr. Upton, of the Central California Bank"; and he says, as to one of the notes, "I think it was amongst James A. Bradley's papers," which was all he knew of the matter, except that he had received no payment upon the notes. From the defendant's testimony it appears that at the date of the transaction the notes were in the hands of Mr. Upton, as his bailee, already indorsed; and as to the terms of the transaction, he testifies that Bradley, who was the largest stockholder in the company, proposed to it, "If you will arrange with Bush to surrender those notes to you, I will let you have the money to go ahead and take care of your vineyard," and also that he said to defendant, "If you will surrender those notes to the company, I will take the matter up and advance the company sufficient money." From other parts of the testimony it appears that the understanding was that Bradley was to take from the company the notes thus surrendered to it. Thereupon the witness testifies: "I gave them (that is, the company) an order on Mr. Upton, who held the notes, to go and get them." Some little confusion is produced by answers of the witness to questions asked him on cross-examination; but, on the whole, it may be gathered that the transaction was as above stated, and on the close of his testimony the defendant's attorneys proposed to put Mr. Upton on the stand, saying: "We expect to prove by him that Mr. Bush sent him word to give up those two notes to either Mr. Bradley or some other representative of the Sunset Vineyard Company, and that Mr. Bradley came to Mr. Upton, who had the notes in his possession, and that Mr. Upton gave them to Mr. Bradley; that at the same time Mr. Upton asked Mr. Bradley whether he had been buying some notes, and Mr. Bradley said, 'No; I am a large stockholder in the Sunset, and I have got to advance some money to them, and these notes are to be surrendered up.'" But the court excluded the evidence, saying: "There is the same evidence before the court now. I don't believe there can be any dispute as to the facts of the case at all." To which ruling the defendant excepted. From this it appears that the court understood the transaction as stated above; but it will be observed that the declarations of Bradley to Upton had not been proved, and that the testimony offered as to these was not only new, but of material importance. For, the transaction being as stated, it would follow that Bush did not indorse, transfer, or deliver the note to Bradley, but to the company, as to which the transfer and indorsement could create no obligation (Civ. Code, § 3116); nor, indeed, could it have any effect other than that of a mere relinquishment or surrender of his title to the company. The ordinary effect of such a transaction would be to extinguish the obligation itself; but here, by agreement between Bradley and the corporation, assented to by Bush—who held the other notes—the note was not to be canceled, but was to be transferred by the latter to Bradley, to be held by him as evidence of its debt, with the benefit of the mortgage security. Such an agreement would doubtless be valid, and its effect would be to keep the note alive and to vest the title in Bradley. But—assuming the facts to be as stated in the offer of proof—his title would come to him from the company, and there would be no contract of transfer or indorsement between him and Bush, nor, indeed, any direct contractual relation whatever. Nor could Bradley acquire from the company any right of action against Bush, since the company itself, by the transfer or surrender to it of its own obligation, did not acquire such right of action. That such was the contract might, indeed, have been inferred from the uncontradicted testimony of Bush, without the aid of the testimony offered, or, indeed, it might be inferred from the specific facts found by the court, if they stood by themselves. But, as appears by the findings as to the transfer, indorsement, and delivery of the note, and as to consideration, the court took a different view, and it is clear that, had the rejected evidence been admitted, these findings could not be sustained. For these reasons, the order appealed from must be reversed.

The order appealed from is reversed, and the cause remanded for new trial.

I concur: ALLEN, J.

I concur for the sole reason that I think the court erred in excluding the offered testimony of Upton: GRAY, P. J.

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1 Cal. App. 498

MANDARY v. SMARTT et al.

(Court of Appeal, Second District, California Aug. 30, 1905.)

1. APPEAL—OBJECTIONS—COMPLAINT.

Where, in a suit to foreclose a mechanic's lien, a demurrer to the complaint was overruled by consent, and when plaintiff offered his evidence defendant bank objected because the complaint was insufficient for want of facts, in that it was not alleged that there had been any declaration of lien filed in the office of the county recorder as required by law, but stated that it only desired to raise two propositions, neither of which related to the actual use of the materials in the building, and was willing to take the testimony on such matters and submit the case, defendant bank could not object on appeal to the complaint's failure to allege that the materials sued for were actually used in the building.

2. MECHANICS' LIENS—CLAIM OF LIEN.

Where a claim for a mechanic's lien, containing the matter specified by Code Civ. Proc. § 1187, is filed within the time required, the lien attaches, and it is immaterial whether the claimant styled it a "claim of lien," or a "claim of benefit under the lien law."

3. SAME—REPAIRS—ADDITIONS.

Where certain counters and partitions placed in a building were shown to be such additions to the building as amounted to a repair and alteration thereof, they were properly styled "repairs and alterations" in a claim for a mechanic's lien.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by M. R. Mandary against S. G Smartt and others. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant Kern Valley Bank appeals. Affirmed.

Smith & Allen, for appellant. Reardan & Whitaker, Geo. W. Whitaker, and Fred E. Borton, for respondent.

ALLEN, J. Action to foreclose a mechanic's lien. Judgment and decree for plaintiff. From the judgment, and an order denying a new trial, the defendant Kern Valley Bank appeals.

The first question presented upon the appeal is as to the sufficiency of the complaint. The complaint sets out an agree ment between the lessee of the owner and the contractor, by which the latter agrees to furnish all the material and labor and to make certain alterations and repairs to a building. It further alleges that he fully completed all of the work agreed to be done. Following this it is alleged that plaintiff entered into an agreement with said contractor whereby he agreed to and contracted to furnish him certain specified materials, which were to be used in making such alterations and repairs, and which alterations and repairs were made with the knowledge of the owners. A copy of the lien filed of record is incorporated in the complaint, and, after the usual and ordinary statements, concludes as follows: "Wherefore said M. R. Mandary claims the benefit of the law relative to liens of mechanics and others upon real property as found in the Code of Civil Procedure of the state of California." It must be conceded that nowhere in the complaint is found the necessary allegation that the materials were actually used in the building, yet, in view of the conduct of all parties at the trial, such omission becomes unimportant. The transcript shows that the demurrer to the complaint was overruled by consent; that upon the trial, when plaintiff offered his testimony, counsel for defendant bank objected to the introduction thereof, and in such objection stated that it was "on the ground that the complaint does not state facts sufficient to constitute a cause of action. In other words, that the pleadings do not show that there has been any declaration of lien filed in the office of the county recorder, as required by law. I object to the introduction of any testimony with the view to prevent a lien being declared against the Arlington Hotel, and a decree of foreclosure ordered." Further along, before the court passed upon the objection, counsel for the bank said: "There are only two propositions I care about in this matter. We deny that they are entitled to a lien to a partition that is mentioned in the complaint, and to the counter, and I am satisfied to try those two questions—to take the testimony upon those two matters and submit the case. Let the objection stand to all the material, and you may prove that the material set forth in here was furnished." This statement to the court could have had no other effect than to assure plaintiff and his counsel that no question would be raised on account of any defect in the complaint other than as to the form of lien; that they might prove the fact of use without any amendment in that regard. And to permit the defendant now to raise any objection to the complaint which might have been obviated by a timely amendment would be unfair. The only question, therefore, presented by the exception is as to the sufficiency of the lien set out in the complaint. Section 1187, Code Civ. Proc., provides specifically what matters and things are essential to be stated in a claim of lien, all of which appear in this lien. Having stated those matters and filed the same in due time, the lien attaches. It is a claim upon its face, and a claim is all he is required to verify and file; and it is of little consequence whether the claimant styles it a "claim of lien," or a "claim of benefit under the lien law."

The defendant next contends that the counter and partitions were neither alteration nor repairs, but additions. Let this be conceded. They were shown to be such additions as amounted to a repair and alteration of the building, and therefore properly styled "repairs and alterations." Whether they were permanent in their character, and became part of the structure by the manner of construction, was for the trial court to say under the evidence, and there was evidence sufficient to warrant the court in its finding that they were permanently attached to the building and became a part thereof.

We find no error in the record, and the judgment and order are affirmed.

We concur: GRAY, P. J.; SMITH, J.

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1 Cal. App. 511

TERRACE WATER CO. v. SAN ANTONIO LIGHT & POWER CO. et al.

(Court of Appeal, Second District, California. Aug. 30, 1905.)

1. SALES—ELECTRICITY—PERSONAL PROPERTY.
Under Civ. Code, §§ 654, 655, 663, declaring that anything of which there may be ownership is "property" under the Code, that there may be ownership of all inanimate things which are capable of appropriation or of manual delivery, and that every kind of property that is not real is personal, a plaintiff was entitled to recover for breach of a contract for the delivery of electricity under a complaint charging a breach of a contract to sell and deliver "personal property."

2. SAME—GENERAL DAMAGES—PLEADING.
Under Civ. Code, § 3308, providing that the detriment caused by the breach of the seller's agreement to deliver personal property, the price of which has not been fully paid in advance, is deemed the excess, if any, of the value of the property to the buyer over the amount which would have been due to the seller under the contract if it had been fulfilled, a plaintiff was entitled to recover, for breach of a contract for the sale and delivery of electric power, the difference between the contract price and what it would cost to procure the power from another, under a general ad damnum clause in the complaint.

3. SAME—ESTOPPEL.
Where a seller of electric power wrongfully put an end to the contract, and prevented the buyer from performing it, the seller was estopped to deny that the buyer had not been damaged to the extent of his actual loss and his outlay fairly incurred.

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by the Terrace Water Company against the San Antonio Light & Power

Company and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Otis, Gregg & Surr, for appellants. E. R. Annable and H. M. Willis, for respondent.

ALLEN, J. This action is based upon an alleged breach of contract entered into between plaintiff and defendants, in which findings and judgment went for plaintiff. This appeal is by defendants from the judgment, supported by a bill of exceptions.

The defendant corporation on March 19, 1898, entered into an agreement in writing by which it obligated itself to furnish and deliver to plaintiff for the period of five years, during the irrigating season of each year and at a point to be designated by the plaintiff, on lots 7, 8, and 9, block 25, Rancho San Bernardino, a continuous service of 24 hours of electric power, in an amount not less than 10 nor greater than 20 horse power, for the sum of $6.50 per horse power per month; it being agreed that plaintiff should have a reasonable time in which to purchase and place in working order necessary machinery to utilize the power for the pumping of water from its wells situate on the lots before mentioned before the contract should become operative for the first year. The defendant corporation commenced the performance of such agreement, but in December, 1900, destroyed the connections between its plant and plaintiff's pumping machinery, and thereafter refused to furnish any power whatever, and did not furnish power during the irrigating seasons of 1901 and 1902, but refused so to do. The court found that the plaintiff was required to, and did, for the 10½ months comprising the irrigating season of the 2 years mentioned, purchase of the only parties from whom such power was obtainable, and at the cheapest rate, power with which to operate its pumps, at a monthly cost of $86 in excess of the cost to plaintiff under said contract with defendant, the aggregate of which excess was $903, for which judgment was rendered.

Upon the trial the court below, under a general averment of damages, admitted evidence, against the objections of defendant, tending to show that 70 inches of water was necessary to irrigate the lands described in the complaint and upon which was situate the pumping plant. This proof of such use of water, its extent, and necessity, was not essential in establishing plaintiff's rights under the contract, nor, perhaps, under the allegations of the complaint, admissible. But it is apparent from the findings that nothing was considered, and nothing entered into the judgment, by way of special damages, and the error was not, therefore, prejudicial.

The court further admitted evidence tending to show that plaintiff, after the breach, in order to obtain the power agreed to be furnished to it by defendant, entered into an agreement in writing with another power company, from which it obtained the power for the delivery of which defendant was in default; and the full execution thereof and the payment for such power was established. For the excess cost over that which would have resulted to plaintiff, had defendant performed its contract, and for this excess cost and nothing else, the court rendered judgment. Appellant insists that such evidence was inadmissible under the general ad damnum clause of the complaint. The contract set out in the complaint was in reference to the sale and delivery of personal property. The thing of which there may be ownership is called property under our Code. Civ. Code, § 654. There may be ownership of all inanimate things which are capable of appropriation or of manual delivery. Civ. Code, § 655. Every kind of property that is not real is personal. Civ. Code, § 663. It may be regarded as a solecism to say that one may own a thing not susceptible of definition and the nature and character of which is practically unknown, yet when one gathers from the elements an energy or force which he may store, transmit, and utilize, he thereby appropriates to his own use that thing, whatever it may be, and it is a subject of ownership, of barter and sale, so long as it is in possession. The defendant by the contract agreed to sell the energy in which it had an ownership, and to deliver the same at stated times in fixed amounts; and, as appears from the contract, the price thereof had not been fully paid in advance. Section 3308, Civ. Code, provides: "The detriment caused by the breach of a seller's agreement to deliver personal property, the price of which has not been fully paid in advance, is deemed to be the excess, if any, of the value of the property to the buyer over the amount which would have been due to the seller under the contract, if it had been fulfilled." "Damages which necessarily result from the act complained of are denominated 'general damages,' and may be proved under the ad damnum clause. * * * The defendant must be presumed to be aware of the damages which necessarily result from the act done, and cannot be held to be taken by surprise." Treadwell v. Whittier, 80 Cal. 579, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175. "Special damages must be alleged solely for the purpose of giving defendant notice of plaintiff's claim." Bristol Mfg. Co. v. Gridley, 28 Conn. 201. The parties to a contract of the character set out in the complaint must be held to have had in view the damages provided by law for its violation, and the minimum of damages must of necessity be the procurement from another of that which the defaulting party failed to deliver. To so act is, by our Supreme Court, in Mabb v. Stewart, 81 Pac. 1073, held to be a duty as an observance of the principle that one injured must exercise reasonable care to render the injury as light as possible. In this case the injured party did not permit special damages to the groves and land for the irrigation of which the contract was obviously made, but did that which produced the least injury. It certainly cannot be said that one violating a contract cannot be supposed to contemplate as a result, and one which would necessarily follow its violation, that which would produce the least possible injury. Notice is not essential when only such claim is sought to be established. The party who voluntarily and wrongfully puts an end to a contract and prevents the other party from performing it, is estopped from denying that the injured party has not been damaged to the extent of his actual loss, and his outlay fairly incurred. U. S. v. Behan, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168.

The proposition advanced, that a party may disregard his obligations and confidently assume that the only consequence thereof is a nominal damage, and that such nominal damage is all that necessarily follows such violation, and all that can reasonably be anticipated as a penalty, should have no support.

We find no error in the record, and the judgment is affirmed.

We concur: GRAY, P. J.; SMITH, J.

1 Cal. App. 541

DALLMAN v. FRANK et al.

(Court of Appeal, First District, California. Sept. 7, 1905.)

1. Appeal—Findings—Evidence.

The findings of a court will be upheld in the appellate court, if there is any evidence which by any reasonable construction tends to support them, and in making its decision the trial court is at liberty to consider, not only the testimony given at the trial, but all inferences of fact which may be reasonably drawn from the facts established by the testimony.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3979–3982.]

2. Executors and Administrators—Services Rendered Decedent—Evidence.

In an action for services rendered testatrix in her last illness, evidence *held* to sustain a finding that such services were rendered without an intention to charge therefor.

3. Work and Labor—Presumption of Contract.

The presumption of a contract, which the law implies on proof of the rendition of services, in the absence of any showing of the circumstances under which they were rendered, ceases to exist when it is shown that they were merely such offices as one friend would perform for another in time of sickness and distress, either by way of physical aid or in the comfort of personal companionship.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Work and Labor, §§ 11, 14.]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Fannie Dallman against J. J. Frank and others, as executors of the estate of Lissette Chesney, deceased. From a judgment in favor of defendants, and from an order denying plaintiff's motion for a new trial, she appeals. Affirmed.

E. A. Bridgford, for appellant. L. L. Solomons, for respondents.

HARRISON, P. J. The plaintiff brought this action to recover $915 from the defendants, as executors of the last will and testament of Lissette Chesney, deceased, as the reasonable value of services alleged to have been rendered to the decedent in her lifetime at her special instance and request. The defendants, in their answer, do not deny that services were rendered by the plaintiff to the decedent, but they allege that whatever services were so rendered were mere friendly and neighborly offices performed by the plaintiff of her own accord, and were rendered voluntarily and gratuitously, and for which no promise of payment was ever made by the decedent, either expressly or by implication. Upon the trial of the cause the court found that the services were not rendered at the instance and request of the deceased, but were performed by the plaintiff voluntarily and gratuitously of her own motion, and were acts of friendship, having no pecuniary value. Judgment was thereupon rendered in favor of the defendants, from which and from an order denying her motion for a new trial the plaintiff has appealed, and urges in support of the appeal that the above findings of the court were not sustained by the evidence.

The findings of a court, like the verdict of a jury, will be upheld in the appellate court if there is any evidence which, by reasonable construction, tends to support such findings; and in making its decision the trial court is at liberty to take into consideration, not only the testimony given at the trial, but also all inferences of fact which may be reasonably drawn from the facts established by such testimony. Upon an appeal the burden is upon the appellant to show error in the court below, and although the appellate court may be of the opinion that, on the evidence in the record, it would have reached a different conclusion, it is not for that reason authorized to set aside the findings of the trial court. If the evidence is such that reasonable men may reach different conclusions thereon the findings of the trial court must be sustained.

The main issue before the superior court was the character of the services rendered the deceased; the plaintiff seeking to show that they were rendered as a nurse, and the defendants that they were mere friendly offices gratuitously performed. It appears from the evidence that Mrs. Chesney lived in the upper flat of a building on Sixth street, of which she was the owner, and that the plaintiff, with her husband and family, lived in the flat immediately beneath, and had lived there for several years as the tenant of Mrs. Chesney and of her husband in his lifetime. During this period the families of the plaintiff and of Mrs. Chesney appear to have been on friendly and social terms, frequently visiting each other in their respective apartments. Upon the lower floor of the building there was a saloon, which had been occupied by Mr. Chesney in his lifetime. He died in February, 1899, and after his death Mrs. Chesney carried on the business with the aid of the employés which he had had during his lifetime. She had been troubled with asthma for several years, and in the latter part of August, 1899, she was taken seriously ill, and died in October of that year. The evidence of the services rendered by the plaintiff relates to two periods of time—the first from the time of Mr. Chesney's death until the latter part of August, when Mrs. Chesney was taken ill, and the other from that time until her death. There was no testimony of any direct employment of the plaintiff, but her husband testified with reference to the first of these periods that on the day that Mr. Chesney died Mrs. Chesney "sent for" his wife "to come to her aid," and that he "told her to go"; but the terms of the message or the character of the aid requested was not shown, and, although he purported to state their character, his testimony thereon was greatly impaired by his subsequent statement that during this time he was occupied in his store, and had not the slightest idea of what his wife did with Mrs. Chesney during the day, thus leaving the court to consider this portion of his testimony as mere hearsay. His testimony, and that of other witnesses for the plaintiff, that during this period the plaintiff devoted the whole of her time to the care of Mrs. Chesney; that Mrs. Chesney could not get out of her room to get anything, and that for that reason she required the plaintiff to wait on her; that the condition of Mrs. Chesney was such as to require her continuous services—was in direct conflict with the testimony of the employés in the saloon that during this period Mrs. Chesney came into the saloon every morning and evening two or three times a day, attending to her business there, and would remain sometimes two hours at a time, and also with the testimony of one of the defendants that he visited her during this period at different hours of the day, morning, afternoon, and evening, nearly every day, and found her in her office attending to her business, that during this period he had never seen the plaintiff in the apartments of Mrs. Chesney, and with one or two exceptions had never seen her with Mrs. Chesney, and had never seen her doing anything for Mrs. Chesney. When Mrs. Chesney was taken ill in August, a physician was called to attend her, who visited her daily from that time until her death, and during that period she also had the attendance of two nurses, one in the daytime, and the other during the night. The only testimony of any specific service rendered by the plaintiff during this period was that given by the day nurse, to the effect that the plaintiff visited the sickroom nearly every day at different hours in the day, and was there on an average about an hour and a half each day, and that while there she would sit by the side of Mrs. Chesney, and fan her and rub her with alcohol. The nurse, however, said that she did this of her own accord and without any request. The night nurse testified that the plaintiff was in the room every night, that Mrs. Chesney often wanted her to sit there, and that she would sit by her and talk to her and comfort her. She did not testify that any services were rendered by the plaintiff other than those of comfort. The attending physician, who visited Mrs. Chesney several times each day during her illness, stated that he would not say that the plaintiff was acting as a nurse, but that she was giving such care as a well woman might extend to a sick woman; that she was a great moral comfort to Mrs. Chesney, besides the physical aid she extended to her. The defendant Frank testified that during this period he visited Mrs. Chesney every day and night, and remained there sometimes an hour and sometimes longer, and at times had remained all night; that he saw the plaintiff there nearly every time he went, but that he never saw her doing anything other than to sit there and fan Mrs. Chesney and rub her hands.

It may be assumed that, in determining the issues before it, the superior court took into consideration the friendly relations shown to have existed between the plaintiff and Mrs. Chesney, and that it made the reasonable inference therefrom that the message from Mrs. Chesney to the plaintiff on the day of her husband's death to come to her aid was rather a request for the comfort of a companion in her affliction than for the purpose of giving employment to the plaintiff; that much of the testimony given on her behalf was either hearsay or the opinion of the witnesses, and was in many essential respects contradicted by other witnesses; the absence of any direct evidence that the plaintiff had rendered any specific services as a nurse to Mrs. Chesney prior to her last sickness; that by reason of evidence of the physical ability of Mrs. Chesney to care for herself during the period prior to her illness, and her employment of two experienced nurses during her illness, she was under no necessity of asking for the services of the plaintiff; that the services shown to have been rendered by the plaintiff during the illness of Mrs. Chesney were friendly and social merely. In thus considering their nature its finding that the services were gratuitous and without any expectation of reward cannot be said to be without evidence for its support. The presumption of a contract, which the law implies upon proof that one has rendered services to another, in the absence of any showing of the circumstances under which they were rendered, ceases to exist when it is shown that they were merely such offices as one friend would perform for another in time of sickness or distress, either by way of physical aid or in the comfort of personal companionship. See Moulin v. Columbet, 22 Cal. 508. After finding that the services rendered by the plaintiff were gratuitous, the issue respecting the value became immaterial, and the failure to make a finding thereon was not error. For the same reason the plaintiff suffered no harm from the admission in evidence of Mrs. Chesney's will. The judgment and order are affirmed.

We concur: HALL, J.; COOPER, J.

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1 Cal. App. 538

NASON et al. v. JOHN et al.

(Court of Appeal, First District, California. Sept. 6, 1905.)

1. Appeal—Notice—Parties.

Codefendants not served with process and not appearing, and against whom no judgment is taken, need not be served with notice of appeal.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 2136.]

2. Materialman's Lien — Foreclosure — Complaint.

The complaint, in an action by a materialman against the owner for the value of material furnished the contractor for work on defendant's house, failing to state that at the time of filing notice of lien or bringing the action anything was owing from defendant to the contractor, or any fact, such as premature payment, that under Code Civ. Proc. § 1184, might give a lien, fails to state a cause of action.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, § 506.]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by R. N. Nason and others against William John and others. Judgment for plaintiffs, and defendant John appeals. Reversed.

Otto tum Suden, for appellant. C. L. Dam, for respondents.

HALL, J. Defendant William John appeals from a judgment foreclosing a materialman's lien for $129.39 against him as owner. Respondent in his brief moves that the appeal be dismissed, because no notice of appeal was served on Willams, the contractor and codefendant with appellant. The decree, however, recites that "defendant G. A. Willams, not having been served with process, was not before the court." No judgment was taken against Willams. Defendants not served with process and not appearing, and against whom no judgment is taken, need not be served with notice of appeal. Terry v. Superior Court, 110 Cal. 87, 42 Pac. 464; Hinkel v. Donohue, 88 Cal. 597, 26 Pac. 374; Merced Bank v. Rosenthal et al., 99 Cal. 39, 31 Pac. 849, 33 Pac. 732; Clarke v. Mohr et al., 125 Cal. 540, 58 Pac. 176. The motion to dismiss the appeal is denied.

Appellant contends that the judgment must be reversed for the reason that the complaint states no cause of action as against appellant. This contention must be sustained. The action is by a materialman against the owner (appellant) for the value of material (paints, etc.) furnished the contractor for the painting of the house of appellant. There is in the complaint no attempt to allege that at the time of filing the notice of lien, or of bringing the action, there was anything owing from the owner (appellant) to the contractor, nor is any attempt made in the complaint to allege any fact, such as a premature payment by the owner to the contractor, or the like, that under section 1184, Code Civ. Proc., might be claimed to give the materialman a lien against the property of the owner for the value of his materials. That such an allegation is necessary to state a cause of action in this class of cases is well settled by the following authorities: Turner v. Strenzel, 70 Cal. 28, 11 Pac. 389; Whittier v. Hollister, 64 Cal. 283, 30 Pac. 846; Rosenkranz v. Wagner, 62 Cal. 151; Wells v. Cahn, 51 Cal. 423; Renton v. Conly, 49 Cal. 185. See, also, Harmon v. S. F. & S. R. R. R. Co., 86 Cal. 617, 25 Pac. 124; Southern Cal. L. Co. v. Jones, 133 Cal. 242, 65 Pac. 378; Dingley v. Greene, 54 Cal. 333.

There is no allegation in the complaint that the contract between the owner and the contractor was for an amount exceeding $1,000, and therefore the contract was not such an one as is required to be in writing and recorded, and the whole contract price may have properly been payable in advance, or in such installments and at such times as the owner and contractor may have agreed upon. Southern Cal. L. Co. v. Jones, supra.

Judgment is reversed.

We concur: HARRISON, P. J.; COOPER, J.

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1 Cal. App. 532

SHERWOOD et al. v. WALLIN.

(Court of Appeal, First District, California. Sept. 6, 1905.)

1. Contracts — Specific Performance—Adequate Remedy at Law.

Defendant agreed, in consideration of 5,000 shares of a block of 17,500 shares of the stock of a mining company to be given to him, and in further consideration of the dismissal of a suit concerning the 17,500 shares, to effect a settlement with the claimant of such disputed stock, surrender the certificate for cancellation, receive 5,000 shares, and cause to be issued to plaintiffs the balance. *Held* that, where plaintiffs in a suit to compel specific performance of such agreement alleged that with the 12,500 shares they would have a majority of the stock of the company, while if defendant retained the 17,500 shares he would control a majority of the stock, would so conduct the affairs of the company as to destroy the value of the stock owned by plaintiffs, and that the stock was of uncertain value in the market at the time, but would be of great value if plaintiffs were enabled to retain their control of the company and defendant was not permitted to secure control, the complaint showed that plaintiffs did not have an adequate remedy at law.

2. SAME—FINDINGS.

Where, in a suit for specific performance of an agreement to surrender certain corporate stock for cancellation represented by certificate No. 7, the court found that defendant had not surrendered such certificate for 17,500 shares of the stock, and defendant's answer alleged that he was entitled to retain such shares, and he testified that he had done so, but, in order to perfect an appeal, he deposited 17,500 shares of the stock represented by certificate No. 128, an objection that the court erred in finding that defendant had not surrendered certificate No. 7 was unsustainable, as the change in the certificates did not affect the identity of the stock.

3. APPEAL—FORMAL ERRORS.

Under the express provisions of Code Civ. Proc. § 475, the appellate court is required to disregard errors in mere form that do not affect the substantial rights of the parties.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4540.]

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by L. M. Sherwood and others against Frank A. Wallin. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Edwin L. Forster, for appellant. Purcell Rowe, for respondents.

HALL, J. Action for the specific performance of a contract, in which plaintiffs secured a judgment, and defendant appeals from the judgment on the judgment roll and a bill of exceptions.

Appellant demurred to the complaint, and now urges that "the demurrer should have been sustained on the ground that the complaint did not state facts sufficient to constitute a cause of action against the defendant, in that it does not state facts showing that the plaintiffs have not a plain, speedy, and adequate remedy at law." In support of this contention appellant cites us many authorities to the effect that specific performance will not be decreed, except where plaintiff has no plain, speedy, and adequate remedy at law. Senter v. Davis, 38 Cal. 450; White v. Fratt, 13 Cal. 521; Duff v. Fisher, 15 Cal. 375; Imlay v. Carpentier, 14 Cal. 173; Moulton v. Knapp, 85 Cal. 385, 24 Pac. 803. Conceding the general rule to be as claimed by appellant, we think that plaintiffs, by the allegations of their complaint, brought themselves within the rule. The complaint is quite long; but, in order to understand the question involved, we will endeavor to state the salient facts alleged. By way of inducement it is alleged that plaintiffs and one George W. Mann had entered into a contract for the formation and promotion of the Golden Key Mining Company; that it had been agreed that a certificate for 17,500 shares of the stock should be issued to said George W. Mann, but left in escrow with one of the plaintiffs, L. M. Sherwood, until said Mann should fully perform the things agreed by him to be performed; that said stock (certificate No. 7) was issued and placed in the hands of said Sherwood; that thereafter Mann brought a suit in claim and delivery in the United States Circuit Court for said stock, and in such suit the United States marshal took possession of said certificate of stock and held the same until given up as thereinafter alleged. It was also alleged that Mann further claimed an interest in 5,000 other shares of the stock of said company, which he was to hold and vote at all meetings of the stockholders; that he claimed that the company was indebted to him in a large sum, the amount being unknown to plaintiffs; that said Mann had in his possession the books, papers, records, and seal of said company, and refused to surrender them to the secretary of said company until his demands on plaintiff were satisfied; that plaintiffs denied and contested the claims made by Mann, and asserted that Mann had failed to comply with the terms of the contract between plaintiffs and Mann; that plaintiffs were the owners of said certificate No. 7 after the rights of said Mann were extinguished, and equally interested in the other certificate of stock, etc. Then follow allegations to the effect that defendant, Wallin, with full knowledge of the matters above recited, agreed with plaintiffs, in consideration of 5,000 shares of said 17,500 to be given him and the consent of plaintiffs to a dismissal of the suit concerning said 17,500 shares and the consent of plaintiff L. M. Sherwood that the United States marshal deliver said stock to defendant, to effect a settlement with Mann of all things in dispute between plaintiffs and Mann, to secure the dismissal of said suit in the United States court, the surrender to defendant of said stock, the indorsement thereof to defendant by Mann, the execution of an assignment by Mann of all his interest, etc., in and to said company, either as promoter or otherwise, and of all his rights under said contracts with plaintiffs, the delivery by Mann to Wallin of all books, papers, seal, and certificates of said company in hands of Mann; that immediately upon the completion of the settlement with Mann defendant would immediately surrender said certificate No. 7 for 17,500 shares of said stock to the secretary of said company for cancellation, and there should be then issued 12,500 shares thereof to plaintiffs and 5,000 shares to defendant in full payment for his services and payments in the settlement with Mann; that said defendant further agreed that he would turn over to plaintiffs all the said books and papers and documents received from Mann, and would make, execute, and deliver an assignment of all rights, etc., assigned by Mann to him. Then follow allegations showing the complete settlement with Mann effected by defendant, a demand by plaintiffs on defendant that he surrender the certificate for 17,500 shares for cancellation, and that he have issued 12,500 thereof to plaintiffs and 5,000 to himself, and that he turn over to plaintiffs the books, papers, and documents received from Mann, and that he execute and deliver to plaintiffs an assignment of all the rights, etc., assigned by Mann to him as in the complaint specified, and the refusal of defendant in all respects to comply with the demand of plaintiffs; that plaintiffs have fully performed the contract with defendant. Then follow allegations to the effect that plaintiffs now own 45,000 shares, and with the 12,500 shares agreed to be turned over to plaintiffs they would have a majority of the capital stock of the company, while, if defendant be allowed to retain the 17,500 shares of stock, he would be able to control a majority of the stock, and will so conduct the affairs of said company as to destroy the value of the stock owned and held by plaintiffs; "that the stock of said company is of uncertain value in the market at this time, but, as plaintiffs are informed and believe, will be of great value if they are enabled to retain their majority of the stock of said company, and the said defendant is not permitted to secure the control of said company; that the retention of the control of said stock and the refusal of said defendant to fulfill his said contract will work the said plaintiffs irreparable injury, and that the damage to plaintiff cannot be readily estimated in an award of damages; that the agreements, contracts, papers, books, and assignments as above specified to be made and turned over to plaintiffs by defendant under said contract are of great importance to plaintiffs, but have no specific or certain market value, and it will be difficult to do justice by an award of pecuniary damages."

The allegations above set forth are sufficient, we think, to show that plaintiffs had no adequate remedy at law. Treasurer v. Commercial Mining Co., 23 Cal. 390; Senter v. Davis, 38 Cal. 453; Cushman v. Thayer Mfg. Co., 76 N. Y. 365, 32 Am. Rep. 315; Krouse v. Woodward, 110 Cal. 638, 42 Pac. 1084; Manton v. Ray, 18 R. I. 672, 29 Atl. 998, 49 Am. St. Rep. 811; also, though not so directly in point, Fleishman v. Woods, 135 Cal. 256, 67 Pac. 276. Neither was it necessary to join the corporation in the action. Sayward v. Houghton, 82 Cal. 628, 23 Pac. 120. No error was committed in overruling the demurrer to the complaint.

What we have already said disposes of the point urged that the court erred in finding that the plaintiffs had not a plain, speedy, and adequate remedy at law, as there was sufficient evidence to support the specific allegations above set forth.

It is next urged that the court erred in finding "that defendant had not surrendered certificate No. 7 for cancellation." In answer to this, it is sufficient to say that the finding is "that he has not surrendered certificate No. 7 for 17,500 shares of the capital stock of the Golden Key Mining Company to the secretary thereof, so that 5,000 shares may be issued to him, and the remainder, 12,500 shares, to the plaintiffs." The substantive thing to be done was the turning over of 12,500 shares to the plaintiffs, and there is no pretense, either in the answer of defendant or in his evidence, that he has done so. On the contrary, his answer was to the effect that he was entitled to retain the 17,500 shares, and his evidence was that he had done so. As appears from a stipulation in the record, defendant, for the purpose of perfecting this appeal under section 943, Code Civ. Proc., has deposited with the clerk of the trial court certificate No. 128, representing 17,500 shares of said stock. The finding in the terms made by the court is strictly true. His evidence shows that he still has the same 17,500 shares, though represented by another certificate. The change of certificates did not affect the identity of the stock, which was the real thing in controversy. Hawley v. Brumagin, 33 Cal. 394; Krouse v. Woodward, 110 Cal. 638, 42 Pac. 1084; Craig v. Hesperia Land & Water Co., 113 Cal. 7, 45 Pac. 10, 35 L. R. A. 306, 54 Am. St. Rep. 316.

For the same reasons the court did not err in giving judgment for the surrender of "certificate No. 7, for 17,500 shares of the capital stock of said company, for cancellation, and that the plaintiffs receive 12,500 shares of the same and the defendant take the remainder, 5,000." Looking through the matter of form and to the substance, the real thing thus ordered was the transfer from defendant to plaintiffs of 12,500 shares of said stock, and such a transfer would have been a sufficient compliance with the judgment to entitle defendant to a satisfaction thereof. This court must disregard errors in mere form that do not affect substantial rights of the parties. Code Civ. Proc. § 475. The judgment is affirmed.

We concur: HARRISON, P. J.; COOPER, J.

1 Cal. App. 560

DOE v. ALLEN.

(Court of Appeal, First District, California. Sept. 11, 1905.)

1. Shipping — Action for Freight — Findings—Evidence.

In an action for freight on a cargo of coal, evidence *held* to support a finding that on or or about December 19, 1899, plaintiff delivered from a certain steamer to defendant, at defendant's special instance and request, a certain cargo of coal, on consideration of defendant's promise to pay freight money thereon.

2. Appeal — Review — Findings—Conflicting Evidence.

Where there is a substantial conflict in the evidence, the findings of the trial court thereon will not be interfered with on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3983-3989.]

3. SAME—HARMLESS ERROR—EVIDENCE—RULINGS.

Where, after the court had reserved its ruling on defendant's objection to certain evidence, he moved to strike out all the testimony of the plaintiff stating the alleged contract, etc., which included the evidence previously objected to, which the court then overruled, defendant was not prejudiced by the court's failure to rule on the first objection.

4. STATUTE OF FRAUDS—DEBT OF ANOTHER—ORIGINAL PROMISE.

Civ. Code, § 1624, subd. 2, declares that a special promise to answer for the debt, default, or miscarriage of another, except in cases provided in section 2794, shall be void unless in writing and subscribed by the party to be charged or by its agent; and section 2794 declares that where the promise is for an antecedent obligation of another, and is made on a consideration beneficial to the promisor or moving from either party to the antecedent obligation or from another person, it shall be valid, though resting in parol. *Held* that, where defendant, claiming to have purchased and paid for certain coal in possession of the carrier, holding the same under a lien for freight, agreed to pay the freight to the carrier in consideration of delivery, such promise was an original undertaking, based on a new consideration, and was not within the statute.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by C. P. Doe against Charles R. Allen. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

T. C. Coogan, for appellant. Charles E. Naylor, for respondent.

HALL, J. This is an appeal by defendant from a judgment and order denying his motion for a new trial. The complaint sets forth two causes of action; the first count alleging that defendant became indebted to plaintiff on the 19th day of December, 1899, in the sum of $747.95, for freight money upon a cargo of coal that day delivered by plaintiff to defendant at his (defendant's) special instance and request, which said defendant promised to pay in consideration of the delivery by plaintiff to defendant of said cargo of coal. The only points presented by the appeal concern the first cause of action.

The first point urged is that "the evidence is insufficient to justify or sustain the finding and decision contained in paragraph 1 of the findings of fact herein: "(1) That on or about December 19, 1899, plaintiff delivered from steamer Alice Blanchard to defendant, at the special instance and request of defendant, at the city and county of San Francisco, state of California, a cargo of coal, upon consideration of defendant's promise to pay the freight money thereon; (2) that defendant promised on or about said day to pay plaintiff the freight money due thereon." The plaintiff, among other things, testified that in December, 1899, he brought a cargo of coal to San Francisco on the steamer Alice Blanchard, arriving here about December 18th, and consigned to Charles R. Allen; that on the 18th day of December he called upon the agents of the consignors with reference to the freight money; that they did not pay. Continuing, the witness said: "On that day I had a conversation with Charles R. Allen with reference to freight money on this cargo of coal. I telephoned to Mr. Allen on the morning of the 18th. I asked him if he would pay the freight if we delivered it. He answered back, stating that he would. This telephone message was sent from the telephone of Messrs. Byxbee & Clark's office" (agents of consignors). He further testified that the conversation was held during the morning of the 18th at a time when but a few tons of coal had been discharged, and that the discharge of the coal was finished at half past 12, December 19, 1899, and that he delivered the coal because defendant agreed to pay the freight. The above testimony supports the findings. It is true that defendant gave testimony which contradicts the testimony of plaintiff, and counsel for appellant has called our attention to alleged contradictions and improbabilities in the testimony of plaintiff. But these were matters to be solved by the trial court; and where there is a substantial conflict in the evidence, such as is presented in this case, this court will not interfere with the action of the lower court in regard thereto. Evidence that the promise was made on the 18th of December, 1899, was sufficient to support the finding that "defendant promised on or about said day [December 19, 1899] to pay plaintiff the freight money due thereon." Whether or not the telephonic conversation occurred on the 18th or 19th day of December, under the condition of the evidence in this case, went to the evidentiary value of the respective testimony of plaintiff and defendant as to that conversation; but the court was not required, as is claimed by appellant, to make a finding as to which of the two days the promise was made upon.

Appellant urges as ground for reversal the failure of the court to rule upon a motion made by defendant to strike out the answer of plaintiff as follows: "I telephoned to Mr. Allen on the morning of the 18th. I asked him if he would pay the freight if we delivered it. He answered back, stating that he would. This telephone message was sent from the telephone in Messrs. Byxbee & Clark's office." The motion to strike out was made upon the ground that the answer of the witness showed upon its face that it was a promise within the statute of frauds, and the court said: "I will reserve my ruling." Conceding for the purpose of this decision that a failure to pass on such a motion is reversible error (City of Stockton v. Dunham, 59 Cal. 609; Raymond v. Glover, 122 Cal. 471, 55 Pac. 398), and passing the point that nowhere in the assignment of errors contained in the statement on motion for a new trial is the failure to pass upon this particular motion assigned as error, we find that later on, at the close of the evidence for plaintiff, the defendant "moved the court to strike out all testimony of plaintiff stating the alleged contract made over the telephone, on the ground that said contract fell within the application of the statute of frauds and that said testimony was inadmissible." This motion the court denied, and to this ruling defendant duly excepted. It will thus be seen that the defendant renewed his motion and obtained a ruling. The testimony referred to in the last motion is the identical testimony given in the answer of plaintiff above set forth. It therefore cannot be said that the court did fail to rule on defendant's motion.

The vital question, however, presented by the appeal, concerns the application of the statute of frauds, and is raised by several objections to testimony given by plaintiff, by the motion to strike out last referred to, and by a motion for nonsuit made by defendant at the close of plaintiff's case, and which was by the court denied. It is contended by appellant that the testimony of plaintiff, if true, tended to prove a parol promise to answer for the debt of another (the consignor), and was therefore void under subdivision 2 of section 1624 of the Civil Code. But we think that the facts of this case bring it within one of the exceptions to the general rule. The pertinent part of section 1624 is as follows: "The following contracts are invalid, unless the same, or some note or memorandum thereof be in writing and subscribed by the party to be charged, or by his agent: (1) * * * (2) A special promise to answer for the debt, default or miscarriage of another, except in the cases provided for in section 2794 of this Code." Turning to section 2794, we find the following provision: "A promise to answer for the obligation of another in any of the following cases is deemed an original obligation of the promisor, and need not be in writing: (1) * * * (2) * * * (3) Where the promise, being for an antecedent obligation of another, is made * * * upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person." The facts of this case are squarely within the above exception. At the time of the promise plaintiff, as carrier, had possession of the cargo of coal, and had a lien thereon for the freight dependent on such possession. Defendant claimed to be the owner of the coal, as purchaser from the consignor, but he could not, under the law, obtain possession thereof without the consent of plaintiff, except by paying the freight. According to his own letter, put in evidence on cross-examination of plaintiff, defendant had already paid the consignors for the coal. Under such circumstances the obtaining possession of the coal discharged of the lien for freight money was a consideration beneficial to defendant, and brought his promise to pay the freight money within the exception of section 2794. It became an original obligation of the promisor.

Counsel for defendant has cited us to Maule v. Bucknell, 50 Pa. 39, an interesting case because of the discussion of the diverse rulings of different courts on the proper effect of the statute of frauds. It is there said: "A new consideration for a new promise is indispensable without the statute, and if a new consideration is all that is needed to give validity to a promise to pay the debt of another the statute amounts to nothing, nor can it make any difference that the new consideration moves from the promisee to the promisor." But an examination of the statute of Pennsylvania discloses the fact that, like the statutes of many of our states, it contains no exception such as we have in section 2794, Civil Code. It simply provides that no action shall be brought to charge the defendant upon any special promise to answer for the debt of another, unless the promise be in writing, subscribed by the defendant. Pa. St. Frauds and Perjuries, § 1; Brightly's Purd. Dig. 831. The case, however, recognizes an exception to the general rule within which the case now before the court also comes. Speaking of cases that are exceptions to the general rule, the court said: "*Arnold v. Stedman*, 45 Pa. 186, *was a case within one of the recognized exceptions. There the promisor's property was liable* for the debt of another, independent of the express promise, and the defendant undertook to pay the debt of the property." (The italics are ours.) In Arnold v. Stedman, 45 Pa. 186, Arnold by a written contract agreed to sell one Barrett two lots of land on deferred payments, and on failure to make the payments Barrett was "to give possession of said property to said Arnold." Barrett took possession, and whilst he was in possession Stedman built a barn on the lots for Barrett and filed a mechanic's claim of lien for $200. Barrett not having made his payments to Arnold, the latter brought suit in ejectment, and during the pendency thereof promised Stedman that, if he would not proceed further in the action to enforce his lien, he (Arnold) would pay Stedman's claim, and to this Stedman agreed. Arnold having recovered the lots, Stedman brought suit against Arnold on his promise, and the court held that the promise was not within the statute of frauds. The court said: "Here, then, was a lien or claim upon property in which Arnold had an interest, and it was a benefit to him that no proceedings should take place on the mechanic's lien held by Stedman while his ejectment was in progress. The consideration, therefore, as regarded Arnold, of his promise, was the benefit or advantage to himself arising from Stedman's relinquishing proceedings upon his mechanic's lien. The consideration did not proceed from or to the debtor, but was an entirely new and fresh one between Arnold and Stedman, and was a new, original, and binding contract; Arnold's object being, not to answer for the debt of Barrett, but to subserve a purpose of his own."

So in the case before us the cargo of coal, which was the property of defendant, was in the possession of plaintiff, and liable to him for the freight. Defendant's promise to pay the freight in consideration of the delivery of the coal cannot properly be said to be a promise to pay the debt of the consignor, but was a new, binding contract between plaintiff and defendant. Clay v. Walton, 9 Cal. 329, also cited by defendant, was decided at a time when our statute of frauds did not contain the exception contained in section 2794, Civil Code (Hittell's Gen. Laws, § 3156), and was not a case where plaintiff delivered to defendant property of defendant upon which plaintiff had a lien, and which lien defendant promised to pay, and is therefore not in point.

Judgment and order denying motion for a new trial are affirmed.

We concur: HARRISON, P. J.; COOPER, J.

1 Cal. App. 556

HAUB v. FREIERMUTH.

(Court of Appeal, First District, California. Sept. 11, 1905.)

SLANDER — CHARGING CRIME — FAILURE OF PROOF.

Though the words alleged by the complaint to have been said by defendant of plaintiff: "I have a man to prove that H. struck S. in front of his place of business, that he had two witnesses who had tracked the blood stains from H.'s shop to where S. fell, and that he had proof that H. was guilty of the murder of S."—are slanderous per se, as charging a crime, there is failure of proof, on evidence merely that defendant, in addition to saying that he had a witness who saw H. strike S., said to one person, "H. might have killed him anyhow," and to another, "If you will follow up H. pretty close, you will find that this man's death came that way," and "he might have something to do with it," and to another, "the S. case was a murder."

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by George Haub against Charles Freiermuth. Judgment for plaintiff. Defendant appeals. Reversed.

P. R. Lund and George M. Hurlbut, for appellant. John B. Carson, for respondent.

HARRISON, P. J. Action for slander. Judgment was rendered in favor of the plaintiff for $1,000 damages, and the defendant has appealed.

In his complaint the plaintiff alleges that the defendant spoke of and concerning him, in the presence of one Gibson and divers other persons, the following defamatory words, viz.: "I have a man to prove that George Haub struck Richard Schwartz in front of his place of business; that he had two witnesses who had tracked the bloodstains from Haub's shop to the place where Schwartz fell unconscious; and that he had proof that Haub was guilty of the murder of Schwartz." The words thus alleged to have been spoken by the defendant are actionable in themselves, and, if false, are presumed to have been spoken with malice. The slander for which a civil action is authorized is defined in section 46 of the Civil Code, and the plaintiff's cause of action herein is based upon subdivision 1 of that section, which declares that a publication other than libel, which falsely charges any person with crime, constitutes slander. The complaint in such action may specify the crime alleged to have been imputed to the plaintiff, accompanied by the words in which the crime was charged, or it may merely set forth the words alleged to have been spoken; but in either case it must appear from the words themselves, aided, if necessary, by proper averments of their meaning and application, that the defendant charged the plaintiff with a crime. It is not sufficient to merely allege that he charged the plaintiff with having committed a certain crime. The words must be set out in the complaint, that the defendant may have notice of the particular charge which he is required to answer.

The rule is of long standing that to authorize a recovery in such action the plaintiff must prove the utterance of the words set forth in his complaint, or enough of them to show that the defendant charged him with the particular offense constituting the slander. He is not required to reproduce with literal precision the identical words set forth in his complaint, but those which are proved to have been spoken must be in substance the same, or have substantially the same meaning. Equivalent words or words of similar import will be insufficient; nor will his cause of action be sustained by proof of words that might produce an impression similar to that which the words alleged would produce. The words shown to have been spoken by the defendant are to be construed by their own meaning and import, and not by any impression which the hearer may receive from them, unless it is both shown by proper averments in the complaint and by evidence at the trial that the defendant intended by their use to create such impression. Neither is he required to prove all of the words set forth in his complaint, unless all are essential for establishing the slanderous charge; but he must prove enough of them to sustain his cause of action. In actions for slander the rule that the probata must correspond with the allegata is eminently applicable. The plaintiff is not entitled to a recovery upon proof of words not set forth in his complaint, or upon a failure to prove the slanderous words which he has alleged. It is unavailing that the evidence is such as would authorize a jury to find that the defendant intended to charge the plaintiff with the crime. Their function is to determine whether he spoke the words alleged in the complaint. These principles will find support in the following authorities: 2 Greenl. on Ev. § 414; Townsend on Slander & Libel, §§ 365, 369, 371; Newell on Slander & Libel, p. 804; 13 Ency. of Pleading & Practice, p. 62 et seq.; Fox v. Vanderbeck, 5 Cow. 513; Ward v. Dick, 47 Conn. 300, 36 Am. Rep. 75; Wilborn v. Odell, 29 Ill. 456; Schmisseur v. Kreilich, 92 Ill. 347; Ransome v. McCurley, 140 Ill. 626, 31 N. E. 119; Sword v. Martin, 23 Ill. App. 304; Irish American Bank v. Bader, 59 Minn. 329, 61 N. W. 328; Payson v. Macomber, 3 Allen, 69; Chace v. Sherman, 119 Mass. 387; Bassett v. Spofford, 11 N. H. 127; Merrill v. Peaslee, 17 N. H. 540.

At the trial the witness Gibson referred to in the complaint testified: "The defendant stated to me that 'we,' I think, or 'they'—I am not positive as to the words—have a witness that saw Mr. Haub strike Mr. Schwartz; that they had a witness that saw Mr. Haub in his own butcher shop; and that they also had a witness that followed Mr. Schwartz up the street, as he staggered up the street. He said that Mr. Schwartz fell at the corner of the street, Union and Laguna, and there was a witness that had traced the blood back to the butcher shop." On cross-examination he gave the language of the defendant as follows: "He stated that 'they' or 'we' had a witness that had seen Mr. Haub strike Mr. Schwartz. He said he was struck in the butcher shop, and that they had a witness that saw Mr. Haub strike this man. He said there was a witness that had followed Mr. Schwartz up the block and saw him stagger all the way and fall at the corner, and also that there were two witnesses that had traced the blood back to the butcher shop." Another witness (Nuhrenburg) testified that in a conversation with the defendant, in which he suggested that Schwartz had died of heart disease, the defendant replied: "No, I don't believe he had heart disease. Somebody hit him because he had a hole in the back of his head." And upon the witness expressing a doubt the defendant replied, "You know that Mr. Haub and Mr. Schwartz had some business troubles, and it is George Haub that hit him." Being asked if he was sure he said those words, the witness replied: "Yes, sir; he did not say 'killed' or 'murdered,' but he said 'hit' him." The gravamen of the plaintiff's cause of action is that the defendant falsely charged him with the murder of Schwartz; and to authorize a recovery it was necessary to prove that the defendant had spoken the words set out in the complaint in which that charge was made, viz.: "That he had proof that Haub was guilty of the murder of Schwartz." If the complaint had not set out these words, or contained an allegation that they were spoken by the defendant, it would have failed to state a cause of action, since the other words do not of themselves, or by reason of any averments in the complaint, charge the plaintiff with the commission of a crime; and proof that the defendant had spoken only those other words was equally insufficient to authorize a recovery. There is nothing in the testimony above quoted, or elsewhere in the record, which indicates that the defendant said that he had proof that Haub was guilty of the murder of Schwartz, or that he uttered any words substantially the same; and there was the direct testimony of Nuhrenburg that in his conversation with him the defendant did not use the words "killed" or "murdered."

The only testimony that the defendant, in any words spoken by him, associated the plaintiff with the death of Schwartz, was that of the witness Wulzen that the defendant said to him, "Mr. Haub might have killed him anyhow," and of the witness Fanning that he said, "If you will follow up Haub pretty close you will find that this man's death came that way," and, "he might have something to do with it," and the above testimony of Nuhrenburg. The testimony of Gibson that the defendant said to him that "the Schwartz case was a murder" did not connect the plaintiff with the words. None of these expressions, however, correspond with the words set forth in the complaint, or contain words substantially the same in sense. It may be added, although irrelevant to the decision herein, that if they had been set forth in the complaint in addition to the words therein given they are conditional and argumentative in form, and do not constitute a direct charge that the plaintiff had committed any crime. It must be held, therefore, that the evidence presented by the plaintiff was insufficient to sustain his action or to justify the verdict of the jury. It was not a case of variance, as suggested by the respondent, but was a failure of proof to sustain his allegation. Code Civ. Proc., § 471.

The judgment and order appealed from are reversed.

We concur: COOPER, J.; HALL, J.

(148 Cal. 211

McCARTY v. SOUTHERN PAC. CO. et al. (CITY OF SACRAMENTO, Intervener).

(Sac. 1,202.)

(Supreme Court of California, April 5, 1905. On Rehearing, Nov. 13, 1905.)

1. Eminent Domain — Condemnation of Land for Levee Purposes.

Where property is taken for public use, and an easement is sufficient for the use, the fee will not be deemed to be appropriated unless stated expressly or by necessary implication in the statute governing the proceeding or in the judgment of condemnation.

[Ed. Note.—For cases in point, **see vol. 18**, Cent. Dig. Eminent Domain, § 836.]

2. Same—Assessment of Damages.

St. 1861, p. 355, c. 352, relating to the reclamation of swamp land, provides that, if it is necessary to construct levees on land other than swamp land, the swamp-land commissioners shall have power to take possession of so much of the land as may be necessary, if the same be private property, and if the necessary rights be not granted by the owners, and that appraisers may be appointed to assess the damages. Act April 9, 1862 (St. 1862, p. 153, c. 158), § 8, relating to a levee constructed by the city of Sacramento, provided that, when the levee was finished by the swamp-land commissioners, they should deliver the same to the city levee commissioners, and thereupon the title should vest in the city. Section 6 (page 152) provided that city levee commissioners might take possession of any land necessary for a levee, and condemn the same in accordance with Acts 1861 (St. 1861, p. 358, c. 352), § 16. The petition upon which the condemnation of land for the Sacramento levee was founded alleged that the commissioners had found it necessary to use certain land for levee purposes. The report of the appraisers stated the compensation to be made, and the judgment confirming the report was silent as to the estate taken. Held, that the city of Sacramento did not acquire the fee to land taken for the purposes of levee.

On Rehearing.

3. EMINENT DOMAIN — LEVEES — CONDEMNATION BY CITY—AUTHORITY.

Act April 9, 1862 (St. 1862, pp. 152, 153, 158, c. 158, §§ 4, 7, 17), provided, in substance, that the levee board of the city of Sacramento might construct that portion of levees required by the plans adopted at a joint meeting of the city board and state board of swamp-land commissioners, and that in case the state board was unable, from lack of funds, to let out the constructing of the levees, the city levee commissioners could construct so much of the levee as was necessary for the protection of the city, or could advance the funds necessary therefor to the state board. Authority to condemn lands without the city for levee purposes was given by St. 1861, p. 355, c. 352, to the state board, and a petition to the district court by the state board was required. *Held*, that the city board of levee commissioners had no authority to condemn land for a levee which lay outside of the city; such authority being in the state board alone.

4. CONSTITUTIONAL LAW — DUE PROCESS OF LAW—EMINENT DOMAIN—PROCEDURE.

St. 1861, p. 358, c. 352, § 16, providing for the condemnation of land for levee purposes, did not specifically require notice to the owners of property condemned, but directed that the appraisers to be appointed by the court should proceed to examine the premises, and an order of court appointing such appraisers directed them to give notice of the time of hearing and examination. *Held*, that the notice given under such order was a sufficient compliance with the rule that no one can be deprived of his property except by judgment upon due process of law.

5. SAME—ESTOPPEL—ACQUIESCENCE.

On an issue as to the validity of the condemnation of land by a city for levee purposes, it was contended that the landowners' predecessors had accepted a part of the award made, and was estopped from asserting the invalidity of the proceedings. The amount of the damages awarded was $195. There was no evidence that any part of it was ever paid. The appraisers' report in the proceedings stated that the entire tract belonging to the predecessors was subject to taxes amounting to $665, and thereafter the district attorney filed with the city board a claim for $741 for the same taxes, whereupon the board "decided to withhold the same from the amount of damages awarded." The stubs of the warrant book of the board further showed that afterwards warrants were issued to the district attorney for such sum, with a memorandum that the amount was withheld from the damages awarded. There was no evidence that the owners knew of such payment, or consented to it. The levee at that time covered but a small part of the 165-foot strip claimed by the city, but thereafter the levee was widened, and subsequently a sum of money was paid to the then landowners. *Held*, that the evidence did not show an estoppel.

In Bank. Appeal from Superior Court, Sacramento County.

Action by Daniel McCarty against the Southern Pacific Company and others, the city of Sacramento intervening. From a judgment in favor of plaintiff, intervener appeals. Affirmed.

J. H. McKune and Devlin & Devlin, for appellant. A. L. Shinn, for respondent. S. Luke Howe and A. A. De Ligne, for intervener.

SHAW, J. Upon the former hearing of this case the appeals of the plaintiff from the order granting a new trial, and of the defendants from the judgment, were disposed of. That part of the former opinion based on the theory that the intervener's motion for a new trial was also granted, and refusing to consider its appeal from the judgment on that theory, was vacated before the decision became final. Although the intervener and defendants appeared to make common cause against the plaintiff, yet, upon an inspection of the motion and order for a new trial, it appears that it was the motion of the defendants alone which was granted, and that the judgment, so far as the intervener is concerned, stands subject to the present appeal. A general statement of the facts and points in controversy is contained in the former opinion. 78 Pac. 260. We are here concerned only with the points presented by the intervener upon its appeal.

In its complaint in intervention the city of Sacramento alleged that it was the owner in fee of the strip of land 165 feet in width constituting the levee in controversy, and upon this allegation issue was taken by the plaintiff. The court found and adjudged that the city has an easement for its levee over and across the said strip of land, including the entire levee as now existing, with the privilege of entering on said land to repair the levee, and of taking earth for that purpose from said land at any point within 70 feet of the middle line of the levee, but not to interfere with the buildings of plaintiff, or with his occupancy of the land, except so far as may be necessary for the protection and maintenance of the levee, and that the railroad track was maintained upon the levee for its protection. Counsel for intervener, in their brief, say that the easement as described in the findings was curtailed in the judgment. They do not, however, point out in what particular it was curtailed, and upon examination we fail to perceive wherein the description in the judgment is substantially different from that in the findings.

The only point argued by the intervener on its appeal from the judgment is that upon the evidence the court should have adjudged that the city was the owner of the fee in the strip of land embraced in the levee, instead of a mere easement therein for levee purposes. It is claimed, although, as we think, not seriously, that the evidence shows that the city has acquired title to the fee by adverse claim and possession. The evidence is of such a character, however, that we cannot disturb the finding on this proposition, but must hold that it is sufficiently supported on that point.

The principal contention that the city owns the fee is made upon the theory that the condemnation proceedings under the act of 1862 vested in the city the fee simple. There is another ground upon which the right to the fee appears to be based, although it does not seem to be clearly stated in the brief. It is that the board of swamp-land commissioners in charge of the reclamation district in which the levee in controversy is situated constructed the levee in question under the authority given in section 16 of the act of May 13, 1861 (St. 1861, p. 358, c. 352), and that it became the property of the city in fee by virtue of the provisions of that section and of section 8 of the act of April 9, 1862 (St. 1862, p. 153, c. 158), and that this title is independent of the effect of the condemnation proceedings. The objection that the act of 1862 gave no power to the city levee commissioners to condemn lands outside of the city limits, and that the proceedings in condemnation were void because of uncertainty in the description of the land taken, and by reason of want of notice to the owners, may be dismissed from our consideration. For the purposes of the case, we may assume that the proceedings were valid, and that the authority of the levee commissioners to institute the proceedings cannot now be questioned. Conceding all this, we think that the evidence, taken in connection with the law bearing upon the proceedings, shows that the city obtained nothing more than an easement for the construction, maintenance, and repair of the levee.

There can be no doubt that it was within the power of the state to provide by statute that the fee should be taken for that purpose. The rule is, however, and the appellant practically concedes it, that in all cases where property is taken for public use, and an easement is sufficient for the purpose of the use, the fee will not be deemed to be appropriated in any case, unless it is so stated, expressly or by necessary implication, either in the statute or in the judgment of condemnation. The law does not favor the taking of a fee when it is not necessary to the use. The fee is not necessary for the purpose of constructing, maintaining, and repairing a levee intended to keep out flood waters. It is well known that such floods occur only at rare intervals, usually not more than once in a year, and lasting only for a few days, or weeks at most, and in some years not occurring at all. During all the intervening periods such a levee serves no public purpose whatever. Once it is constructed, its surface can be used by the owner of the fee during the greater part of each season for many purposes, and the grasses and vegetation grown thereon may be appropriated by him without in any respect affecting or impairing the use or efficiency of the premises as a levee. The two uses are not wholly inconsistent; hence, so far as they are consistent, they may exist together, and be vested in different persons. The owner of the fee will still have a proprietary interest in all the space above and below the levee, and may use the same as he sees fit, provided such use does not impair the constructions constituting the easement, nor interfere with the use of the easement. It is clear, therefore, that the fee was not necessary to the use, although it may be conceded that the Legislature might have so declared.

It may be granted that where the statute in terms provides for the condemnation of the "land" or of "lands" for the public uses and purposes, or where any equivalent term is used, it will usually be construed to authorize the taking of the fee. We search the statutes in vain for any language which, expressly or by necessary implication, gives authority to take the fee for the levee in question. Section 16 of the act of 1861 aforesaid, relating to the reclamation of swamp and overflowed land, provides that if, in the work of reclamation, it is found necessary to construct levees, trenches, or other works on lands other than swamp and overflowed lands, the board of swamp-land commissioners "shall have power to enter upon and take possession of so much of said land as may be necessary for said work of reclamation, if the same be private property, and, if the rights and privileges necessary be not granted by the owners," that appraisers may be appointed to assess the damages and injuries to such lands arising from the taking. This manifestly contemplates only such an entry and possession as may be necessary for the purpose intended; that is, to construct, maintain, and keep in repair the levee for the purposes of reclamation. It does not authorize the commissioners to take the land, but merely to enter upon and take possession thereof; and, if the right and privilege to do so are not given by the owners, then such right and privilege are to be taken, and payment made of the damages arising therefrom. Keeping in view the character of the public use for which the property was to be taken, it is manifest that this language should not be construed to direct the taking of the fee simple. Section 8 of the act of 1862 aforesaid, relating to the levee in question, provides that when the levee was finished by the swamp-land commissioners, and the portion thereafter to be controlled by the city of Sacramento ascertained, the commissioners should then deliver such portion to the city levee commissioners, and thereupon "the title to said levees and their appurtenances shall vest absolutely in the city of Sacramento." This does, indeed, declare that the title to the thing described shall be absolute in the city; but the thing itself is not the land in fee simple on which the levee stands, but only the levee. This plainly implies that an easement, and not the fee, was intended to be given; that is to say, the thing erected on the land and devoted to public use, with all the appurtenances necessary for its effectual use and maintenance.

Nor does the judgment in the condemnation proceedings carry a greater estate than a mere easement in the property. Section 6 (page 152) of the act provides that the city levee commissioners may enter upon and take possession of any land that may be necessary for the levee within the city, or any land within the county, although outside the city, that may be necessary or proper to furnish materials for its construction, and may have the same condemned for the public use in accordance with section 16 of the act of 1861. This manifestly does not empower the levee commissioners to condemn lands outside of the city for the purpose of erecting a levee thereon, but gives the right to condemn lands outside of the city solely for the purpose of taking therefrom materials with which to construct the levee. The land in question is outside of the city of Sacramento. Conceding, however, that this question cannot now be entertained, it is clear that the language of the section does not give the city levee commissioners any power either to take or to condemn a fee-simple title to land within or without the city for the purposes of constructing a levee thereon. Moreover, the petition upon which the condemnation proceedings were founded does not ask for the taking of a fee. It alleges that the city levee commissioners "have found it necessary to enter upon and occupy and use for the purpose of constructing levees thereon" the lands therein described, and it prays that such orders may be made as will entitle the levee commissioners "to enter upon, take, use, and appropriate for levee purposes" the lands described. This use demands an easement, and nothing more. There is nothing in the report of the appraisers to indicate whether the appraisement is of an estate in fee or of a mere easement. It merely states the compensation proper to be made to the owners of the land condemned for levee purposes. The judgment confirms the report of the appraisers, without stating anything concerning the nature of the estate to be taken, or for which the damages are allowed. Under neither of the proceedings which appear to have been taken in this case can the city claim a fee-simple title.

The easement, however, gives the city a right to erect and maintain on the levee all buildings or other constructions that may be reasonably necessary or convenient for the use to which it is devoted, or which are adapted to preserve it in good condition for that use. The right to do these things, however, does not make it necessary to hold that the estate taken is a fee simple. This right merely adds to the burden of the easement. Whether or not the maintenance and operation of a railroad upon the levee is an undue interference with the rights of the owner of the fee, or constitutes a substantial addition to the burden on his title, is a question not arising on this appeal. The intervener does not complain of that part of the judgment which appears to recognize the right of the railroad to maintain its track upon the levee, but seems to acquiesce in that use of the levee, and makes common cause with the defendants against the plaintiff. As between the plaintiff and the defendants, a new trial has been granted, and the right to maintain the railroad track, as between those parties, is not involved in this appeal.

The judgment is affirmed so far as it may affect the rights of the intervener and the plaintiff.

We concur: VAN DYKE, J.; HENSHAW, J.; ANGELLOTTI, J.; LORIGAN, J.

(May 5, 1905.)

PER CURIAM. It is ordered that the judgment heretofore rendered in bank in this cause on the appeal of the city of Sacramento, intervener herein, from the judgment of the superior court, be vacated, and that the cause be placed on the present Sacramento calendar, for further argument in regard to the validity of the condemnation proceedings and the right of the intervener to an easement, under said proceedings, of greater width and extent than that given in the judgment appealed from.

On Rehearing.

We adhere to the views expressed in the opinion rendered on the former hearing. The purpose of the present hearing was, by the order therefor, limited to the consideration of the "validity of the condemnation proceedings and the right of the intervener to an easement, under said proceedings, of greater width and extent than that given in the judgment appealed from." The former opinion assumed, without deciding, that the condemnation proceedings were valid, and declared that the estate thereby acquired by the city of Sacramento was an easement and not a fee. It is claimed, however, that by the proceedings in condemnation the city was given an easement 165 feet in width for all levee purposes, with the additional right to cause the levee, when completed, to be turnpiked and used as a toll road, whereas, by the judgment appealed from, the easement given is only 140 feet wide, and is further limited so as to give the right to maintain the levee at the existing width only, which is much less than 140 feet, with no right to a turnpike road, and as to the remaining width, giving only the right to take earth therefrom to repair the existing levee; so that, if the proceedings in condemnation are valid, or if plaintiff is estopped to dispute their validity, the judgment appealed from is erroneous, and a new trial will be necessary.

Respondent now claims that there is no specification of the insufficiency of the evidence to sustain the finding as to the width and extent or character of the easement. This contention is correct so far as the right to use the levee as a turnpike road is concerned. We think the question of the width of the strip of land in controversy, aside from the character of the estate therein, is sufficiently, though not clearly, presented by the specifications.

The law authorizing the proceedings made no provision for notice to the owners of the property condemned, and the record made of the proceeding is somewhat uncertain in respect to the description of the land taken and also as to the amount of damages awarded, and for these and other reasons the respondent claims that the proceedings are invalid. The law (St. 1861, p. 358, c. 352, § 16) does not specifically require notice, but it directs that the appraisers, who are appointed by the court ex parte, shall proceed to the premises, and examine, hear, and determine as to the damages awarded. The order of the court appointing these appraisers directed them to give notice of the time of the examination and hearing, and this was done to the satisfaction of the court. The constitutionality of such a proceeding seems questionable, but, under the doctrine of the decision of the Supreme Court of the United States in Paulsen v. Portland, 149 U. S. 30, 13 Sup. Ct. 750, 37 L. Ed. 637, the notice given appears to be a sufficient compliance with the rule that no person can be deprived of his property except by judgment upon due process of law. See, also, Curran v. Shattuck, 24 Cal. 433.

We do not consider it necessary to decide whether or not the proceeding is void because of uncertainty in the description or in the amount awarded as disclosed in the record. We think it was void for other reasons. As stated in the former opinion, section 6 of the act of 1862 (St. 1862, p. 152, c. 158) does not authorize the board of city levee commissioners to condemn lands outside the city to be used as a levee. It gives the board power to take land outside the city only for the purpose of obtaining therefrom materials for the construction of the levees within the city. See Johnston v. Sacramento Co., 137 Cal. 204, 69 Pac. 962. The land in question was not taken for any such purpose, and, if it were so taken, it would not authorize the building or maintenance of a levee thereon. The levee in question was constructed by the city levee commissioners solely under the authority conferred by sections 4, 7, 17, c. 158, pp. 152, 153, 158, of the act of 1862, aforesaid. These sections provided that after the board of state swamp and overflowed land commissioners had finally adopted a plan for the reclamation of swamp-land district No. 2, in which the lands and levee in question are situated, or after such plans had been finally approved at a joint meeting of the state board and city board therein provided for, the city board should proceed to construct that portion of the levees required by such plans, lying within the city, and that as soon as possible the state board should let out contracts for the construction of all the levees outside of the city. Section 17 provided, however, that in case the state board was unable from lack of funds to "let out the constructing the levees" for said swamp-land district in time to have them completed by October 1, 1862, the city levee commissioners could construct so much of said levee as was necessary for the protection of the city, or could advance the funds necessary therefor to the state board, and that the moneys so expended or advanced should be repaid to the city levee fund out of the first moneys thereafter coming into the treasury of the swamp-land district. The plans for the levees outside the city were adopted by the state board, and modified and finally established at a joint session of the two boards, as provided in the act. The state board was without funds to complete its portion thereof, and let no contracts therefor, but gave notice of its inability to do so to the city board, and requested the latter to act in the premises in accordance with the above provisions of the act. Thereupon the proceedings in condemnation were taken, and the levee was thereafter constructed by the city board. It will be observed that by the scheme provided, the levee in question was to be made by the state swamp-land board, and that the city board was empowered to come to the assistance of the state board, and construct the levee in its behalf; but that the authority of the city board to condemn lands for a levee was restricted to lands necessary for levees within the city, and did not include land for this levee which lay outside of, and to the east of, the city and eastwardly of Burns slough. The authority to condemn lands for this levee was given to the state board by section 16 of the act of 1861. St. 1861, p. 358, c. 352. An authority to one party to "construct" a levee on behalf of a second party could scarcely be held in any case to include authority to the first party to condemn the land on which the levee was to be constructed. 10 Am. & Eng. Ency. of Law, 1074. But it clearly cannot be so construed in a case like the present one, where the law by implication withholds such authority to condemn from the first party, and by its terms expressly gives it to the second party. The grant of such power must be by express terms or necessary implication, and the statute conferring it must be strictly construed. 7 Ency. of Pl. & Pr., 468; San Francisco, etc., W. Co. v. Alameda W. Co., 36 Cal. 639; Curran v. Shattuck, 24 Cal. 432; Stanford v. Worn, 27 Cal. 174; Creighton v. Manson, Id. 628; Smith v. Davis, 30 Cal. 537; Trumpler v.

Bemerly, 39 Cal. 491; Chase v. Putnam, 117 Cal. 368, 49 Pac. 204. The proceeding is special and statutory, and the prescribed method must, in such cases, be strictly pursued. A petition to the district court by the state board was required. There is no authority given for the filing of such petition by any other party. Hence a petition filed and presented by some other party would not give the court jurisdiction to proceed. Stanford v. Worn, 27 Cal. 171; 7 Ency. of Pl. & Pr. 513, 517. In such special proceedings, where a petition is required, the presentation of a petition showing authority to proceed is necessary to confer jurisdiction upon the court. In re Grove St., 61 Cal. 452; Haynes v. Meeks, 20 Cal. 315; Meeks v. Hahn, 20 Cal. 626; Fitch v. Miller, 20 Cal. 382; Pryor v. Downey, 50 Cal. 398, 19 Am. Rep. 656; 15 Ency. of Law & Pro. 810, 816; 12 Ency. Pl. & Pr. 178. It follows, that the court had no jurisdiction of the proceeding, and that the judgment of condemnation was void.

The appellant further claims that the plaintiff's predecessors accepted a part of the award made, or the benefit thereof, and that the plaintiff is thereby estopped from asserting the invalidity of the proceeding, or denying the right of the city to an easement of the width and character purported to be given thereby. The amount of the damages awarded was $195.50, and there is no evidence that any part of it was ever paid. The appraiser's report in the proceeding states that the entire tract belonging to the plaintiff's predecessors was subject to taxes of 1859, 1860, and 1861, amounting to $665.96. In July, 1863, the district attorney filed with the city board a claim for $741.39 for the same taxes, then delinquent, and the board thereupon "decided to withhold the same from the amount of damages awarded." The stubs of the warrant book of the board further show that afterwards warrants were issued to the district attorney for this sum, with a memorandum that the amount was withheld from the damages awarded. There is nothing further to show the reason or purpose of making this payment, if it was made, nor any evidence that the owners consented to the arrangement, or had any knowledge thereof, except an admission at the trial by plaintiff's counsel that the "balance" of the delinquent taxes for those years was paid by the owners. There is, however, no evidence that there was any balance. There are other facts inconsistent with an estoppel. The levee at that time covered but a small part of the 165-foot strip now claimed, and the excess, it appears, was not then claimed by the city board. In the spring of 1868 the levee was raised several feet and widened, so as to be from 50 to 70 feet wide at the bottom. In the following November the city board paid to the then owners $247 for 9.88 acres of land taken for levee purposes on this levee. This would make a strip through the tract 84 feet wide, or 42 feet additional on each side of the former levee. The inference is thus raised that the owners claimed and the board paid the above sum for the additional land taken by the widening of the levee through that tract, which is inconsistent with the theory that the parties had accepted the award, waived the invalidity of the proceedings, or consented to an easement 165 feet in width. In view of this conflict in the evidence, and other evidence which we do not consider it necessary to discuss, we cannot say that the finding of the trial court as to the width and character of the easement is not supported by sufficient evidence.

The judgment, so far as it affects the rights of the intervener, is affirmed.

We concur: ANGELLOTTI, J.; McFARLAND, J.; VAN DYKE, J.; LORIGAN, J.; HENSHAW, J.

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147 Cal. 774

PEOPLE ex rel. RUSSELL v. TOWN OF LOYALTON. (Sac. 1,158.)

(Supreme Court of California. Sept. 25, 1905.)

1. MUNICIPAL CORPORATIONS—CREATION—PETITION—SUFFICIENCY.

It is not necessary, under St. 1883, p. 93, c. 49, and amendments thereto, that the petition for the incorporation of a municipal corporation should state that there is any town within the proposed boundaries.

2. HOLIDAYS—ELECTION—VALIDITY.

An election to determine whether a proposed municipal corporation shall be created may be held on a legal holiday named in Pol. Code, § 10, though Code Civ. Proc. § 134, prohibits the transaction of "judicial business" on holidays; for, on holidays, transactions not within the statutory prohibition may be carried on as on other days.

3. MUNICIPAL CORPORATIONS—EXTENT OF TERRITORY—DETERMINATION.

Under Const. art. 11, & 6, providing that municipal corporations shall not be created by special laws, but the Legislature shall by general laws provide for the incorporation of cities and towns, and St. 1883, p. 93, c. 49, providing that "any portion of a county containing not less than" 500 inhabitants may become incorporated, and giving the board of supervisors power to change the boundaries proposed, the question as to whether certain territory proposed to be included in a municipal corporation shall be included therein is for the final determination of the board.

4. SAME—NOTICES OF ELECTION—SUFFICIENCY.

A board of supervisors ordered notices of an election to determine whether a proposed municipal corporation should be created to be posted at five specified places, and they were posted accordingly. One of the notices was posted outside of the boundaries of the proposed corporation. *Held*, that proper notice was given; Mun. Corp. Act (Laws 1883, p. 93, c. 49) § 2, requiring only four notices to be posted within such boundaries.

5. SAME—DETERMINATION OF BOARD OF SUPERVISORS—FINALITY.

Under the statute relating to creation of municipal corporations, which provides that the board of supervisors shall, on the hearing of the petition for incorporation, determine how many inhabitants reside within the proposed boundaries and whether the petition is signed by a sufficient number of resident electors of the district, the finding of the board on the questions is conclusive, in the absence of a law providing for an appeal, or in the absence of a showing that the decision was induced by fraud.

6. SAME—ELECTION—VALIDITY.

At the election to determine whether a proposed municipal corporation should be created, it was found that 5 votes were cast by persons residing without the boundaries of the proposed corporation. Seventy-nine votes were cast for incorporation and 30 against. *Held* that, assuming that the 5 illegal votes were cast for incorporation, the election resulted in favor of incorporation.

7. SAME—BURDEN OF PROOF.

A party assailing the validity of an election to determine whether a proposed municipal corporation shall be created has the burden of proving that a sufficient number of illegal votes to affect the result were cast.

8. SAME—EVIDENCE—ADMISSIBILITY.

In proceedings for the incorporation of a municipal corporation, it was not error to refuse the party assailing the validity of the incorporation permission to prove that the board of supervisors mistakenly thought that certain territory was included within the proposed boundaries of the proposed corporation when they heard the petition for incorporation and determined as to the eligibility of the signers thereof and as to the population within the proposed boundaries, the decision of the board thereon being final.

Department 1. Appeal from Superior Court, Sierra County; Stanley A. Smith, Judge.

Action by the people on the relation of D. Russell, against the town of Loyalton. From a judgment for defendant, plaintiff appeals. Affirmed.

U. S. Webb, Atty. Gen., and John B. Irish, for appellant. Frank R. Wehe and F. D. Soward, for respondent.

ANGELLOTTI, J. This action was brought for the purpose of determining the right of defendant to hold and enjoy the franchise and to exercise the powers of a municipal corporation of the sixth class, which it assumes to be under certain proceedings had under the general law providing for the organization, incorporation, and government of municipal corporations. St. 1883, p. 93, c. 49, and amendments thereto. Defendant had judgment, and this is an appeal by plaintiff from such judgment and from an order denying the motion for a new trial.

1. Upon the face of the record of the incorporation proceedings there appears to have been a literal compliance with every statutory requirement It is suggested that the petition for incorporation does not state that there is any "town" within the proposed boundaries, but under our statute no such statement is required. The petition stated everything required by the statute. The record shows that the election in the "proposed corporation for the purpose of determining whether the same shall become incorporated" was ordered by the board of supervisors to be held on the 9th day of September, 1901, and was held on said day. That day being a holiday under the provisions of our statute (Pol. Code, § 10), it is claimed that no valid election could be held thereon. Appellant has pointed out no statute prohibiting the holding of such an election on a holiday, and we know of none. There is a statutory prohibition as to the transaction of certain "judicial business" on certain holidays, including September 9th (Code Civ. Proc. § 134); but the holding of an election does not come within that term. In the absence of any such statutory prohibition, we know of no reason why the election could not be held on a day set apart by statute as a holiday. The rule appears to be that on all such days all transactions not within statutory prohibitions may be carried on as on any other day. 27 Am. & Eng. Enc. Law (2d Ed.) p. 414.

2. The complaint contained allegations as to the large area of land included within the boundaries of the supposed corporation and the character thereof; the object thereof being to show that the great bulk of the land should not have been included, being uninhabited and suitable only for farming, timber, and grazing purposes. The court found that the land consisted of about 52 square miles of territory, with a population of about 700. The evidence showed that the village proper was a small collection of houses, about 40 in number, with a population of less than 500, and that the remainder of the vast acreage included was of the character alleged. It is contended that it is essential to incorporation under the provisions of our law that there should be a town or village of at least 500 inhabitants, and that it was never contemplated by the framers of our statute that land of the character alleged, having no natural connection with the town or village and no adaptability to village purposes, might be included. In view of the provisions of our statute upon these matters, it must be held that there is no force in this contention. While the good policy of permitting the inclusion in the incorporation of a town of an unlimited amount of outside territory having no natural connection therewith and in no way adapted for town or city government may well be questioned, it must be admitted that the matter is one wholly within the control of the legislative department of the state, except so far as such power may be limited by constitutional provisions. The Constitution contains no intimation whatever as to the minimum of population essential to incorporation, nor does it attempt to limit the power of the Legislature in providing for the determination of the question as to what shall constitute municipal territory. The only constitutional restriction is that municipal corporations shall not be created by special laws, and the Legislature is required by general laws to provide for the incorporation,

organization, and classification of cities and towns. Const. § 6, art. 11. This leaves the questions as to population, extent, and character of territory entirely with the legislative department. When we come to a consideration of the general municipal incorporation act, we find that it is expressly provided that "any portion of a county containing not less than five hundred inhabitants, and not incorporated as a municipal incorporation, may become incorporated" as a municipal corporation thereunder, upon complying with the provisions thereof. St. 1883, p. 93, c. 49. The board of supervisors of the county is given certain power in regard to changes in the boundaries proposed, but no other tribunal may interfere. The question as to whether territory proposed to be included should be brought under municipal control is left to be finally determined by the board of supervisors.

The question here discussed is not a new one in this state. It was definitely decided by this court in People v. Riverside, 70 Cal. 461, 11 Pac. 759, where territory comprising some 50 square miles, much of which was apparently not at all adapted to municipal purposes, was included. That the law here is as above stated was also recognized by this court in People v. Linden, 107 Cal. 94, 100, 40 Pac. 115, where the territory included comprised 48 square miles. We have found no decision from any other state that is applicable under the language of our statute. Where the tribunal charged with the duty of determining the boundaries is limited by language of the Legislature which may reasonably be construed as applicable only to towns and villages proper and adjacent territory naturally connected therewith, a very different question is presented; but no such limitation can be found in the broad words used in our statute. We do not decide whether or not there might be such fraud in the matter of fixing boundaries as would be held to invalidate the proceedings; for there was no sufficient allegation of fraud in this respect, and absolutely no proof of any such fraud.

3. The board of supervisors ordered notices of the election to be posted at five specified places, and they were posted accordingly. Subsequent to the election it was discovered that one of the specified places, viz., "Lewis Mill," was not within the boundaries of the proposed corporation. The law, however, requires only four notices to be posted within such boundaries. Section 2, Mun. Corp. Act. As the order of the board was literally complied with, and as such literal compliance resulted in four notices being posted within the boundaries, the notice given was in all respects as required by law.

4. It is claimed that the averment in the petition for incorporation to the effect that there were 700 inhabitants in the territory proposed to be incorporated was false, and that there were not exceeding 350 inhabitants therein. It is also claimed that, of the 57 persons who signed said petition, 32 were not residing within the boundaries of such proposed incorporation. The corporation act requires that there must be not less than 500 inhabitants, and that the number of inhabitants must be stated as nearly as may be in the petition, and it also requires the petition to be signed by not less than 50 electors of the county residing within the territory proposed to be incorporated. By express provision the board of supervisors is required upon the hearing, to "ascertain and determine how many inhabitants reside within such boundaries." The board is further required, of course, as a prerequisite to exercising jurisdiction, to determine whether or not the petition, apparently sufficiently signed, has been in fact signed by a sufficient number of resident electors of the district. The record shows that in this matter the board of supervisors heard the petition, and expressly found that each and all of the allegations contained in the petition and affidavit annexed thereto were true. This necessarily included the finding that each of the signers of the petition was an elector of the county and resident of the proposed corporation. The board further expressly found the number of inhabitants thereof to be 700. The law provides for no appeal from the decision of the board upon such questions. Under what appears to be the settled law of this state, the decision of the board of supervisors upon both these questions of fact must be held to be conclusive here. There was no allegation to the effect that the decision was induced by any extrinsic or collateral fraud, and in the absence of any right of appeal or review by a higher tribunal such decision could be vacated only upon grounds which would justify the vacating of a judgment rendered by a court of record. It will only be necessary in this connection to refer to the case of People v. Los Angeles, 133 Cal. 338, 65 Pac. 749, where the whole matter was thoroughly discussed and the law applicable very clearly stated.

5. At the election there were 79 votes for incorporation and only 30 against. It was urged by appellant that more than one-half of the votes were cast by persons residing without the boundaries of the proposed corporation. The trial court found that only 5 votes were cast by persons residing without the boundaries of the proposed town of Loyalton, and that, except as to such 5 votes, no person was permitted to vote at such election who had not resided within the limits of the proposed corporation for at least 60 days next preceding said election. It appears that at the time of the election Lewis Mill, together with certain buildings and places of abode for many who there

worked, was generally supposed to be within the boundaries of the proposed corporation, while as a matter of fact it was about one-half mile east thereof. It was under this supposition that whatever votes were improperly cast were deposited by the voters and received by the election board, and there is no pretense that there was any fraud in the matter upon the part of anybody. It may be assumed, for the purpose of this decision, that every illegal vote was cast for incorporation. The question, then, is as to whether the illegal votes were sufficient in number to make any difference in the result if they be deducted. As we have said, the court below found that there were not to exceed 5 illegal votes. We have carefully examined the evidence adduced upon this question, and we cannot say that the finding of the trial court is not sufficiently sustained thereby, so far as is necessary to support the judgment. There can be no doubt that upon this proposition the burden of proof was on the plaintiff. The evidence contained in the record is not at all clear and convincing as to the actual residence of many of the voters. It may be that such evidence would compel the conclusion that some, in addition to the 5 found by the trial court, were illegal voters by reason of nonresidence; but we are satisfied that we cannot, upon that evidence, disturb the finding to the extent of holding that there is no support in the evidence for the conclusion that there was not a sufficient number of such illegal votes cast to affect the result, even though all such illegal votes be deducted from the total vote cast for incorporation.

6. The court was amply justified in holding that the allegations of the complaint to the effect that the Loyalton Lumber Company and its officers in any way coerced its employés to vote for incorporation were not sustained by the evidence.

7. We have examined the various rulings complained of relative to the admission and exclusion of evidence, and find no error. Much reliance is based upon the fact that the court refused to permit plaintiff to show that the members of the board of supervisors mistakenly thought that Lewis Mill was included within the proposed boundaries at the time they heard the petition for incorporation and determined as to the eligibility of the signers thereof and as to the population; but we think such proposed evidence was entirely immaterial. As we have seen, it was for the board of supervisors to finally determine both of these matters from the evidence submitted to them, and neither the evidence nor the mental processes by which their conclusion was reached are reviewable here. What has been said disposes of all the points requiring notice.

The judgment and order are affirmed.

We concur: SHAW, J.; VAN DYKE, J.

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1 Cal. App. 609

PERRY v. J. NOONAN LOAN CO.

(Court of Appeal, First District, California. Sept. 20, 1905.)

1. Appeal — Review — Order Granting New Trial.

An order granting a new trial on the ground of the insufficiency of the evidence to sustain the verdict rendered will not be reversed on appeal, where the issue was one of fact on which the evidence was conflicting.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3871.]

2. Same—Settlement of Statement—Waiver of Objections.

An indorsement by opposing counsel on a proposed statement of the case for use on a motion for new trial that "the foregoing statement is correct and may be settled and allowed, subject to the right to object as heretofore reserved as not prepared and presented in time," was a waiver of the right to amend the statement, and authorized its presentation to the judge for settlement without notice; and the reservation of the right to object on the stated ground will not avail on appeal, where it does not appear from the record that any objection was in fact made or ruled on motion.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by D. E. Perry against the J. Noonan Loan Company. Plaintiff appeals from an order granting a new trial. Affirmed.

Frank W. Sawyer, for appellant. Walter E. Dorn, for respondent.

HARRISON, P. J. This action was brought to recover the value of services rendered by the plaintiff to the defendant during the two years prior to the commencement of the action; the amount claimed being $6,000. The cause was tried by a jury, and a verdict rendered in favor of the plaintiff for $1,520. Thereafter the court granted the defendant's motion for a new trial "on the ground of the insufficiency of the evidence to justify the verdict rendered herein." From this order the plaintiff has appealed.

Being an action of quantum meruit, the amount to be recovered depended upon the testimony of witnesses as to the value of the services, and on this point there was a marked conflict in the testimony. In his complaint the plaintiff alleged their value to be $250 per month, and at the trial there was testimony on his behalf placing their value at different sums from $250 to $300 per month, while on the part of the defendant witnesses placed their value at from $65 to $150 per month. There was also testimony tending to show that the plaintiff had been paid a large portion, if not all, of the amount that he was entitled to under testimony on behalf of the defendant. The court was therefore fully authorized to grant a new trial.

The appellant urges that the court erred in granting the motion, for the reason that the statement of the case, upon which the motion was made, was not presented to the plaintiff within the time allowed by law therefor, and that therefore it was improperly settled by the judge, and should not have been considered by him. The following are the facts relied upon in support of this position, viz.: The verdict of the jury was rendered December 9, 1901. The defendant gave notice of its intention to move for a new trial December 19, 1901. At the close of the statement which was settled is the following: "The defendant proposes the foregoing as his statement on motion for a new trial. Dated March 25, 1902. Walter E. Dorn, Attorney for Defendant." Directly underneath is the following: "The foregoing statement is correct, and may be settled and allowed, subject to the right to object as heretofore reserved as not prepared and presented in time. Dated March 25, 1902. F. W. Sawyer, Attorney for Plaintiff." This is followed by the following certificate of settlement: "The foregoing statement is correct, and is hereby settled and allowed. Dated April 2, 1902. John Hunt, Judge of Superior Court."

It does not appear from the record whether the plaintiff was present or absent at the time of the settlement of the statement. His admission of its correctness and consent that it be settled was a waiver of his right to propose amendments thereto, and authorized the defendant to present it to the judge for settlement, without any notice to him. Code Civ. Proc. § 659. (3) If there were any facts or reasons in support of the objection now urged, he could have reserved the right in his stipulation to be present at the settlement, and he should have then appeared and presented them to the judge and obtained a ruling upon their sufficiency, and, if such ruling was adverse, should have taken an exception thereto. The matters so presented, together with the ruling and his exception, should have been incorporated into the statement and made a part of the record, and they could then be considered by the court in hearing the motion, and also upon an appeal therefrom. When the statement was presented to the judge for settlement, he was not required to enter upon a personal investigation of the sufficiency of the objection which the plaintiff had "reserved the right" to make, but was at liberty to assume that as he had failed to specify any fact or reason in support of such objection, and did not appear to make the objection, it was without foundation. If, however, it be assumed that the plaintiff was present at the settlement, it does not appear that he made any objection thereto; but if it be further assumed that he made the objection which he had reserved the right to make, and that it was overruled by the court, the record does not show that he took any exception to such ruling. Section 647, Code Civ. Proc., does not include such ruling within those which are deemed excepted to. In Cole v. Wilcox, 99 Cal. 549, 34 Pac. 114, the defendant objected to the settlement of the statement upon the ground that the same was not served in time, in reference to which the court said: "A mere objection to the settlement of the statement, without pointing out the basis or the grounds of the objection, or presenting the facts upon which it was made, was not fair to either the judge or the opposite party; and, even if an exception had been taken to the ruling of the judge upon such objection, the party taking the exception would not have the right to its consideration upon appeal. When the motion for a new trial came on to be heard, the court in its action thereon was limited to considering the matters contained in the statement, and was not at liberty to go outside of the statement for the purpose of determining whether the new trial should have been granted or refused."

The order is affirmed.

We concur: COOPER, J.; HALL, J.

1 Cal. App. 447

PEOPLE v. ROBERTS.

(Court of Appeal, First District, California. Aug. 18, 1905.)

1. LARCENY—INSTRUCTIONS.

In a prosecution for larceny, where there was evidence that two other persons besides defendant were present and concerned in the commission of the offense, a charge that the prosecution must prove beyond a reasonable doubt that defendant "and no one else" committed the offense was properly refused.

2. CRIMINAL LAW—TRIAL—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

In a prosecution for larceny, it was not error to refuse a charge that the jury should not consider testimony stricken out by the court, where the court charged that defendant was to be tried only on the evidence which was before the jury, and that the jury should not consider evidence which had been excluded by the court.

3. SAME—APPLICATION OF INSTRUCTIONS TO CASE.

Pen. Code, § 484, defines larceny as a felonious stealing, etc., of the personal property of another. Section 487 declares that grand larceny is committed "(1) when the property taken is of value exceeding $50; (2) when the property is taken from the person of another; * * * (3) when the property taken is" one of certain enumerated animals or articles. *Held*, that a charge defining grand larceny in accordance with section 484 and subdivision 1 of section 487, but failing to mention subdivisions 2 and 3 of the latter section, was not erroneous, where there was no charge of larceny from the person, nor of any article or animal mentioned in subdivision 3.

4. LARCENY—TRIAL—INSTRUCTIONS.

In a prosecution for larceny, where the evidence showed that defendant and his accomplices tried to get the prosecuting witness into a card game, but were unsuccessful, and that prosecuting witness gave defendant money with which to play cards under the fear that, if he did not do so, it would be extorted from him by force or violence, but in no way participated in the game himself, a lengthy charge on the subject of larceny by trick and device was unwarranted by the evidence, misleading to the jury, and prejudicial to defendant.

5. SAME—EVIDENCE—OBJECTIONABLE QUESTIONS.

In a prosecution for larceny, a question asked by the district attorney: "Do you understand that, if a man came to you on the street and put a pistol to your head, and you handed out the money, that the money belonged to him?" was objectionable; but permitting the same to be answered was not of itself ground for reversal.

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

George Roberts was convicted of grand larceny, and appeals. Reversed.

Samuel M. Shortridge and Frank J. Murphy, for appellant. U. S. Webb, Atty. Gen., for the People.

HALL, J. The defendant, Roberts, was charged with and convicted of grand larceny, and this appeal is from the judgment and the order denying his motion for a new trial.

Defendant claims that the court erred in refusing to give at request of defendant the following instruction: "Not only must the prosecution prove beyond all reasonable doubt that the crime charged has been committed, but they must prove beyond all reasonable doubt that the defendant, and no one else, committed the offense. In the absence of such proof, the defendant must be acquitted." The evidence in this case showed that two other persons besides the defendant were present and were concerned in, and aided and abetted the defendant in, the commission of the offense. Under the requested instruction the jury would have been obliged to acquit the defendant, although convinced that the three persons jointly and together committed the offense. Such is not the law. The instruction was properly refused.

The defendant requested the following instruction: "Offers to prove certain alleged facts which have been made in your presence are not evidence, and you should not take the same into consideration, nor allow yourselves to be in any manner influenced thereby. [Neither should the jury consider testimony stricken out by the court.]" The court refused to give the part inclosed in brackets, but gave the rest. Both propositions are sound in law, and might well have been given by the court, yet we do not think any error was committed in the refusal thereof, for the reason that the same instruction in substance was by the court given elsewhere. Thus the court said: "The defendant is to be tried only on the evidence which is before the jury, and not on suspicions that may have been excited by questions of counsel, answers to which were not permitted." Again it is said: "The court deems it proper to admonish you that you are not to consider evidence which has been excluded by the court in determining any fact in the case." When the jury were told that the defendant is to be tried only on the evidence which is before the jury, they as sensible men must have understood that evidence stricken out was not before the jury, and evidence excluded may fairly be said to include evidence stricken out.

The court read to the jury as a part of its instructions section 484, Pen. Code, defining larceny, and a portion of section 487, as follows: "Grand larceny is larceny committed in either of the following cases: (1) Where the property taken is of the value exceeding $50.00"—and, continuing, instructed the jury as to larceny committed by fraud, trick, or device. Counsel for the defendant treats this as one instruction, and objects to the first part, for the reason that the court read a portion only of section 487. In answer to this it is sufficient to say that the court read all of the section that was in any way pertinent to the charge made in the information. There was no charge in the information of a larceny from the person, neither was there a charge of larceny of any article or animal mentioned in subdivision 3 of section 487. It was, therefore, quite unnecessary to read subdivisions 2 and 3 of section 487.

As to the remaining portion of the instruction as to larceny by trick and device, it is not contended that it is not correct as an abstract proposition of law, but that it is suggestive and argumentative, not predicated on any evidence in the case, and not responsive to the theory of the prosecution. In Blashfield on Instructions to Juries, it is said: "Instructions to the jury should be applicable to and limited to the evidence adduced in the cause. It is erroneous to give instructions based on a state of facts which there is no evidence tending to prove, or which the undisputed evidence shows does not exist, and it makes no difference that such instructions contain correct statements of the law." Section 86, citing many cases. Again, in section 91, the same writer says: "The giving of an instruction not supported by the evidence is sufficient ground for reversal, where it appears that such instruction misled, or might have misled, the jury, to the prejudice of the party complaining. Where the instructions as a whole are abstract and inapplicable to the facts in issue, the judgment will be reversed. If an instruction submits an issue not warranted by the evidence, or is based on facts not in evidence, or is so worded as to lead the jury to infer the existence of a state of facts entirely at variance with the evidence, the error will almost invariably be considered ground for reversal"—citing many cases. In Clark v. State, 32 Neb. 246, 49 N. W. 367, it was held reversible error to instruct the jury that if defendant formed a conspiracy to commit the crime, and became intoxicated to nerve himself to commit it, his intoxication would be no excuse; there being no evidence that he became intoxicated for such purpose, although there was evidence that he was intoxicated at the time of committing the alleged crime. In People v. Devine, 95 Cal. 227, 30 Pac. 378, it is said: "In some cases an inapplicable instruction can do no harm, but when it is liable to mislead a jury, to the prejudice of one of the parties, it becomes as grave an error as though it were not correct as an abstract proposition of law." The trial court had read to the jury section 485, Pen. Code, relating to larceny of lost and found property. There was no evidence of the finding of any lost property, and the giving of the instruction was held to be reversible error. In People v. Sanchez, 24 Cal. 28, it was said: "No instruction should be given to a jury which is not predicated upon some theory logically deducible from at least some portion of the testimony. Such instructions are only calculated to confuse and mislead the jury, and ought not to be given."

In the case now under consideration the court gave a lengthy instruction of about six folios on the subject of larceny by trick and device, correct in the abstract, but, it is contended, not predicated on the evidence in the case. It therefore becomes necessary to examine the evidence on this point. Perry, the prosecuting witness, testified that he was standing on the corner of Fourth and Market streets, San Francisco, on March 20th, when he was addressed by defendant, who asked Perry where he was from. Finding that Perry was from Los Angeles and a stranger in San Francisco, defendant represented that he also was a stranger to the city. The two agreed to visit the Park and Cliff House together, but first the defendant induced Perry to go with him to 1344 Market street by the representation that he was a mining man, and had some specimens of ore that he wished to have assayed by a friend who had an office at that place. On getting to 1344 Market street Perry was, after some objection, induced to go into the building, and after some hunting they found the proper room, and there found that the assayer was not in, but did find two persons, claimed to be strangers, who had apparently been playing cards. They invited Perry and defendant to join the game. Defendant did, but Perry, though urged by defendant, refused. On the first game defendant appeared to win, and on the second game bet what change he had, and then asked Perry for a loan of $20. Perry refused, whereupon defendant took from his pocket a paper which he represented to be a check on a Denver bank, and showed it to the other parties playing the game. One of them said to Perry: "It is all right. Let your friend have the money. This check is all right." Perry refused, whereupon one of the parties, called "the Doctor," got up and locked the door, and put the key in his pocket, saying, in effect, that he did so for fear his wife might call and catch him gambling. Defendant then again demanded the money, whereupon Perry said, "I suppose I am a victim, and I will have to give you the money," and took off his belt, in which he carried his money, and gave defendant $20. On repeated demands Perry gave to defendant altogether $80, $20 at a time, all of which was bet by defendant on his hand, and on a call of hands was lost to one of the other players. The players then disbanded and left the premises. From all the circumstances in evidence it is certain that the three card players were confederates. On the question of how and why he parted with his money Perry testified as follows: "So far as the game of cards was concerned, I was not connected with the game, or in any manner involved in the game, as I was not a player or participant, and made no bet. I lost no money by betting. * * * I did not part with any of this money on the strength of that check. That had nothing to do with the parting of any of my money. This proposition of mines, and ore and rock —that had nothing to do with my parting with any of my money. And nobody suggested my parting with any money on account of any mines or mining stock. I parted with $80." On redirect examination by the district attorney he gave testimony as follows: "I have said the defendant asked me to lend him the money. In response to that question I did not give him any money when he asked me to lend it to him. When I gave the money to him he said: 'Let me have the money.' That was immediately after the door was locked. I did not let him have any money for the purpose of having him play a game. Q. You yourself took no part in the game at all, and loaned him no money for the purpose of betting? That is correct, is it? A. Yes, sir. Q. Why did you hand over—take off your belt and hand over—$80, $20 at a time, and four different times, making $80 in all? Why did you do that—hand that money to the defendant? A. Because they made their demand repeatedly for the money, and I felt that they would take the money if I did not give it over willingly. I thought they would force me to give them the money; did not know whether they would knock me in the head or shoot me, but felt that they would take the money by force; and I gave up the money rather than take chances of being injured in any way. Q. Did you part voluntarily or willingly with any of your money? A. I did not. Q. I understood you to say you feared. What kind of fear was it you had—of what? A. There were three men in the room, and I did not know whether they would knock me in the head, or shoot me, or what. I was just afraid they would overpower me in some way, and take the money. I mean of personal injury. I did not have any weapon of any kind or character on me." The witness on his direct examination gave evidence of conduct and demeanor of the three card players tending to cause him to fear an intention, perhaps, to use force to get the money.

From the foregoing statements of the

prosecuting witness it will be seen that he completely eliminated from the case any possible grounds for the theory that he parted with his money through any fraud, trick, or device. Yet the court in the instruction complained of fully submitted to the jury the issue as to whether the possession of the money had been parted with as the result of fraud, trick, and device. Other than the reading of section 484, Pen. Code, defining larceny in general terms, no other explanation of what constitutes larceny was given. By the instructions of the court stress was laid almost entirely on the issue of larceny by fraud, trick, and device. While we recognize that it is not every case of giving an instruction not pertinent to the evidence that will result in the reversal of a judgment, we are of the opinion that the giving of the instruction under discussion under the circumstances of this case was prejudicial error. The fact that there was evidence in the case tending to show an unsuccessful attempt to obtain the money by fraud, trick, and device made it all the more probable that the jury was misled and confused, to the prejudice of the defendant, by the giving of this instruction.

It is claimed that the court erred in allowing proof of the forfeiture of the defendant's bail bond, "owing to the unlawful absence of the defendant," but this evidence was by the court ordered stricken out.

The objection to the question put by the district attorney, "Do you understand if a man came to you on the street, and put a pistol to your head, and you handed out the money, that the money belonged to him?" should have been sustained, but the error is too unimportant to, of itself, require a reversal.

As the order and judgment must be reversed for the error in giving the instruction last herein discussed, it is not necessary to determine whether or not the evidence was sufficient to sustain the verdict.

The judgment and the order denying the motion for a new trial are reversed.

We concur: HARRISON, P. J.; COOPER, J.

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1 Cal. App. 546

LE TOURNEUX v. GILLISS et al.

(Court of Appeal, First District, California. Sept. 8, 1905.)

1. CONTRACTS—LEGALITY OF CONSIDERATION—NOTE FOR MONEY ADVANCED FOR LOBBYING.

"Lobbying," which has a well-defined meaning, and signifies to address or solicit members of a legislative body for the purpose of influencing their votes, is contrary to public policy, whether or not it is carried on in such manner as to constitute a crime under the statute; and a note given for money advanced for the expenses of a person to enable him to engage in the business of lobbying will not be enforced.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 587-589.]

2. BILLS AND NOTES—BONA FIDE PURCHASERS—BURDEN OF PROOF.

When the consideration for a note is shown to have been illegal, the burden is cast upon a transferee, suing thereon, to show that he is a holder in good faith and for value.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 1683.]

3. NEW TRIAL—SURPRISE AT TRIAL.

The fact that the attorney for a plaintiff failed to introduce evidence in rebuttal on a material issue of fact created by defendants' evidence, in reliance upon the erroneous belief that the burden of proof on such issue rested on the defendant, does not make a case of surprise which will entitle him to a new trial.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 186.]

4. APPEAL—GRANT OF NEW TRIAL—ABUSE OF DISCRETION.

The making of an order granting a new trial without a legal reason therefor is an abuse of discretion, which warrants a reversal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4538½.]

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Laura Le Tourneux against George P. Gilliss and E. Wilson. Defendant Wilson appeals from an order granting a new trial. Reversed.

Drown, Leicester & Drown, for appellant. Charles F. Hanlon, for respondent.

COOPER, J. This action was brought to recover upon a promissory note for $500, made by defendants Wilson and Gilliss to Thomas Eager, the father and assignor of plaintiff. The note was executed for money to be advanced by Eager to Gilliss. Defendant Wilson received no consideration for signing the note, but signed at the request of Eager and as surety for Gilliss. Wilson alleged as a defense that the consideration for the note was a lobbying contract, which was illegal, against public policy, and void. The court found in favor of Wilson on such affirmative defense. Thereafter plaintiff proposed a statement on motion for a new trial, which was allowed and settled by Hon. Edward A. Belcher, the judge who tried the case. The motion came on for hearing before Hon. Thomas F. Graham, the term of the judge who tried the case having expired, and was granted. From the order granting a new trial, this appeal is taken.

It is contended in support of the action of the court in granting the motion that the evidence was not sufficient to support the findings and judgment, and that for this reason, if for no other, the order is correct. This leads us, necessarily, into an examination as to whether or not the consideration for the note was illegal and against public policy. The answer alleges that under the laws of this state a regular session of the Legislature was held in the city of Sacramento commencing on the first Monday after the 1st day of January, 1897; that prior to the commencement of the session, in the month of December, 1896, defendant Gilliss requested Eager to advance and loan to him sufficient moneys to enable him to go to Sacramento and there to remain during the coming session of the Legislature and carry on the business or lobbying and soliciting the votes of members of the Legislature for or against such bills or legislative measures as might affect the interests of said Gilliss or those by whom he should be employed; that such occupation or business of lobbying consisted in influencing or seeking to influence by secret or corrupt means the votes of the several members of the Legislature in connection with or concerning such bills or legislative measures as might come before said Legislature for passage or action and as the said Gillis or those by whom he might be employed should be interested in; that in consideration of these matters, and for the sole purpose of enabling the said Gilliss to go to Sacramento and carry on the said business of lobbying during the said session of the Legislature, Eager agreed to advance and loan to Gilliss the necessary funds, upon the said Gilliss executing the note in controversy, with defendant Wilson as surety thereon; that on the said agreement and understanding, and solely for the purpose of enabling said Gilliss to get said money for the purpose of lobbying, the said note was signed by defendant Wilson, all of which was known by said Eager; that both Gilliss and said Eager attended the said session of the Legislature, and engaged in the business of lobbying during the session, and co-operated together and shared the profits of such business. The evidence in support of the allegations of the answer is found principally in the deposition of defendant Wilson, and is without conflict. It shows in substance that Eager and Gilliss came to defendant Wilson and stated that they wanted to go to Sacramento and engage in the lobbying business, that Gilliss was without money, and that Eager would furnish the money if Wilson would sign the note. The money was to be expended for Gilliss' expenses in lobbying. Eager said that Gilliss had had a great deal of experience, and that the two would make a strong team in Sacramento. He told Wilson that the money was to be used for the purpose of paying the expenses of lobbying at Sacramento, and that he would advance the money to Gilliss for such purpose. Wilson said that by lobbying they meant influencing the Legislature to vote for a bill or against it in any way that the vote of the legislator could be reached, and that it was distinctly understood that the money to be advanced on the note was to be used only for the purpose of lobbying. The witness Rogers testified: That he saw Gilliss at Sacramento when the Legislature met, and that he stayed with witness and Eager off and on until the Legislature adjourned. That "Gilliss and Eager were working together. They were up there lobbying for different measures, doing work for anybody they could get it to do for. I think they together had some work for the railroad company there." The witness further testified that they (Eager and Gilliss) asked him to help them with the "scalpers' bill," and that "Gilliss' business there was well known to everybody, for he was there to look after the affairs of the railroad company, and Mr. Stowe sent him up there, which is a fact, to attend to any business of the railroad company before the Legislature." The witness Wilcox testified that Eager wanted him (the witness) to introduce Eager to members of the Legislature, and that he introduced both Eager and Gilliss to various members; that they (Eager and Gilliss) agreed to pay witness for his services in introducing them to the friends and members, and for his conversation favorable to the bill they had up; and that they did make him two small payments at the Lick House, in San Francisco, after the session closed.

Counsel for respondent contends that lobbying may be lawful, legal, and honorable, provided secret and corrupt means are not resorted to, and that the evidence does not show that any member of the Legislature was approached by secret or corrupt means. Our Constitution provides (section 35, art. 4): "Any person who seeks to influence the vote of a member of the Legislature by bribery, promise of reward, intimidation or other dishonest means shall be guilty of lobbying, which is hereby declared a felony." And section 89 of the Penal Code provides: "Every person who obtains or seeks to obtain money or other thing of value from another person upon a pretense, claim, or representation that he can or will improperly influence in any manner the action of any member of a legislative body in regard to any vote or legislative matter is guilty of a felony." We cannot adopt the views of counsel for respondent as to the word "lobbying" being used in a "good sense." The term "lobbying" has a well-defined meaning in this country, and signifies to address or solicit members of a legislative body, in the lobby or elsewhere, with the purpose of influencing their votes. Black's Law Dic.; County of Colusa v. Welch, 122 Cal. 431, 55 Pac. 243. It makes no difference that the contract did not provide for acts to be done within the prohibition of the Constitution. It was the object and purpose of the parties in giving the note to provide means to enable Gilliss to engage in the business of lobbying. He would not be presumed to engage in the business without compensation from the parties desiring his services. It is not the policy of the law that the members of the Legislature should be subjected to the personal solicitation, during the session, of experienced and paid lobbyists. Men who are paid to influence legislation, and who become acquainted with and cultivate the friendship of members through dinners, wines, cigars, and personal attention, are certainly not assisting the state in procuring good legislation. If such men escape public prosecution, it is no reason that the time of the courts should be taken up in aiding and assisting them in relation to their nefarious business. Courts will not permit themselves to be used for the purpose of aiding or enforcing such contracts. If such persons escape punishment through a public prosecution, they may consider themselves fortunate.

In the early case of Martin v. Wade, 37 Cal. 168, it was held that a promissory note given for moneys loaned to the promisor for the purpose of enabling him to pay the expenses of securing his election to a public office is void, because the consideration was against public policy. The court quoted the language of Mr. Chief Justice Wilmot in Collins v. Blantern, 2 Wilson, 341: "You shall not stipulate for iniquity. All writers upon our law agree in this: No polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again. You shall not have a right of action where you come into court of justice in this unclean manner to recover it back." In County of Colusa v. Welch, 122 Cal. 428, 55 Pac. 243, it was held that the board of supervisors of a county had no authority to employ special counsel for the purpose of influencing members of the Legislature with respect to pending legislation affecting the interests of the county. The court said: "The statute making certain lobby practices criminal does not by implication legalize others not within the purview of the criminal law, which are void as against public policy. * * * The language of the complaint is, as before stated, as follows: That, if the sum of $1,000 'was agreed to be paid to said Sprague, it was to secure, by means of personal solicitation, and by means of private interviews with members of the Legislature of California, and by means of lobbying, the defeat of said senate bill.' These allegations bring the case within the rule enunciated by Cooley as being void. The term 'lobbying' has a well-defined meaning in this country, and signifies to address or solicit members of a legislative body, in the lobby or elsewhere, for the purpose of influencing their votes." In Ball v. Putnam, 123 Cal. 134, 55 Pac. 773, the action was upon a promissory note. It appeared that the note had been given for money to be used in connection with the division of Colusa county and the creation of Glenn county therefrom. While the case was reversed for erroneous ruling, the court said: "There is evidence in the record tending to show that the contract which lay at the bottom of all the transactions between these parties was a contract void as against public policy. Not enough appears to justify this court in saying that such is the fact, but enough appears to call for rigid inquiry by the trial judge, and if, after such inquiry, the evidence elicited leads him to believe that such is the fact, he will withhold all relief in this action; for a contract which is against public policy, good morals, or the express mandate of the law cannot be made the basis of any action, legal or equitable. Neither the silence nor the consent of the parties to it justifies the court in retaining jurisdiction of such action." It is unnecessary to further discuss the authorities, but the following are a few of the many that sustain the proposition: Dunham v. Hastings Pavement Co. (Sup.) 67 N. Y. Supp. 632; Tool Co. v. Norris, 69 U. S. 45, 17 L. Ed. 868; Sweeney v. McLeod, 15 Or. 330, 15 Pac. 275; Kansas Pacific Ry. Co. v. McCoy, 8 Kan. 538; Chippewa V. & S. Ry. Co. v. Chicago, St. Paul & O. Ry. Co., 75 Wis. 224 44 N. W. 17, 6 L. R. A. 601; McDonald v Buckstaff (Neb.) 76 N. W. 476; Rose v. Truax 21 Barb. 361; Powers v. Skinner, 34 Vt. 274 80 Am. Dec. 677.

The defendant Wilson having proven that the consideration for the note was illegal, the law immediately presumed that the plaintiff stood in the shoes of Eager, and the burden of proving that she was a holder in good faith and for value was then cast upon her. Daniel on Neg. Inst. (4th Ed.) § 769a, p. 766; Fuller v. Hutchings, 10 Cal. 523, 70 Am. Dec. 746; Graham v. Larimer, 83 Cal. 173, 23 Pac. 286; Jordan v. Grover, 99 Cal. 194, 33 Pac. 889. It is therefore evident that the defendant Wilson introduced ample evidence to support the judgment in his behalf.

Respondent contends that the court was justified in granting the motion for a new trial on the ground of surprise. We have carefully read the affidavits, and our opinion is that no such surprise is shown as would in law justify the order. The surprise, as stated by counsel in his brief, is: "On the trial of facts in the lower court the judge [Belcher] and counsel led us to believe that, unless defendant Wilson assumed the burden and proved affirmatively that plaintiff knew the facts of the defense of bad consideration, the judgment would be entered in favor of plaintiff for the amount due on her note, and thus stopped plaintiff from introducing her depositions on file, by which she could prove her innocence, provided the law required her to assume such a burden. Judge Graham holds such a course of fooling an attorney warrants the granting of a new trial." It appears from the record that, when defendant's counsel was introducing evidence to prove that Eager and Gilliss were engaged in lobbying in Sacramento, plaintiff's counsel stated that he would object to the evidence as immaterial, unless the defendant could prove affirmatively that plaintiff knew of it. The judge remarked that the objection would be good, unless plaintiff was connected with it. Thereupon plaintiff's counsel said, "Does counsel promise that my client knew of this that the witness is testifying?" Counsel for defendant replied, "We expect to show that to a certain extent." Counsel for plaintiff replied, "On that promise, all right." Counsel for Wilson replied, "If it is necessary for us to prove that, we will prove it." The judge remarked that the testimony would "have no materiality unless there is a connection made." Then, after the testimony on behalf of Wilson was closed, the following proceedings took place: "Counsel for Plaintiff: Where is your testimony that you promised the court that my client knew all about it? Counsel for Defendant: I rest. Counsel for Plaintiff: I submit counsel has not kept his promise. I move to strike out the testimony of Wilcox and Rogers on the ground that this testimony was let in on the promise to the court that he would supply the proof connecting the plaintiff with the testimony, showing that she knew the facts. Counsel for Defendant: I desire to be heard on that. That is the very point. The Court: Counsel desires to be heard on that. Have you any further rebuttal testimony? Counsel for Plaintiff: I move to strike out the testimony of these two witnesses. There are two depositions, being plaintiff's and Mr. Eager's, on file not read. I move to strike out the testimony of Mr. Wilcox and Mr. Rogers. The Court: I understand that— Counsel for Plaintiff (interrupting): I want a decision on that. The Court: That will be taken under advisement. Counsel for Defendant: I don't want to be heard in the matter till we close the case. Counsel for Plaintiff: The authorities I have— The Court (interrupting): I would like to have you produce the matter in writing. Are the proofs in? Counsel for Plaintiff: I would like a decision on this motion before I determine whether I read the depositions or not. I think your honor will rule with me. The Court: If I pass on the matter now, I will deny the motion. I will pass on it now and deny it. Counsel for Plaintiff: Take an exception. I will rest my case. The depositions show she bought this note for value. Counsel for Defendant: Do you rest? Counsel for Plaintiff: Yes, sir."

The above does not show that counsel was surprised, or lulled into a belief that a certain thing existed by which he was deceived. Counsel for defendant introduced sufficient evidence to shift the burden upon plaintiff to show that she was a holder of the note in good faith without notice. He had not promised to introduce more. The court ruled against plaintiff on the motion to strike out. Not only this, but plaintiff's counsel was asked, both by the court and the defendant's attorney, if the proofs were in and if he rested. He was not deceived as to any fact, or as to the rulings made. He evidently entertained the view, and acted upon it, that the defendant had to prove that plaintiff had knowledge of the consideration for the note, and that such consideration was illegal. He was mistaken in this view of the law, but that was no ground for relief after the case had been finally submitted and decided. No doubt, if he had asked within a reasonable time after the submission to have such submission set aside upon terms, and had made a proper showing, the trial judge would have relieved him. But in the trial of cases counsel deal at swords' length. Each one relies upon his own knowledge of the law, and the evidence which he deems essential. If, after a case had been submitted and decided, the losing party could have the judgment set aside because he acted upon an erronous view of the law, there would be no end to litigation. There have been times, no doubt, in the experience of every lawyer, when he would have liked to have been relieved of a situation brought about by his failure to do the proper thing at the proper time. But after judgment it is too late for relief on such ground. Fuller v. Hutchings, 10 Cal. 523, 70 Am. Dec. 746; Santa Cruz R. P. Co. v. Bowie, 104 Cal. 287, 37 Pac. 934.

In the above discussion we have considered the affidavits, without passing upon the objection that they are not properly authenticated. It was not prejudical error to allow the witness Wilcox to testify to the effect that Eager told him, while in Sacramento, that he was engaged in the business of lobbying. Declarations of Eager would be admissible against himself, and we cannot say they would not be admissible as against plaintiff, if plaintiff is conceded to have known the illegality of the consideration and the purposes for which the note was given. Not only this, but the witness testified elsewhere without objection that he saw Eager and Gilliss almost every day talking to members, entertaining them with drinks, cigars, and dinners; that they employed witness in connection with the "scalpers' bill." His language is: "I was employed, first, to introduce them to all the members I knew, and, secondly, to 'feel' all the members how they stood on the proposition, whether for or against it, and whether they could be 'persuaded' or not." It thus appears, without the declarations of Eager, that he was at Sacramento engaged in lobbying. The material question was as to the consideration for which the note was given. Concerning this there is no conflict. As to whether the parties carried out their agreement to conduct a lobbying business or not is not very material.

We have not overlooked the fact that all presumptions are in favor of the order made by the trial court; that, if it can be affirmed here upon any statutory ground included in the notice and properly in the record, it will be done; and that it must appear that the court abused its discretion in making the order. But, where the court grants a new trial without any legal reason for so doing, its discretion has been abused.

The order is reversed.

We concur: HARRISON, P. J.; HALL, J.

(7 Cal. Unrep. 239)

ALBION LUMBER CO. v. CALIFORNIA BRIDGE & CONSTRUCTION CO. et al.

(Court of Appeal, First District, California. Sept. 13, 1905.)

Appeal—Findings—Conflicting Evidence—Review.

Findings of the trial court on a question of fact, based on conflicting evidence, will not be disturbed on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3983-3989.]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Albion Lumber Company against the California Bridge & Construction Company and others. From an order denying defendant's motion for a new trial, they appeal. Affirmed.

W. Lair Hill, for appellants. Albert H. Elliot and Edward H. Stearns, for respondent.

HALL, J. Appeal from order denying defendant's motion for a new trial. The motion was made on the ground of insufficiency of the evidence to justify certain findings. The labor of the court in this case is very greatly reduced by the frank admission on the part of the counsel for appellant that upon all points save one there was a substantial conflict of testimony. The suit is to recover a balance of $486.04 alleged to be unpaid upon an account for lumber furnished defendant by plaintiff for certain work done by defendant at San Rafael. The defendant claims that the court should have allowed defendant a credit for $183.92, loss upon certain piles furnished defendant by plaintiff, through one Pierce, for a job done by defendant near Fresno.

Upon this point the testimony of A. W. Burrell was to the effect that plaintiff agreed to furnish for the Fresno job, among other things, piles; that before the piles were shipped defendant was to have been notified, so that the piles might be inspected at San Francisco; that defendant was so notified, save as to two car loads, 24 piles in number, and that after the shipment of these two car loads, and before delivery at Sanger (a point near Fresno), it was discovered that they were not according to the description of piles which were to be furnished, and thereupon he notified McIntyre (the representative of the plaintiff) and asked to have the piles returned and suitable piles put in their place; that McIntyre said it would not pay to ship them back there (San Francisco), and directed him to sell them to the best advantage he could, or make such use of them as the company could make, and the Albion Lumber Company would "stand the loss." The witness further testified as to what he did do with the piles in question, and to the effect that it resulted in a loss of $183.92. On this point, however, the testimony of McIntyre, who represented the plaintiff, is set forth as follows: "The lumber and piles sold to Pierce [referring to the lumber and piles furnished defendant for the Fresno job] were all shipped as ordered, and were all inspected in San Francisco before being shipped, and were all of the character ordered, and no objection was ever made thereto. The witness denied that he ever directed Mr. Burrell to sell or use any defective piles, or ever stated that the Albion Lumber Company would stand any loss for defective piles, and denied that A. W. Burrell, or the California Bridge & Construction Company, or C. C. Pierce ever made any claim for defective piles." There is thus a direct conflict between the testimony of Burrell and McIntyre upon the question at issue. We cannot interfere with the decision of the trial court upon a question of fact, where there is a substantial conflict in the evidence.

The order denying the motion for a new trial is affirmed.

We concur: HARRISON, P. J.; COOPER, J.

(7 Cal. Unrep. 233)

SCHINDLER v. GREEN et al.*

(Court of Appeal, Third District, California. Nov. 16, 1905.)

1. Contracts — Construction — Implied Agreements.

Where there is no provision in a building contract as to how windows are to be placed, there is an implied agreement that they shall be placed in a workmanlike manner.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 877.]

2. Same — Performance — Defects — Right to Compensation.

Where a contractor fails to complete his contract, even though such failure is a trivial variance, he must have acted in good faith and honestly have endeavored to complete his work properly before he can recover therefor, if the trivial variance is such as to entitle the other party to damages to complete the work or make it as it should be.

3. Mechanics' Liens — Enforcement — Appeal—Disposition of Cause — Modification of Judgment.

Where, in a suit to enforce a mechanic's lien, the lower court found that defendants owed plaintiff a certain sum and awarded him a lien therefor, and defendants found no fault with the amount awarded plaintiff, but appealed on the ground that plaintiff was not entitled to a lien, and all the evidence and proceedings had on the trial were brought before the appellate court for review, that court, on setting aside the judgment for error in giving plaintiff a lien, would not remand the case for a new trial, but would direct the lower court to modify the judgment by striking therefrom the provisions for a lien and to enter a personal judgment in plaintiff's favor for the sum found due.

On application for rehearing. Denied. For former opinion, see 82 Pac. 341.

BUCKLES, J. This application for rehearing in this case pretends to be based upon the ground that this court in the original opinion in the case, filed August 14, 1905 (82 Pac. 341), committed error in holding that the placing of two windows in the basement story of the house not immediately under the windows in the story above was unworkmanlike and was not satisfactory to defendants and was not a trivial imperfection. These windows constituted a part of the ornamentation of this little house, as well as of its constituent parts. Ornamentation is as much a matter of substance as any of the constituent parts, such as light and ventilation. The testimony in the case showed, and the court below found, "that the two windows placed by plaintiff in the front portion of the basement story of said house were not directly underneath the two front windows of the upper portion of said house, which upper portion consisted of the old house after the same had been raised, and that the placing of such windows in this manner was not workmanlike." The testimony supports the above finding; but this court found, further, "that the failure of plaintiff to place said windows in the basement in a direct line underneath the two windows of the upper portion of said house is a trivial imperfection." There is no evidence whatever to support this finding, and no inflexible rule of law commanding such deduction. Harlan v. Stufflebeem, 87 Cal. 511, 25 Pac. 686. The evidence is that, as soon as defendants noticed that the windows were not properly placed, the attention of the plaintiff was called to it. He was then and repeatedly thereafter requested to change the windows and place them immediately under the ones above, but he refused to do so. When told that another would be employed to change the positions of the windows and the cost thereof would be deducted from what was due plaintiff, he replied he could do better to go to court, as defendants would have to pay counsel fees and other expenses. The evidence shows the cost of changing the windows and placing them as they should be to exceed $10.

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*Rehearing granted by Supreme Court January 15, 1906.

It is true there was no provision in the contract as to how these windows were to be placed, but there was impliedly in plaintiff's contract an agreement that his work should be done in a workmanlike manner, and these windows were not placed in a workmanlike manner, and the failure to place them properly seems to indicate a want of good faith. In a Pennsylvania case, decided in Gillespie Tool Co., 123 Pa. 26, 16 Atl. 37, it is said: "The equitable doctrine of substantial performance is intended for the protection and relief of those who have faithfully and honestly endeavored to perform their contracts in all material and substantial particulars, so that their right to compensation may not be forfeited by reason of mere technical, inadequate, or unimportant omissions or defects. It is incumbent on him who invokes its protection to present a case in which there has been no willful omission or departure from the terms of his contract." The spirit manifested by this plaintiff, when his attention was called to the unworkmanlike manner of setting the front windows, would indicate a willfulness, and not an honest endeavor to complete his work in a workmanlike manner. In Harlan v. Stufflebeem, 87 Cal. 511, 25 Pac. 687, the court says: "If there has been no willful departure from its provisions, and no omission of any of its essential parts, and the contractor has in good faith performed all of its substantive terms, he will not be held to have forfeited his right to a recovery by reason of trivial defects or imperfections in the work performed. If the omission or imperfection is so slight that it cannot be regarded as an integral or substantive part of the original contract, and the other party can be compensated therefor by a recoupment for damages, the contractor does not lose his right of action"—citing numerous cases. That case was before the Supreme Court on the judgment roll alone, where the court was unable to view the evidence before the lower court, and the court said: "In the absence of the testimony upon this point, we are bound to assume that it was sufficient to support the finding that the plaintiffs substantially completed their contract, as also the finding that the defendants would be fully compensated for any imperfection in the work by deducting $5 from the contract price." But in the case at bar the testimony is before us, and we do not believe it supports the finding "that the failure of the plaintiff to place said windows in the basement in a direct line underneath the two windows of the upper portion of said house is a trivial imperfection"; that is, if such can be considered a finding of fact. In Perry v. Quackenbush, 105 Cal. 307, 38 Pac. 742, the court said: "In such case there must be a substantial performance of every material covenant in the contract, and the failure must not have resulted from design or bad faith, and whether these facts exist is a matter to be determined by the jury, or the court sitting as a jury. Substantial performance must be found."

Carpenter v. Ibbetson, 81 Pac. 1114, cited by respondent, is a case where the contract price was $1,000 and to be paid before the work begun, and $900 was so paid. There was extra work amounting to $300. Payment was refused, and the contractor brought suit, alleging completion of the work, which was inside work. The answer denies the completion or performance of the contract and the amount due, and by way of cross-complaint specifies breaches of the contract. The lower court found the contract had not been completed and that the defendants were damaged in the sum of $382.52, which was the amount that plaintiff sued for. The appellate court held that this was not the true measure of damages, and that the case was one of substantial compliance with the contract, and also that the payment was to be made before the commencement of the work, and is to be regarded as an independent promise. Besides, there was no suggestion of a want of good faith on the part of the contractor, as in the case at bar. In the case of Van Clief et al. v. Van Vechten, 130 N. Y. 579, 29 N. E. 1019, cited by respondent, this language is used: "But when, as in this case, there is a willful refusal by the contractor to perform his contract, and he wholly abandons it, and after due notice refuses to have anything more to do with it, his right to recover depends upon performance of his contract, without any omission so substantial in its character as to call for an allowance of damages if he had acted in good faith. While slight and insignificant imperfections or deviations may be overlooked on the principle of 'de minimis non curat lex,' the contract in other respects must be performed according to its terms. When the refusal to proceed is willful, the difference between substantial and literal performance is bounded by the line of 'de minimis' "—citing a long list of cases. So, in the case at bar, the difference was such that it required the payment of damages, small though they were, to make the change of windows to make them conform to the implied contract that they would stand in the building in a workmanlike manner, and the plaintiff having abandoned the work, showing a willful disregard for his contract and entire want of good faith. It is deemed useless to cite further authorities, for there seems to be a remarkable uniformity in all the cases, holding that, where a contractor has failed to complete his contract, even though the failure is a trivial variance, he must have acted in good faith and honestly endeavored to complete his work properly, before he can recover, if the trivial variance is such as to entitle the defendant to damages to complete or make it as it should be. Good faith and honest intention are prerequisites before relaxing the rule of strict performance to substantial performance. It will be borne in mind this was a small dwelling, being but 16x32 feet, with but two windows in the front in each story, so that the misplacing of the windows in the basement story is not so small a matter, and these people, the defendants, are as much entitled to have the windows in their little home put in perfectly, and in a workmanlike manner, as the owner of a more imposing structure. The imperfections complained of, while generally they would be considered small, in this instance, to these people, became a matter of great importance. The evidence shows that, had the plaintiff acted in good faith, with an honest endeavor to do the right thing, he could have had his money without suit.

For the reasons stated the plaintiff is not entitled to a lien; and, as we see no reason for changing the views expressed in our former opinion, the same are adhered to. In that opinion we directed that a personal judgment be entered in favor of plaintiff for $326.85, being the amount found due him in the lower court. In his brief on rehearing plaintiff objects to this, on the ground that, if he is entitled to a personal judgment, he is entitled to a lien. That he is not entitled to a personal judgment any more than a lien is true, viewed as an abstract proposition of law. But all the evidence taken in the lower court, as well as all the proceedings had on the trial, are before us, and it is plain, under the views we have expressed and a review of the evidence, there is no reason for remanding the case for a new trial. Bianchi v. Hughes, 124 Cal. 24, 56 Pac. 610. And possibly this court would have been justified in simply remanding the case for a new trial, even though nothing but delay and vexation to both sides could result from such a course. But in the case at bar the defendants stood ready to pay the balance due by deducting the amount which it would take to reset the windows, and tendered what was claimed by defendants to be due, and deposited the same in court, and at no time have defendants claimed they would not pay. It is true there was some difference as to extra work, but no material difference as to the cost of changing the windows, all of which was thoroughly gone into at the trial, and the lower court found defendants owed plaintiff the sum of $326.85. The defendants in their brief seem to be satisfied with the amount found due, and say that no good result could come to either litigant by sending the case back for a new trial. Quoting from defendants' brief: "The case appears to have been fully and exhaustively tried in the lower court upon its merits." Then it quotes the following rule: "Where the court can see from the record what the rights of the parties are, it will not remand the case, but will render such a decree as ought to have been rendered below"—and the close of said brief declares that substantial justice has been done between the parties. It appears, therefore, that any further litigation in this matter is for the sole purpose of attorney's fees for plaintiff and the costs of making and filing a lien, which plaintiff cannot recover upon, under the views here expressed.

Upon these considerations and in the interest of justice, it is therefore ordered that the lower court be directed to modify its said judgment by striking therefrom its decree declaring a lien on the premises and providing for a sale thereunder and costs of lien and attorney's fees, then enter a personal judgment against defendants and in favor of plaintiff for the sum of $326.85, and, as so modified, the judgment is affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

1 Cal. App. 429

BOHAN v. RECORD PUB. CO.

(Court of Appeal, Second District, California. Aug. 16, 1905.)

1. LIBEL—LIBELOUS ARTICLES.

A publication in a newspaper animadverting on the frequency of fires in plaintiff's building, stating that the proprietor of the building would be arrested if another fire was discovered, and that plaintiff's explanation of the fires was not satisfactory, was libelous per se.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 29, 30.]

2. SAME—APPLICATION OF LIBEL TO PLAINTIFF.

Under Code Civ. Proc. § 460, providing that in an action for libel it is not necessary to allege any extrinsic facts for the purpose of showing the application to plaintiff of the defamatory matter complained of, but it is sufficient to allege, and, if denied, to prove, that the same was published concerning plaintiff, a publication libeling the "B. Paint Company" was sufficiently shown to be a libel on plaintiff, where it was alleged and proven that it was published of plaintiff, who was the sole proprietor of the concern known as the "B Paint Company."

3. SAME—DAMAGES RECOVERABLE—RESTRICTION TO BUSINESS INJURED.

Where a libel of a business house is of such a character as to defame the proprietor or members of the firm of proprietors individually, the damages recoverable by the proprietor or members of the firm are not limited to those affecting the business.

4. SAME—INSTRUCTIONS.

In an action for libel, a charge that, if the jury should find that plaintiff had not suffered any damage to his reputation, the jury should find for defendant, was objectionable, when the publication was libelous per se, in that it was in opposition to the principle that damages must be presumed.

5. SAME—PRESUMPTION OF MALICE.

In an action for libel, a charge that if the libel was published without ill will, but in good faith and believing it was true, the jury should consider such matters in mitigation of damages, was erroneous, in view of the presumption of malice where the publication was libelous per se, and ill will appeared clearly upon its face.

6. SAME—EVIDENCE—GOOD FAITH.

In an action for libel, where no exemplary damages are claimed, evidence that the publication was made without ill will and in good faith, believing in its truth, is inadmissible.

Appeal from Superior Court, Los Angeles County, M. T. Allen, Judge.

Action by Edmund Bohan, doing business as the Bohan Paint Company, against the Record Publishing Company. From an order denying a new trial, defendant appeals. Affirmed.

Edwin A. Meserve and Jeff Paul Chandler, for appellant. B. H. Hunter, W. H. Morris, and Hunter & Summerfield, for respondent.

SMITH, J. The plaintiff, who was the sole proprietor, owner, and manager of the establishment known as the "Bohan Paint Company," sued the defendant for a libel published in its journal, the Los Angeles Record, and recovered a verdict and judgment for the sum of $500. The defendant appeals from an order denying its motion for a new trial.

The libel complained of is as follows: "Another Fire will Cause Their Arrest. During the last 40 days there have been three mysterious fires in the rear of the Bohan Paint Company on Broadway, near Sixth, or in the alley very close thereto. Three times has the fire department responded to alarms in that neighborhood, and each time arrived just in time to prevent disastrous fires. A month ago Policeman Mike Holleran, while covering his beat early in the morning, noticed flames in the rear of the store occupied by the paint company. When he went into the rear of the place the flames were making rapid headway. and he summoned the fire department. There were a number of oil barrels in the rear of the yard, but the proprietor of the establishment denied that there was any oil in them. However, the fire would have been a disastrous one, had not Holleran acted promptly. Yesterday afternoon there was another fire in the rear of the paint shop. It burned some time, but the department again checked the flames. Many of the boxes and barrels, however, were burned. This morning the department was again summoned. A bonfire was burning in the rear yard of a hardwood frame factory next door, and the owners of that plant did not know how the fire started. When Capt. Lennon arrived, he noticed the ashes from another bonfire near the fence in the rear of the paint shop. This fire had undoubtedly burned out during the night. In explaining the fire of yesterday afternoon, the paint firm says that some oil-soaked sawdust was left in the rear yard, and that spontaneous combustion was the result. Assistant Chief O'Donnell and Secretary Robert Burns held a long consultation in the matter, and it was decided to arrest the proprietor of the firm if another fire is discovered in the rear of the place. Chief O'Donnell informed the paint people that they would be compelled to clear up the rear yard at once and remove all inflammable material. The paint company's explanation of the fires is not satisfactory."

It is argued by the appellant, among other points: That the above article is not libelous per se; that it does not charge the plaintiff personally with any crime, but refers to the firm of Bohan Paint Company only; and that damages cannot be recovered other than such as might result from injury to the business of the company. But these points are untenable. The publication, we think, is on its face libelous; and it is alleged and proven that it was published of the plaintiff, who was the sole proprietor of the concern known as the "Bohan Paint Company." Code Civ. Proc. § 460; Schomberg v. Walker, 132 Cal. 224, 64 Pac. 290. Nor is there any principle upon which his claim for damages should be limited to those affecting his business. Civ. Code, §§ 3300-3333. Nor would the case be otherwise had there been more than one proprietor of the firm. In such case, the firm could not have recovered damages other than such as might have been sustained by them in their common business; but, if the libel were of a character to affect them personally, each of the firm could maintain his personal action. Schomberg v. Walker, supra.

It is also objected that the court erred in refusing to give certain instructions of the appellant. But these, we think, were rightly refused. The first is to the effect that, if the jury should find from the evidence that the plaintiff had not suffered any damage to his reputation, fame, and credit, then, notwithstanding the proof of the libel and the failure of the defendant to justify, the jury should find for the defendant, which is opposed to the principle that damages must in such case be presumed. The second is to the effect that, if the jury should find from the evidence that the article was published by the defendant without any ill will toward the plaintiff, but in good faith and believing it was true, they should consider these matters in mitigation of damages. But, in the case of a publication libelous per se, ill will or malice is to be presumed, and in this case the ill will of the defendant appears clearly upon the face of the publication. Nor do we perceive any principle upon which, in a case where exemplary damages are not claimed, evidence of this character can be regarded as legitimate. The third and fourth instructions, the denial of which is complained of, are, in effect, that it was sufficient for the defendant, in justification, to prove so much of the article only as constituted the sting or substance of the charge; but there is no evidence in the record to justify this instruction.

Other errors complained of are sufficiently disposed of by what has been said as to the above. There are several objections to the admission and exclusion of testimony; but these are of no materiality, and do not require further consideration.

The order appealed from is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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1 Cal. App. 467

In re McCARTHY'S ESTATE.

(Court of Appeal, First District, California. Aug. 24, 1905.)

1. Homestead — Allotment to Widow — Duty of Court.

Where premises, selected by deceased in his lifetime from community property as a homestead, do not exceed $5,000 in value at the time of their appraisal in probate proceedings, it is the imperative duty of the court to set them off to the widow on her petition.

2. Same — Appraisement — Ex Parte Proceedings.

Code Civ. Proc. art. 2, c. 5, §§ 1474–1486, provide for appointing appraisers in probate proceedings where there is a question of the value of the homestead. Section 1478 provides that when the report is filed the court must set a day, pursuant to notice, for hearing objections, and confirm or reject the report. *Held*, that where an appraisement was made, and objected to by a creditor, and witnesses were heard, and the matter was submitted to the court, it was error for the court, after ordering a reappraisement, to confirm the report on the reappraisement, and to set the premises apart as a homestead, without notice to the objecting creditor or affording her an opportunity to be heard, and to further refuse to hear a direct application by her to be heard.

3. Same—Evidence—Report of Appraisers.

Under Code Civ. Proc. art. 2, c. 5, §§ 1474–1486, providing for the appraisement of a homestead in probate proceedings when there is a question as to the value of the homestead and the hearing of objections to their report, an ex parte report of appraisers is not evidence of the value of the homestead in the hearing of the objections.

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

In the matter of the estate of Charles Patrick McCarthy, deceased. From an order setting apart a homestead to the widow, a creditor appeals. Reversed.

Wyckoff & Gardner, for appellant. James A. Hall, for respondent.

HALL, J. Appeal from order setting apart a homestead to the widow of deceased. The petition for the order states that the premises therein described were selected by deceased in his lifetime as a homestead from community property, and that the value of the same does not exceed $5,000, and is valued in the inventory at $5,000, and was of less value than $5,000, to wit, of the value of about $2,000, at the time of the selection of the same as a homestead. The appellant, a creditor of the estate, filed her written opposition to the petition, in which she alleged, among other things, that the value of the premises sought to be set apart as a homestead is greatly in excess of $5,000, to wit, $9,000 or thereabouts, and that its value at the time of selection exceeded $5,000, and was $5,500. It is admitted that the estate will be insolvent and there will be no money to pay appellant's claim, if the premises are finally set apart as a homestead.

If the premises did not exceed in value the sum of $5,000 at the time they were appraised in the probate proceedings, it was the imperative duty of the court to make the order setting them off to the petitioner. The main issue upon which the matter was tried in the lower court was as to the value of the premises. Many witnesses were called and examined, and thereupon the matter was submitted. The judge afterwards filed an order in writing, in which it is stated: "The evidence here shows that the property in question is of greater value than $5,000, and that the two claims presented are just debts against the estate, and that the same should be paid before an order is granted placing the property beyond the reach of said creditors." The judge further stated in the order that it was his "opinion that our statute does not authorize the superior court of this state to set apart a homestead of greater value than $5,000, when the making of such an order would defeat the collection of just claims of creditors. Under the facts as developed by the evidence, the court will defer action on said petition until another inventory is made and filed herein, when such further action will be taken as may appear legal and just to all parties concerned." The above order was made November 4, 1903, and, of course, did not decide the contest before the court. Two days after the above order was made, without notice to appellant, the court appointed three appraisers to appraise the homestead premises. The appraisers so appointed afterwards returned an apraisement, in which they valued the property at $5,000, and fixed the value at the time of its selection at $2,000. The court thereafter, without notice to appellant and without setting any time for hearing the report of the appraisers, made an order setting apart the premises as a homestead. The appellant afterwards made a motion to set aside the order so made, and asked that a day be set for the further hearing of the application, at which all parties interested should have notice and an opportunity to be heard. In support of the motion so made the appellant filed affidavits stating "that said new inventory and appraisement was never offered or received in evidence at the hearing of said matter, or at any adjournment thereof, or at any time, or at all, when said creditors or their attorneys had an opportunity to be heard thereon; that no notice was ever given to said creditors or their attorneys of said last-mentioned application of said attorney of said petitioner for the setting-off of said homestead." The affidavits further stated that the value of the premises so set apart was greatly in excess of $5,000, "as appears by the testimony of the witnesses at said former hearing, and as appears by the findings of the court in its order made after said hearing." The court denied said motion of appellant and refused to reopen said matter. Afterwards, on the 11th day of January, 1904, the court made and filed findings, in which it is found, "that on or about the 16th day of November, 1903, this court ordered a reappraisement of said property, and duly appointed appraisers in that behalf, and that on or about the 24th day of November, 1903, said appraisement was duly returned to this court, and was a unanimous report of three appraisers so appointed, and said appraisers did value and appraise said real property at the time said appraisement was made to be the sum of $5,000; and they did further find, ascertain, and appraise the value of said real property at the time the same was selected as a homestead, as aforesaid, to be the sum of $2,000." The court further found "that said property is not now and never has been of the value of more than $5,000," and also found that at the time of its selection it was of the value of $2,000.

It was error for the court to appoint appraisers, and receive the evidence contained in the appraisement made by them, without the knowledge or consent of appellant, after the investigation had been closed. The court had no more right to do this than it would have had to hear the evidence of three new witnesses in the absence of appellant and her counsel after the case was closed. The first appraisement valued the property at $5,000. The very object of the contest made by appellant was to have the value of the property determined in court from the testimony of witnesses who were subject to cross-examination. After such witnesses had been produced, and the court was convinced that the value of the property exceeded $5,000, and the matter submitted, it was a submission as to all parties. To hear the application for new appraisers, and to appoint them, and receive and act upon their report, was taking more testimony on one side only. The Code of Civil Procedure provides, under article 2, c. 5, §§ 1474–1486, for appointing appraisers in certain cases where there is a question as to the value of the homestead. In such case, when the report is filed, "the court must set a day for hearing any objections thereto from anyone interested in the estate. Notice of the hearing must be given for such time, and in such manner, as the court may direct. If the court be satisfied that the report is correct it must be confirmed, otherwise rejected." Section 1478. If it be conceded that the court had the right to order a reappraisement of the homestead, under section 1478, Code Civ. Proc., it must be admitted that under the same section the court should set a day for hearing any objections to the report made by the new appraisers, and cause notice thereof to be given. The court not only did not set a day for hearing any objections to the report, but refused to hear the appellant upon her direct application to be heard. This, we think, was error.

It is urged that the court found that the value of the property at the time of filing the declaration of homestead was $2,000, and that this finding justified the order setting it apart. It is sufficient to say that such finding is based entirely on the report of the appraisers appointed after the matter was tried, and, as before said, such ex parte report is not evidence. The only evidence taken on the hearing of the petition and objections thereto as to the value of the premises at the time of its selection as a homestead was that of one witness, who testified that the property was worth $75 or $80 per acre. There were 41 acres in the premises. It may be fairly supposed that the witness, in giving the value as so much per acre, referred to the land only, and did not include the improvements, especially as another witness put the value of the improvements at $2,000. We would thus have the reappraisement as the only evidence tending to show that the premises when selected as a homestead were worth less than $5,000. Not only this, but the testimony in the case, and the order made by the court after the case was submitted, show that the theory of the petitioner was that the property did not exceed in value $5,000 at the time of the hearing. We do not intimate that it would make any difference in the result if the value at the time of filing the declaration were conceded to be $2,000. It is not necessary to decide that question on this appeal.

The order is reversed.

We concur: HARRISON, P. J.; COOPER, J.

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1 Cal. App. 461

FOUNTAIN v. CITY OF SACRAMENTO.

(Court of Appeal, Third District, California. Aug. 23, 1905.)

1. ACTION—CONTRACT OR TORT—WAIVER OF TORT.

A conversion may be waived, and an action maintained on an implied contract for the value of the articles.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Action, § 198.]

2. MUNICIPAL CORPORATIONS — CONTRACTS — ESTOPPEL.

A city, under its charter, providing that no contract for expenditure of more than $100 shall be effective, unless authorized by a vote of the trustees, is not liable, on the ground of estoppel or an implied contract, where brick are bought by a single trustee for it for construction of a wall, and are used therein.

Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Action by W. A Fountain against the city of Sacramento. Judgment for defendant. Plaintiff appeals. Affirmed.

White & Miller, for appellant. H. W. Johnson and A. A. De Ligne, for respondent.

CHIPMAN, P. J. The action is for the value of 44,000 bricks alleged to have been sold and delivered to defendant by plaintiff, of the value of $440. A claim was presented to defendant by plaintiff, after the bricks had been used by defendant, demanding payment, which set forth the wrongful taking from plaintiff, and conversion by defendant of the said bricks. This claim was rejected, and thereupon plaintiff brought the action. The court found that plaintiff, at the request of C. W. Paine, one of the trustees of defendant, delivered a lot of bricks at the city cemetery, which this trustee told him were to be used in building a wall around a portion of said cemetery, and that from the representations made to him by the trustee at the time plaintiff understood that the bricks were being sold by plaintiff to defendant, and that defendant would pay for them; that there were 53,000 bricks, worth $10 per 1,000, and that plaintiff presented a claim for 9,000, and this claim was allowed and paid; that the bricks unpaid for were actually used by defendant in constructing said wall, and still remain there; that "no express contract was made between plaintiff and defendant, nor did the board of trustees of defendant take any action whatever, in relation to ordering the bricks, or in the nature of calling for bids, accepting of a bid, or letting of a contract for the purchase of the bricks." The court found, as conclusions of law, that defendant is not liable on an implied contract, or in assumpsit, but, if liable at all, is liable only for the conversion of the bricks, and that plaintiff has therefore mistaken his remedy. Judgment passed for defendant, from which plaintiff appeals on the judgment roll alone.

It has been frequently decided by the Supreme Court of this state that, where personal property has been wrongfully taken and converted, the owner has his election to sue in tort for the conversion, or he may waive the tort and sue in assumpsit on an implied contract to pay the reasonable value of such property. Fratt v. Clark, 12 Cal. 89; Roberts v. Evans, 43 Cal. 380; De La Guerra v. Newhall, 55 Cal. 20; Lehmann v. Schmidt, 87 Cal. 15, 25 Pac. 161; Chittenden v. Pratt, 89 Cal. 178, 26 Pac. 626; Lataillade v. Orena, 91 Cal. 565, 27 Pac. 924, 25 Am. St. Rep. 219. See, also, Pomeroy's Remedies and Remedial Rights, §§ 568–571. In Roberts v. Evans the action was to recover the value of certain personal property alleged to have been sold and delivered by plaintiff to defendant, and proof of the wrongful taking was held sufficient to sustain assumpsit for its value. In De La Guerra v. Newhall the complaint alleged an express promise, and evidence of the wrongful taking of the property under an implied promise was held sufficient, and that proof of an express promise to pay was unnecessary.

The court erred in its conclusion that plaintiff could not recover, for the sole reason that he had chosen the wrong form of action. If, however, the judgment can be sustained on any ground, it is our duty to affirm it. The charter of the defendant city provides that "no contract for the payment of more than $100 shall be effective unless authorized by a vote of the board of trustees," of whom there are nine. The charter directs as to the course to be taken when a contract is so authorized. The mayor must approve or disapprove. If he disapprove, the trustees must proceed to consider and vote on the contract, and on the affirmative vote of six it shall become a valid contract, the same as if signed by the mayor, and not otherwise. Charter, § 23 (St. 1893, p. 551, c. 7, art. 2), and subdivision 22, § 25 (Id. p. 553), confers the power on the board to make appropriations for certain purposes, and also to make contracts "for the use and benefit of the city," in all cases specifying the fund out of which payment is to be made; and it is provided that, "should the board, or a majority thereof, contract or create any debt against the city contrary to the provisions of this charter, such debt, claim or obligation shall be null and void as against the city or any of its funds." The charter gives the board power "to control, enlarge, improve, or abolish the cemeteries heretofore belonging to the city, and to create other cemeteries" (subdivision 24, § 25; St. 1893, p. 554); and their control and management are provided for by article 15, § 194, et seq. (Id. p. 603, c. 7).

It is perfectly clear that there was no express contract, as the court found. The charter forbids any kind of a contract for the expenditure of more than $100, unless authorized by a vote of the board of trustees given in the manner therein provided. It must be upon some principle of estoppel, or upon an implied contract or liability arising independently of charter provisions, that relief may be given, if at all. The case may appear to justify the doctrine of equitable estoppel as applied in some cases decided by our Supreme Court cited by appellant. It seems to us, however, that if any substantial or practical results are to be achieved by the restrictions upon the powers of municipal boards of trustees to incur liabilities, which have been placed in charters, it will be impossible to bring any such results about if the provisions must give way under all circumstances to the principle upon which equitable estoppels are generally applied. Plaintiff must be charged with knowledge of the charter provisions in force when he delivered the bricks. He therefore knew that a single trustee—one out of nine—could not legally act for all, and there is no pretense that this trustee was acting as the agent of his co-trustees, or that he assumed to so act. And if he had assumed to be acting for all, and plaintiff so understood it, the principle of ostensible agency does not extend to such a case. Plaintiff would still be put upon inquiry as to the trustee's authority to so act; for plaintiff is presumed to have known that no liability against defendant for over $100 could be legally created, except in the manner provided by the charter. It appears that Mr. Paine acted without consulting his co-trustees, and in entire disregard of charter provisions. It does not appear, except inferentially, that the other trustees had any knowledge of the transaction relating to the 44,000 bricks. They seem to have had some knowledge as to 9,000, for they caused the claim for them to be paid. The charter restrictions were enacted to protect the property holders of the city, plaintiff among them, against just such transactions as this one. Plaintiff acted as much in violation of the charter as did the trustee who bargained with him. These facts and considerations take from the final action of the trustees in rejecting the claim much of its apparent inequity. Instances are becoming too frequent where parties endeavor to fix illegal liabilities upon municipalities under the doctrine of equitable estoppel, thus seeking to avoid injurious consequences which they knowingly brought upon themselves.

The courts have, in some cases of peculiar hardship, and where the circumstances seemed to demand it, come to the relief of persons dealing with municipalities. Appellant has cited some of these in support of his contention, notably Higgins v. San Diego Water Co., 118 Cal. 524, 45 Pac. 824, 50 Pac. 670; Sacramento Co. v. Southern Pacific Co., 127 Cal. 217, 59 Pac. 568, 825; Contra Costa Water Co. v. Breed, 139 Cal. 432, 73 Pac. 189. The still later case of Times Publishing Co. v. Weatherby, 139 Cal. 618, 73 Pac. 465, it seems to us is so nearly parallel with the case before us as to be controlling. In that case some printing work had been done under a contract entered into by the city council of the city of Eureka, and payment therefor was ordered by them. The treasurer, Weatherby, refused to pay the claim. The court said: "The ground upon which respondent failed to pay the warrant was that no valid contract for printing was made as required by the city charter. Section 167 of the charter [St. 1895, p. 398, c. 5] has this sweeping provision: 'The city of Eureka shall not be, and is not, bound by any contract, or in any way liable thereon, unless the same is made in writing by order of the council, and the draft thereof approved by the city attorney and the council and the same ordered to be and be signed by the mayor or some other person authorized thereto in behalf of the city; but the council, by an ordinance, may authorize an officer, committee, or agent of the city to bind the city without a contract in writing for the payment of any sum of money not exceeding three hundred dollars.' There was no compliance with this provision touching the printing here involved, and it is so stringent and prohibitive, and so comprehensive in its scope, that we see no way to protect appellant from the harsh consequences which follow the neglect to have the contract executed as required by the charter." We have carefully compared the charters of these two cities, and, while there is a difference in phraseology, we discover no substantial difference in their meaning. Both are equally stringent, prohibitive, and comprehensive, though different in their forms of expression. No court, with consistency, could deny relief in the one case and allow it in the other.

This doctrine of equitable estoppel was invoked in Santa Cruz Rock Pavement Co. v. Broderick, 113 Cal. 628, 45 Pac. 863. There the work had been completed, accepted, and ordered paid; but the auditor refused to draw his warrant on the treasury. The court said: "In entering into the contract, the plaintiff was charged with knowledge of all the limitations upon the powers of the board of supervisors. He knew that the board had no power to authorize the contract for doing the work, unless it had invited sealed proposals therefor, and he entered into the contract with the knowledge that he had not made any proposal for doing the work. Having thus performed a contract which he knowingly entered into in disregard of statutory requirements, he is not in a position to claim any equitable consideration by reason of its performance." The court further said that to enforce a promise subsequently made to pay for work which had been contracted for in disregard of charter restrictions "would set at naught all limitations upon municipal powers, and, as was said in Sutro v. Pettit, 74 Cal. 337, 16 Pac. 7, 5 Am. St. Rep. 442, 'put the people in the complete power of careless or unscrupulous officers.'" The consolidation act of San Francisco was probably more stringent than the Eureka or the Sacramento charter; but we do not think the courts should split hairs, or be eager to discover distinctions between charters, in order to protect persons who have knowingly acted in violation of their plain provisions, even though the municipal authorities have participated in such violations.

Sacramento Co. v. S. P. Co., supra, was a case where the supervisors of the county agreed with defendant to share the cost of a bridge to be used jointly by the people for general travel and by defendant for a railroad track. The bridge was completed under the contract, which was entered into by plaintiff and defendant, in good faith and upon advice of plaintiff's law officer, and defendant was paid by plaintiff for its expenditures as provided by the contract. Subsequently the county undertook to recover back this money, but the court held against it, although apparently conceding that the contract might have been declared void, had timely proceedings been instituted. We can conceive of many reasons why the county should be estopped from recovering back money paid out under such circumstances which would not apply here. In the Contra Costa Water Co. Case, the circumstances were peculiar and quite different from the facts in the present case. It appeared that "the city council, in its corporate capacity, did absolutely approve respondent's claims and ordered them paid." Furthermore, "there were no 'restrictions imposed by the charter' absolutely prohibiting the action of the city council involved." Besides, the city was under the necessity of having water from day to day, and in point of fact the claims made out and ordered paid by the council were at a less rate than had been declared reasonable by the ordinance of the city. The principle of estoppel was applied, as in the Sacramento County Case; but there is a broad distinction between the two cases and the one here. Higgins v. San Diego Water Co., supra, was likewise peculiar in its circumstances. For an explanation of the scope of the decision we refer to concurring opinion of Chief Justice Beatty in Contra Costa Water Co. v. Breed, in which he shows how it came about that recovery could be had upon quantum valebat while denying the validity of the contract. The case lends no strength to appellant's contention.

Whatever may have been the reasons in the cases cited by appellant for avoiding the enforcement of the restrictions upon the powers of municipalities there involved, we do not think the doctrine of equitable estoppel should be extended to the present case, or any similar case. To do so would be to throw down all the bars that have been raised to protect the people from the consequences of charter violations, and would smooth the way to dangerous inroads upon municipal treasuries. There may be an apparent injustice in some cases in adhering strictly to charter provisions. Individuals may suffer, but it is better so than that entire communities should be deprived of the protection given them against infractions of the law by which they are governed, especially where the loss falls upon one who has knowingly taken upon himself the risk of loss.

The judgment is affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

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1 Cal. App. 458

REED et al. v. McDONALD.

(Court of Appeal, Second District, California. Aug. 21, 1905.)

1. SALES—ACTION—RECOVERY OF PRICE PAID —BURDEN OF PROOF.

In an action on a written contract for the purchase of hay by plaintiffs from defendant, which provided that plaintiffs should pay for the hay at the contract price for a stipulated number of tons as estimated, and that on the ascertainment of the true tonnage any deficiency should be made good by defendant at the agreed price per ton, the burden was on plaintiffs to show that, under the contract as alleged by them, there was a deficiency in the estimated quantity.

2. SAME—EVIDENCE.

In an action on a written contract for the purchase of hay by plaintiffs from defendant, which provided that plaintiffs should pay for the hay at the contract price for a stipulated number of tons as estimated, and that on the ascertainment of the true tonnage any deficiency should be made good by defendant at the agreed price per ton, it was error to exclude from evidence the written contract, which contained stipulations as to the manner in which the tonnage should be determined.

3. SAME — PARTIES—PURCHASERS FROM CONTRACTING PARTIES.

In an action on a written contract for the purchase of hay by plaintiffs from defendant, which provided that plaintiffs should pay for the hay at the contract price for a stipulated number of tons as estimated, and that on the ascertainment of the true tonnage any deficiency should be made good by defendant at the agreed price per ton, purchasers of the hay from one of the plaintiffs were not necessary parties.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by H. M. Reed and another against R. McDonald. From a judgment for plaintiffs, and from an order denying a new trial, defendant appeals. Reversed.

Laird & Packard and J. W. P. Laird, for appellant. Smith & Allen and W. S. Allen, for respondents.

ALLEN, J. Plaintiffs' complaint avers that on February 20, 1900, they bought of defendant a stack of baled hay containing 650 tons, more or less, at $8.75 per ton; that it was agreed that, until the hay was removed and the true tonnage learned, plaintiffs should pay the contract price therefor to defendant, and when the hay was moved and the true tonnage ascertained, if there was more or less than 650 tons, the excess or deficiency should be adjusted between the parties at the selling rate per ton. The plaintiffs paid the price based on the estimate. Afterwards, on February 1, 1901, plaintiffs allege that they completed the removal of the hay and ascertained that the stack contained but 471 tons plus, which deficiency, at the rate named, amounted to $1,563.20. Defendant denies that the removal of said hay was ever completed, or any ascertainment was ever had that said stack contained 471 tons plus only, and alleges, further, that at the date of the commencement of the action and long prior thereto the hay had been sold to and was the property of others not parties to the action, who were and still are living. Findings and judgment for plaintiffs, and from the judgment and order denying a new trial, defendant appeals.

It appears from the evidence that possession of the hay was delivered to the purchasers at the date of the purchase, and that the purchasers caused the same to be insured in their names and returned the same for tax assessment as their property. Although, at the time of the sale, they returned the keys to the corral in which the hay was situate to the seller, he was to deliver the same upon the purchasers' request to those whom they might desire to remove the hay. It further appears that plaintiffs commenced the removal of the hay about March 1st, under an agreement with the seller (whether in harmony with the written agreement or not does not appear from the record) that the weights should be determined by reference to tags placed in each bale by the baler, and under this arrangement plaintiffs removed 307¼ tons, the weights of which, it is shown were satisfactory to all parties; plaintiffs having on the day of their purchase sold 300 tons of the hay to one De Groot, who, after the removal of the hay above specified, employed a man named Loveland to remove and ship his 300 tons of hay. There is testimony offered by plaintiffs tending to show that De Groot and plaintiffs had a conference with defendant before De Groot commenced the removal of the hay, at which it was agreed that, instead of De Groot weighing and determining the weights as by the contract provided, the car weights of the railroad company should be accepted. The evidence is without conflict, however, that defendant refused to accept car weights from De Groot, or weights of any kind from Loveland, his agent. During the progress of the trial plaintiffs offered in evidence the original written contract between plaintiffs and defendant, executed at the time of the sale, to the introduction of which the defendant objected because it was in terms different from the terms set out in the complaint. Thereupon plaintiffs withdrew the offer. This objection on defendant's part seems to have been captious; but, the offer having been withdrawn before any ruling of the court was had upon the question, the incident is not worthy of notice.

During the cross-examination of one of the plaintiffs, and subsequently when defendant was putting in his testimony, he offered in evidence, after proper identification, the written contract between the parties with reference to the sale of this hay; it having been stated in open court by plaintiffs' attorney that this contract contained stipulations as to the manner in which the tonnage should be determined. The introduction of the written contract was objected to by plaintiffs as being incompetent and irrelevant, which objection was sustained. This was error. The burden was upon the plaintiffs to show that under the contract as set out by them there was a deficiency in the quantity estimated, and on this question the manner of weighing or determining the tonnage provided in the contract was a material matter. Plaintiffs' contention, however, was and is that this written agreement was changed by an oral executed agreement, by the terms of which the manner of ascertaining the tonnage was changed. But on the evidence in the record there is a question whether the modifying agreement was so far executed as to give it validity; and, in the absence of the original contract, the question cannot be satisfactorily determined. The prejudicial character of the error in excluding this written contract is apparent throughout the entire record.

The purchasers from Reed were not necessary parties to this action.

Judgment and order reversed.

We concur: GRAY, P. J.; SMITH, J.

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1 Cal. App. 441

COATS v. ATCHISON, T. & S. F. RY. CO.

(Court of Appeal, Second District, California. Aug. 17, 1905.)

1. EMINENT DOMAIN—RAILROADS—OCCUPYING STREET — CONSENT OF CITY — DAMAGE TO ABUTTING PROPERTY.

A railroad company, though erecting and maintaining its road in a street, as permitted by Civ. Code, § 465 (5), and with consent of the city, is liable for injury to the right of an owner of abutting property to access thereto.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 263, 310.]

2. RAILROADS—OCCUPYING STREETS—NUISANCE —MEASURE OF DAMAGES.

A railroad company, occupying a street by maintaining an embankment in front of abutting property, preventing access to it, is liable as for a nuisance; the measure of damages being the amount of injury actually sustained at the commencement of the action therefor, and the measure of damages in condemnation, the deterioration in market value, not obtaining.

3. NUISANCE—ACTION FOR DAMAGES—DEMAND FOR ABATEMENT.

Demand for abatement of a nuisance is not necessary for an action for damages from its maintenance.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, §§ 102, 103.]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by J. R. Coats against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

T. J. Norton, U. T. Clotfelter, and E. E. Millikin, for appellant. Charles G. Lamberson, for respondent.

SMITH, J. The plaintiff is the owner of a lot of land in the city of Visalia, fronting on the east side of East street, on which, from a date anterior to the transactions involved in this case, he had, and had been operating, a foundry and machine shop and repair shop for machinery. The defendant is the successor in interest of the San Francisco & San Joaquin Valley Railway Company, and is maintaining in East street, between the main track of its road and the east line of the street, a side track erected by its predecessor on an embankment of about two feet elevation, which prevents access to the plaintiff's premises, and has thus seriously interfered with the use of the premises for the purposes of his business. The suit was brought for resulting damages, and plaintiff recovered verdict and judgment for $800, being the damages suffered by the plaintiff from the commencement of the maintenance of the nuisance by the defendant to the commencement of the suit. The appeal is from the judgment, and from an order denying the defendant's motion for a new trial.

The points urged by the appellant, or those that need be considered, are: (1) That the side track and embankment were constructed by its predecessor under an ordinance of the city of Visalia authorizing its construction, and hence were not unlawful, and consequently not a nuisance; (2) that under the pleadings and evidence in the case plaintiff was not entitled to recover more than nominal damages; (3) that demand upon the defendant for abatement of the nuisance was essential to plaintiff's action, and that such demand was not made.

1. In support of its first point the defendant relies upon the license given its predecessor by section 465, subd. 5, of the Civil Code, "to construct its road over the street," and an ordinance of the city of Visalia authorizing it to do so. But in the license pleaded it is expressly provided, as a condition of using the street, that the corporation shall restore it "to its former state of usefulness as near as may be, or so that the railroad shall not unnecessarily impair its usefulness." Under these and preceding provisions of the law, it has been held in many cases in this state that the consent of the city authorities to use its street for railroad purposes "in no wise touches the question of damages to private property on the line of the street," and that the right to a just compensation for the injuries thus inflicted is in no wise affected by the question whether such consent had been or had not been given. S. P. R. R. Co. v. Reed, 41 Cal. 262; Schulte v. N. P. T. Co., 50 Cal. 592; Severy v. C. P. R. R. Co., 51 Cal. 197; Ford v. Santa Cruz R. R. Co., 59 Cal. 290; Beronio v. S. P. R. R. Co., 86 Cal. 421, 24 Pac. 1093, 21 Am. St. Rep. 57. The first case cited is, indeed, criticised in Montgomery v. Railway Co., 104 Cal. 186, 196, 37 Pac. 786, 25 L. R. A. 654, 43 Am. St. Rep. 89; but the same point was not involved in that case, and what is there said upon the general subject is questioned in O'Connor v. S. P. R. R. Co., 122 Cal. 684, 55 Pac. 688; but the principle in S. P. R. R. Co. v. Reed cannot be questioned, for it is a settled principle that the right of the owner of land abutting on a street to access over it to and from his premises is itself a right of property, of which, under the constitutional provisions, he can no more be deprived without compensation than of any other property. Schaufele v. Doyle, 86 Cal. 109, 24 Pac. 834; Eachus v. Los Angeles Electric Ry. Co., 103 Cal. 617, 37 Pac. 750, 42 Am. St. Rep. 149; Brown v. Board of Supervisors, 124 Cal. 280, 57 Pac. 82. There was an exception, or apparent exception, to this principle in favor of the right of the municipality to grade its streets, by which it and its proper agents were exempted from liability, unless for negligence in the work; but in this case the defendant's predecessor was not the agent of the city for that purpose, nor would the city itself have been authorized to raise embankments over portions of the street, except as part of the entire work of grading the street. Now, by article 1, § 14, of the Constitution, the power heretofore vested in the municipality in this regard has been taken away, and it is provided: "Private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner." Reardon v. San Francisco, 66 Cal. 492, 6 Pac. 317, 56 Am. Rep. 109; Eachus v. Los Angeles Electric Ry. Co., 103 Cal. 617, 37 Pac. 750, 42 Am. St. Rep. 149; Eachus v. Los Angeles, 130 Cal. 492, 62 Pac. 829, 80 Am. St. Rep. 147. It is clear, therefore, that the defendant's predecessor in erecting, and the defendant in maintaining,

the nuisance complained of, are to be regarded as ordinary tort feasors.

2. As to damages, there is nothing in the case to take it from under the application of the general rule applying to nuisances and other injuries to land (1 Sedgwick on Damages, 267, 274, 294, citing Hatfield v. Central R. R. Co., 33 N. J. Law, 251; Wood, Law of Nuisances, § 830; 2 Greenleaf on Evidence, § 474), which is "that every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money" (Civ. Code, § 3281), which, except where otherwise provided, shall be "the amount which will compensate for all the detriment proximately caused thereby" (Id. § 3333). This may be in some cases the deterioration in the market value of the property, as, e. g., where the nuisance is a continuing one and cannot be abated. 2 Greenleaf on Evidence, § 468; Wood on Nuisances, § 856; Eachus v. Los Angeles Elec. Ry. Co., and Same v. Los Angeles, supra. But it is not always that this measure of damages is admissible. Hopkins v. W. P. R. R. Co., 50 Cal. 194; Severy v. C. P. R. R. Co., 51 Cal. 197. Ordinarily, he is entitled to recover only an amount sufficient to compensate him for his actual detriment; and this he is always entitled to recover. Hence it is said, in cases of nuisance, "the rule of damages * * * is the amount of injury actually sustained at the commencement of the suit" (2 Greenleaf on Evidence, § 474; Wood on Nuisances, § 855), though, "where the damages are of a permanent character and go to the entire value of the estate affected by the nuisance, [it is said] a recovery may be had of the entire damages in one action." (Id. § 856). The case of Eachus v. Los Angeles Elec. Ry. Co., 103 Cal. 617, 37 Pac. 750, 42 Am. St. Rep. 149, is not in conflict with these principles. That was a case of the kind noted above, where the deterioration of the value in the land was the proper measure of damages, and in which there was no other damage claimed by the plaintiff. Nor can the language cited by the appellant from the opinion in that case bear the construction put on it. What is said is, in effect, that "a mere infringement of the owner's personal pleasure and enjoyment," etc., as, e. g., by "the erection of a county jail or a county hospital," is not a ground for damages, which is but to say that a party cannot recover for a mere interference with his personal pleasure and enjoyment where "no right has been violated," or, in other words, for damnum absque injuria. Wood on Nuisances, § 867. But, from the very definition of nuisance, where his right is violated, it is clear that he may recover damages for any interference "with the comfortable enjoyment of * * * (his) property." Civ. Code, § 3479; Code Cov. Proc. § 731. So what is said with reference to the diminution in value of the property "for some particular use" is to be understood as referring to the case before the court, where the question at issue was only as to the value of the property.

The position of appellant in this regard seems to be that the measure of damages in the case of nuisance affecting real property is the deterioration in the market value of the land by reason of the nuisance. This, indeed, is the measure of damages established by the Code in suits for the condemnation of land (Code Civ. Proc. § 1248); but we cannot conceive upon what principle the same measure of damages must be applied in suits for damages for nuisance or trespass, and to apply it generally would be in conflict with the very definition of nuisance as given in the Codes, and with the provisions of the Civil Code as to the measure of damages in case of tort, and with the authorities on the subject. For, though under the provisions of the law, as it stood before and since the adoption of the new Constitution, the right to condemn the plaintiff's right in the street was accorded to the defendant, yet it has not thought fit to avail itself of this privilege, and it therefore stands, as we have already said, in the position of a mere tort feasor. Nevertheless the appellant's claim seems to be supported to some extent by the decision in Kishlar v. S. P. R. R. Co., 134 Cal. 636, 66 Pac. 848, where it was apparently held, in a case where the plaintiff was a leaseholder of a lot which he used in the business in which he was engaged, and the value of which for that purpose was entirely destroyed by the shutting off of access to it by the defendant, that the plaintiff was entitled to recover "only the fair market value of the plaintiff's property"; i. e., of his lease. But by reference to the record in that case it will be seen that this was, in effect, conceded by both parties, and that the only question considered by the court was the contention of the appellant that the use of the land "to the plaintiff for a particular purpose" was "a proper element to be considered by the jury, * * * and should not be taken from the jury in arriving at market value" (page 639 of 134 Cal., page 849 of 66 Pac.); and in support of this proposition the case cited by the appellant was San Diego Land Co. v. Neale, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604, which was a condemnation suit, as was also the case of Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224. Naturally, therefore, the question here involved was not considered by the court, and the decision cannot be regarded as an authority upon the general proposition. In the present case, the damage to the plaintiff's land and to the business carried on by him on the land was clearly proven; and under the evidence introduced the amount found by the verdict cannot be regarded as excessive. Code Civ. Proc. § 657, subd. 5; Boyce v. Cal. Stage Co., 25 Cal. 460; Lee v. S. P. R. R. Co., 101 Cal. 120, 121, 35 Pac. 572.

As to the claim of the appellant that demand to abate the nuisance was necessary to the plaintiff's action, the doctrine contended for by the appellant, if previously existing, was abrogated by section 3483 of the Civil Code. See note to this section in Revisor's Edition. Whether want of knowledge of the existence or noxious character of a nuisance would be a defense to an action (Grigsby v. Clear Lake Water Co., 40 Cal. 396) need not here be considered, as there was evidence in the case to justify the jury in finding such knowledge.

For the reasons given, we are of the opinion that the judgment and order appealed from should be affirmed; and it is so ordered.

We concur: GRAY, P. J.; ALLEN, J.

148 Cal. 142

MORTON et al. v. MORTON. (S. F. 3,436.)

(Supreme Court of California. Oct. 14, 1905.)

1. Trade-Names—Unlawful Competition—Injunction—Complaint.

Plaintiffs alleged that for more than 10 years, under the name of "Morton Special Delivery," they had conducted a transfer business, and each of its solicitors wore a hat badge containing the word "Morton," and that plaintiffs' business had become well and favorably known by such name; that defendant, whose name was also Morton, had shortly before the beginning of the action engaged in a competing business under the name of "Morton Transfer Company," and had affixed to his hat the single word "Morton's," using letters of the same size, color, and general appearance as plaintiffs' badge, and represented to the public that he was acting for plaintiffs, and thereby deceived the public and procured much baggage for transfer which would otherwise have gone to plaintiffs. *Held*, that the complaint stated facts entitling plaintiffs to an injunction.

2. Same—Adequate Remedy at Law—Insolvency.

Where defendant used plaintiffs' trade-name and a copy of their badge in a competing business to deceive the public, by causing them to trade with him when they intended to have traded with plaintiffs, plaintiffs had no adequate remedy at law, regardless of the question of defendant's insolvency, and were therefore entitled to an injunction.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, § 86.]

3. Same—Injunction—Prohibitory—Issued Pending Trial.

Where an injunction complained of, issued on a verified complaint at the time of issuing summons and without notice to defendant, merely restrained defendant, his agents, and employés from representing himself as the representative of plaintiffs, and from wearing on his hat, while engaging in the business of soliciting the transfer of baggage, a badge with the word "Morton's" thereon, or any badge similar thereto, it was prohibitory only, and not mandatory, and was properly issued pending trial.

Department 1. Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

Suit by William R. Morton and another against John Morton. From an order granting an injunction, defendant appeals. Affirmed.

William J. Herrin, for appellant. Naphtaly, Freidenrich & Ackerman, for respondents.

VAN DYKE, J. This is an appeal from an order granting an injunction upon a verified complaint at the time of issuing the summons and without notice to the defendant. The complaint alleges substantially the following facts, viz.: Plaintiffs have for more than 10 years previous to the bringing of the action, August 5, 1902, under the name of "Morton's Special Delivery," conducted the business of transferring for hire the baggage and luggage of persons from their places of landing in San Francisco to their hotels or places of destination therein, and from their hotels and residences to the depots or wharves whence they were about to depart. In that business they employed a large number of solicitors, whose business it was and is to solicit custom from travelers. Each solicitor had for some time been caused by plaintiffs, while actually employed in his work, to wear upon his hat a badge upon which is printed in conspicuous letters the word "Morton." This badge indicated to the public that the solicitor was representing the Morton Special Delivery, which is well and favorably known, and that any baggage intrusted to any solicitor wearing such a badge would be handled by the persons doing business under that name. The defendant, within a few months prior to the bringing of the action, became engaged in the same character of business, under the name of "Morton Transfer Company." For the purpose of misleading and deceiving the public, as alleged, into the belief that he was a solicitor of plaintiffs, and that they will handle all baggage intrusted to him to transfer, he has and still uses in connection with his business a badge affixed to his hat, with the single word "Morton's" thereon. Such badge is of the same size, color, and general appearance as plaintiff's badge, and the letters thereon are precisely similar in size, color, and general appearance as those of plaintiffs' badge; the only difference being the additional "s," with an apostrophe, to the name "Morton." During such time defendant has and still does represent to the public that he is acting for plaintiffs, and by the use of this artifice he deceives the public into the belief that he represents the plaintiffs, and thereby procures from them much of their baggage for the purpose of transfer. It is alleged, further, that plaintiffs' business has become well and favorably known under the name of "Morton," and that as a result of the defendant's misrepresentations in the use of said badge they have been damaged in the sum of $500, and, if such use and misrepresentations are continued, will suffer and sustain other damage, and that such loss or damage will be irreparable, and that they have no plain, speedy, or adequate remedy at law. All these allegations must, for the present purpose, be considered as confessed; the defendant having failed to answer. The injunction having been issued according to the provisions of section 527, Code of Civil Procedure, the defendant in the lower court might have moved to vacate or modify said injunction under the provisions of section 532, Code of Civil Procedure. He appears, however, to have failed to make any move in that direction, but, on the contrary, chose to take an appeal directly from the ex parte order granting the injunction, and to stand upon his contention that the order does not find sufficient support in the complaint on which it is based.

From the foregoing summary of the complaint, evidently this position of the appellant is untenable, as the complaint certainly states facts sufficient to entitle plaintiff to an injunction. As in Weinstock v. Marks, 109 Cal. 529, 42 Pac. 142, 30 L. R. A. 182, 50 Am. St. Rep. 57, and Dodge Stat. Co. v. Dodge, 145 Cal. 380, 78 Pac. 879, the basis of plaintiffs' action is that defendant is attempting by fraudulent representations to the effect that defendant's business is plaintiffs' business to appropriate the benefit of the good will of plaintiffs' established business. The principle applicable was stated in the Weinstock Case, as follows, viz.: "When one tradesman resorts to the use of any artifice or contrivance for the purpose of representing his goods or his business as the goods or business of a rival tradesman, thereby deceiving the people by causing them to trade with him, when they intended to and would have otherwise traded with his rival, a fraud is committed—a fraud which a court of equity will not allow to thrive." This statement was approvingly quoted in the Dodge Case. The only appropriate and adequate remedy in such a case as this is the remedy of injunction, and this is so, regardless of the question of the insolvency of the person committing the fraud. If an injunction could not be granted as against a financially responsible person guilty of such fraud, the fraud upon the rival business and the public could be continued indefinitely, and the only right of the owner of the rival business would be in a multiplicity of actions for damages; whereas it might be in many cases practically impossible to ascertain the amount of damage done. The allegations in this complaint as to the nature of business here involved show beyond doubt that such would be the situation in this case. It is urged that, in so far as the injunction herein granted was mandatory, it was erroneously granted; the contention being that a mandatory injunction should not be granted pending trial, or until the rights of the parties had been definitely ascertained by the chancellor. We are, however, of the opinion that the injunction granted in this case was prohibitory only, and in no respect mandatory. The injunction complained of restrains the defendant, his agents, and employés from representing himself as the representative of plaintiffs, and from wearing on his hat, while engaged in the business of soliciting the transfer of baggage and luggage, a badge with the word "Morton's" thereon, or any badge similar thereto. This injunction does not restrain the defendant from carrying on his business in a legitimate manner and without the artifice referred to, by which it is sought to unjustly obtain some of the business of the plaintiffs. We are satisfied that the injunction was entirely justified by the allegations of the complaint, and went no further than was necessary to restrain the continuance of an artificial contrivance resorted to by defendant for the sole purpose of deceiving the public into the idea that in patronizing him they were patronizing plaintiffs, and of thus acquiring patronage intended to be given to plaintiffs. It is well settled that, while a person undoubtedly has the right to engage in business in his own name, he will not be allowed to resort to any artifice or contrivance in the use of that name for the purpose of deceiving the public as to the identity of his business or products, and that to prevent this result a certain manner of use of one's own name may, in a proper case, be prohibited. See Dodge Stat. Co. v. Dodge, supra, and other cases cited.

The order appealed from is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

148 Cal. 90

CODY v. MARKET ST. RY. CO. (S. F. 3,489.)

(Supreme Court of California. Oct. 11, 1905.)

1. Carriers — Injuries to Passengers — Street Railroads—Instructions.

An instruction, in an action for injuries to a passenger, that the carrier is required to exercise the highest degree of care in transportation of passengers, and that a showing that the injury was caused by the carrier's act in operating the instrumentalities employed in its business raises a presumption of negligence, which throws on the carrier the burden of showing that the injury was sustained without its negligence, was not erroneous, as requiring defendant to overcome plaintiff's showing by a preponderance of the evidence; the court having also charged that plaintiff was required to prove her case by a preponderance of the evidence.

2. Same—Time to Alight—Premature Start—Negligence—Presumption.

Where a passenger alleged injuries by the premature starting of a street car as she was attempting to alight, the case was one in which the presumption of negligence arose from injuries resulting from the carrier's act in operating the instrumentalities used in its business.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1286.]

3. Trial—Issues—Instructions.

Where the issues made by the pleadings were simple, were apparently not in dispute, and had probably been correctly stated to the jury by counsel, as provided by Code Civ. Proc. § 607, the refusal of a requested instruction stating the issues to the jury was not error.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 478.]

4. Same.

The court may properly refuse a request to charge fully covered by other instructions given.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 651-659.]

5. Carriers—Injuries to Passengers — Actions—Instructions.

Where, in an action for injuries to a passenger on a street car by an alleged premature start, the only negligence submitted to the jury related to the management of the car at the very moment of the accident, it was not error to refuse to charge that the carrier's failure to stop the car at the street where plaintiff intended to alight was not the proximate cause of her injury and did not entitle her to recover.

6. Appeal—Review—Harmless Error.

Where, in an action for injuries to a passenger, the court charged the proper measure of damages, and there was no evidence of any injuries other than those specifically alleged in the complaint, defendant was not prejudiced by the refusal of an instruction limiting plaintiff's recovery to such specified injuries.

Department 1. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Margaret Cody against the Market Street Railway Company. From an order denying defendant's motion for a new trial, it appeals. Affirmed.

C. W. Cross, for appellant. Sullivan & Sullivan, for respondent.

ANGELLOTTI, J. This is an action for damages for personal injuries, alleged to have been received by plaintiff, through the negligence of defendant, while alighting from one of defendant's cars, upon which she was a passenger. She obtained judgment for $750, and defendant appeals from an order denying its motion for a new trial. The only points made on this appeal relate to the action of the trial court in the matter of instructing the jury.

1. The case made by plaintiff was substantially as follows, viz.: Being a passenger on a northbound Devisadero street car, in the city and county of San Francisco, she desired to alight at Eddy street; but, owing to the fact that the conductor was engaged in another portion of the car, she was unable to inform him of her desire until after the car had passed Eddy street, and was between Eddy street and Ellis street, the next cross-street north of Eddy. She then informed him of her desire and explained why she had not told him earlier. The car was stopped shortly before it reached Ellis street. She immediately attempted to alight, and while doing so, one of her feet being on the ground and the other on the bottom step of the car, the car was started, and she was thereby thrown to the ground and injured. Her claim was that the car was negligently started by defendant while she was in the act of alighting, and that such negligence was the sole cause of her injury, and it is not contended that the evidence submitted on her behalf was in any way insufficient to support a verdict in her favor. The reply made to

plaintiff's evidence by defendant was confined exclusively to evidence tending to show that the car did not stop at all between Eddy and Ellis streets, and stopped only after it had turned from Devisadero into Ellis, and that plaintiff, notwithstanding a statement made to her by the conductor to the effect that she could not get off until the car reached Ellis street, stepped off the car before it reached Ellis street, and while it was still moving. Under these circumstances, the trial court, at the request of plaintiff, instructed the jury as follows, viz.: "The rule concerning the obligations of common carriers of passengers is thus stated by the Supreme Court of this State, in McCurrie v. S. P. Co., 122 Cal. 561, 55 Pac. 325: 'The carrier of passengers is required to exercise the highest degree of care in their transportation, and is responsible for injuries received by them while in the course of transportation, which might have been avoided by the exercise of such care. Hence, when it is shown that the injury to the passenger was caused by the act of the carrier in operating the instrumentalities employed in his business, there is a presumption of negligence which throws upon the carrier the burden of showing that the injury was sustained without any negligence on his part.'" It is claimed that the court erred in giving this instruction.

It is suggested that the effect of this instruction was to make it incumbent on defendant to overcome the showing of plaintiff by a preponderance of evidence, whereas, under the universally recognized rule, no verdict could be rendered for plaintiff in the absence of a preponderance of evidence showing negligence on the part of defendant. That this contention is not well founded is shown by the opinion of this court in several cases where the question has been discussed. Such an instruction simply informs the jury that, when the facts stated therein are shown, a presumption of negligence on the part of the carrier arises, which is sufficient to make out a prima facie case for the plaintiff, and require the defendant to meet the case thus made, or, in other words, to answer the prima facie case, or it will prevail. But it does not require a defendant to show want of negligence by a preponderance of evidence. It does no more than to require him to make such showing as to want of negligence as will leave the jury, with all the evidence before it, unsatisfied as to whether there was negligence on defendant's part, and, if on the whole case the scale does not preponderate in favor of the presumption of negligence and against the defendant's proof, plaintiff is not entitled to a verdict, for he has not established his case by a preponderance of evidence, as he was compelled to do under the well-settled rule. The term "burden" or "burden of proof" is frequently used to signify simply the burden of meeting a prima facie case, rather than the burden of producing a preponderance of evidence, and as used in the instruction in question imported nothing more. The distinction is clearly shown in the opinions of this court in Scott v. Wood, 81 Cal. 398, 400, 22 Pac. 871; Patterson v. S. F. & S. M. Ry. Co. (Cal.) 81 Pac. 531, 533; and Kahn v. Triest, etc., Co., 139 Cal. 340, 344, 73 Pac. 164. Upon the proposition that it was necessary for the plaintiff to prove her case by a preponderance of evidence, the trial court correctly instructed the jury that they should find a verdict for the defendant "unless the plaintiff has shown by a preponderance of the evidence that she was injured by the negligence of the defendant," and there could not reasonably have been any misunderstanding on the part of the jury as to the meaning of the instruction complained of. It is the settled law in this state that such an instruction may properly be given where the circumstances of the case justify it, and that it is not open to the objection under discussion. Osgood v. Los Angeles Traction Co., 137 Cal. 280, 283, 79 Pac. 169, 92 Am.St.Rep. 171; Green v. Pacific Lumber Co., 130 Cal. 435, 440, 62 Pac. 747. The instruction correctly stated the law applicable to common carriers of passengers (McCurrie v. S. P. Co., 122 Cal. 558, 561, 55 Pac. 324), and the rule stated therein is as applicable to street railway companies as it is to other carriers (Bosqui v. Sutro Railroad Co., 131 Cal. 390, 400, 63 Pac. 682).

It is, however, claimed that, conceding that the instruction may be given in a proper case, it was not applicable under the facts in this case. We are unable to perceive any merit in this contention. There can be no question that the relation of carrier and passenger continues to exist while the passenger is expeditiously engaged in the act of carefully and prudently alighting from the car, and that the carrier is bound to exercise the same high degree of care in affording a passenger a reasonable opportunity to alight in safety as in carrying him safely. Booth on Street Railway Law, §§ 326, 329, 337, 349. If a passenger, while alighting with due care from a car, is injured by some act of the carrier in operating the car, a presumption of negligence on the part of the carrier at once arises. Proof of such facts, as has often been said, causes the case to fall within the rule given by Shearman & Redfield on Negligence, § 59: "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." McCurrie v. S. P. Co., supra; Osgood v. Los Angeles Traction Co., supra. The rule has been held applicable in cases of passengers entering upon and alighting from street cars. Birmingham, etc., Ry. Co. v. Hale, 90 Ala. 8, 12, 8 South. 142, 24 Am. St. Rep. 748; City, etc., Railway v. Findley, 76 Ga. 311; Dougherty v

Missouri R. R. Co., 81 Mo. 325, 51 Am. Rep. 239. Of course the mere fact unexplained that such a person was injured while entering or leaving a car would raise no such presumption, but, where the evidence shows that the injury was caused by the act of the carrier in operating the instrumentalities employed in his business, and that the passenger was exercising due care, there can be no question as to the application of the rule enunciated in this instruction. Booth Street Railway Law, § 361. The evidence introduced by plaintiff tended to show such a condition of affairs, and, undoubtedly, made a prima facie case in her favor upon the question of negligence, and entitled the plaintiff to have the instruction given.

2. It is complained that the court erred in refusing to give an instruction requested by defendant purporting to be a statement as to what plaintiff alleged in her complaint, and what defendant denied. It may be conceded that it is always entirely proper for the trial court to state to the jury the issues to be determined by them, and it may be that in some cases, by reason of peculiar circumstances existing, such a statement would be necessary in order that the jury might clearly understand the particular questions to be decided; but we see nothing in the record of this case to indicate that such a statement by the court was at all necessary. The issues made by the pleadings were exceedingly simple, there was apparently no dispute between the parties as to what they were and presumably, in the absence of anything to the contrary in the record, they had been correctly stated to the jury by counsel. Code Civ. Proc. § 607.

3. The instruction requested by defendant to the effect that, if plaintiff's injuries were caused solely by her negligently alighting from the car while it was in motion, she could not recover, was fully covered by other instructions given, and the refusal to give it was therefore not erroneous.

4. Each of two instructions requested by defendant and refused by the court embodied the proposition that the failure of the car to stop at Eddy street could not be considered the proximate cause of any injury sustained by plaintiff, or entitle her to recover. There was no intimation either in the complaint, evidence, or instructions of any claim of negligence on the part of defendant in the matter of the failure of the car to stop at Eddy street. The plain effect of certain instructions given was that the only negligence on the part of defendant to be considered at all was such as related to the management of the car at the very moment of the accident, or, as put in one of the instructions, "at the time she attempted to alight from the car," and there could have been no misunderstanding on the part of the jury in this regard.

5. Defendant's requested instruction No. 9 was fully covered by other instructions given.

6. Complaint is made of the refusal of the court to give a requested instruction in terms limiting the amount to be awarded plaintiff, in the event of her recovery, to such a sum as would reasonably compensate her for the damages sustained by reason "of being bruised in the region of the shoulders and left arm, and by nervous shock," which were the injuries specifically alleged in her complaint. We think this instruction embraced both the general and special damages alleged, and stated the law correctly. At the same time, a careful examination of the record satisfies us that the failure to give the instruction could not have substantially affected defendant's rights. The court had already instructed the jury as to the proper measure of damages, namely, such amount as would compensate plaintiff for the injuries proximately caused by defendant's negligence. There was practically no evidence relating to any injury other than those specifically alleged in the complaint, and it is not to be assumed that the jury may have included in their verdict any award for injuries concerning which there was no evidence.

This disposes of all the points made by appellant.

The order denying the motion for a new trial is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

148 Cal. 102

In re ANGLE'S ESTATE. (S. F. 4,003.)

(Supreme Court of California. Oct. 11, 1905.)

1. DESCENT AND DISTRIBUTION—DISTRIBUTEES—RIGHTS OF CREDITORS.

A judgment creditor of a widow is entitled to enforce the judgment only against such portion of the residue of the estate of the widow's deceased husband as belonged to her or her successors in interest.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Descent and Distribution, § 526.]

2. MORTGAGES—FORECLOSURE—JUDGMENT—RES JUDICATA.

Where a widow mortgaged her interest in her deceased husband's estate, which mortgage was assigned to her husband's administrator, who foreclosed the same in a proceeding to which objector, a subsequent mortgagee, was a party, the foreclosure decree was res judicata as to the validity and ownership of the mortgage foreclosed and the indebtedness of the widow thereon to the estate.

3. ADMINISTRATORS — SALE UNDER ORDER OF COURT—EFFECT ON MORTGAGE.

Where, after an administrator had obtained a decree foreclosing a mortgage given by his intestate's widow on her interest in the estate, such interest was sold under a probate order, and the sale was duly confirmed, such sale did not operate as a payment of the mortgage debt, but merely transferred the estate's security from her interest as heir in the "land" of the estate to her interest in the proceeds of the sale.

4. HUSBAND AND WIFE—COMMUNITY PROPERTY—INTEREST OF SURVIVING WIFE.

Civ. Code, § 1402, provides that on the death of the husband one half of the community property goes to the surviving wife, and the other half, subject to testamentary disposition by the husband, to his descendants equally, if of the same degree of kindred. *Held* that, where a husband died leaving descendants, his widow took one-half of the community property, absolutely, and not the half and an additional one-third of the remaining half as heir.

[Ed. Note.—For cases in point, see vol. 26 Cent. Dig. Husband and Wife, § 1009.]

5. EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST DISTRIBUTEES—SET-OFF.

The right of an administrator to set off a judgment against his intestate's widow, belonging to the estate, against her share thereof, as against her creditors, does not depend upon her insolvency.

6. APPEAL—EXCLUSION OF EVIDENCE—RECORD.

Appellant was not entitled to a review of the exclusion of certain papers offered in evidence, where the record failed to indicate the contents of the papers or their materiality to the issues.

7. SAME—HARMLESS ERROR.

Where a widow's interest in the estate of her deceased husband was more than exhausted by a judgment against her held by the estate, a junior judgment creditor of the widow was not prejudiced by the admission in evidence of an assignment made by the widow of her interest in the residue of the estate shortly prior to the distribution.

Department 1. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Judicial settlement of the estate of Rench Angle, deceased. From a final distribution decree, one Ambrose, a judgment creditor of the widow, appeals. Affirmed.

A. Morgenthal, for appellant. Weldon & Held, J. E. Pemberton, Arthur J. Thatcher, T. L. Carothers, and J. C. Ruddock, for respondents.

ANGELLOTTI, J. This is an appeal from a decree of final distribution, by which a balance of money in the hands of the administrator, amounting to $5,388.42, constituting all of the ascertained residue of the estate, except a judgment against the surviving wife, amounting to $6,721.88, was distributed to four of the six children of deceased, in equal shares. The only appellant is one Ambrose, who designates himself in the notice of appeal as a judgment lien holder against the fund distributed. In his answer to the petition for distribution, he styles himself a judgment creditor of the surviving wife of the deceased, whom he alleged to be an heir and entitled to a portion of the residue of the estate, and asked that the same be distributed, subject to his judgment lien. The trial court found that such surviving wife was entitled to no portion of the residue, owing to the fact that the unpaid judgment of the estate against her was greater in amount than her portion of the estate, and for that reason refused to afford appellant any relief, and distributed the residue of money to four children, the other two having already received their portions.

Appellant's claim was one against the surviving wife only. The debt upon which it was based was created after the death of deceased. The surviving wife purchased sheep from appellant, gave him a note for the purchase price, and, to secure the payment of the same, executed to him a mortgage upon her interest in a tract of land owned by the estate. She had prior thereto executed a mortgage upon the same interest to one Cooper, and this mortgage, and the indebtedness thereby secured, were subsequently assigned to the administrator with the will annexed of said estate. Subsequently appellant commenced an action to foreclose his mortgage, making such administrator a party defendant. In that action it was determined that the mortgage held by the estate was a prior, valid and subsisting mortgage, and that there was due thereon to the estate $4,814.67, and, also, that there was due on appellant's mortgage $4,994.26. A decree was entered requiring the sale of the interest of the surviving wife in the mortgaged premises to satisfy, first, the claim of the estate, and, secondly, the claim of appellant, and directing the docketing of judgments against the surviving wife for any deficiency remaining after such sale. An appeal was taken by appellant here from that judgment, he contesting the validity of the claim of the estate, and the judgment was here affirmed. Ambrose v. Drew et al., 139 Cal. 665, 73 Pac. 543. No sale of the mortgaged premises was ever made under the foreclosure decree, as, pending the appeal, the administrator had, under order of the probate court, regularly sold the interest of the deceased in the real property affected by the mortgage, and such sale had been duly confirmed. All of the money in the hands of the administrator was a part of the proceeds of said probate sale. No part of appellant's judgment has ever been paid. The judgment in favor of the estate, embraced in said foreclosure decree, amounted, with the interest adjudged, at the date of the decree of distribution to the sum of $6,721.88, and is the judgment specified in such decree as a portion of the residue of the estate. All the property of the estate is community property. Without deciding the point, it may be assumed, for the purposes of this decision, that appellant, under the facts stated above, had such an interest as entitled him to be heard in the matter of the distribution. Est. of Crooks, 125 Cal. 459, 461, 58 Pac. 89. It is obvious, however, that he could have no right whatever, except as against such portion of the residue as belonged to his judgment debtor, the surviving wife, or her successors in interest. If the decision of the lower court, to the effect that by reason of the judgment of the estate against her she was entitled to nothing, be correct, appellant must necessarily fail.

The right to set off, as against the share of the surviving wife, such amounts as were due from her to the estate, is not disputed. It is urged, however, that there was nothing so due from her, and the finding that a portion of the residue consisted of this judgment against her is attacked. The contention in this respect involves questions as to the validity and ownership of the mortgage originally given to Cooper and afterwards assigned to the estate, and the subsequent judgment thereon in favor of the administrator, which were fully litigated and fully determined in the foreclosure action in which appellant, the estate through the administrator, and the surviving wife were parties (Ambrose v. Drew, supra), and are res judicata. Even if it be conceded, as contended by appellant, that the decision in that case was erroneous, it is beyond review. The judgment therein against the wife and in favor of the estate became an asset of the estate. With legal interest to the date of the decree, it amounted to the sum specified therein, and in such amount, no part thereof having been paid, constituted a portion of the residue. It is contended that, when the mortgaged property was sold at probate sale, the mortgage was thereby paid, but manifestly such sale of the decedent's interest in the land could in no way affect the indebtedness of the wife to the estate, except to alter the security held by the estate for the payment of such debt. Instead of holding her interest as heir in the land of the estate as security, it thereafter held her interest as heir in the proceeds of such land.

Upon the theory entertained by the court below, to the effect that the attempted disposition of the property by will was invalid, and that the law as to succession in cases of intestacy therefore applied, as to the correctness of which theory no point appears to be made by appellant, its conclusion that, all the property being community property, the wife was originally entitled to only one half of the property, and the six children of deceased were originally entitled to the other half, was undoubtedly correct. Section 1402, Civ. Code. Appellant's contention in this behalf appears to be that where the property is community property, and there are a surviving wife and children, the wife takes one half absolutely, and one-third of the remaining half as heir. This contention is answered by the express terms of the statute cited above, where it is provided as follows, viz.: "Upon the death of the husband, one half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his descendants, equally, if such descendants are in the same degree of kindred to the decedent. It is only in the absence of descendants that the rule contended for by appellant would be applicable. The residue of the estate, consisting only of $5,388.42 in money, and the judgment against the wife for $6,721.88, and she being entitled to only one-half of such residue, it necessarily follows that she was entitled to receive nothing on distribution.

It is contended that the finding that the surviving wife is insolvent, and that the judgment against her is without value, except as the same may be used as an offset against the money which would otherwise be due her, is not sustained by the evidence. This finding, however, is immaterial. The right to offset the judgment against her share was not dependent upon her insolvency.

Appellant complains of rulings of the lower court refusing to admit in evidence certain papers offered for the stated purpose of showing that the wife was not indebted to the estate at the time of distribution, but that said estate was indebted to her. There was nothing in the record to indicate what the offered papers in fact showed in this regard—nothing to indicate they were at all material to the questions stated, viz., the indebtedness of the wife. Where a party seeks to show error on the part of the court in excluding evidence, he must make his bill of exceptions show the materiality of the proposed evidence, for error will not be presumed. This is specially true of writings offered in evidence, where, unless the offered papers are set forth or some statement is made in the bill as to their contents, it is impossible to ascertain whether they in fact bore upon the questions in issue on the trial. What is said as to these offers in the record and in appellant's brief shows, furthermore, that the evidence sought to be introduced was of matters preceding in date the trial and decree in the foreclosure action of Ambrose v. Drew, supra, whereby the fact and amount of indebtedness were finally determined against the wife. There was no pretense that, if such decree were correct, any of the indebtedness thereby declared had been paid.

Appellant complains of a ruling of the court admitting in evidence a paper executed by the wife shortly prior to the distribution, purporting to assign to the four sons of deceased all her interest in the residue of said estate. This ruling could not have affected appellant prejudicially. If the purported assignment had not been received in evidence, it would still be true that appellant could not have obtained any relief. The conclusion that, by reason of the judgment against her, the wife was entitled to no portion of the residue, leaves him without any right as to any portion of such residue.

This disposes of all the points made by appellant against the correctness of the action of the lower court.

The decree of distribution appealed from is affirmed.

We concur: **SHAW, J.; VAN DYKE, J.**

148 Cal. 64

In re WASHBURN'S ESTATE.

(S. F. 4,320.)

(Supreme Court of California. Oct. 9, 1905.

EXECUTORS AND ADMINISTRATORS—DISTRIBUTION—SETTLEMENT.

The court, on petition of distributees and over the objection of creditors of an estate, will not arrest the course of administration, charge the assets with a lien for unpaid debts, legacies, and expenses, discharge the administrator, and direct distribution, where the money necessary to pay debts, legacies, and expenses of administration is not proffered in court, and the only offer to pay the same is "on the decree of distribution being granted," and not as a condition thereof.

Department 1. Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Application by Jeanie W. Higgins for final distribution of the estate of Albert Henry Washburn, deceased, to which E. P. and John S. Washburn filed objections. From an order denying the application, and denying petitioner's motion for a new trial, she appeals. Affirmed.

Rehearing denied November 8, 1905.

A. Everett Ball and J. M. Corcoran, for appellant. Wilson & Wilson and Congdon & Congdon, for respondents.

SHAW, J. This is an appeal from a judgment denying the petition of Jeanie W. Higgins for distribution of the estate of Albert Henry Washburn, deceased, and from an order denying her motion for a new trial in the proceeding. The following is a statement of the material facts established by the record and the findings of the court: The deceased by his will bequeathed some small specific money legacies to certain persons named, and gave all the residue of his estate to Edward P. Washburn, John S. Washburn, and Jay B. Cook, in trust during the lives of his wife, Jean Bruce Washburn, and his daughter, Jeanie W. Higgins, to manage, control, invest, and reinvest the same, according to their own judgment, and to pay the net income thereof to his wife and daughter in equal shares during the lives of both, and thereafter to the survivor during her life, and upon the death of the survivor that the trust should cease and the property should thereupon vest in Henrietta and Charles Higgins, children of his daughter aforesaid, and in such other children as should be born to her, or such of them as were then living, share and share alike. The parties named as trustees were also made executors of the will. Cook renounced as executor, and the two Washburns were duly appointed and qualified. The estate was all community property, and his widow transferred and conveyed to the petitioner, Jeanie W. Higgins, the entire one-half thereof, being the one-half which, as community property, vested in said widow, and was not subject to testamentary disposition. Thereafter the widow died, and the petitioner, being thereupon entitled to the whole of the income of the residue, under the terms of the trust, relinquished and surrendered all of her rights under the trust to her said children, Henrietta and Charles. She claims that this surrender operated as a merger, and clothed the two children with the absolute present title to all of the estate that was disposed of by the will; that is to say, to the one-half thereof. A final account of the executors had been settled, the decree settling the same showed that there was but $819 cash on hand, and that the bulk of the estate consisted of shares of stock in two corporations, known as the Yosemite Stage & Turnpike Company and the Wawona Hotel Company, the value not appearing, and that there was $4,000 unpaid on the legacies, $12,839.02 unpaid on the claim of E. P. Washburn as a creditor, and $1,713.14 unpaid on the claim of John S. Washburn as a creditor, both of which claims were due and had been regularly allowed. There were also due to them as executors their costs of administration, including commissions. These costs were not mentioned in the final account, and had not been settled or allowed, but the findings state that they were due and unpaid. Henrietta and Charles Higgins were minors, and the petitioner was their duly appointed guardian. The two Washburns appeared as creditors, and, in that capacity, objected to any final distribution of the estate; their objections being based on the ground that their debts were unpaid. They also objected, as executors, on the ground that the debts and legacies were unpaid, that their commissions as executors and other expenses of administration were due, owing, and unpaid, and that there was not sufficient money on hand to pay the same. More than one year had elapsed since the first publication of notice to creditors, and the findings are that the estate was in a condition to be closed and distributed as soon as the legacies, debts, and costs of administration were settled and paid, but that, unless by a sale, which none of the interested parties desired, the only means of paying these sums was the income of the property, of which a sufficient amount for that purpose had not yet accumulated.

The petitioner claimed that she was entitled, absolutely, to one half of the property, and that her two children were entitled absolutely to the other half, both being subject to the payments of the debts, legacies, and costs of administration, and she asked distribution accordingly, and offered to pay the above charges upon a decree of distribution as prayed for being granted. Section 1663 of the Code of Civil Procedure provides that, after one year from the issuance of letters, an heir, a devisee, or legatee may have his portion of the estate distributed to him, if the estate is but little indebted, and it can be done without loss to the creditors, provided such party give a proper bond as security for his share of the debts, or, if the debts are secured by a sufficient mortgage on real estate, distribution may be ordered without bond. Provisions of like character, in which a bond is made indispensable, are found in sections 1658 to 1661, inclusive. The proceeding here involved does not come under either of these statutory provisions. It purports to be an application for a final distribution of all the property of the estate, without bond or security for the debts. The real proposal of the petitioner is that all the property be turned over to the distributees, subject to the debts, legacies, and expenses, that the executors be discharged, and that said distributees shall undertake to complete the process of administration of the estate by paying the said debts, legacies, and expenses.

Under the circumstances of this case the court properly refused to make the distribution prayed for. Where the creditors and other parties entitled to the payment of money in due course of administration consent that the administration be closed and that the property of the estate be distributed to the persons entitled, without the payment of such claims, but subject to a lien therefor, doubtless the court, in its discretion, and upon request of the persons entitled to distribution, may make an order accordingly. And under the sections above referred to, where the debts are secured by mortgage or by a bond approved by the court, a person entitled to distribution may have his portion distributed to him, although the creditors do not consent thereto. This may possibly be the case, even if such person be the sole heir and entitled to the entire estate, although this is a question we do not decide. In all such cases, however, the administration is not closed, but continues for the payment of the debts and expenses of administration. But we know of no authority for the proposition that the court, upon petition of the distributees, and over the objection of the creditors or without their consent, may arrest the course of administration, charge the assets with a lien for the unpaid debts, legacies, and expenses, discharge the administrator from further duties respecting the estate, and deliver the property of the estate to the heirs, residuary legatees, or devisees, burdened only with the charge for the sums due, to be paid at the will of the distributees, or when they are compelled to do so by a suit to enforce the lien. If it be contended that this extreme course was not proposed, and that the petitioner asked only a conditional decree that the executors deliver the property to the distributees upon condition that the distributees should concurrently pay to the executors the amounts due for legacies, debts, and costs of administration, and it be conceded that, in a proper case, such a decree might be made, still it could not be done here, for the costs of administration were unsettled and uncertain. The estate was not in a condition to have the administration closed. It may be admitted that, if the necessary money had been proffered in court, the court might, in its discretion, have then and there proceeded to settle the commissions and costs, and, having done so, directed the payment of the money on the one hand, and the distribution of the estate on the other hand, to the parties entitled. No such course was pursued or proposed. The offer was to pay the debts, etc., "on the decree of distribution being granted," which means after the granting of the decree and at some indefinite time in the future. This construction of the findings as to the offer is shown to be correct by the evidence, which was to the effect that the only payment offered was one to be made subsequently at a bank in San Francisco. One of the principal objects of administration is the payment of the debts of the deceased. For that purpose, the assets are subjected to the jurisdiction of the court, and to that extent it is a proceeding for the benefit of the creditors. Each creditor is entitled to have the proceeding kept on foot and the property kept in legal custody, until his debt is paid, or secured in some manner provided in the statute, and he cannot be required to yield this right and accept a lien or charge on the property to be enforced in some new and independent proceeding.

We do not consider it necessary to discuss or determine the question whether or not the transfer by the petitioner of her interest under the trust to the two children now born to her caused a merger of the whole estate in the property in the said children, so as to terminate the trust and authorize a distribution of the absolute title to those two, subject to be opened to let in as part owners children who may be hereafter born to petitioner, who may be living at her death.

The judgment denying distribution and the order denying a new trial are affirmed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

148 Cal. 55

STATE v. SUPERIOR COURT OF SACRAMENTO COUNTY. (Sac. 1,409.)

(Supreme Court of California. Oct. 9, 1905.)

1. WILLS—PARTIES ENTITLED TO CONTEST.

Under Code Civ. Proc. § 1307, providing that any person interested may appear in proceedings for the probate of a will and contest the will, a party to be entitled to appear must have some interest in the estate which may be affected by the probate of the proposed will.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 532–535, 550–554.]

2. SAME—STATEMENT OF CONTEST—INTEREST OF CONTESTANT—SUFFICIENCY OF SHOWING.

Code Civ. Proc. § 1307, provides that any person interested may appear in probate proceedings and contest a will. Civ. Code, § 670, provides that all property of which there is no owner belongs to the state. Sections 672 and 1404 provide that a nonresident alien who takes by succession must appear and claim the property within five years from the time of succession or be barred. *Held*, that a statement of contest of a will presented by the state, and alleging by way of legal conclusion merely that the state is the only party entitled by law to the proceeds of the estate, does not show that the decedent died without heirs or that such heirs are nonresident aliens, so that the state would have an immediate present or future contingent interest in the property, such as to entitle it to contest the will.

3. Same.

Nor does a petition for the probate of a will filed by the public administrator, alleging that deceased has no heirs residing in the state of California, show any such interest in the estate.

4. Same—Statement of Contest.

A paper filed in probate proceedings, addressed to the public administrator and others claiming an interest, and purporting to give notice that the state claims the estate in the matter of which the paper is filed, on the ground that the decedent died without leaving any heirs at law or next of kin, has no proper place in the files of the case, is not a pleading recognized by law, and cannot be accepted in lieu of allegations that should have been contained in the statement of contest of decedent's will which the law requires contestant to file.

5. Same—Allegation of Statement.

A notice that the state claims property of a decedent's estate on the ground that the decedent left no surviving heirs is not equivalent to an allegation of the fact that he left no surviving heirs.

6. Same—Persons Entitled to Contest—Interest in Estate.

The possibility that all of the heirs of a decedent or some one of them may fail to appear and claim the property, so that thereupon the Attorney General may proceed under Code Civ. Proc. § 1269, to declare an escheat, and that no heir may then or within 20 years after judgment appear to claim the property or its proceeds, so that absolute ownership will vest in the state under sections 1271, 1272, does not give the state an interest in the estate of the decedent, within the meaning of section 1307, authorizing any person interested in an estate to appear in probate proceedings and contest the will.

In Bank. Mandamus proceedings by the state against the superior court of Sacramento county. Dismissed.

U. S. Webb, Atty. Gen., and L. T. Hatfield, for the State. A. L. Shinn, R. L. Shinn, and Clinton L. White, for respondent.

SHAW, J. The state of California, by the Attorney General, by an original proceeding in this court, applies for a writ of mandate to compel the superior court of Sacramento county to allow the state of California to appear in said court as contestant in a proceeding therein pending for the probate of a document alleged to be the last will of one Fritz Miller, deceased. Section 1307 of the Code of Civil Procedure provides that in such a proceeding any person interested may appear and contest the will. It is a necessary condition to the right of any party to appear that such party shall have some interest in the estate which may be affected by the probate of the proposed will. Waiving for the purposes of the decision all other objections to the granting of the writ, we think it must be denied, for the reason that the application made to the superior court does not show that the state of California possesses an interest in the estate of Fritz Miller sufficient to make it a proper party to the proceeding for the probate of his will. It was claimed on the argument that Fritz Miller died without heirs or next of kin, or that, if he left any kin, they were nonresident aliens, and that the state would have, in the former case, an immediate present interest in the property, as provided in section 670 of the Civil Code, or, in the latter case, a future contingent interest, to become vested in the event that such aliens fail to appear and claim the property within five years, as provided in sections 672 and 1404 of the Civil Code, and that either interest is sufficient to give the right to maintain a contest of the will. In support of this position counsel cites State ex rel. Donovan v. District Court, 25 Mont. 355, 65 Pac. 120, which appears to be precisely in point. The proposition may be conceded, but the facts upon which it rests are not shown to exist by any proper pleading or averment. The proposed statement of contest, which the state presented to the superior court and offered to file, contains no allegation on the subject. It merely states the legal conclusion that, under the will executed under date of February 13, 1905, the state of California is the only party entitled by law to the proceeds of the estate. The petition for the probate of the will, which was filed by the public administrator, states that "the deceased had no heirs residing in the state of California." It does not aver that there were no heirs residing elsewhere, nor that the heirs, or any of them, were aliens. The only document which the petitioner here offered to file in the superior court, containing any statement of fact on the subject, was a paper, entitled in the said superior court and in the estate of Fritz Miller, deceased, signed by the Attorney General and by L. T. Hatfield, attorney, addressed to the public administrator and others claiming an interest, purporting to be a notice that the state of California claims the entire estate upon certain stated grounds, among which was the statement that Fritz Miller "died without leaving surviving him any heirs at law or next of kin." This document had no proper place in the files of the case, is not a pleading recognized by law, and cannot be accepted in lieu of an allegation that should have been contained in the statement of contest, or "written grounds of opposition to the probate," which the law requires the contestant to file. Furthermore, a notice that the state claims the property, on the ground that the deceased left no surviving heirs, is not an allegation of the fact that he left no surviving heirs. It is a presumption of law that a person has next of kin who will succeed to his estate upon his death, leaving no will. People v. Roach, 76 Cal. 297, 18 Pac. 407. The contrary, if it is relied on to establish a right, must be shown affirmatively.

Upon this condition of the record the only ground upon which the state can claim that it has an interest sufficient to authorize it to maintain the contest is that, although the deceased did leave surviving heirs in whom, if the will is invalid, the title to his property has vested, and who are not aliens whose title will be forfeited by escheat if they do not claim the property within five years, yet that there is a possibility that all the heirs, or some one of them, may fail to appear and claim the property, that thereupon proceedings may be instituted, under section 1269, Code Civ. Proc., to declare an escheat, and that no heir entitled may then, or within 20 years after judgment therein, appear to claim the property or its proceeds, and thereupon the state may take as absolute owner. Code Civ. Proc., §§ 1271, 1272. We do not think this remote and contingent possibility, or series of successive possibilities, constitutes an interest which will authorize the party, having nothing more substantial, to maintain a contest of a will.

The petition is denied, and the proceeding dismissed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.; McFARLAND, J.; HENSHAW J.; LORIGAN, J.

148 Cal. 69

HARRISON v. COLGAN, State Controller.

(S. F. 4,375.)

(Supreme Court of California. Oct. 9, 1905.)

1. JUDGES—SALARIES—CHANGE.

Under Const. art. 6, § 17, providing that the compensation of justices of the Supreme Court shall not be increased or diminished after their election, nor during the term for which they have been elected, the salary of existing judges of such court during their term could only be changed by constitutional amendment.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Judges, § 82.]

2. SAME — STATUTES — CONSTRUCTION — CONSTITUTIONALITY.

St. 1905, p. 224, c. 249, amending Pol. Code, § 736, raising the annual salary of each justice of the Supreme Court to $8,000, and of each justice of the District Courts of Appeal to $7,000, construed in connection with Const. art. 6, § 17, prohibiting the increase or diminishing of the salary of a justice of the Supreme Court during his term, operated only to increase the salary of such judges as were thereafter elected to a regular term, leaving section 736 before amendment, fixing such salary at $6,000, in force in the meantime.

3. SAME — JUDGES OF DISTRICT COURTS OF APPEAL—SALARIES.

Const. art. 6, as amended November 8, 1904 (St. 1905, p. xxxiv) established District Courts of Appeal, and provided that the salaries of the judges should be the same as those of justices of the Supreme Court. Pol. Code, § 736, fixed the salary of Supreme Court judges at $6,000, and Const. art. 6 § 17, prohibited the increase thereof during the term for which they shall have been elected, and St. 1905, p. 224, c. 249, amended Pol. Code, § 736, by raising the salary of the justice of the Supreme Court to $8,000. *Held* that, as no justice of the Supreme Court was entitled to more than $6,000 during his present term, the justices of the District Courts of Appeal were limited to that sum until the next succeeding election of a Supreme Court justice to a regular term.

4. SAME—TERM OF OFFICE.

Const. art. 6, as amended November 8, 1904 (St. 1905, p. xxxiv), created District Courts of Appeal with terms of office and salaries the same as justices of the Supreme Court, and provided that on ratification by the people of the amendment the Governor should appoint nine persons to serve as justices of such courts until January, 1907. *Held*, that the preliminary term of the office of justice of the District Court of Appeal began to run from the adoption of the constitutional amendment, regardless of the date of the appointment of the incumbents, and such amendment, having been adopted prior to the amendment of Pol. Code, § 736, by St. 1905, p. 224, c. 249, increasing the salary of justices of the Supreme Court and of the District Courts of Appeal, was inapplicable to persons appointed to fill such preliminary term as justices of the District Courts of Appeal, under Const. art. 6, § 17, prohibiting the increase of the compensation of justices of the Supreme Court during their term.

5. STATUTES—ENACTMENT—EFFECT—TIME.

St. 1905, p. 224, c. 249, amending Pol. Code, § 736, by raising the salaries of the judges of the Supreme Court and of the several District Courts of Appeal, having been passed without an emergency clause, was of no force until 60 days after its passage, as provided by Pol. Code, § 323, so that it did not apply to judges of the District Courts of Appeal appointed after such amendment had been passed and approved by the Governor, but before the expiration of such 60 days, under Const. art. 6, § 17, made applicable to the District Courts of Appeal, prohibiting the increase of the salaries of justices of the Supreme Court during their term.

6. SAME—ENACTMENT—FORCE.

Const. art. 4, § 16, declaring the procedure required for the enactment of a law, has no application to the time when a bill duly enacted shall become operative as a law.

McFarland, J., dissenting.

In Bank. Petition by Ralph C. Harrison for a writ of mandate against E. P. Colgan as Controller of the state of California. Writ denied.

See 81 Pac. 1010.

Charles W. Slack, for petitioner. U. S. Webb, Atty. Gen., for respondent.

SHAW, J. This is an original proceeding in this court to compel the State Controller to issue a warrant on the state treasury in favor of the plaintiff for his salary as justice of the District Court of Appeals of the Second District for the month of June, 1905. The plaintiff demanded compensation for that month at the rate of $8,000 a year, which the defendant refused. The proceeding is really begun on behalf of all the present justices of the District Courts of Appeal for the purpose of obtaining a determination of the question whether the annual salary of the incumbents of that office, after the taking effect of the act of March 18, 1905, and prior to the first Monday after the first day of January, 1907, is $8,000, or $6,000.

The amendments to article 6 of the Constitution, adopted at the general election on November 8, 1904 (St. 1905, p. xxxiv), established three new courts, styled District Courts of Appeal, and provided that there should be three justices of each of said courts. It further provided that "their terms of office and salaries shall be the same as those of justices of the Supreme Court," and that, "Upon the ratification by the people of this amendment, the Governor shall appoint nine persons to serve as justices of the District Courts of Appeal until the first Monday after the first day of January in the year 1907. * * * At the election in the year 1906 nine of such justices shall be elected"—and that the justices so elected for each district should classify themselves, so that one should go out of office in 4 years, one in 8, and one in 12 years from January, 1907. At the time this amendment was adopted the law provided that "the annual salary of each justice of the Supreme Court is six thousand dollars." Pol. Code, § 736, enacted March 12, 1872, and in force by virtue of section 11, art. 22, of the Constitution of 1879, continuing in force "All laws relating to the present judicial system of the state." The Constitution also then contained a provision in section 17 of article 6, which was continued and made also applicable to the justices of the District Courts of Appeal by the amendment that the compensation of the justices of the Supreme Court "shall not be increased or diminished after their election, nor during the term for which they shall have been elected." The Governor delayed making the appointments of justices of the District Courts of Appeal until April 10, 1905, at which time he appointed nine persons to those offices, including the plaintiff, and each of them immediately qualified and have ever since been acting as such justices. The act of March 18, 1905, under which, in connection with the provision of the Constitution first above quoted, the plaintiff claims the increased salary, is as follows:

"Sec. 1. Section seven hundred and thirty-six of the Political Code of the state of California is hereby amended so as to read as follows: 736. The annual salary of each justice of the Supreme Court is eight thousand dollars; and the annual salary of each justice of the several District Courts of Appeal is seven thousand dollars." St. 1905, p. 224, c. 249. The act contained no emergency clause, and hence, under section 323 of the Political Code, it did not take effect as law until May 17, 1905, 60 days after its passage. Of the terms of the seven justices of the Supreme Court in office at the time of the ratification of the constitutional amendment in question, two will expire in January, 1907, two in January, 1911, and three in January, 1915. The foregoing are the principal constitutional and statutory provisions affecting the question for consideration.

The contention of the plaintiff is that the latter clause of the amended section (Section 736 of the Political Code), fixing the salaries of the justices of the District Courts of Appeal at $7,000, is in conflict with the provision of the constitutional amendment of 1904, to the effect that the salaries of those justices shall be "the same" as those of the Supreme Court justices, and is therefore void, and the only effective part of the section is the provision fixing the salaries of the justices of the Supreme Court at $8,000; that this increase of the salaries of justices of the Supreme Court, by virtue of the last-mentioned constitutional provision, also acts upon the salaries of the justices of the District Courts of Appeal, and gives a like increase to them; that the terms of the latter justices did not begin to run until the date of their appointment, April 10, 1905; that at that time the amended section 736, aforesaid, had been passed by both houses of the Legislature and approved by the Governor, and nothing remained to make it effective as law, except the lapse of the required 60 days from the time of its approval; that under these circumstances the salaries of the justices of the District Courts of Appeal must be deemed to have been increased before the term for which they were appointed had begun, and before their appointment, and not during such term or after such appointment; and that the law, so construed, does not transgress the constitutional restriction upon an increase of salaries, and it therefore became applicable to the newly appointed justices as soon as it took effect, although the latter event happened after the terms began.

1. Under the constitutional prohibition of any increase in the salaries of justices of the Supreme Court after their election or during the term, it is impossible for the Legislature to increase the salary of any justice of that court until January, 1907. Such salary could, of course, be changed at any time by means of a constitutional amendment. Such an amendment is to be submitted for adoption at the general election in 1906. But, even if adopted, it does not purport to affect salaries which become due in the meantime, and in any event it does not affect the present question. The salary of each justice is, and without such amendment will continue to be during his present term, $6,000 a year. The amendment, if adopted, will change it for the time elapsing after its adoption, but not before. What, then, are the salaries of the justices of the Supreme Court to which those of the District Court justices must, for the present, conform? Clearly not the salaries which may hereafter be payable under the amended statute when a new term of some of the justices of the Supreme Court shall have begun, but the present salaries now allowed and paid to them by law. The justices of the district courts can, upon their own theory, claim nothing under the provision expressly made for them by the amending statute, but only by virtue of the clause which acts directly upon the office of jus-

tice of the Supreme Court. The purpose of the constitutional provision that the salaries of the justices of the respective courts should be the same was, presumably, to preserve a similar standard of capacity in the two courts. It could not have been intended that a law raising the salaries of justices of the Supreme Court, but inoperative as to present justices, owing to the prohibition of an increase during their terms, should, nevertheless, be operative in the meantime upon the justices of the District Courts of Appeal, who are not referred to therein, and who can take only under the provision operative upon the justices of the Supreme Court who may be hereafter elected. The effect of the statute upon the justices of the Districe Courts of Appeal being secondary only, and dependent on its first having some actual application to some at least, of the justices of the Supreme Court, it must, for the time being, be held inoperative upon all alike. It must be taken in connection with the constitutional limitations upon such legislation, and the two must be harmonized, if possible. So far as, by its language, it would appear to apply to existing terms and present incumbents, it is unconstitutional and void. To make the two harmonious, and give the statute some effect, it must be read as if it declared that "the annual salary of each justice of the Supreme Court hereafter elected to a regular term shall be eight thousand dollars." The amended section, applying in terms to the Supreme Court justices, although an existing statute, is not in force, because there is no subject upon which it can constitutionally operate. It remains in abeyance, and must so remain until the beginning of the next ensuing regular term of the office of justice of the Supreme Court. In the meantime the only effective law fixing the salaries of justices of the Supreme Court is the original section 736 of the Political Code, fixing them at $6,000 a year, and to this the justices of the District Courts of Appeal must, in the meantime, conform, in order that their salaries shall be the same as those of the justices of the Supreme Court.

2. We are further of the opinion that the preliminary term of the office of justice of the District Court of Appeal began to run as soon as that office was created by the adoption of the amendment of 1904 to the Constitution. Immediately upon the taking effect of the amendment, and without any regard whatever to the appointment of any person as justice thereof, the District Courts of Appeal became existing courts to which appeals could be taken, and the offices of justices thereof became existing offices to which persons could be appointed. A preliminary term extending to January 7, 1907, immediately began to run, and vacancies in the offices were at once created. These vacancies might have been filled at any time thereafter by the appointment of persons to hold the respective offices for the unexpired part of the preliminary terms then running. There would have been no serious contention that this preliminary period did not constitute a term, if a time had been expressly mentioned for it to begin, or if it had been designated as a "term" in the amendment. The effect, however, is the same. The office began to exist at a time fixed, namely, upon the ratification of the amendment; the end of the time of service of the first appointees was fixed; and this constituted a "term" in fact as effectually as if it had been called by that name. If we should concede that the increase could apply to the justices of the District Courts before it became applicable to any justice of the Supreme Court, and should then hold, as here contended, that the term did not begin to run until there was an appointee, it would follow that the conditions would have been such that the Governor could have so arranged the time of making the several appointments, with respect to the passage of the act, that some of the justices would be entitled to the increased salary and others would not, or, by an early appointment, could have prevented any of them from receiving it, or, by deferring all appointments until after May 17th, could have secured it to all of them. And this possibility might have induced some concert of action between him and the members of the Legislature, and the attempt to exercise improper influences by expectant candidates for the offices. We are far from supposing that such things would or could have done or attempted by any of the persons concerned. But restrictions of this character are made with a view to preventing such conduct under any possible administration or circumstances, and must be construed accordingly. It is only with respect to the effect upon the proper construction of the provision that we mention these possibilities. They furnish as weighty reasons for the application of the restriction to the preliminary term, and for holding that that term began with the office rather than with the appointment of an incumbent thereto, as those assigned for the application thereof to the regular terms. In State v. Parker, 30 La. Ann. 1183, in considering a statute creating an office with a regular term to be filled by appointment, but not fixing the time of its commencement, the court says: "The 'office' commenced its existence on the 5th of March, 1870, and in the absence of provisions to the contrary, as an incident thereto, 'the term' commenced at the same time that the office did. There is no more reason for saying that the commencement of the term was suspended until there was an appointee than there is for saying that the existence or commencement of the office itself was suspended. Neither the existence of the office nor the running of the term depended upon the appointment of an occupant." The justices were appointed to serve for the unexpired part of the preliminary term for which they

were appointed. It is a settled rule regarding such restrictions that they forbid any increase during a term, regardless of the fact that different persons may successively hold for successive parts of the term, so that one who is elected or appointed after a part of such term has expired cannot have an increase made after the term began, though prior to his election or appointment. Larew v. Newman, 81 Cal. 590, 23 Pac. 227; Storke v. Goux, 129 Cal. 526, 62 Pac. 68. The effect is that no justice of the District Court of Appeal serving any part of the preliminary term, is entitled to more than $6,000 a year, no matter when the first appointment for such term was made. In Brodie v. Campbell, 17 Cal. 18, a case where the law, creating the office of district judge, fixed a preliminary term to be filled by appointment, to be followed by a regular term of six years, but fixed no time for the beginning of the regular term, nor for the ending of the preliminary term, except by the rather indefinite provision that the first appointee should hold "till the next general election, when a judge shall be elected by the qualified voters of the district," it was held that the term of the first appointee ended, and that of the duly elected successor began, on the day when the successor qualified as such. The case was decided upon the peculiar language of the act, and we do not think it applicable to the point we are now considering.

3. If, however, it is conceded that the respective terms of the respective justices of the District Courts of Appeal ending in January, 1907, did not begin until they were respectively appointed, we are, nevertheless, of the opinion that the amended section 736 of the Political Code does not affect their salaries during that term. The decisions are uniform in this state, that, until the time arrives when it is to take effect and be in force, a statute which has been passed by both houses of the Legislature and approved by the Governor has no force whatever for any purpose, and all acts purporting to have been done under it prior to that time are void. People v. Johnston, 6 Cal. 674; Miller v. Kister, 68 Cal. 145, 8 Pac. 813; Santa Cruz W. Co. v. Kron, 74 Cal. 223, 15 Pac. 772. The amended section 736, increasing the salaries of justices of the Supreme Court, did not become law, or have any effect, until May 17, 1905. It is admitted that prior to that time the respective justices of the District Courts of Appeal received and were entitled to a salary at the rate of only $6,000 a year. To allow them a salary of $8,000 a year from and after that time would be to increase their salary during the term for which they were appointed, and by a statute which did not become law until after that term began. It is said in support of the plaintiff's theory on this point that the purpose of the constitutional inhibition was solely to prevent the possibility of an officer using the power and influence of his official position to obtain an increase of compensation after his term begins, and that, as this could not be done where the steps necessary to the passage of such a law are complete before the term has begun, the prohibition should not be applied to such a statute. It cannot be truly said that this was the sole purpose of the prohibitory clause. We have seen that it would be possible for such an increase to be made by arrangement with the appointing power and the Legislature, at the instance of candidates who have been assured of their appointments and for their benefit, and that this also furnishes a reason for the prohibition. It is true that, so far as this object is concerned, the restriction could easily have been evaded in the present instance, conceding that the term had not begun, by including in the statute a clause making it take effect immediately. The fact that this was not done, and that there was at least a reasonable expectation that the appointments would be made before the amendment to the Code would be in force, raises a strong presumption that the Legislature did not suppose that the act would affect the salaries of the appointees if there was no emergency clause, and did not desire that it should. But in any event the Constitution plainly forbids an increase during the term, and no exception is made in favor of a law passed before the term begins, but not in force until afterwards. We cannot hold it inapplicable to the present law merely for the reason that one of the grounds which may have induced its insertion in the Constitution is not applicable to the present case, particularly where the other grounds would or might be peculiarly applicable. The provisions of our Constitution are therein expressly declared to be mandatory and prohibitory. The case of Stuhr v. Hoboken, 47 N. J. Law, 147, which holds the contrary with respect to a similar prohibition contained in a city charter, is not a very well-considered case, is not consistent with the decisions of this court above cited that a statute not in force is absolutely ineffective, and does not meet with our approval. There is nothing in section 16 of article 4 of the Constitution to the effect that an act of the Legislature is of any force before the time when it is declared to be in force by the statute itself. That section merely declares what procedure is required for the enactment of a law, and does not attempt to specify the time when the bill thereby enacted shall pass to the state of an operative law.

The petition for a peremptory writ of mandate is denied

We concur: BEATTY, C. J.; LORIGAN, J.; VAN DYKE, J.; HENSHAW, J.

ANGELLOTTI, J. (concurring). I concur in the judgment. While I am entirely satisfied that under the existing law no justice of the Supreme Court now in office can receive the increase of salary provided for by the amendment to section 736 of the Political Code during the term for which he was elected, and that consequently, until January, 1907, there can be no justice of said court who will actually receive more than $6,000 per annum, I am not satisfied that this fact alone would bar the present justice of the District Courts of Appeal from receiving the increased salary, if the act increasing the salary had gone into effect prior to their appointment, and prior to the commencement of the term for which they were appointed. If the amendment to section 736 of the Political Code is a valid enactment at all, it undoubtedly fixes the legal salary of justices of this court at $8,000 per annum, and the mere fact that other provisions preclude any resent member of this court from receiving the increase during his term does not make it any the less true that $8,000 is the salary fixed by law for justices of the Supreme Court. The Constitution provides that the salaries of justices of the District Courts of Appeal "shall be the same as those of justices of the Supreme Court," and it may well be contended that by virtue of this provision any justice of the District Court of Appeal, elected or appointed after the taking effect of the amendment, and whose term of office commences after such taking effect, would be entitled to receive the legal salary fixed thereby—in other words, that such amendment acts equally and uniformly upon justices of the Supreme Court and justices of the District Courts of Appeal, and applies to all justices of either court who are elected or appointed for a new term after the amendatory act became a law. I am, however, fully satisfied that the term for which the present justices of the District Courts of Appeal were appointed commenced with the adoption of the constitutional amendment, and therefore before the act increasing the salaries was enacted by the Legislature. The Constitution prohibiting an increase of salary during the term for which they were appointed, legislation subsequent to the commencement of the term could not affect them.

I am also satisfied that, inasmuch as the law fixing the salary did not take effect until after the justices were actually appointed by the Governor, it could not operate to affect them. The salary fixed by law at the time of their appointment was only $6,000, and this could not be subsequently increased as to them, except by constitutional amendment.

I concur in all that is said in the opinion as to these two grounds, and therefore concur in the judgment denying the petition for a writ of mandate.

McFARLAND, J. (dissenting). I dissent, and think that petitioner is entitled to a salary of $8,000 per annum. My views on the subject are, briefly, these:

The Constitution provides that the salaries of justices of the District Courts of Appeal "shall be the same as those of justices of the Supreme Court," and by the act of March 18, 1905, it is enacted that "the annual salary of each justice of the Supreme Court is $8,000." There is no doubt, therefore, that the annual salary of justices of the Supreme Court as fixed by law is $8,000, leaving out of view, for the present, the proposition that certain individual justices may be precluded from receiving that amount on account of the provision that the salaries of justices "shall not be increased or diminished after their election nor during the term for which they shall have been elected." The whole law existing to day touching the salaries of justices of the Supreme Court commenced with the adoption of the Constitution of 1878. This Constitution deals with the whole subject of the salaries of justices and judges of the new courts which it creates, and necessarily covers that whole subject; and, of course, statutes about the salaries of justices of former courts are no longer of any significance. As to the salaries of the judges of the new superior courts, its provision is that, "until otherwise changed by the Legislature the superior court judges shall receive an annual salary of $3,000 each." But the provision as to salaries of justices of the Supreme Court is materially different. It is that "during the term of the first judges elected under this Constitution the annual salaries of the justices of the Supreme Court shall be $6,000 each." It does not provide that such salaries shall continue until otherwise provided by the Legislature. It does not provide at all for salaries of justices who shall be elected after the first term. It leaves that for the Legislature, whose duty it was to provide for the salaries of said future justices. The Legislature, however, neglected that duty until March 18, 1905. And when, at the last-named date, the Legislature did perform that duty by fixing the salary at $8,000, the salary was not thereby "increased." It simply for the first time fixed the salary, not by increasing an existing salary, for there was none, but by remedying the former neglect to fix any salary at all. The fact that, from the time when the provision of the Constitution as to the salaries of the first justices ceased, the state, without any law on the subject, paid the justices certain compensation, does not in any way affect the validity of the above views.

This subject would, of course, be a delicate one for the justices of this court to handle, if their salaries were involved; but the case at bar involves only the salaries of justices of the District Courts of Appeal. It may be noticed, however, that the opposite view would leave the salaries of the District Appellate justices in confusion for many years, unless the people next year adopt a pending constitutional amendment. According to the prevailing opinion, those justices are not to receive the salary fixed, generally, by law as the salary of the justices of the Supreme court, but only such salary as the latter justices are actually receiving under the provision against increasing salaries. Does that mean the salary which a majority of such justices are receiving, or the salary which any of them are receiving? In January, 1907, there will be two newly elected justices of the Supreme Court who will not be subject to the provision against increasing salaries, and they will undoubtedly be entitled to the $8,000 salary. But at that time the other five members of this court will, under the rule announced, be entitled to only $6,000; and at that time will the newly elected justices of the district courts of appeal be entitled to the $8,000 received by two of the Supreme Court justices, or will they be deprived of the $8,000 until 1911, when a majority of the Supreme Court justices will be entitled to receive the $8,000? In my opinion the Constitution clearly intends that after the expiration of the term of the first justices of the Supreme Court the entire matter of their salaries shall rest with the Legislature, subject only to the provision that after the Legislature had once fixed the salary any increase which it should afterwards make should not affect those already in office during their terms.

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148 Cal. 149

LOOMIS v. LOOMIS et al. (S. F. 3,459.)

(Supreme Court of California. Oct. 14, 1905.)

1. HOMESTEAD — SURVIVORSHIP—CONVEYANCE BY HUSBAND.

In the absence of the abandonment of a homestead by the concurrent act of both parties in the mode prescribed by Civ. Code, §§ 1242, 1243, the wife being entitled to the property absolutely in case she survived her husband, a deed to the property executed to her by the husband alone, in consideration of her promise to preserve the property for the husband's brother after her death, conveyed nothing.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, § 182.]

2. TRUSTS—CREATION.

Where a husband's separate deed to his wife of property occupied by them as their homestead, in consideration of her promise to hold the same for another after her death, did not increase the wife's estate in the property on her surviving her husband, she did not hold the same under a constructive trust, under Civ. Code, § 2224, creating a constructive trust in property "acquired by fraud."

3. HOMESTEAD—INCUMBRANCE.

The title to homestead property vested jointly in husband and wife cannot, during the lives of both, be conveyed, incumbered or impaired in favor of a third party, except by a single written instrument executed and acknowledged personally by both husband and wife, as provided by Civ. Code, §§ 1242, 1243.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, § 203.]

4. TRUSTS—CREATION.

A letter written by a widow to the brother of her deceased husband, that her home was a gift to her, with a promise that, when she was through with it, it should be given to the brother, was insufficient to create an express trust in the property for the brother's benefit, under Civ. Code, § 2222, providing that a voluntary trust is created by any words indicating with reasonable certainty an acceptance of the trust or an acknowledgment made on a sufficient consideration of its existence and the subject thereof.

Department 1. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by Hannah Ann Loomis against E. H. Loomis and others. From a judgment denying a portion of the relief demanded, and from an order denying plaintiff's motion for a new trial, she appeals. Reversed.

R. E. Ragland and E. A. Bridgford, for appellant. Joseph Hutchinson, Frank Otis, and W. B. Treadwell, for respondents.

ANGELLOTTI, J. This action was brought by plaintiff to quiet her title to a parcel of real property in San Francisco, found to be of the value of $5,000, and to have declared void, upon the ground that the execution of the same was procured by undue influence, a certain deed executed by her to defendant Mary Hawley, in trust to receive the rents and profits of the property, to pay therefrom the taxes, insurance, and repairs, and to pay the balance thereof to the use of plaintiff during her life, and upon her death "to convey the said property in fee simple absolute" to one E. H. Loomis. The trial court found against plaintiff upon her allegations of undue influence, but determined that the deed of trust was void under the decision of this court in Estate of Fair, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70. The correctness of this determination is not disputed here. The trial court, however, found that, notwithstanding the invalidity of said deed of trust, plaintiff was not the owner of any interest in said land other than an estate for her life therein, and that, subject to said estate for life, defendant E. H. Loomis was the owner of "an estate in fee in remainder of said property, commencing at the death of said plaintiff." Judgment having been entered accordingly, the plaintiff appeals from the whole of the judgment, except that portion thereof relating to the invalidity of the deed of trust, and also from an order denying her motion for a new trial.

The theory of counsel for defendant Loomis, adopted by the learned judge of the court below, appears to be that by reason of a certain transaction between plaintiff and her husband, Barney Loomis, on January 6, 1900, plaintiff received said property from her husband, solely in trust to receive the rents and profits of the same during her life, and that upon her death the said property should vest in fee in said E. H. Loomis, a brother of her husband. The transaction in question, viewed in the light of the evidence most favorable to defendant, was as follows, viz.: On January 6, 1900, the husband, Barney Loomis, executed and delivered to plaintiff what purported to be an absolute conveyance of said property, which purported to be made in consideration of love and affection. This deed was in fact executed by the husband only upon the promise of his wife that she would contract "to reserve this property for my brother." The wife agreed to this, and thereupon drew up and signed a writing wherein she stated, according to the evidence of a witness who was present, the writing not being produced, "that she would reserve and hold this property for the brother of her husband." On February 2, 1900, the said husband died. On February 5, 1900, she wrote a letter to said brother, in which, after speaking of the death and burial of her husband, she said: "This home is a gift to myself with the promise that, when I am through with it, it shall be given to his brother, Edwin, who proved himself the best friend to him he ever found." On February 16, 1900, she executed the void deed of trust, hereinbefore referred to, indicating her understanding of the terms and conditions upon which she had received the deed from her husband. It is claimed by defendants that the foregoing evidence sufficiently shows a constructive trust, in accord with the doctrine of Brison v. Brison, 90 Cal. 323, 27 Pac. 186, Hayne v. Hermann, 97 Cal. 259, 32 Pac. 171, and similar cases, relating to transactions between husband and wife. It is said by counsel for defendants that it is the settled law of this state, under the decisions, that, where a husband conveys property to his wife, upon a prior or contemporaneous promise by her to hold the property, in whole or in part, for the benefit of another, the law fastens upon her a constructive trust for the disposition of the property in accordance with the promise. It may be conceded here that the rule is correctly stated by counsel, and that the evidence set forth above is sufficient to bring the transaction of January 6, 1900, within the operation of that rule. As to this, it is unnecessary to express an opinion, in view of other facts presented by the record, which make the rule contended for inapplicable here.

The record shows that on that day the premises in question constituted the duly selected and recorded homestead of the plaintiff and her husband. It does not appear whether the property was community property, or the separate property of either spouse, but owing to the fact, alleged by the pleadings, established by the evidence, and found by the trial court, that the wife had on February 18, 1881, regularly selected the premises as a homestead, and that the husband on March 14, 1899, did the same, and there being no intimation that the homestead so selected had ever been abandoned, it is unquestioned that on January 6, 1900, the property constituted the homestead of the parties, selected either from the community property, or from the separate property of the person selecting or joining in the selection of the same. Under these circumstances it cannot be doubted that it was then of such a character that it would, unless subsequently abandoned by the concurrent act of both parties, vest absolutely on the death of either husband or wife in the survivor. In the absence of such abandonment, which could only be effected by the mutual concurrent act of the parties, in the mode prescribed by law (sections 1242, 1243, Civ. Code), the law gave the homestead property absolutely to the wife in the event that she survived her husband. Her husband could not affect her right in this regard by any instrument which he, acting alone, could execute. It is true that it has been held that a husband may, by deed executed by himself alone, convey his title to the homestead property to his wife, subject to the homestead (Burkett v. Burkett, 78 Cal. 310, 20 Pac. 715, 3 L. R. A. 781, 12 Am. St. Rep. 58; In re Lamb, 95 Cal. 397, 405, 30 Pac. 568); but such a conveyance cannot affect the homestead character of the estate, nor can it prejudicially affect the wife's right of survivorship thereunder. A wife cannot be held to acquire, under such a deed, any right or interest in the property described therein that she already has under the law, and her absolute right to succeed to such property in the event of her husband's death is such a right. When, therefore, the husband died before her, the property vested absolutely in her under the homestead laws, and the husband's deed added nothing to her title. Whatever interest had been conveyed by that deed, the homestead subject to which the conveyance had been made had taken all of the property, and left nothing to be affected by such deed. From the moment of her husband's death, she held nothing under such deed. Under these circumstances, it follows that there was, subsequent to the death of the husband, no property to which the rule as to constructive trusts contended for by defendants could apply, for clearly such rule is applicable only to such property as is acquired by reason of the transaction relied on. As stated in Hayne v. Hermann, supra, "Whenever one person acquires from another the title to real estate by a fraud, actual or constructive, practiced upon that other, a constructive trust is created, which a court of equity will fasten upon the title in his hands." It is the property acquired by the fraud as to which the trust is created, and that alone, or, in the language of section 2224 of the Civil Code, "the thing gained." The only property acquired by the wife under the deed was the interest of the husband subject to the homestead. Such interest, it may be assumed, was held by the wife from the date of the deed to her husband's death in trust, by reason of her promise made when the deed was executed, but by his death that interest was absolutely terminated, and thenceforth the deed was ineffectual as a muniment of title.

There is no question, in this connection, as to whether there was such an interest in the husband at the date of the deed as to constitute that deed a sufficient consideration for the promise of the wife, but the question is whether there is property in her hands acquired by the wife from her husband under a deed made under such circumstances as to create a constructive trust. When it appears that there is no property in her hands acquired by reason of such deed, all questions as to a constructive trust are removed from the case. Defendant must then prevail, if at all, only upon the theory that an express trust in favor of defendant Loomis is shown. As to this, it is manifest that no such trust was created while both husband and wife were living. Under the clear and explicit provisions of our homestead law, as uniformly construed by this court, the interest in the homestead property, vested jointly in the husband and wife, cannot, while both live, be thus conveyed, incumbered, destroyed, or impaired, in favor of a third party, except by a single written instrument, executed and acknowledged personally by both husband and wife (sections 1242, 1243, Civ. Code. See Hart v. Church, 126 Cal. 471, 476, 58 Pac. 910, 77 Am. St. Rep. 195, and cases there cited; Freiermuth v. Steigleman, 130 Cal. 392, 62 Pac. 615, 80 Am. St. Rep. 138); and any attempted action in this behalf not in full conformity with the requirements of the law is absolutely void and inoperative for any purpose, and acquires no validity, even if the premises subsequently lose their character as a homestead from abandonment or other cause (Gleason v. Spray, 81 Cal. 217, 22 Pac. 551, 15 Am. St. Rep. 47; Powell v. Patison, 100 Cal. 236, 34 Pac. 677). In Graves v. Baker, 68 Cal. 133, 8 Pac. 691, an action to declare a trust, it was squarely held, in accord with what has been said, that a deed of homestead property from a husband to a wife, in trust to receive the rents and profits for herself and children during her life, and providing that after her death the property should vest absolutely in the children, was, as against a valid declaration of homestead, void, because executed and acknowledged by the husband alone. In this case there was no pretense that the husband and wife joined in a single instrument, or that the writing signed by her at the time of the execution of the deed, was acknowledged by her.

Defendant, however, relies upon a letter written by plaintiff to defendant Loomis, after the death of her husband, as creating such a trust. The statement relied on in that letter has already been set forth. There was nothing herein to indicate any intention on the part of the writer to create any trust, and all that the letter constituted at most was a voluntary acknowledgment on the part of plaintiff, made without any consideration whatever, that the property had been given to her by her husband, upon her promise that when she was through with it she would give it to defendant Loomis. It afforded very satisfactory evidence that she had made the alleged promise to her husband at the time of the execution of the deed, evidence in support of the claim of constructive trust, but it had no further effect, and could not, under the circumstances already detailed, operate to create a voluntary trust under the provisions of section 2222, Civ. Code, as claimed by defendant. From what has been said, it follows that the finding of the trial court as to the ownership of this property is not supported by the evidence. It is contended by plaintiff that, upon the findings of the court, judgment should be ordered entered for plaintiff in accordance with the prayer of her complaint, but we are of the opinion that the other findings are not such as to enable us to do this in the face of the findings as to ownership.

The judgment and order are reversed, and the cause remanded for a new trial.

We concur: SHAW, J.; VAN DYKE, J.

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148 Cal. 155

GOSS v. STEIGER TERRA COTTA & POTTERY WORKS. (S. F. 3,481.)

(Supreme Court of California. Oct. 14, 1905.)

TRIAL—INSTRUCTIONS—CHARGE ON FACTS.

A request to charge that evidence of oral admissions of a party should be viewed with caution, as provided by Code Civ. Proc. § 2061, subd. 4, was properly refused as a violation of the constitutional provision that "judges shall not charge juries with respect to matters of fact."

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 439-448.]

Department 1. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Fred Goss against the Steiger Terra Cotta & Pottery Works. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Alexander D. Keyes, for appellant. C. H. Wilson, for respondent.

VAN DYKE, J. The action is for damages for personal injuries, on account of being burned from an explosion of an oil tank, alleged to have been suffered through the negligence of defendant while the plaintiff was in the defendant's employ. The action was tried by a jury and judgment entered on the verdict for the defendant. The plaintiff appeals from the judgment upon a bill of exceptions.

At the trial one Steiger testified that he called on the plaintiff at the hospital about 12 hours after the explosion occurred, and he asked the plaintiff the following question: "Did you not know that it was dangerous to use a lantern in an oil tank of that kind?" To this question the plaintiff replied: "Yes;

I knew it was dangerous, and it was all carelessness on my part, and if I ever get over this I will know better next time." When the cause was submitted, the plaintiff requested the court to instruct the jury as follows: "The jury are instructed that evidence of oral admissions of a party ought to be viewed with caution." The court refused so to instruct the jury, to which ruling plaintiff excepted.

The only point made upon the appeal is that the court erred in refusing the instruction referred to. This instruction is in the language of the last paragraph, subdivision 4, § 2061, Code Civ. Proc. In Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124, it was held by this court in bank, after an elaborate discussion of the question, that such an instruction was in violation of the provision of the state Constitution that "judges shall not charge juries with respect to matters of fact." This question was again before this court in People v. Wardrip, 141 Cal. 229, 74 Pac. 744, where it was said: "Such an instruction seems under the weight of authority in violation of the Constitution against charging as to matters of fact." It was added, however, in that case, that the refusal of the instruction, if error, was not such as to justify reversal, as it states mere commonplace matter within the general knowledge of the jury. See, also, later cases of People v. Moran, 144 Cal. 48, 77 Pac. 777; People v. Ruiz, 144 Cal. 251, 77 Pac. 907. The court below, therefore, did not err in refusing to give the instruction requested.

Judgment affirmed.

I concur: ANGELLOTTI, J.

SHAW, J. I concur upon the ground that the instruction is a correct statement of the duty of the jury, or of a court in considering such evidence, and that the action of a court in either giving or refusing such an instruction is not sufficient ground for reversal. The constitutional mandate justifies its refusal, and the giving of it can do no harm, for it only expresses the plain duty of the jury. People v. Farrington, 140 Cal. 659, 74 Pac. 288.

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148 Cal. 137

DUNSMUIR v. COFFEY, Judge.

(L. A. 1,760.)

(Supreme Court of California. Oct. 12, 1905.)

1. WILLS—PROBATE—CONCLUSIVENESS.

On prohibition to prevent the execution of an order appointing a special administrator, the validity of an order previously made annulling an order admitting the will to probate, and the validity of the latter order, on which the order appointing the special administrator depends for its validity, may be considered by the court.

2. MOTIONS — ORDERS—VACATION—POWER OF COURT.

In the absence of an application for relief on the ground of mistake, inadvertence, surprise, etc., made under Code Civ. Proc. § 473, which in all cases must be made within a year, an order which is not void on its face cannot be set aside by the court which rendered it, except in a separate action.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Motions, §§ 78, 83.]

3. WILLS—PROBATE—VALIDITY OF ORDERS.

An order admitting a will to probate, even if erroneous, is not rendered void by reason of an incorrect determination by the court of the domicile of deceased.

In Bank. Petition by James Dunsmuir for writ of prohibition against J. V. Coffey, judge of the superior court of the city and county of San Francisco. Writ issued.

Rehearing denied November 9, 1905.

Bishop, Wheeler & Hoefler and Charles S. Wheeler, for petitioner. Campbell, Metson & Campbell, for respondent. Eustace Cullinan and Thomas W. Hickey, for special administrator.

LORIGAN, J. Alexander Dunsmuir died on or about the 31st day of January, 1900, in the city of New York. On the 24th day of February following his will was presented for probate to the Supreme Court of British Columbia at Victoria and was there duly admitted to probate. On the 26th day of April of that year an authenticated copy of the will, together with an authenticated copy of the decree admitting it to probate in British Columbia, was filed in the superior court of the city and county of San Francisco, with a petition for the probate of the will and for letters testamentary thereon. After due notice the will was admitted to probate. The administration proceedings were regular, and culminated in a decree of final distribution and the discharge of the executor. Under the will and by the decree the estate was distributed to James Dunsmuir, a brother of the deceased and petitioner herein. In the regular proceedings upon administration it is declared that Alexander Dunsmuir at the time of his death was a resident of the city and county of San Francisco. The decree of distribution upon the question of domicile declares "that the said testator, Alexander Dunsmuir, died on the 31st day of January, 1900, at the city and county and state of New York, and at the time of his death he was a British subject and a resident of, and domiciled at, Victoria, British Columbia, but temporarily residing in the city and county of San Francisco, as appears from the evidence both oral and documentary introduced upon the hearing of the petition for distribution." The decree in the matter of the estate was entered upon June 4, 1901. Shortly thereafter James Dunsmuir, executor under the will, was finally discharged, and the administration was thus closed. Nearly five years after the will had been admitted to probate, and four years after final distribution and discharge of the executor, the superior court of the city and county of San Francisco in which the will had been admitted to probate, upon motion of Edna Wallace Hopper, made its order vacating and annulling the order admitting the will to probate. While this order was made by the same court, that is to say, the superior court in probate, it was actually given by another judge than the one who had five years previously allowed probate of the will. Application in certiorari was made to this court to review this order vacating and annulling the order admitting the will to probate, but the application was refused upon the ground that an appeal from this order would afford adequate relief. Subsequent to this order vacating and annulling the order admitting the will to probate the superior court appointed a special administrator and directed that administrator to take from James Dunsmuir, distributee under the decree of distribution, the property so to him distributed. Petitioner now comes to this court seeking to prohibit the execution of this last order of the court.

A preliminary objection by way of demurrer to the petition is presented by the respondent, under which he contends that the inquiry of this court must be confined to a consideration of the validity or invalidity of the order appointing a special administrator, and directing him to take charge of the assets of the estate, and that the inquiry cannot go back of this order to a consideration of the question whether the order annulling the order admitting the will to probate was valid or invalid. We do not consider that any such limitation can be placed upon the inquiry. The order appointing the special administrator and directing him to take charge of the estate depends for its validity entirely upon the validity of the order previously made, annulling the order admitting the will of Alexander Dunsmuir to probate. And this latter order, annulling the order admitting the will to probate, is itself an order void upon its face, unless, in turn, the order originally admitting the will to probate was itself void on its face. Hence it must follow that, if the order annulling the order admitting the will to probate is itself void, then the order appointing the special administrator, which is based upon such a void order, is itself necessarily void. The contention of respondent is fully and completely answered adversely to his position by People v. Davis, 143 Cal. 673, 77 Pac. 651, where the court says: "It is well settled that a court has no power to set aside or vacate on motion a judgment not void upon its face, unless the motion is made within a reasonable time, and it is definitely determined that such time will not extend beyond the limit fixed by section 473 of the Code of Civil Procedure, which in no case exceeds one year. It is also settled law that a judgment is not void upon its face unless its invalidity is apparent from an inspection of the judgment roll. * * * Under such circumstances (in the absence of application made within the time specified in section 473 of the Code of Civil Precedure) the judgment, which is not invalid on its face, is entirely beyond the reach of the court that rendered it, except in a separate action, and any order of the court purporting to vacate it is beyond the jurisdiction of the court, and therefore void. Such an order occupies no better position than a judgment that is void upon its face, and, like such a judgment, is assailable wherever and whenever it may be produced, and whether the attack upon it be direct or collateral. * * * If the judgment was not void upon its face, the order setting it aside was upon its face an absolute nullity, and it was not necessary for the plaintiff to appeal therefrom. Neither failure on the part of plaintiff to appeal nor lapse of time could make it valid or impair the power of the court to formally vacate it on its own motion and without notice."

The claim of petitioner insisted on here is that the order annulling the order admitting the will to probate is void, and, that being so void, the subsequent order appointing a special administrator and directing him to take from petitioner the property distributed to him by the decree, being an attempted interference with his right under such decree, the consideration of the validity or invalidity of the order annulling the order admitting the will to probate, upon which the decree is based, is not only proper, but essentially necessary. In our opinion there can be no doubt of the correctness of petitioner's position, and that it devolves upon this court to determine whether or not the order annulling the order admitting the will of Alexander Dunsmuir to probate was or was not void. To determine this necessarily involves a consideration of the order admitting the will to probate, because it must be conceded that, if the order admitting the will to probate was not of itself void on its face, the court had no power, after the lapse of time shown, to make an order setting it aside, for, as above quoted from People v. Davis, after the lapse of time limited by section 473 of the Code of Civil Procedure, "the judgment which is not invalid on its face is entirely beyond the reach of the court that rendered it, except in a separate action, and any order of the court purporting to vacate it is beyond the jurisdiction of the court, and therefore void."

This brings us to the controlling inquiry in the case, which is whether the order admitting the will of Alexander Dunsmuir to probate by the superior court of the city and county of San Francisco was void on its face. Regardless of the distinction which may exist between the probate of domestic and foreign wills, and regardless also of the correct determination of the matter of the domicile of the deceased, we are satisfied that this inquiry must be answered in the negative. The order admitting the will to probate was in no sense void. Even if it were erroneous (a question not necessary to be decided), it was still valid until reversed upon direct proceedings upon appeal. This proposition is definitely settled in Goldtree v. McAlister, 86 Cal. 93, 24 Pac. 801, where it is said: "An error of the court in deciding that certain documentary evidence, not properly authenticated, proved a valid foreign probate of a will, is not different in character or in principle from an error in deciding, as in the case of Irwin v. Scriber, 18 Cal. 500, that certain evidence proved that the deceased had her last place of residence in Sacramento county. The error in the former case may have proceeded from a misconception of what constituted a valid foreign probate of a will or from an error as to what was competent or sufficient evidence to prove it. In the latter case the error may have arisen from a mistaken view of what constituted a residence or from an error as to what was sufficient or competent evidence to prove it. Such errors may be corrected by appeal, but do not render the judgment void." This case was one of a collateral attack upon the probate of a will under circumstances similar to those involved in the case at bar, though less favorable to the contention of this respondent. It was there held that such a probate, even if erroneous, was not void, and the ruling in that case entirely disposes of the controlling question involved here. The order annulling the admission of the will of Alexander Dunsmuir to probate made at the time and under the circumstances disclosed is, in its nature, an attempt to declare void a decree in no sense void, and the result is, as said in People v. Davis, that the attempt to do so is beyond the jurisdiction of the court, and is itself void. It follows, then, that, as the order vacating the order admitting the will to probate is void, the order appointing the special administrator and directing him to take charge of the estate, which is based on this previous void order, is equally void, and that the writ of prohibition should issue as prayed for, and it is so ordered.

We concur: HENSHAW, J.; McFARLAND, J.; ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

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148 Cal. 126

GREENBERG v. WESTERN TURF ASS'N.
(S. F. 3,376.)

(Supreme Court of California. Oct. 12, 1905.)

1. Master and Servant—Independent Contractor—Respondeat Superior—Question for Jury.

Where, in an action to recover a penalty for plaintiff's ejection from a race course after having presented a ticket for his admission, in violation of a statute, the evidence was conflicting as to whether the persons who ejected plaintiff were employes of defendant, the owner of the course, or of a detective agency, an independent contractor, whether they were defendant's servants was for the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1274.]

2. Theaters and Shows—Constitutional Law—Place of Public Amusement—Regulation—Police Power.

A state, in the exercise of its police power, can regulate public race tracks and places of public amusement.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Theaters and Shows, § 1.]

3. Civil Rights—Constitutional Law.

A statute making it unlawful to refuse admission to any opera house, theater, race course, or other place of public amusement to any person over 21 years of age who presents a ticket of admission, and providing a penalty therefor, was a valid exercise of the state's police power, and was not unconstitutional, as a deprivation of civil rights conferred by Const. U. S. Amend. 14, or by Const. Cal. § 1.

In Bank. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Hyman Greenberg against Western Turf Association. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Affirmed.

W. S. Goodfellow, Goodfellow & Eells, Charles F. Gardiner, and D. E. Alexander, for appellant. Sullivan & Sullivan and E. C. Harrison, for respondent.

HENSHAW, J. This case is between the same parties and similar to that of Greenberg v. Western Turf Association, 140 Cal. 357, 73 Pac. 1050. Plaintiff recovered judgment before a jury, and from that judgment and from an order refusing its motion for a new trial, defendant appeals.

Defendant first complains of the court's refusal to instruct the jury to render a verdict in its favor; the contention herein being that upon the undisputed facts Green and Newman, who ejected the plaintiff, were not employés of the defendant, but of Mr. Morse, proprietor of the Morse Detective Agency, and that, as Morse was an independent contractor, the doctrine of respondeat superior should have been applied to him, and not to the defendant. The evidence, however, upon the question was conflicting, and the court properly submitted the matter for determination to the jury.

It is next contended that the act under which plaintiff sought his recovery is unconstitutional, and in this regard it is insisted that the construction put upon the act in 140 Cal. 357, 73 Pac. 1050, is erroneous. Herein appellant contends that the statute is in contravention of the fourteenth amendment to the Constitution of the United States and section 1 of the Declaration of Rights of the state Constitution, and this court is asked to reconsider the construction which heretofore it has put upon the act. The argument of appellant in this respect seems to be that as at common law the purchaser of a ticket to a place of amusement held only a revocable license, and the proprietor of such a place of amusement could either refuse the holder of the ticket admission, or eject him after admission, not being responsible in tort, but merely in contract for the price of the ticket, and the necessary expenses incurred by the purchaser, no subsequent legislation by the state can modify this common-law rule, except in one particular, and that is, that the exclusion cannot be by way of race discrimination, and because of "race, color, or previous condition of servitude," and that, as the act in question is not designed to meet this condition or to effectuate this end, it is an unwarranted invasion of the rights which the defendant enjoyed before the passage of the act under the rule as it existed at common law. If the right of state Legislatures to pass an act such as this rested upon the proposition enunciated, the acts themselves would be of no value, for, as pointed out in the note to McCrea v. Marsh, 71 Am. Dec. 745: "The states might pass such laws, but, if a ticket to a theater is but a revocable license, they would be of little effect, as, if the theater proprietor desired to exclude colored persons, he might do so merely by revoking the license, and it would be impossible to determine whether it was revoked by reason of 'race, color, or previous condition of servitude.'" The truth of the matter is that the right of the state rests upon no such flimsy foundation. It is based upon its fundamental right, when not acting in contravention to its Constitution or to the Constitution of the United States, to modify the common law. As is said in Charge to Grand Jury, 1 Hughes, 541, Fed. Cas. No. 18,258: "A state has the constitutional and legislative power to change or modify the common law, and by statute establish and regulate the rights of its citizens to the enjoyment and benefit of inns, public conveyances, etc." As pointed out in 1 Dillon, Municipal Corporations (4th Ed.) § 357: "Charters not infrequently confer upon the corporation the power to 'license and regulate' or to 'license, regulate, and tax' certain vocations and employments, and to 'tax and restrain' or 'prohibit' exhibitions, shows, places of amusement, and the like, and, unless there is some specified limitation on the authority of the Legislature in this respect, such provisions are constitutional." The state, in the exercise of its police power, has the unquestioned right to regulate these places of public amusement, and it is in the exercise of this power, and not at all as having to do with civil rights, that the act in question was upheld in 140 Cal. and 73 Pac., and its constitutionality is here again affirmed.

We concur: McFARLAND, J.; LORIGAN, J.; SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

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1 Cal. App. 602

PARSONS v. SILVA et al.

(Court of Appeal, First District, California. Sept. 19, 1905.)

CONTRACTS — CONSIDERATION — AGREEMENT TO OBTAIN DISCHARGE OF MORTGAGE.

The fact that an agent, holding a power of attorney from plaintiff, executed a mortgage on her property and appropriated the proceeds to his own use, and that she was about to institute suit to recover the money, which she forebore to do, constituted a sufficient consideration for a contract, executed by the agent and his wife, by which they agreed to secure the discharge of the mortgage without cost to plaintiff.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 319.]

Appeal from Superior Court, Alameda County; S. P. Hall, Judge.

Action by Mary L. Parsons against Louisa Silva and Frank Silva. Judgment for plaintiff, and defendants appeal. Affirmed.

E. A. Holman and Judson M. Davis, for appellants. R. B. McKee, W. J. Donovan, and D. Mitchell, for respondent.

COOPER, J. Appeal from judgment on a bill of exceptions. The amended complaint alleges in substance: That on the 21st day of December, 1895, the plaintiff was the owner of a tract of land described in the complaint of the value of $600, upon which she desired to secure a loan of $500 for the purpose of enabling her to appeal to the Supreme Court from a judgment rendered against her in the superior court of Alameda county. That she consulted defendant Frank Silva, who was acting as a loan agent, in regard to obtaining a loan upon the said real estate, and at Silva's request and by his advice she executed an instrument, making him her attorney in fact for the purpose of executing a mortgage upon the property and securing the loan, and at the same time plaintiff delivered to Silva her title papers. That it was the agreement that the money should not be borrowed, nor the mortgage executed, except for the purpose of obtaining money by which plaintiff could carry on the contemplated appeal, and, if plaintiff should subsequently decide to abandon the appeal, the defendant Silva was not to proceed further with the loan. That subsequently, on the 24th day of January, 1896, the plaintiff decided to abandon the contemplated appeal, and so notified Silva, and demanded of him that the power of attorney be canceled and her title papers surrendered, but Silva stated to plaintiff that he could not find the power of attorney, nor the title papers. That prior to January 24, 1896, said Silva had, under the said power of attorney, and without plaintiff's knowledge, executed a note and mortgage upon said land to one Rauer for $500, which sum defendant Silva received and appropriated to his own use, no part of which was received by plaintiff. That the mortgage and power of attorney were not placed of record until about six months after the mortgage was executed, and plaintiff then for the first time discovered the fact, and thereupon immediately went to defendant Frank Silva for an explanation, and he denied that he ever executed the note and mortgage, or that he ever received the $500, or that he knew anything about the placing of the power of attorney or mortgage upon record. That afterwards, when threatened with legal proceedings by plaintiff, in order to satisfy her and to get her to forbear such contemplated proceedings, defendants, who are husband and wife, executed an agreement in writing of which the following is a copy, to wit: "Whereas, I, Frank Silva, some time ago was appointed under power of attorney to act for M. L. Parsons in respect of certain property situate in Tulare county, being a ranch there claimed by her; and whereas, said power of attorney authorized F. Silva to borrow certain money to carry on an appeal by said M. L. Parsons to the Supreme Court; and whereas, Mrs. Parsons notified said Silva not to proceed further in respect of said appeal, and also notified one Burris therein acting as counsel and adviser; and whereas, it now appears on record against said property a mortgage for $500.00, it is hereby declared by said Silva that no such sum was ever raised or paid to him either personally or as acting under said power of attorney or otherwise, and that, if said mortgage exists or is recorded as aforesaid, same is in fraud, and void for want of consideration and authority. Be it therefore witnessed, that we, the undersigned, do jointly and severally guaranty to said M. L. Parsons (in consideration that she is in no way responsible for same) to investigate and clear from the records said mortgage in order that she may be in the same position in respect of said property as when she granted said power of attorney to said Silva; and we will pay Mr. Mitchell all his charges for attorney fees and costs of clearance. Witness our hands and seal this 16 day of September, 1896. Frank Silva. Louisa Silva." That plaintiff relied upon defendants to carry out said contract and clear the records of said mortgage, all of which they failed to do, and by reason of said failure the said mortgage was foreclosed, and the said property sold, and lost to plaintiff, without any fault on her part. That defendants have never redeemed said property, nor restored it to plaintiff, nor paid her its value or any sum or at all. That by reason of the said failure of defendants to keep the said contract and clear the records of said mortgage, as they agreed to do, plaintiff has lost her property, and been damaged in the sum of $600.

The demurrer was properly overruled. The consideration for the agreement was that plaintiff would forbear to institute legal proceedings in regard to an iniquitous transaction by Frank Silva, the husband of defendant Louisa Silva, and not only this, but the money which Frank Silva had received and appropriated to his own use was a consideration for the agreement. The findings are supported by the evidence. It may be that Burris, who was associated with defendant Frank Silva in business and who prepared the papers, appropriated the money, and that Frank Silva did not receive any part of it; but as to this the evidence is squarely in conflict. Burris testified that he received the check, and "the money was immediately turned over to Mr. Silva." Taking the testimony of Burris, in connection with the fact that defendants, by signing the written agreement, practically acknowledged the liability of defendant Frank Silva, the finding of the court is amply supported. The question as to whether or not plaintiff was responsible for the mortgage is immaterial. She had made herself responsible to the mortgagee by executing the power of attorney. As between herself and defendant Frank Silva she was not responsible for it; that is, she was not in equity bound for it, but Silva was, and acknowledged himself to be so bound by executing the agreement.

The judgment is affirmed.

We concur: HARRISON, P. J.; HALL, J.

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1 Cal. App. 488

RILEY v. LOMA VISTA RANCH CO. et al.

(Court of Appeal, Second District, California. Aug. 28, 1905.)

1. CORPORATIONS—OFFICERS—AUTHORITY.

Where the secretary and manager of an incorporated partnership, who before incorporation was the manager and one of the principal partners, had been in the habit of storing hay in the warehouse of the corporation and issuing receipts to himself therefor, which were regularly entered on the books and known to at least some of the directors, he had authority to issue such receipts.

2. SAME—RATIFICATION.

Where the secretary and manager of a corporation issued a warehouse receipt to himself, which was regularly entered on the books of the company, and thereafter the secretary's report, in which the receipt was referred to, was approved, and at a later meeting all the official acts of the board of directors during the year were ratified and confirmed, after which, on negotiation of the receipt, the prospective purchaser made inquiry of the officers of the corporation as to the amount of storage chargeable against the property, and was told that a certain rate had been agreed upon with the secretary, the corporation ratified the issuance of the receipt.

3. WAREHOUSEMEN—RECEIPTS—ESTOPPEL.

Under Act April 1, 1878, § 1 (Civ. Code, p. 779), forbidding warehousemen to issue receipts for goods which have not been received into store or which are not in store at the time of issuing the receipt; section 10, making a violation of this provision a felony; and section 6, declaring that a warehouseman shall not be allowed to make any offset, claim, or demand other than is expressed on the face of the receipt, etc.—a warehouseman is estopped to deny the actual receipt and possession of the goods represented by a receipt.

Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by William Riley against the Loma Vista Ranch Company and others. From a judgment for defendants, plaintiff appeals. Reversed.

James H. Blanchard and Will D. Gould, for appellant. William E. Cox, R. H. F. Variel, Curtis D. Wilbur, and G. P. Adams, for respondents.

SMITH, J. Appeal from a judgment for the defendants and from an order denying plaintiff's motion for a new trial.

The defendant corporation is successor of the firm of Bixby & Howard, composed of Jotham Bixby, the defendant Howard, and five others, who, excepting one, subscribed for and continued to be the holders of all the stock of the corporation. Howard was manager of the business of the firm before the incorporation, and continued to be such until about the 23d day of January, 1897. This suit was brought to recover the value of the balance of the hay undelivered, represented by a warehouse receipt, which is as follows:

"Loma Vista Warehouse. No. 172.

"Howard's Summit, Los Angeles Co., Cal., 7—14, 1896. Received in Warehouse at Howard's Summit, on storage, the following merchandise for account of W. W. Howard, at the following rates, one dollar per ton for the season; i. e., July 1, '97.

"Not responsible for shrinkage or loss by fire.

Gangway Numbers	Lots.	Marks.	No. of Bales.	Weight.	Description.
2-4-11	D	1	2159	474,691	Oat & Barley Hay.
12-13	J				

"This receipt must be surrendered and storage paid before delivery of goods will be made. Transfers not complete unless entered in the warehouse books. Storage commences July 1, 1896. Loma Vista Ranch Co., Proprietors, per W. W. Howard, Sec. & Manager."

This receipt, it is found, was for the balance of the hay undelivered, represented by a receipt in similar form issued in the year 1895, which had been pledged to the Merchants' National Bank of Los Angeles as collateral security for the sum of $2,000, and for which the new certificate was substituted. The latter was assigned for value to the defendant W. L. Riley, December 27, 1897, and by him to the plaintiff. Portions of the hay represented by the receipt, aggregating 1,399 bales, were delivered to the defendant W. L. Riley and indorsed on the receipt; and after this delivery the defendant corporation refused to deliver any more hay upon the ground that all the hay of Howard in their possession had been delivered. The assignment of the plaintiff was after this refusal of the defendant corporation, of which the assignee had notice. It was found by the court that "through omissions, mistakes, and oversight the last-named receipt called for a larger amount of hay than was then actually on storage in said warehouse and barns of the said defendant Loma Vista Ranch Company," and, in effect, that the hay actually delivered to W. L. Riley was all the hay at that time in the hands of the company; and it is further found, in effect, that the defendant corporation never made, issued, or delivered either of said warehouse receipts to W. W. Howard, or subsequently ratified the same, or either of them, and that its officers and directors, other than Howard, did not have any notice or knowledge of the issuance of such receipts until after the resignation of Howard, and that at the time of the assignment of the receipt to W. L. Riley the latter knew that the said Howard had been in fact the secretary and manager of the corporation defendant, and in charge of its business and warehouse at the time the receipt was issued, and purchased the receipt and hay represented thereby, "with notice that the said Howard had issued said receipt in the name of said corporation by himself, as secretary and manager thereof, to himself in his individual capacity, without authority so to do, and with constructive notice that said receipt, as against said corporation, defendant called for more hay than said corporation defendant had received or had then in its possession or warehouse."

But these findings are attacked by the specifications of the appellant, and from the evidence in the case the following facts appear without contradiction: Previously to the issue of the receipt sued upon, Howard had been in the habit of storing hay in the warehouse of the defendant corporation and issuing receipts to himself therefor, which were regularly entered in the books of the company and known to its directors, or some of them; and from the minutes of the corporation it appears that in the report of Howard as secretary, made on the 23d day of January, 1897, this particular receipt is referred to, and that at the next subsequent meeting the minutes of the preceding meeting, showing the financial statement and annual account of Howard, were read and the minutes of the meeting approved, the minutes showing no objection made to the receipt in question. And, again, at the stockholders' meeting of June 27, 1898, all the official acts of the board of directors of the corporation during the year were approved, ratified, and confirmed. It also appears from the evidence of William Riley that before completing his purchase of the certificate and the hay represented thereby he went to the company's office and inquired of the officers there present how much the charge of storage against the hay was, and was informed that they had made arrangements with Mr. Howard and that it would be $1.50 a ton, if the hay was taken away within three months, and that none of the officers said anything "about any suspicion of the warehouse receipt in any way." This evidence is confirmed by the witness Rawson, who succeeded Howard as manager, and was one of the officers applied to. Upon this evidence, which was uncontradicted, we think it clear that Howard had authority to issue receipts to himself, and that this particular receipt was ratified by the company upon its receipt of Howard's report and its failure to make any objection to the receipt upon the occasion of Riley's inquiry as to the rate of storage. Phillips v. Sanger L. Co., 130 Cal. 432, 62 Pac. 749. And this view of the case is confirmed by the character of the incorporation, which was that of an incorporated partnership, of which Howard had been the manager and one of the principal partners. Shorb v. Beaudry, 56 Cal. 450. We are of the opinion, therefore, that the findings objected to were not justified by the evidence.

It remains to consider whether it was competent for the defendant corporation to contradict their receipt as to the amount of hay represented by it, and on this point we are of the opinion that it could not. By the first section of the act of April 1, 1878 (Civ. Code, p. 779), a warehouseman is forbidden to issue a receipt for goods that have not been bona fide received into store by such warehouseman, or which are not in store and under his control at the time of issuing the receipt; and by section 10 a violation of this or other provision of the act is made a felony; and by section 6 it is provided, with reference to negotiable receipts, of which this is one, that a warehouseman shall not "be allowed to make any offset, claim, or demand other than is expressed on the face of the receipt or receipts issued for the same, when called upon to deliver said goods," etc. By the provisions of the act, therefore, a warehouseman is estopped to deny the actual receipt and possession of the goods "represented by said receipt," which seems to be in accordance with the general law. Hanover Nat'l Bank v. American Dock & Trust Co. (Court of Appeals of New York) 43 N. E. 72, and cases cited. The case cited is very similar to the case before us on both of the points involved.

We are of the opinion that the judgment and order appealed from must be reversed, and it is so ordered.

We concur: GRAY, P. J.; ALLEN, J.

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1 Cal. App. 483

RAINE v. LAWLOR, Judge of Superior Court.

(Court of Appeal, First District, California. Aug. 28, 1905.)

1. ADMINISTRATORS — SPECIAL ADMINISTRATRIX—APPOINTMENT.

Under Code Civ. Proc. §§ 1411, 1412, providing for the appointment of a special administrator at any time and without notice, such an appointment was valid, whether the order was made by the court or by a judge in chambers.

2. PROHIBITION—JURISDICTION.

Under Code Civ. Proc. § 1102, providing that the writ of prohibition is the counterpart of the writ of mandate, and arrests the proceedings of any tribunal when they are without or in excess of jurisdiction, a writ of prohibition will not issue to an inferior tribunal, unless it is proceeding or is about to proceed in excess of its jurisdiction.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Prohibition, §§ 37–56.]

3. ADMINISTRATRIX—VACATION OF APPOINTMENT.

Where a judge of a superior court appointed a special administratrix, he had jurisdiction of a motion to set aside such appointment as inadvertently granted.

Petition for writ of prohibition by Edith M. S. Raine against William P. Lawlor, as judge of the superior court of the city and county of San Francisco. Writ denied.

Henry C. McPike, for petitioner. Riordan & Lande, and M. J. Kuhl, for respondent.

COOPER, J. This is a petition for a writ of prohibition against Hon. William P. Lawlor, as judge of the superior court of the city and county of San Francisco, to prohibit him from revoking an order appointing petitioner special administratrix of the estate of Inez Sexton Hutton, deceased. On the 2d day of May, 1905, an order was made and signed by said judge, appointing petitioner special administratrix of the estate of deceased and directing that special letters of administration issue to her upon filing a bond and taking the proper oath. Petitioner thereupon qualified and gave the proper bond. It is not necessary to decide the question as to whether the order appointing petitioner was made by the court or by the judge at chambers. In either case the appointment was valid. Code Civ. Proc. §§ 1411, 1412.

On the 10th day of May, 1905, H. W. Hutton, the surviving husband of deceased, served and filed a notice of motion to vacate and set aside the order appointing the petitioner such special administratrix, upon the ground, among others, that the order was irregularly and inadvertently made and without notice. The motion came on regularly to be heard on the 11th day of May, 1905, the petitioner being represented by her attorney, whereupon the court, after due consideration of the matter, concluded that the order appointing the petitioner such special administratrix was irregularly and inadvertently made, without notice as prescribed by the rules of the court, and announced that it would, and it is about to, make an order setting aside and revoking the order appointing petitioner such special administratrix. The writ of prohibition will not issue to an inferior tribunal, unless it is proceeding, or is about to proceed, in excess of its jurisdiction. Code Civ. Proc. § 1102. The petitioner here accordingly sets forth "that said order and proceeding is in excess of the jurisdiction of the said William P. Lawlor as such superior judge, and he is without any jurisdiction to make said order upon any of the grounds stated." Jurisdiction is the power to hear and determine the subject-matter in controversy. If the law confers the power to render a judgment or decree, then the court has jurisdiction. "The question is whether, on the case before a court, its action is judicial or extrajudicial, with or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction. What shall be adjudged and decreed between the parties, and with which is the right of the case, is judicial action, by hearing and determining it." Rhode Island v. Massachusetts, 12 Pet. 657, 9 L. Ed. 1233.

The court or the judge thereof had the power to set aside the order if it was inadvertently made. Hall v. Polack, 42 Cal. 219; Crim v. Kessing, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491; Kaufman v. Shain, 111 Cal. 17, 43 Pac. 393, 52 Am. St. Rep. 139. Counsel for petitioner concedes that courts have the inherent power to set aside orders inadvertently made, but claims that, "when the uncontroverted facts show as matter of law that there was no inadvertence, the court below has no power to vacate its order on the ground that it was inadvertently made." This is but an argument that the court had the power to decide the matter, provided it decided right, but did not have the power to decide wrong. If it had the power to deny the motion to set aside its order, alleged to have been made by inadvertence (and this is conceded), it had the power to grant it. It had the power to determine whether or not the order was inadvertently made. It had the power to decide the matter, even if its decision was wrong. It is not necessary to express any opinion as to whether or not the record shows that the order was inadvertently made. If the court arrived at a wrong conclusion, it was only error, which cannot be reached in this proceeding. The court was the tribunal, and the judge who heard the matter was the person provided by the laws of the state for passing upon the very question presented. The court below was the sole judge of the evidence and of the question as to whether or not the order had been inadvertently made, and its decision is conclusive as to this collateral proceeding. Crim v. Kessing, 89 Cal. 486, 26 Pac. 1074, 23 Am. St. Rep. 491; People v. Curtis, 113 Cal. 71, 45 Pac. 180.

The case of Wiggin v. Superior Court, 68 Cal. 398, 9 Pac. 646, is directly in point, and supports the views herein expressed. There the court made a decree of final discharge of the administrator. It afterwards, upon application of some of the heirs, made an order setting aside and vacating the decree of final discharge upon the ground that such discharge was "made inadvertently and ex parte." A writ of prohibition was sought upon the ground that the court had no jurisdiction to set aside the decree of final discharge. The court said: "We are of opinion that the court had jurisdiction to set aside its order or decree discharging petitioner from his office of administrator, upon the ground that such decree had been inadvertently made and entered, and that, having power so to do, if error was committed, it cannot be corrected by means of a writ of prohibition, which only issues to arrest 'the proceedings of any tribunal, corporation, board or person * * * when such proceedings are without or in excess of the jurisdiction.'" In Wreden v. Superior Court of Stanislaus Co., 55 Cal. 504, it is said: "Any error committed in the decision of a motion can be saved by a bill of exceptions, and be disposed of by appeal, or any other method of review known to the law; but judicial acts, which are the subject of review by these ordinary and adequate remedies, are not the subject of prohibition. The mere fact, if such were the fact, that a court is about to act erroneously or irregularly in a matter of which it has jurisdiction will not warrant the issuance of a writ of prohibition." In Woodward v. Superior Court, 95 Cal. 276, 30 Pac. 535, it was sought by prohibition to arrest proceedings in regard to the appointment of a receiver, on the ground that no sufficient showing had been made to justify the appointment. It is said: "The court had jurisdiction of the subject-matter and of the parties. It had the power, therefore, to hear and determine a motion for the appointment of a receiver, and its action thereon cannot be regarded as in excess of its jurisdiction."

It is not necessary to decide in this case whether any appeal lies from the order complained of. If no appeal lies, the petitioner cannot be greatly injured. She has no statutory right to be appointed special administratrix. She can again apply upon notice, and be heard the same as any one else, if the court should deem it necessary to appoint a special administrator.

The writ is denied.

We concur: HARRISON, P. J.; HALL, J.

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1 Cal. App. 479

WATER SUPPLY CO. v. SARNOW et al.

(Court of Appeal, Second District, California. Aug. 26, 1905.)

1. EXECUTION—ISSUE—LIMITATION.

Act 1895 (St. 1895, p. 38, c. 33), authorizing an order for execution without notice after the lapse of five years from the rendition of judgment and before the same is barred, is constitutional as to judgments rendered after the passage of such act.

2. SAME—ORDER—EFFECT.

An execution being the only method by which a money judgment may be enforced, an order for an execution on such a judgment amounts to an order for its enforcement, and is authorized by Code Civ. Proc. § 685.

3. INTERPLEADER—JURISDICTION.

Code Civ. Proc. § 542, subd. 5, providing for an attachment of personal property belonging to defendant, in the hands of another, or of debts or credits owing him, and sections 717, 721 providing that the creditor can bring no action against the person having such property in his possession, or owing debts to the defendant, until supplementary proceedings have been instituted and an order obtained authorizing such suit, do not prevent such third person from bringing a bill of interpleader, where the judgment debtor appears and consents to the jurisdiction of the court to determine to whom the debt so attached should be paid.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Bill of interpleader by the Water Supply Company against L. G. Sarnow and Josie Sullivan. From a judgment awarding a fund to defendant Sarnow, defendant Sullivan appeals. Reversed.

T. F. Allen, for appellant. Reardan & Whitaker, for respondent Sarnow. Fred E. Boynton, for respondent Water Supply Company.

ALLEN, J. The complaint avers that in January, 1902, defendant Sarnow obtained a judgment against plaintiff for $844; that in May and October following Josie Sullivan caused to be served upon the secretary of plaintiff an execution issued out of a judgment theretofore rendered in her favor and against Sarnow, whereby she sought to levy upon and hold all property or credits in plaintiff's hands due Sarnow; that plaintiff is ignorant of the rights of the parties to the proceeds of said judgment, and would be put to hazard if compelled to judge between the respective claims, and avers that it is willing to pay the full amount of said judgment to whomsoever the court may direct, pending the hearing, with the usual prayer requiring the interpleader to be discharged, etc. To this complaint the general demurrer of each of the defendants was overruled, and the defendant Sullivan thereupon filed, as was required, a pleading which she denominated a cross-complaint, in which it is averred that judgment in her favor against Sarnow was rendered in February, 1897, the amount of which, including interest, was, at the date of filing said claim, $742.03; that on May 11, 1902, Sullivan filed in the court in which the judgment was rendered her affidavit, setting out the rendition and nonpayment of the judgment; that more than five years had elapsed since the entry; and that Sarnow now has property out of which it could be made; that the court, upon presentation of such affidavit, made its order that an execution issue, and the same was issued; that on May 20, 1902, the sheriff duly levied on all moneys, debts, and credits of Sarnow in the hands of plaintiff, and that in order to make such levy the sheriff served upon the plaintiff's secretary, and left with him, notice that the same were attached by virtue of said writ; that subsequently the sheriff returned said execution unsatisfied; that, when the execution was levied, there was $950.35 in the plaintiff's hands belonging to Sarnow; that afterwards, in October, 1902, another execution was issued out of said judgment so rendered, in favor of Sullivan and against Sarnow, which was duly levied; and the same allegations are set out as were made in reference to the first levy. To this cross-complaint Sarnow demurred generally, and the same was sustained by the court, and, Sullivan not desiring to amend, the court found that Sullivan acquired no rights to the money in the hands of plaintiff by virtue of such levies, that Sarnow was entitled to the money, and by its judgment ordered that plaintiff pay to the clerk the amount of said judgment in favor of Sarnow, and that upon such payment the judgment should be satisfied by the clerk and the money paid to Sarnow. From this judgment against her and in favor of Sarnow, the defendant Sullivan appeals.

The act of 1895 (St. 1895, p. 38, c. 33), authorizing the order for execution without notice after the lapse of five years from the rendition of judgment and before the same is barred by statute, as to all judgments rendered after the passage of such act, is by our Supreme Court, in Harrier v. Bassford, 145 Cal. 530, 78 Pac. 1038, held to be constitutional. Inasmuch as the only way by which a money judgment may be enforced is by execution, such an order for an execution amounts to an order for its enforcement, and is authorized by section 685, Code Civ. Proc. It is averred in the plaintiff's complaint that a copy of such execution was served, which being admitted, a right and claim as to the money was initiated, which would entitle the plaintiff to maintain an action under section 386, Code of Civil Procedure. The cross-complaint alleges that the execution was levied, and, no special demurrer being filed, the same was sufficient. The essential facts may be improperly or defectively stated, but such defects can only be reached by a special demurrer. Grant v. Sheerin, 84 Cal. 200, 23 Pac. 1094.

The same observations are appropriate as to the general demurrer to the original complaint. The only theory, therefore, upon which the court could have proceeded in its judgment in favor of Sarnow and against Sullivan was that the sections of the act providing for proceedings supplementary to the execution were applicable to this case, and their nonobservance destroyed any rights which Sullivan may have acquired to the money or credits in plaintiff's hands. It is true that before any action can be maintained by a judgment creditor on account of a levy made under subdivision 5, § 542, Code of Civil Procedure, he shall first proceed as provided by sections 717–721, Code of Civil Procedure, and procure an order authorizing such suit. This, however, is because of the want of privity between the judgment creditor and his debtor's debtor, and the policy of the law is that the party garnished shall have due notice and examination in relation to the subject of the claim against him, and be afforded an opportunity to pay without suit. But in this case the plaintiff voluntarily comes into court as the actor, and sues Sullivan and Sarnow. The plaintiff thereby waives all proceedings under said sections and invokes the jurisdiction of the court, and when Sarnow appears in such proceedings he consents to the jurisdiction of the court to hear and determine their conflicting claims to the property; and it would be an idle performance to stay all proceedings in the interpleader suit until Sullivan had taken those steps contemplated by section 717 et seq., Code of Civil Procedure, in order that he might establish his right to claim the money. For it certainly could not be contended that a party garnished may absolutely destroy the rights acquired under the original levy by instituting a suit under section 383. The levy of the execution gave to Sullivan rights which she might enforce under proceedings supplementary to the execution, and the effect of which would be to defer any claim of Sarnow to such money until those rights had been determined. All parties then appearing, the determination of their respective rights could be had in this proceeding as effectually as in an original proceeding brought by Sullivan against plaintiff. The cross-complaint, therefore, as against the general demurrer, was sufficient, and the court erred in sustaining the demurrer thereto.

Judgment is reversed, with directions to overrule the demurrer to the cross-complaint.

We concur: GRAY, P. J.; SMITH, J.

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1 Cal. App. 566

PEOPLE v. RICHARDS.

(Court of Appeal, First District, California. Sept. 15, 1905.)

1. Criminal Law—Appeal—Harmless Error.

A judgment will not be reversed because of questions allowed to be asked a witness on cross-examination, where he testified to substantially the same things on his direct examination.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3139.]

2. Same—Impeachment of Verdict.

A verdict finding a defendant charged with murder guilty of manslaughter cannot be impeached by affidavits of the jurors that it was agreed to as a compromise between jurors who were in favor of a higher degree and those who were for acquittal.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2392, 2393.]

3. Same—Instructions.

It is not error to instruct the jury in a criminal case that "it is the duty of every juror to reason with his fellow jurors to the end that he may join in a lawful verdict"; that being the purpose of the statute in requiring the jury to "retire for deliberation."

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1800.]

4. Homicide — Reading Law to Jury — Instructions.

It is not error, on a trial for murder in which the homicide is admitted, to read to the jury section 1105 of the Penal Code, providing that "upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that defendant was justifiable or excusable," where the jury are also instructed that defendant is entitled to an acquittal if the evidence is such as to create a reasonable doubt of his guilt.

5. Statutes — Jury — Selection—Constitutional Law—Local Law.

That portion of Code Civ. Proc. § 204, providing for the selection of the panel of jurors by a majority of the judges of the superior courts in counties and cities and counties having a population of 100,000 inhabitants or over, instead of by the board of supervisors, as provided for in other counties, is not in contravention of article 4, § 25, of the state Constitution, which prohibits the Legislature from passing local or special laws "regulating the practice of courts of justice"; virtually the same provision having been enacted long prior to the adoption of the present Constitution, and kept in force by article 22, § 11, thereof, which provides that "all laws relating to the present judicial system of the state shall be applicable to the judicial system created by this Constitution until changed by legislation."

6. Same—Decision as to Constitutionality.

The courts will not hold a legislative act unconstitutional where there is a reasonable doubt as to its invalidity.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 46.]

7. Jury—Challenge to Panel.

The fact that some of the persons selected as jurors do not possess the requisite qualifications is not ground for a challenge to the panel.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 541, 543.]

8. Same—Selection.

The provisions of the Code as to selecting jurors are directory and should be liberally construed, and a substantial compliance with the methods laid down is all that is required.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 266.]

9. Same.

Under Code Civ. Proc. § 204, which provides that after the superior court in January of each year has made an order designating the number of trial jurors required for the ensuing year, and after the list of such jurors has been made and returned, they shall serve for the "ensuing year or until a new list of jurors shall be provided," it was not error to select a trial jury from the list returned for the preceding year, where it does not appear from the record that at the time of the trial the list for the current year had been certified and filed with the clerk as required by sections 208, 209, until which time the new list has not been "provided" within the meaning of the statute.

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Prosecution of Edward Richards for murder. From a judgment of conviction for manslaughter, and an order overruling a motion for new trial, defendant appeals. Affirmed.

Rehearing denied by Court of Appeal October 12, 1905; by Supreme Court November 14, 1905.

Milton Shepardson, for appellant. U. S. Webb, Atty. Gen., for the People.

COOPER, J. The defendant was charged with the crime of murder, and convicted of manslaughter. He made a motion for a new trial, which was denied, and this appeal is from the judgment and the order denying said motion.

1. It is contended that it was error for the court to permit the prosecution to ask the witness Selvaggo several questions in cross-examination, tending to show that he spent most of his time in lounging and loafing in and around saloons and dance halls. The witness had testified on direct examination that he was in the habit of sitting around the saloon where the homicide occurred a great deal of the time; that he had been arrested upon a charge of vagrancy, as being an idle and dissolute person roaming around the streets. The cross-examination did not bring out any facts that would more strongly tend to discredit the witness than the facts he had already testified to on direct examination. It is always the safer and more dignified course for the prosecution to refrain from asking questions in cross-examination that are insulting or that tend merely to degrade the witness. But a case will not be reversed because of error in allowing such questions where it is apparent that no injury was done. In this case the witness had, in direct examination, testified to substantially the same matters that were brought out in the cross-examination, and, therefore, he suffered no injury by the cross-examination.

2. The court did not err in striking out the affidavits of certain jurors made for the purpose of impeaching the verdict to which they had assented. The affidavits tended to show that, after the jurors had been deliberating for more than four hours—some voting for murder in the first degree, some for murder in the second degree, some for manslaughter, and some for acquittal—as the hour was getting late, and to prevent being kept out all night, it was agreed as a compromise that the jurors who had been voting for murder would vote for manslaughter, in consideration that those who had been voting for not guilty would also vote for manslaughter. The affidavit of one juror states, "that in order that another trial of said cause be not had, and to save the defendant from being convicted of murder, and purely as a compromise verdict upon said charge, the 12 jurors being unable to agree upon a verdict, affiant, and others upon said jury who believed in the innocence of the defendant upon the charge of murder, agreed to vote and did vote, to convict the defendant of the crime of manslaughter." The verdict was evidently a compromise, as many verdicts are. The jurors held different views, but finally, by mutual concessions, reached a mean between two extremes. The jurors who had voted "not guilty," in order to save another trial and to prevent defendant from being convicted of murder, agreed to the verdict of manslaughter. The jurors who believed the defendant guilty of murder, in the language of one of the affidavits, "seeing after several ballots were taken that it was hopeless to further vote for the conviction of defendant of murder in the second degree in said cause, voted for the conviction of defendant upon the charge of manslaughter." If a verdict could be set aside because arrived at after discussion and by way of compromise, few verdicts would stand. A juror who would not deliberate and listen to the views of his fellow jurors would be a dangerous man to have upon a jury. While every juror should act conscientiously, and not sign or agree to a verdict that he does not approve of, yet discussion and listening to the views of others may convince him that his first impressions were wrong, and that the views of his fellow jurors are correct. It has been universally held in this state that affidavits of jurors cannot be used to impeach their own verdict, except where the verdict is reached by a resort to the determination of chance. The case of Dixon v. Pluns, 98 Cal. 384, 33 Pac. 268, 20 L. R. A. 698, 35 Am. St. Rep. 180, does not support appellant's contention. There, in an action for damages, the jurors agreed that each juror should write on a piece of paper the amount at which he would fix the verdict, and the aggregate of the sums thus written should be divided by 12, and that this should be the verdict of the jury. Such verdict was clearly the result of chance. The result was uncertain and unknown, and depended to a certain degree upon the estimate of each juror, which could only be known to himself. In the case at bar each juror knew the verdict to which he agreed. No matter what influences caused him to agree to it, it was assented to by him, and was not determined by chance. If the verdict had been determined in pursuance of an agreement to abide by the result of a game of cards, a guess, or tossing up a coin, then affidavits of the jurors finding it would have been admissible.

3. In cross-examination of the witness Selvaggo the district attorney read to him what purported to be his answer to a question from his testimony given at the coroner's inquest, for the purpose of asking the witness if he so stated. The attorney for defendant objected to reading a part of the answer so given, and asked that the whole of the statement be read. The court informed the district attorney that he could read the portion to which he desired to call the attention of the witness. The defendant's attorney excepted to the ruling, and now urges the ruling as erroneous. Notwithstanding the ruling of the court the district attorney said: "I will give everything; I will read from the beginning." He then appears to have continued reading the balance of the answer, covering some two

folios of the transcript, and questioned the witness about it. The objection was not renewed, and evidently the whole of the answer given at the coroner's inquest was read; at least it is not shown otherwise. It therefore not only appears that there was no error committed, but that the contention is entirely without merit. It is due to the business of this court and the orderly dispatch thereof, that counsel should not insist upon error in regard to matters of such trifling import.

4. It is claimed that the court erred in instructing the jury that "it is the duty of every juror to reason with his fellow jurors, to the end that he may join in a lawful verdict." The instruction only stated to the jury that which each juror is presumed to have known. The court, in the same instruction of which the above is an extract, told the jury: "The action of the other jurors in their deliberation should not influence your action as to what your verdict should be without your judgment individually as a juror in the case is changed by argument of your associates upon the evidence introduced and the law as given you by the court. You are just as much entitled to your opinion as to what the evidence and the law warrants you in doing in this case as is any other juror in the case, or all the others combined." If the contention of defendant is correct, the jurors would not be required to reason with each other in their deliberations. The law requires that the jury retire for deliberation. Pen. Code, §§ 1135–1138. Deliberation means careful consideration and examination of the reasons for and against a choice or measure. We often speak of the deliberations of a legislative body, of a board or council, as well as of a jury. It was the duty of every juror to deliberate, to reflect upon, and reason, for the purpose of joining in a lawful verdict.

5. It is claimed that the court erred in reading section 1105 of the Penal Code to the jury as part of its instructions. The section reads: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that defendant was justifiable or excusable." It is said that the killing was admitted by defendant, and he justified by attempting to show that it was done in self-defense, hence that it was error to tell the jury that in such case the burden of proof shifts to the defendant. The section clearly contemplates that in case the homicide is proved or admitted, the burden is upon the defendant to prove circumstances of mitigation, or that justify or excuse it, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that defendant was justifiable or excusable. And this is what the court told the jury, and was correct. People v. Hawes, 98 Cal. 653, 33 Pac. 791; People v. Adams, 137 Cal. 582, 70 Pac. 662; People v. Matthai, 135 Cal. 445, 67 Pac. 694. The court elsewhere in its charge told the jury that the law does not require the defendant to establish his defense beyond a reasonable doubt, or even by a preponderance of evidence; but that, if the evidence was such as to create in the minds of the jurors a reasonable doubt as to the guilt of the defendant, they should acquit him. Other instructions and rulings are complained of; but after examination we find no prejudicial error, and it would serve no useful purpose to further discuss them.

6. Defendant's counsel have devoted over 40 pages of their printed brief to a discussion and criticism of the manner of drawing the jury, and an additional brief amicus curiæ has been filed with the names of some 50 members of the bar attached to it. We do not deem it necessary to discuss any of the points made in the brief, except the single one raised by the record in regard to the challenge to the panel. The challenge interposed to the panel was on "the ground that no jury had been drawn, nor had any panel of jurors ever been summoned or drawn for that purpose; defendant claiming that said section 204 of the Code of Civil Procedure, in so far as it purports to confer power on said judges to draw or cause to be drawn a jury to try the defendant, is in conflict with the Constitution of this state." The section referred to provides a general rule to the effect that, after the superior court in January of each year has made an order designating the number of trial jurors that will be required for the transaction of the business of the court and the trial of causes for the ensuing year, the board of supervisors shall select in the manner prescribed in sections 205 and 206 a list of persons, equal in number to that designated by the court in its order, to serve as trial jurors during the ensuing year, or until a new list of jurors shall be provided. Then follows the provision claimed to be unconstitutional, to wit: "In counties and cities and counties having a population of one hundred thousand inhabitants or over, such selection shall be made by a majority of the judges of the superior courts." If we were considering alone the merits of the methods of selecting trial jurors, we would have no hesitation in saying that the superior judges are certainly as competent to select the list of trial jurors as the boards of supervisors. In either case the list must be made from persons who are assessed on the last preceding assessment roll, from those who are not exempt from serving, in possession of their mental faculties, not infirm or decrepit, of fair character and approved integrity, and of sound judgment. Then, if any juror shall be selected

or listed who is not competent, or does not possess the necessary qualifications, he may be challenged for cause. Code Civ. Proc. §§ 601, 602; Pen. Code, §§ 1071, 1072. A challenge to the panel can be founded only on a material departure from the forms prescribed in respect to the drawing and return of the jury in civil actions, or the intentional omission of the sheriff to summon one or more of the jurors drawn, and must plainly and distinctly state the facts constituting the grounds of challenge. Pen. Code, §§ 1059, 1060. The challenge, being placed upon the ground that the portion of the section quoted (Code Civ. Proc. § 204), in so far as it purports to confer power upon the superior judges to draw a jury is unconstitutional, we can consider no other. The questions as to the work delegated to the secretary by the judges, and as to the qualifications of the jurors on the list, may therefore be eliminated. In fact such matters are not the ground of a challenge to the panel. The fact that some of the jurors selected do not possess the requisite qualifications is not a ground of challenge to the panel, even if such ground had been stated in the challenge. People v. Young, 108 Cal. 12, 41 Pac. 281; People v. Durrant, 116 Cal. 194, 48 Pac. 75. It is claimed that the said portion of section 204, Code Civ. Proc., making it the duty of the superior judges, in counties having a population of 100,000 or over, to select trial jurors, contravenes article 4, § 25, of the Constitution, which prohibits the Legislature from passing local or special laws: "* * * Third. Regulating the practice of courts of justice; * * * Thirty-third. In all other cases where a general law can be made applicable."

In determining the question, as to the constitutionality of an act of the Legislature, we must remember that the Legislature is an independent part of our government. It is presumed to have had the Constitution in mind when passing the act. It is the exponent of the popular will, and its acts must be treated with respect, reconciled and sustained if possible. A court is never justified in setting at naught the will of the Legislature, unless it is clearly repugnant to the Constitution. In all cases of reasonable doubt the courts will not hold an act to be void because of its being unconstitutional. S. & V. R. R. Co. v. City of Stockton, 41 Cal. 160; University of Cal. v. Bernard, 57 Cal. 612. Section 204 of the Code of Civil Procedure was amended in May, 1876, so as to authorize the district judges of the several districts in the city and county of San Francisco, probate judge, and judge of the municipal criminal court, or a majority of such judges, to select the list of trial jurors. The section was a part of the judicial system before the adoption of the present Constitution, which provides (article 22, § 11): "All laws relating to the present judicial system of the state shall be applicable to the judicial system created by this Constitution until changed by legislation." It has been held that the provision of the section has virtually remained unchanged by legislation, and has been kept in force by the express provisions of the present Constitution. People v. Gallagher, 55 Cal. 462; People v. Durrant, 116 Cal. 194, 48 Pac. 75. As this construction has been placed upon the section by the highest court in the state, and as the procedure of selecting the list of jurors by the judges in cities and counties having a population of 100,000 or over has been followed in this state for over a quarter of a century, we would hesitate long before holding the section unconstitutional at this late day. Practice and acquiescence in the machinery provided for by the section as to selecting jurors for a period of so many years, sanctioned by the courts, furnishes an almost irresistible reason for not now overturning it. Stuart v. Laird, 1 Cranch, 299, 2 L. Ed. 115; Railroad Commissioners v. Market St. Ry. Co., 132 Cal. 677, 64 Pac. 1065. It has been held that the justices of the peace of the city and county of San Francisco, provided for by the act of 1866, were continued in force by virtue of the quoted section of the Constitution (Kahn v. Sutro, 114 Cal. 316, 46 Pac. 87, 33 L. R. A. 620); and the law regulating appeals from justices' courts to the county courts was held to apply to the superior court. California Fruit, etc., Co. v. Superior Court, 60 Cal. 305.

The contention is made that the jury was not drawn from the jurors selected and listed for the year 1904. The statute provides that an order shall be made in January of each year designating the number of trial jurors that will, in the opinion of the court, be required for the transaction of business during the ensuing year, and such jurors shall "serve as trial jurors during the ensuing year, or until a new list of jurors shall be provided." It is undoubtedly the proper construction of the section that, in any year after the list of jurors for such year has been ordered selected and returned, all jurors thereafter impaneled shall be selected from such list. It is shown by the bill of exceptions that "no name on the present panel of this department of the court has been drawn from the trial jury box of the year 1904. They were drawn from the jurors selected and listed by the judges and put in the trial jury box for the year 1903." The Code provides that, after a list of jurors has been made and returned, they shall serve for the "ensuing year, or until a new list shall be provided." It does not appear that the list for 1904 had been certified and filed with the clerk and the names placed in the trial jury box, as it is provided shall be done (Code Civ. Proc. §§ 208, 209), at the time the panel was returned from which the jury was drawn. A new list of jurors was not provided for the year 1904 within the meaning of the law, until the certified list was placed in the possession of, and filed with, the clerk. It is incumbent upon the party claiming error to show it, as all presumptions here are in favor of the lower court. We must hold the provisions of the Code as to selecting jurors directory, and give them a liberal construction. A substantial compliance with the methods laid down by the statute is all that is required.

The judgment and order are affirmed.

We concur: HARRISON, P. J.; HALL, J.

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1 Cal. App. 593

PELEGRINELLI et al. v. McCLOUD RIVER LUMBER CO.

(Court of Appeal, First District, California. Sept. 15, 1905.)

1. APPEAL — REVIEW — ORDER SETTING ASIDE DEFAULT.

An order granting or denying a motion to set aside the default of a defendant will not be reversed on appeal, unless an abuse of discretion is clearly shown, and especially where the motion is granted.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3823.]

2. SAME—EXCUSABLE NEGLECT.

A motion by a corporation to set aside a judgment for a personal injury entered against it by default was supported by affidavits showing that defendant had prepared to defend an action for the injury some two years before, but the action was not then brought; that, on learning casually that the action had been brought, defendant's president notified the agent of an insurance company which was bound by its contract to defend the same, placed the evidence in his hands, and understood that such company would enter an appearance without further notice, although service of summons had not then been made; and that defendant rested upon that understanding until after the judgment was entered before learning of the default. A showing of merits was also made. *Held*, that such showing made a case of excusable neglect, within Code Civ. Proc. § 473, and that the granting of the motion on reasonable terms was not an abuse of discretion.

3. AFFIDAVITS—INFORMATION AND BELIEF.

An affidavit, to be used as evidence, must be positive and direct, and statements made therein on information and belief cannot be considered as evidence.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Maria Pelegrinelli and others against the McCloud River Lumber Company. Plaintiffs appeal from an order setting aside a judgment entered against defendant on default for want of an answer. Affirmed.

Sullivan & Sullivan, for appellants. F. D. Madison, for respondent.

HARRISON, P. J. Judgment in favor of the plaintiffs was rendered herein upon the default of the defendant for failure to answer the complaint. Upon the motion of the defendant the court made an order setting aside the default and judgment upon the payment by the defendant to the plaintiffs of $150 within 10 days from the date of the order. From this order the plaintiffs have appealed.

The defendant is a corporation engaged in operating a lumber mill in Siskiyou county, and the present action is to recover damages sustained by the plaintiffs as the personal representatives of one Amateo Pelegrinelli by reason of his death in May, 1900, alleged to have resulted from the negligence of the defendant. The action was commenced February 6, 1902, and the default of the defendant for want of appearance was entered February 25th, and judgment thereon was rendered March 17, 1902. The motion to set aside the default was noticed March 25th, and on March 28th the court made the above order. In Nicoll v. Weldon, 130 Cal. 666, 63 Pac. 63, it was said: "The granting or denying a motion to set aside the default of the defendant is so largely a matter of discretion with the trial court that, unless it is clearly made to appear that there has been an abuse of this discretion, this court declines to set aside its order. Especially are we indisposed to review its action when it has set aside the default and it does not appear that the plaintiff has sustained any prejudice thereby. The discretion of the court is best exercised when it tends to bring about a judgment upon the merits of the controversy between the parties." See, also, Melde v. Reynolds, 129 Cal. 308, 61 Pac. 932; O'Brien v. Leach, 139 Cal. 220, 72 Pac. 1004, 96 Am. St. Rep. 105; Savings Bank v. Schell, 142 Cal. 505, 76 Pac. 250. Error is never presumed and the burden of showing an abuse of discretion on the part of the trial court is always upon the appellant. As in the case of a finding of fact by that court, if there was any evidence before it which, by reasonable construction, will support its order, its action will be upheld. If the facts presented to it are such that reasonable minds might reach different conclusions thereon, the appellate court will not disturb the conclusion reached by the trial court. The rule is the same whether the motion is granted or denied by the trial court. An examination of the cases cited by the appellants will show that in all of them the action of the trial court has been affirmed, with the exception of two or three cases, in which the default of the party was clearly attributable to pure neglect on his part, and without any showing of an excuse.

The death of Pelegrinelli occurred in May, 1900, and in June of that year the defendant was informed by certain attorneys of their purpose to institute an action against it in behalf of the present plaintiffs; and thereupon the defendant made preparation for the defense of such action by obtaining statements of those having knowledge of the facts connected with the death, and procuring photographs of the locality. No action was brought at that time, but on February 6, 1902, other attorneys commenced the present action. At the hearing of the motion to set aside the default it was shown, by affidavits presented on behalf of the defendant, that at the time the action was commenced and for some time prior thereto the defendant held a policy of insurance with an insurance company, by the terms of which that company agreed to defend it against all actions of the character of the present one. The summons and complaint in this action were not served until February 10th, but on the morning of February 7th the president of the defendant saw a notice in a San Francisco newspaper that the action had been commenced, and he immediately sent for the agent of the insurance company and informed him thereof, and, with him, went over the case and the matters and facts connected with it, and with the defense thereto, and the said agent then and there agreed with the president that the insurance company would appear in said action through its regular attorneys on behalf of the defendant and defend the same, and take entire charge of said defense. At the same time the president delivered to the said agent all of the aforesaid photographs and statements of witnesses. Nothing was said between them with reference to the summons or complaint in the action, or with reference to the service of the same, or when the insurance company would appear therein on behalf of the defendant; but the president states in his affidavit that he understood and believed, from the statement of the agent, that the insurance company would forthwith or within a few days thereafter enter an appearance in the action, or arrange with the attorneys for the plaintiffs with reference thereto, and would take all steps necessary or proper for its defense in said action, and that from that time until after he had learned that judgment had been rendered herein he believed that said company had appeared in the action or arranged for an appearance, and had done or were doing everything necessary or proper for the defense of the company. The summons and complaint were served upon the secretary of the defendant, and were by him immediately delivered to the president, who placed them in a drawer in his office where they remained until after he learned of the entry of the judgment. He also states that he had no notice or knowledge that the defendant's default had been taken, or any trial of the action had, until after the judgment had been entered. The agent of the insurance company, in his affidavit, corroborates the affidavit of the president, except that he states that in the interview of February 7th he meant by his promise and agreement, and thought that the president understood and believed that he meant, that no appearance would be entered in the action or steps taken by the insurance company on behalf of the defendant until after the service of the summons and complaint and notice thereof was given to the insurance company, but he also stated that nothing was said between them with reference thereto.

An affidavit of merits was made on behalf of the defendant, and also an offer to file a verified answer forthwith and proceed at once to the trial of the action, and to comply with any order as to terms that the court might deem reasonable as a condition for setting aside the default and judgment. It sufficiently appeared from these affidavits that the defendant had been advised and believed that it had a good and substantial defense to the plaintiff's action upon the merits, and that it had made preparations for such defense, and intended to defend the action, and for that purpose had secured the aid of the insurance company. We cannot say that it would have been an unreasonable inference by the trial court, from the affidavits, that, upon the interview between the president of the defendant and the agent of the insurance company, he honestly and in good faith understood and believed that that company would, without any further notice or request on his part, take all necessary steps for the defense of the action; and in support of the order appealed from it will be assumed here that that court did make such inference. It may be conceded that it would have been an act of prudence on his part, when he received the copy of the summons and complaint, to have delivered them to the insurance company; but, if he had the right to believe and did believe that the insurance company would enter its appearance and defend the action irrespective of any service of the summons, his failure to give the copies to it cannot be held to have been attributable to any carelessness or inattention. Whatever omission there was must be regarded as an excusable neglect. "Section 473, Code Civ. Proc., is a remedial provision, and is to be liberally construed so as to dispose of all cases upon their substantial merits and to give to the party claiming in good faith to have a substantial defense to the action an opportunity to present it." Nicoll v. Weldon, supra.

The policy of insurance held by the defendant, which was introduced on behalf of the plaintiffs, in which there is a provision requiring the holder of the policy, whenever an action should be brought against it, to forward immediately to the office of the company the summons or other process as soon as the same should be served upon it, cannot be considered in determining whether there was negligence on the part of the defendant, inasmuch as this policy was not issued until after the default had been entered in this action. The affidavit of one of the plaintiffs, to the effect that at the time of the accident the defendant held another policy from the same company containing a similar provision, was not entitled to be considered by the court, for the reason that it purported to be only an affidavit that the affiant had been informed and believed that such was the case. The Code authorizes allegations of a pleader to be made upon information and belief; but an affidavit which is to be used as evidence must be positive and direct. The action of the court is to be based upon facts which may be presented to it, and not upon the belief of the affiant. See Gay v. Torrance, 145 Cal. 144, 78 Pac. 540; Thompson v. Higginbotham, 18 Kan. 42. The plaintiffs made no claim that they would suffer any loss or injury by reason of setting aside the default, nor did it appear that, upon an acceptance of the defendant's offer to have the case set down for trial at an early day, they would not be able to fully present their cause of action, or that they would be deprived of any right. The terms imposed by the court must be deemed an ample compensation for the inconvenience and delay incident upon being required to try the case again.

The order is affirmed.

We concur: COOPER, J.; HALL, J.

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1 Cal. App. 583

MARCH v. BARNET et al.

(Court of Appeal, First District, California. Sept. 15, 1905.)

JUDGMENT — SATISFACTION — SEPARATE JUDGMENTS FOR SAME CAUSE OF ACTION.

Plaintiff, in an action against a number of defendants for damages for the wrongful seizure and sale of his property on an execution, is entitled to recover no more than the value of such property as determined by the court, and where, as the result of separate appeals, he recovered a judgment against one defendant for a part of the amount, which was paid, and against the others jointly and severally for the entire amount, the latter are entitled to have the amount paid by their codefendant credited on the judgment against them.

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Alvaretta L. March, as administratrix, against S. Barnet and others. Plaintiff appeals from an order recalling and quashing an execution and satisfying the judgment previously rendered in her favor. Affirmed.

See 51 Pac. 20.

Rehearing denied November 14, 1905.

W. D. Storey, for appellant. Dinkelspiel & Jacobs and Lindsay & Netherton, for respondents.

HALL, J. This is an appeal by plaintiff from an order of the trial court quashing and recalling an execution, and ordering the entry of satisfaction of the judgment that had been rendered in favor of plaintiff. This action was brought by William F. March, and on his death Alvaretta L. March, as administratrix of his estate, was substituted as plaintiff. In the complaint it is alleged in substance that theretofore an action had been brought by one Button against said Jacob Steen, as maker of a certain promissory note, and said Wm. F. March, as indorser thereof; that an attachment had been issued and property of Steen levied upon; that to secure the release of said property said S. Barnet and one Bowman entered into an undertaking whereby they undertook to pay any judgment that might be rendered against Steen, and thereupon the attachment was released. Subsequently in said action judgment was recovered against Steen, as maker, and March, as indorser, for the sum of $625.97. Thereupon Barnet paid said judgment and took an assignment thereof from Button. Subsequently Barnet assigned said judgment to Isaac Blum, who, shortly after assigned it to Joseph Blum, having first taken out execution and placed the same in the hands of the sheriff with instructions to seize and sell the interest of March in the schooner Ingalls, which, under the further directions of Joseph Blum, the sheriff did, selling the said interest of March to Joseph Blum for $770. Said interest was alleged to be of the value of $1,400, but was found by the court to be of the value of $1,000. Before making the sale the sheriff demanded an indemnifying bond, which was given by the Blums and I. H. Jacobs. Joseph Blum, on the day of the sale, transferred his purchase to I. H. Jacobs, who at the beginning of the suit still held the same. Of the amount realized on the sale $596 was credited on the execution, the balance being applied to costs of sale, etc. Each of the defendants at said sale and at the time of said assignment of said judgment had notice of the relation that Barnet bore to said judgment, and knew that he was a surety on said undertaking for the release of the attachment on Steen's property; that said transfers from Barnet to Isaac Blum, from Isaac Blum to Joseph Blum, and from Joseph Blum to I. H. Jacobs, were made with the purpose on the part of each of the parties thereto to have the said property of plaintiff seized under said execution and sold to reimburse Barnet for the amount he had paid on the judgment against Steen; that Steen instigated and aided and abetted the other defendants in said matters; and that all the other defendants actively participated therein. Judgment was demanded for $1,400, interest, and costs. The court found the facts as above set forth, save that it did not find that Steen instigated, aided, or abetted the proceeding, and rendered judgment for plaintiff against Steen for $770, and interest from the date of said sale and costs, but gave judgment for the other defendants. The defendant Steen took an appeal from the judgment against him, and the plaintiff appealed from that portion of the judgment in favor of the other defendants.

Upon the hearing of the appeal taken by Steen the judgment was modified by reducing the amount to the sum of $596, the amount actually credited on the judgment (March v. Steen, 114 Cal. 375, 46 Pac. 152); he being held liable upon the ground that by the sale under execution of property of plaintiff and the application of the proceeds to the payment of a judgment for which, as between plaintiff and Steen, Steen was primarily liable, plaintiff was entitled to recover of Steen the amount which he (plaintiff) had in effect paid on the judgment against Steen. Steen promptly paid this judgment to one Devoe, the assignee thereof. Subsequently the appeal of plaintiff as against Barnet, the Blums, and Jacobs was decided, and judgment ordered upon the findings against said last-named defendants for $1,000, the value of the property of plaintiff which it was determined had been wrongly seized and sold by these defendants, and interest from the date of the sale and costs. March v. Barnet, 121 Cal. 419, 53 Pac. 933, 66 Am. St. Rep. 44. Upon the entry of judgment in the trial court plaintiff caused execution to issue for the full amount thereof, giving no credit for the amount that had previously been paid by Steen, and levied on property of this respondent, I. H. Jacobs. Jacobs moved the court to recall said execution, and before the hearing of the motion paid to the sheriff the balance due on such judgment, after deducting from the amount of the judgment entered against Barnet, the Blums, and Jacobs the amount theretofore paid by Steen. The court granted the motion, and ordered the entry of full satisfaction of the judgment. The appellant claims the right to collect the full amount of the judgment entered against the codefendants of Steen without giving any credit for the amount paid by Steen, while the respondent claims that he is entitled to a credit for the amount paid by his codefendant Steen.

This latter contention we think to be correct. The action was brought to recover damages resulting to plaintiff from the wrongful taking of his property. It was found that the property taken was of the value of $1,000. As a result of the litigation between these parties it has finally been adjudicated and determined that plaintiff's property was wrongfully taken and converted, to his damage in the sum of $1,000, the value of the property at the time of the conversion, and interest from said time. It has also been determined that Barnet, the two Blums, and Jacobs are jointly and severally liable to plaintiff for the entire amount of such damage, while Steen is liable only to the extent to which the proceeds of the property wrongfully converted were applied to his use. Notwithstanding the form in which the judgment was finally entered, $596 against Steen, and $1,000 against Barnet, Blum, and Jacobs, it is plain from the entire record that it is but one judgment for $1,000 damages, for which Barnet, the Blums, and Jacobs are liable for the entire amount, and Steen for $596 only. Plaintiff has now been paid the $1,000, which the court determined to be the full value of his property wrongfully converted, together with interest from the date of conversion, and costs of suit. By collecting from Steen the $596 realized from the execution sale, he has availed himself to that extent of the benefit of that sale.

The orders are affirmed.

We concur: HARRISON, P. J.; COOPER, J.

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1 Cal. App. 606

BISSELL v. FORBES et al.

(Court of Appeal, First District, California. Sept. 19, 1905.)

BILLS AND NOTES—CONSTRUCTION—PAYMENT—TIME—LIMITATIONS.

Where a note dated October 27, 1893, was payable "on or before three years after date," but also provided that payments should be made as follows, to wit, $80 on the 1st day of November, 1893, and the balance in monthly installments of not less than $12.50, including interest and principal on the 1st day of each and every month thereafter until both principal and interest were fully paid, plaintiff was entitled to sue for the first installment if not paid on November 1, 1893, and for each installment unpaid as it became due thereafter, so that limitations began to run against each installment from the time of its maturity.

Appeal from Superior Court, Alameda County; S. P. Hall, Judge.

Action by Wm. C. Bissell against Sheridan Forbes and others. From a judgment in favor of plaintiff for less than the relief demanded, he appeals. Affirmed.

Wm. C. Bissell, in pro. per. Wright & Wright, for respondents.

COOPER, J. Action to recover on a promissory note and to obtain a decree of foreclosure of a mortgage given as security therefor. The court below held that the promissory note, except the last installment, was barred by the statute of limitations, and gave judgment for the last installment only, with a decree of foreclosure. From this judgment plaintiff prosecutes this appeal.

The sole question here is as to the construction to be placed upon the promissory note, which reads as follows: "$482.40. San Francisco, Cal. Oct. 27th, 1893. On or before three years after date, for value received, we promise to pay to Wm. C. Bissell, or order, the sum of four hundred eighty-two and $^{40}/_{100}$ ($482.40) dollars, in United States gold coin, with interest at the rate of 8 per cent. per annum, payable monthly. Payments shall be made as follows: Eighty ($80) dollars on the first day of November, 1893, and the balance in monthly installments of not less than twelve and $^{50}/_{100}$ ($12.50) dollars including interest and principal, on the first day of each and every month thereafter until both principal and interest are fully paid. This note is secured by a mortgage bearing even date herewith. Sheridan Forbes. Louise Mills Forbes." The action was commenced October 16, 1900, and in time if the whole of the note became due October 27, 1896, and not before, but not otherwise. The note was made in contemplation of all the payments being made within three years after its date; but it contains the express agreement that $80 was to be paid November 1, 1893, and $12.50 on the 1st of each and every month thereafter. There is no ambiguity as to this. The parties agreed to it, and it is not for the courts to make contracts for them. It is elementary that the statute of limitations commences to run from the time an action might be brought. If the first installment, $80, was not paid November 1, 1893, the plaintiff could immediately have commenced an action to recover said amount, and to foreclose his mortgage to that extent, and so of the $12.50 due December 1, 1893, and of each subsequent installment. It is precisely as though a promissory note had been given for the $80 and for each payment of $12.50. The defendants agreed to pay the whole sum on or before three years from date, but they agreed to pay the separate installments at the times provided for in the note. The meaning of the language is plain. Defendants understood what they had agreed to do, and plaintiff must be presumed to have known the time when the installments of the note matured. Ewer v. Myrick, 55 Mass. 16; Grattan v. Wiggins, 23 Cal. 16. The result is unfortunate for plaintiff, but we cannot relieve him on that ground. If the defendants desire to shield themselves by the statute of limitations, they have the right to do so.

The judgment is affirmed.

We concur: HARRISON, P. J.; HALL, J.

1 Cal. App. 608

DODGE v. BOARD OF POLICE COM'RS OF CITY & COUNTY OF SAN FRANCISCO et al.

(Court of Appeal, First District, California. Sept. 19, 1905.)

MANDAMUS—REINSTATEMENT OF POLICEMAN—LIMITATIONS.

Under Code Civ. Proc. § 338, subd. 1, providing that an action on a liability created by statute must be commenced within three years, and section 343, declaring that an action for relief, not otherwise provided for, must be commenced within four years after the accrual of the cause of action, a mandamus proceeding to require plaintiff's reinstatement as a policeman, brought nine years after his removal, is barred by limitations.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, §§ 284, 285.]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Application by Edward E. Dodge against the board of police commissioners of the city and county of San Francisco and others for a writ of mandate to compel respondents to admit the applicant to the position of patrolman on the police force of the city and county of San Francisco. From a judgment awarding the writ, defendants appeal. Reversed.

Franklin K. Lane, City Atty., for appellants. T. C. West and H. M. Owens, for respondent.

COOPER, J. Application for writ of mandate. The petition alleges that the defendants, acting as the board of police commissioners of the city and county of San Francisco, did on or about the 12th day of June, 1893, dismiss the plaintiff from his position of patrolman of the police force of the city and county of San Francisco. The petition for the writ was filed March 6, 1902. In the case of Jones v. Board of Police Commissioners, 141 Cal. 96, 74 Pac. 696, an action similar to the present, it was held that the cause of action was barred by subdivision 1 of section 338 of the Code of Civil Procedure, and also by section 343 of the Code of Civil Procedure. That case was followed and approved by this court in Farrell v. Board of Police Commissioners of City and County of San Francisco (filed May 24, 1905) 81 Pac. 674.

Under the authority of these cases the judgment and order in this case is reversed.

We concur: HARRISON, P. J.; HALL, J.

1 Cal. App. 598

CRAIG et al. v. GRAY et al.

(Court of Appeal, First District, California. Sept. 16, 1905.)

1. FORCIBLE ENTRY AND DETAINER—COMPLAINT—NOTICE TO QUIT.

Where a complaint in unlawful detainer alleged a holding over, without permission of the landlord or his successor in estate, after the expiration of the term fixed in the lease, the complaint was not defective for failure to allege the giving of a notice to quit.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 1238.]

2. SAME—LEASES—TERMINATION.

Where a lease by its express terms expired on a specified date, it was not necessary that either a 3 or 30 days' notice to quit should be given to terminate the lease, under Code Civ. Proc. § 1161, subd. 1, defining unlawful detainer.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 317.]

3. SAME—HOLDING OVER WITHOUT PERMISSION—EVIDENCE.

In an action for unlawful detainer, evidence *held* sufficient to warrant a finding that defendants remained in possession after the termination of the lease without plaintiffs' permission.

4. SAME—ISSUES—FAILURE TO FIND—PREJUDICE.

Where, in unlawful detainer, the complaint alleged the making of a lease by C. and F., as lessors, to defendants, and that thereafter F. by deed of gift conveyed all his interest in the premises to his daughter, which allegation defendants denied, but no evidence was introduced thereon by either party, whereupon the court found that the daughter had no interest in the premises and rendered judgment in favor of C. and F., the court's failure to find on the issue raised with reference to the conveyance was not prejudicial to defendants.

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by Mary Lynde Craig and others against G. F. Gray and another. From an order denying defendants' motion for a new trial, and from so much thereof as awarded damages apart from possession of the premises sued for, defendants appeal. Affirmed.

Fisher Ames, for appellants. Leonard Stone, for respondents.

HALL, J. The plaintiffs Mary Lynde Craig and Samuel Lynde Foster recovered judgment against defendants for the possession of certain premises, together with the sum of $1,500 damages, with interest and costs, in an action of unlawful detainer. The defendants have appealed from an order denying their motion for a new trial, and from so much of the judgment as awards damages, but not from that portion which awards possession of the premises to plaintiffs.

Appellants urge that "the complaint does not state facts sufficient to constitute a cause of action," and contend that the complaint should contain an allegation of the giving of a notice to quit. But the complaint in this case alleges a holding over without the permission of the landlord or his successor in estate after the expiration of the term fixed in the lease. As alleged in the complaint, by express provisions of said lease, the term thereof expired on the 1st day of December, 1901. In such a case neither a 3 days' notice to quit nor a 30 days' notice of the termination of the lease is required. Section 1161, subd. 1, Code Civ. Proc. See Lee Chuck v. Quan Wo Chong & Co., 91 Cal. 593, 28 Pac. 45; Canning v. Fibush, 77 Cal. 196, 19 Pac. 376; Stoppelkamp v. Mangeot, 42 Cal. 322; McKissick v. Ashby, 98 Cal. 424, 33 Pac. 729; Perine v. Teague, 66 Cal. 446, 6 Pac. 84.

The court found that the defendants, after the expiration of the terms fixed in the lease, continued in possession of the premises without permission of the plaintiffs, or either of them; and the appellants urge that the evidence shows that appellants retained possession of the premises with the consent of plaintiffs. In this connection it may be noted that defendants in their answer deny that they remained in possession of the premises at all after the termination of the lease. But, passing this point, the evidence was sufficient to warrant the court in finding that defendants remained in possession after the termination of their lease without the permission of the plaintiffs. The premises were leased to defendants by Mary L. Craig and Samuel L. Foster for the purpose of being used by defendants to take rock therefrom. During the last five years of the term the rental was $250 per month, payable in advance, and the term expired December 1, 1901. Mary L. Craig testified that she called at the office of the Grays on November 9th preceding the expiration of the lease to see if they wished to renew the lease, but they did not come to any terms. The Grays offered $100 per month and 10 cents per yard for all over 1,000 yards. She told them she wanted $250. She again visited Mr. Gray's office December 2d to order them to take up their tracks. She said: "You were at work to-day and yesterday drilling and taking stone away." And he said: "Why, I thought the lease did not expire until the 12th of December." She said: "It expired on the 1st. Either I want the rent or the tracks removed." She next called December 13th to see why they continued work without paying, and they offered her $150 and a certain royalty, which she did not accept. She returned on the 16th of December "to find out, if possible, why they are at work without paying, and I got no satisfaction." She further said: "I have not given them permission or consented to their working on any part of that block, nor approved of it, nor given the least intimation of a permission." The evidence clearly shows that the defendants never consented to pay $250 per month which she demanded, and she never consented that they continue in possession and take rock from the premises, unless they would consent to her terms.

Appellants contend that "the court erred in finding that the plaintiff Samuel Lynde Foster was entitled to any judgment whatever against the defendants; it having been alleged that before the termination of said written lease he had transferred all his interest in the said premises to Marion B. Foster," and also that the court erred in finding that Marion B. Foster had no interest in the said premises. These two points may be considered together. The complaint alleges the making of the lease by Mary Lynde Craig and Samuel Lynde Foster, as lessors, to the defendants, and after proper allegations of the entry under the lease and the holding over it is alleged that Samuel Lynde Foster by gift deed conveyed all his interest in the premises, before December 1, 1901, to Marion B. Foster. This latter allegation was by the defendants denied, and the record shows no evidence was introduced on the issue. The court did not expressly find as to whether or not Samuel Lynde Foster did convey to Marion B. Foster, but did find that Marion B. Foster had no interest in said premises. This may be conceded to be a conclusion of law only. The findings that were made support the judgment, which is in favor of Mary Lynde Craig and Samuel Lynde Foster. Inasmuch as the defendants denied the allegation of the conveyance from Samuel to Marion, and there was no evidence introduced on the issue thus presented, the court would have been obliged to find, if it had made a finding on the issue at all, that no such conveyance had been made. This would not have changed the judgment at all. The failure to expressly find on this issue did not, therefore, prejudice defendants. In S. P. R. R. Co. v. Whitaker, 109 Cal. 268, 41 Pac. 1083, it was said: "But, conceding that there should have been a special finding as to the assessment and payment of taxes, still it clearly appears from the evidence that, if such a finding had been made, it must have been in favor of defendants. And, this being so, the plaintiff was in no way prejudiced by the failure, and the judgment cannot be reversed on this ground"—citing Hutchings v. Castle, 48 Cal. 152; People v. Center, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481; Murphy v. Bennett, 68 Cal. 528, 9 Pac. 738; Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504. In this case, if the court had found that a conveyance had been made from Samuel Lynde Foster to Marion B. Foster, the judgment against the defendants would have been the same, but would have been in favor of Mary Lynde Craig and Marion B. Foster, while, if the court had found that no such conveyance had been made, which as before stated is the only finding that on the record before us could have been properly made, the judgment would still be against the defendants but in favor of Mary Lynde Craig and Samuel Lynde Foster, which is the judgment rendered. Marion B. Foster is not complaining, but, as one of the respondents, is asking this court to affirm the judgment.

We find no error prejudical to defendants, and the judgment and order are affirmed.

We concur: HARRISON, P. J.; COOPER, J.

148 Cal. 184

In re HEYWOOD'S ESTATE. (S. F. 4,331.)

(Supreme Court of California. Nov. 10, 1905.)

1. WILLS—CONSTRUCTION—PURPOSE OF TESTATOR.

A liberal construction should be given to testamentary dispositions of property, and all reasonable intendments should be indulged in, with a view to sustaining testator's disclosed purpose.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 962-967.]

2. WILLS—CREATION—FORM OF EXPRESSION.

No particular form of expression need be used in a will to constitute a valid trust; but it is sufficient if, from the language used, the intention of testator is apparent and the disposition which he endeavors to make is consistent with the rules of law.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1577.]

3. TRUSTS—PURPOSE OF TRUST—MANAGEMENT OF PROPERTY.

Under Civ. Code, § 857, subd. 3, authorizing the creation of a trust to receive the rents and profits of real property and pay or apply them to the use of any person, and section 863, providing that, when a trust is created, the whole estate is vested in the trustee subject to the trust, a trust may be created to "manage" property, and to collect the income, issues, and profits thereof, and pay them to specified persons.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 9.]

4. WILLS—CONSTRUCTION—CONSIDERATION OF WHOLE INSTRUMENT.

In ascertaining the intention of testator as to the source from which payments under a trust created by will shall be made, resort must be had to all the provisions of the will which tend to disclose testator's intention, and the inquiry should not be restricted solely to the particular clause providing for such payment.

5. SAME—CONSTRUCTION OF INSTRUMENTS.

A will bequeathed and devised testator's property, in trust to manage the same and to collect the income thereof and to pay testator's daughter and wife specified monthly sums. A subsequent clause provided that "any excess of income" after the monthly payments were made should be devoted to the improvement of the property or invested in some "income-paying property." Another clause authorized the trustees to sell the property and reinvest the proceeds in "income-paying real estate, or other safe income-paying securities," in order to carry out the provisions of the will. *Held*, that the will contemplated that the monthly payments should be made out of the income only of the trust property, and an objection that it authorized such payments to be made out of the corpus of the property, in violation of Civ. Code, § 857, subd. 3, authorizing the creation of a trust to receive the "rents and profits" of real estate and apply them to the use of any person, was untenable.

6. SAME—CONSTRUCTION—INVALID TRUST.

It is only when the language actually used by testator will admit of no other reasonable construction than that it creates an invalid trust that a court will declare such to be its effect.

7. SAME.

A will creating a trust in favor of testator's daughter, and providing that in case of the death of the daughter without issue the property should be "divided" among certain of testator's relatives, did not create a trust as to the relatives specified, but constituted a direct devise to them in the event of the testator's death.

8. TRUSTS—INVALID PROVISIONS—EFFECT ON PRINCIPAL TRUST.

A provision of a trust clause in a will directing the trustee to use the excess of income after payment of specified annuities in the improvement of unimproved property of the trust estate, or to invest it in some income-bearing property, if invalid, is separable from, and does not invalidate, the primary trust created by the will for the management of the trust estate and the payment of annuities to the beneficiaries.

Department 2. Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

In the matter of the estate of Franklin Heywood, deceased. From an order and decree denying a petition for partial distribution, Agnes Maud Heywood, a daughter of deceased, appeals. Affirmed.

Rehearing denied December 8, 1905.

Timothy J. Lyons, for appellant. Powell & Dow, J. B. Reinstein, W. P. Johnson, Sullivan & Sullivan, Theo. J. Roche, and Cary Howard, for respondents.

LORIGAN, J. This is an appeal from an order and decree denying a petition for partial distribution.

The will of Franklin Heywood, deceased, which was duly admitted to probate in the superior court of the city and county of San Francisco, contained, among others, the following provisions: "Third. I give, bequeath and devise to my executors hereinafter named as trustees eighteen hundred and seventy-five (1875) shares of the capital stock of the Gualala Mill Company, a corporation, and all of the residue of my real and personal property, in trust for the following uses and purposes, to wit: (1) To manage said capital stock and property and to collect the income, issues and profits thereof and to pay to my said daughter during the natural life of my wife, Agnes B. Heywood, the sum of one hundred and fifty dollars ($150) per month for my said daughter's maintenance and support. (2) To pay to my wife, Agnes B. Heywood, during her natural life the amount specified in the articles of separation made between us on the 10th day of July, 1890, viz., one hundred and fifty dollars ($150) per month. (3) Upon the death of my wife one-half (½) of the residue of my estate shall vest absolutely in my said daughter and the remaining one-half (½) shall vest absolutely as follows, to wit: One seventh ($^1/_7$) thereof in my brother William B. Heywood or in case of his death in his son William H. Heywood, and the remaining six-sevenths ($^6/_7$) of said one-half (½) in my brothers and sister and nephew and niece, namely, Charles one-seventh ($^1/_7$) thereof, Samuel one-seventh ($^1/_7$) thereof, Walter one-seventh ($^1/_7$) thereof, Harry one-seventh ($^1/_7$) thereof, Hattie G. Hunt, one-seventh ($^1/_7$) thereof, and in Charles Walter Philips and Irene Moet Philips, children of Georgiana Philips, the remaining one-seventh ($^1/_7$) thereof, or, in case of death, their respective children by right of representation. (4) In case my said daughter should die before my said wife without any child or children, then the whole of said residue shall be divided among my said brothers and sister and niece and nephew in the proportions named in the last preceding subdivision. (5) Any excess of income after such monthly payments are made to my said wife and daughter, shall be used in the improvement of any of my unimproved real property or invested in some income-paying property. Fourth. In case it may be necessary or in case it may be deemed advisable by my trustees hereinafter named, they are hereby authorized to sell at any time the said capital stock of the said Gualala Mill Company or any other property belonging to my estate and to reinvest the proceeds in income-paying real estate or other safe income-paying securities to the end that my wishes herein expressed may be carried out for the maintenance and protection of my said wife and my adopted daughter."

The appellant, Agnes M. Heywood, is the daughter of said deceased mentioned in the provisions of said will, and petitioned the said superior court, under section 1663 of the Code of Civil Procedure, which allows the distribution of an estate before final settlement after the lapse of one year from the issuance of letters testamentary, for distribution to her of the "residue" of the estate of testator mentioned in clause "third" of said will, which we have quoted, upon the theory that the trust attempted to be created thereby was void, that by reason of such invalidity the testator died intestate as to said "residue," and that petitioner was entitled to have it distributed to her as his heir-at-law. General demurrers to the petition were interposed and sustained, and from a decree entered thereupon denying her petition for distribution, the petitioner appeals.

The sole question presented for consideration in the lower court, and now upon this appeal, is whether or not a valid trust was created by the third clause of said will. The position of appellant with reference to said trust clause is that none of the purposes for which the residue of the estate is thereby devised in trust are authorized by section 857 of the Civil Code, or, to be more precise, it is contended by counsel for appellant that there is no authority in the section for the creation of a trust to "manage" the trust fund or "to pay" the annuities, as provided for in the first and second subdivisions of the trust clause in question, or to "divide" the residue of the trust fund at a certain time and upon a specified contingency, as in the fourth subdivision, or to use the "excess of income" in improving real property, or in making new investments, as subdivision 5 provides that the trustees shall do. We are satisfied, from a fair and careful consideration of the trust clause in question, that there is no merit in any of these objections urged by appellant, as far as we deem it necessary on this appeal to consider them. They amount, in our judgment, more to criticisms upon the language employed by the testator in framing the trust than to sound objections against the validity of the trust provisions themselves. In construing testamentary dispositions of property, it is a cardinal rule that a liberal construction should be given to them, and all reasonable intendments indulged in, with a view of sustaining the purpose which it is disclosed the testator had in view. No particular form of expression is necessary to constitute a valid trust. It is sufficient that, from the language used, the intention of the testator is apparent, and that the disposition in trust which he endeavors to make of his estate is consistent with the rules of law. The intent of the testator is the matter for primary consideration, and it is immaterial what method of expression is employed, as long as that intention can be ascertained. As said in Hill on Trustees, p. 101, "it is one of the fixed rules of equitable construction that there is no magic in particular words"; and this court has said that: "Of course, it is a fundamental principle that a construction of a will favorable to testacy will always obtain when the language used reasonably admits of such construction, and that it will not be held to contain a void trust, unless the invalidity of the trust is beyond question * * * and cannot be reasonably construed otherwise." Estate of Dunphy (Cal. Sup.) 81 Pac. 315.

Examining, now, in the light of these general principles, the several points made by appellant against the validity of the trust clause, it is first insisted that section 857 of the Civil Code, providing what trusts may be created, does not authorize a trust to "manage" a trust fund. It is true that the word "manage" is not mentioned in the section, but there is no reason why it should be. The section was designed to provide the purposes for which valid trusts might be created, not to prescribe the form of expression which was to be used in doing so. The word "manage" means to direct, control, govern, administer, or oversee. 19 Am. & Eng. Ency. of Law, p. 706. When a trust is created, the whole estate is vested in the trustee subject to the trust. Civ. Code, § 863. And it is the duty of the trustee to hold the property and administer it. Subdivision 3 of section 857 provides that a trust may be created "to receive the rents and profits of real property and pay them to or apply them to the use of any person. * * *" The trust in the first and second subdivisions of clause third of the will was created for this purpose, and the trustees were directed to manage the trust property to fulfill it. It cannot well be perceived how the "income, issues and profits" referred to in those subdivisions could be derived from the trust estate, unless the trustees managed it so as to produce them. If the trust provision had said nothing about managing the property, the duty would, nevertheless, have been cast by law upon the trustees to do so for the purpose of carrying out the terms of this trust provision. The right to manage the trust property would spring from the devise itself to the trustees as necessary to carry out the purposes of the trust declared, whether the will expressly conferred such power on the trustees or not. And, as the power to manage would be implied, if not expressly granted, no provision of section 857 was violated in expressly conferring it.

Nor do we deem the second objection tenable. This is that the direction to pay to the wife and daughter of testator $150 per month is invalid because such payments are not limited by the terms of the trust to the "rents and profits" as the source alone from which payments shall be made, as provided in subdivision 3 of section 857, but, from the general language used, the capital or corpus of the trust property may be resorted to for such payments. Considered alone, the subdivisions of the trust clause directly providing for such payments may be open to this objection, but in ascertaining the intention of the testator as to the source from which said payments shall be made we must not restrict ourselves solely to an examination of these particular subdivisions of the will. Resort must be had to all the provisions of the will which tend to disclose his intention in that regard. When we do so, there is no room for construction left as to what his intention in that respect was. By his will he directs, first, that the trustees shall manage the property devised, and collect the "income, issues, and profits" and pay the annuitants their monthly allowance, and then provides that "any excess of income after such monthly payments are made to my wife and daughter shall be used in the improvement of any of my unimproved real property or invested in some income-paying property." By the fourth clause he further provides that "in case it may be necessary, or in case it may be deemed advisable by my trustees, * * * they are hereby authorized to sell at any time the said * * * property * * * and to reinvest the proceeds in income-paying real estate or other safe income-paying securities to the end that my wishes herein expressed may be carried out for the maintenance and protection of my said wife and my adopted daughter." These provisions clearly indicate that it was the intention of the testator that the payment of the annuities to his wife and daughter should be made from the income only of the trust property—the rents and profits. In the face of these provisions, so explicitly indicating this purpose, it would be doing violence to the intention of the testator to reach any other conclusion.

It is next insisted that subdivision 4 of the trust clause, which provides that the "whole of the residue of the trust estate shall be divided" among his brothers, sister, niece, and nephew in the event that his daughter dies before his wife, is void, and that a trust "to divide," which counsel for appellant contends is a trust to partition, or convey upon partition, the property of the estate, is not within the purposes for which a valid trust may be created under section 857 of the Civil Code, and relies upon the decision in the Estate of Fair, 132 Cal. 535, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70, as particularly supporting his contention. We do not think the principle of the decision in the Fair Case has any application. Under the trust provisions there involved the testator devised his property to trustees with specific directions that they should "transfer and convey" to the beneficiaries. This was the only method prescribed by him for vesting title, and his intention that the beneficiaries should take title by conveyance only from the trustees was repeatedly reiterated in his will. His intention in this regard, in the opinion of the majority of the court, was so clearly and repeatedly expressed that there was no possible room for construing the language of the trust provisions as making a direct devise to the beneficiaries, or as evidencing an intention to do so. The provision of the will at bar under consideration is radically different from the provisions construed in the Fair Case. It does not provide that trustees shall transfer or convey the trust property to the relatives designated as the only method whereby title to the trust property shall pass to them should the specified contingency happen. In fact, no active duty is cast upon the trustees at all under this section. They are not mentioned in it. No express direction that the trustees shall "divide" the trust property is contained in the subdivision, nor is there any direction in any other provision of the will that they shall make any transfer, conveyance, or division of the trust estate among the beneficiaries, or that they shall do anything at all so as to vest title to it in them.

In order to give countenance to the contention of appellant, it would be necessary to interpolate language into the subdivision directing the trustees to do what confessedly the subdivision does not directly prescribe they shall do, and, having made the interpolation, then declare the trust invalid as a trust "to divide." This a court will never do. It is only when the language actually used by the testator will admit of no other reasonable construction than that it creates an invalid trust that a court will declare this to be its effect. This, however, is far from being the character of the language used in the subdivision in question. Taking that language and construing it in connection with the other provisions of the will, notably subdivision 3 immediately preceding it, we think it was undoubtedly the intention of the testator in using the expression that "the whole of said residue shall be divided among" his relatives therein designated to directly devise the share of the estate otherwise going to his daughter to those relatives in the event of her death. By his will the testator provided for the existence of a trust solely during the lifetime of his wife, the income of the trust property to be devoted to the payment of annuities to herself and his daughter during his wife's lifetime, the only active trust duties devolving upon the trustees being to manage the estate so as to secure and expend the income derived from it. By section 3 of the trust clause, upon the death of his wife, he provided that one-half the remainder of his estate "should vest absolutely in his daughter," and that the remaining one-half should "vest absolutely" in his relations therein named. Under this subdivision the whole residue of his estate was vested in the beneficiaries, respectively, named therein by the terms of the trust itself. No provision was made for any division by the trustees, or any other action upon their part relative to the estate so absolutely devised. Subdivision 4, immediately following (the one in question here), was undoubtedly designed to meet the contingency of his daughter dying before his wife without issue, in which event he intended that the half of his estate previously devised to her should go to the devisees to whom the other half was devised, and that there should be thus vested in them the whole residue of his estate. It was not contemplated that the absolute devise of one-half which he had previously made to the beneficiaries, other than his daughter, should be disturbed in the event of her death, but only that, in such event, the prior disposition in their favor should be increased by vesting in them, in the same proportions as they took their own half, the share to which she would be entitled if she survived the testator's wife. This would necessarily vest in these beneficiaries the whole of the residue, and this was undoubtedly the intention the testator had in view when he provided in section 4 that it should "be divided" among them "in the proportions named in the last preceding subdivision"—subdivision 3. The language used was simply declaratory of his intention that, should the contingency provided for occur, the estate directly devised to his daughter should vest directly in the beneficiaries previously named. It is true that the testator might have used more apt words to disclose his intention to directly devise his estate to the other beneficiaries should his daughter die, but a declaration that it "shall be divided" among them is not by any means indicative of a different intention. If these words were used in a will free from trust provisions, they would undoubtedly be treated as words of devise. And we think they must be taken here as indicating a similar purpose, particularly when we consider that no express direction is given to the trustees to divide the trust estate so as to invest the beneficiaries with title to it, and when we further consider that the previous devise to the daughter, which would be affected by the happening of the contingency, was direct and absolute, and that there is nothing in the subdivision in question or in any other portion of the will to indicate that the testator intended, should the contingency happen, that the substituted beneficiaries should take in any other manner than by a direct devise similar to that by which, in the preceding subdivision, he had disposed of his whole estate.

In the case of In re Dunphy's Estate (Cal. Sup.) 81 Pac. 315, a trust clause in the will there under consideration provided that, upon the death of one of the beneficiaries, one-fifth of the principal of the estate "shall be transferred and distributed" as such beneficiary might by will direct. There was no express direction to the trustees to transfer or distribute. It was insisted that the language used meant that the title to such fifth could only pass by the trustees' conveyance, and that it was a trust to convey and void under the decision in the Fair Case. This court held otherwise, and declared the provision valid, holding that the use of these words evidenced no intention that the trustees should execute a conveyance, and that the provision contained no direction at all to the trustees to transfer, distribute, or convey, nor did it interfere with the apparent intention of the testator that the disposition of the trust estate, authorized by the beneficiary to be made, should operate as a direct devise. As the direction in the Dunphy Case that a portion of the trust estate "shall be transferred and distributed" did not amount to a trust to convey, but operated as a direct devise, certainly the provision in the present trust that the "whole of said residue shall be divided" did not create a trust directing the trustees to divide or transfer title by conveyance on partition, but operated as a direct devise in favor of the beneficiaries. We are satisfied that it was the intention of the testator, in using the language in subdivision 4 that the "whole of said residue shall be divided," to indicate the persons and proportions in which, in the event of his daughter's death, the share otherwise absolutely devised to her should vest, and that no trust of any kind was imposed upon the trustees under said provision.

The foregoing are the only points made by appellants which, in our judgment, call for disposition upon this appeal. The point that subdivision 5 of the trust clause, directing the trustees to use the excess of income, after payment of the annuities, in the improvement of unimproved property of the estate, or to invest it in some income-paying property, is invalid, as not within any of the trusts provided for in section 857 of the Civil Code, we do not think we are at this time called on to determine. It is no part of the primary trust, the validity of which is alone involved on this appeal. It is a provision entirely separable from it. If it were invalid, it would not affect the primary trust which we have determined to be valid. It is quite obvious that the primary trust would be unaffected and the primary purpose of the testator accomplished, even if the direction in the subdivision should be held void. It is clearly not so inextricably interwoven, or so essentially a part of the trust scheme, that all the other trust provisions would fall if it could not be sustained. Whether there will, in fact, be any excess of income is purely a matter of conjecture, a mere contingency which may never arise, and the uncertainty of which could not affect the primary trust. For these reasons, and having in view the character of proceeding here involved and the question presented on this appeal, we do not deem it necessary to determine its validity. This proceeding in the lower court was inaugurated to obtain a partial distribution of the estate, on the theory that the primary trust created by the testator was void. We have determined that this is not so. Having disposed of that question, it appears to us that we have disposed of the only vital point involved in the case. If we were to decide that subdivision 5 attempted to create an invalid trust as to the excess of income, it would be of no advantage to appellant. As the primary trust is valid, the decree denying her application would still have to be affirmed. Aside from this, the validity of this subdivision seems to be a moot question at this time and under this proceeding, whereby appellant seeks a distribution of property. There is nothing in the record to show what income the estate receives, or that there is now any excess of income, or that there is any probability that there will be any such excess. In the nature of things, this could only appear when the matter of final distribution of the estate comes up in the superior court, and it is possible that then the trust may be practically terminated. At that time and properly before that tribunal, if it shall be necessary to do so, the validity of this subdivision of the will can be passed on. For the reasons indicated, we do not think its validity need now be considered, and we do not do so.

The order and decree appealed from are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

(148 Cal. 108)

In re CLARK'S ESTATE. (Sac. 1,336.)

(Supreme Court of California, Oct. 12, 1905. On Rehearing, Nov. 13, 1905.)

1. WILLS—PROBATE.

Code Civ. Proc. § 1294, providing that wills must be proved in the county of which the decedent was a resident at the time of his death regardless of where he died, fixes the place of jurisdiction for all grants of original probate, and section 1322, providing that all wills duly proved in any other of the United States or in any foreign country or state may be allowed and recorded in the superior court of any county in which the testator shall have left any estate, fixes the place of jurisdiction of the grant of ancillary probate of authenticated copies of wills probated in foreign jurisdictions.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 586, 587, 596.]

2. SAME—STATUTES—CONSTRUCTION.

Under Code Civ. Proc. § 1294, requiring wills to be proved in the county of which the decedent was a resident at the time of his death, regardless of where he died, the words "all wills," used in section 1322, declaring that all wills duly proved in any other state or country may be allowed and recorded in any county where testator shall have left any estate, should be construed to mean "all foreign wills," and to include all wills, other than domestic wills, "duly approved and allowed in any of the United States or in any foreign country or state."

3. SAME—ADJUDICATION OF SISTER STATE—FAITH AND CREDIT.

Const. U. S. art. 4, § 1, requiring each state to give full faith and credit to the adjudications of sister states, does not limit the sovereign rights of a state nor deprive it of primary jurisdiction of the rights of its citizens to have the will of a resident originally proved in the county of his residence.

4. SAME—PROBATE—EXTRATERRITORIAL FORCE.

A judgment admitting a will to probate is valid in other states only as to property within the jurisdiction of the court pronouncing the judgment.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 944.]

5. WILLS—FOREIGN WILLS—PROBATE—PROCEEDINGS—SCOPE.

On application for the probate of a foreign will, the sufficiency of the proofs of foreign probate and the question of the residence of the testator are open to contest.

6. SAME—DOMESTIC WILL—FOREIGN PROBATE.

Under Code Civ. Proc. § 1294, providing that wills must be proved in the county of which the decedent was a resident at the time of his death, wherever he may have died, the will of a resident of California, having been originally proved in another state, could not thereafter be proved in California as a foreign will, under section 1322, authorizing the allowance and record of foreign wills in any county in which the testator shall have left any estate.

On Rehearing.

7. SAME.

On an application for the ancillary probate of a foreign will, it is the property within the state and subject to its jurisdiction which constitutes the res conferring jurisdiction on the court to act; proof of the will being a mere incident or means of determining the disposition of such res.

8. SAME—JUDGMENT—CONCLUSIVENESS.

A decree granting ancillary probate of a foreign will is only conclusive in so far as it affects the property of the testator within the state, and is not binding as to the will itself in other jurisdictions, where testator may have left property, or on the courts of his domicile.

Van Dyke, McFarland, and Shaw, JJ., dissenting.

In Bank. Appeal from Superior Court, Yolo County; E. E. Gaddis, Judge.

Application for the probate of the will of Julius H. Clark, deceased, as a foreign will. From an order denying the application, petitioner appeals. Affirmed.

W. A. Anderson and George Clark, for appellant. Arthur C. Hutton, for respondent. Charles S. Wheeler, Campbell, Metson & Campbell, Garrett W. McEnerney, and S. D. Woods, amici curiæ.

HENSHAW, J. Julius H. Clark died in the county of Yolo, in the state of California, on the 14th day of March, 1904, and was a resident of that county at the time of his death. He had resided in the county for more than 20 years continuously prior to his death. On the 13th of July, 1872, while visiting in Keene, N. H., he executed his last will and testament. This will was executed in conformity with the laws of the state of New Hampshire, and also in conformity with the laws of the state of California. It was filed by the executrix named therein in the office of the county clerk of Yolo county, with a petition praying for the probate thereof. In addition to having been a resident of Yolo county at the time of his death, the deceased left estate in that county. Subsequent to the filing of the will and petition the superior court of Yolo county in probate made an order permitting the original will to be withdrawn and forwarded to Keene, N. H. The will was then probated in New Hampshire, and thereafter appellant herein filed his petition in the superior court of the county of Yolo, asking for probate of the same will upon an exemplified copy from the probate court of the state of New Hampshire. The superior court of Yolo county took evidence and determined that at the time of his death Clark was a resident of Yolo county. This finding is not in dispute. As a legal consequence, following this finding, the court concluded that Clark's will should be admitted to probate originally in the superior court of the county of Yolo, and was not entitled to admission as a foreign will. It denied the petition, and this appeal is taken.

We are here for the first time upon a direct proceeding, by appeal from an order refusing probate to such a will, called upon to construe our Code provisions governing the question. We say that we are for the first time called upon in direct proceedings, because, as will hereafter be shown, the cases in which the question may be considered to have arisen were either cases of collateral attack or cases where the precise question here presented was not made an issue, and therefore, under well-settled principles, cannot be said to have been de cided. As all the provisions of the Code bearing upon a single subject-matter are to be construed together, and harmoniously, if possible, it may be well to set forth the sections touching the probate of wills. Section 1294 of the Code of Civil Procedure declares: "Wills must be proved and letters testamentary or of administration granted: (1) In the county of which the decedent was a resident at the time of his death, in whatever place he may have died." Article 3, c. 2, of the same title (11) containing section 1294, above quoted, is devoted to the probate of foreign wills. The article is itself entitled "Probate of Foreign Wills," and section 1322 provides: "All wills duly proved and allowed in any other of the United States, or in any foreign country or state, may be allowed and recorded in the superior court of any county in which the testator shall have left any estate." Section 1323, following, provides that notice of a petition for proving a will shall be given when a copy of the will and the probate thereof, duly authenticated, shall be produced by the executor, or by any other person interested in the will, with a petition for letters. Section 1324 provides that if on the hearing it appears upon the face of the record that the will has been proved, allowed, and admitted to probate in any other of the United States or in any foreign country, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this state, it must be admitted to probate and have the same force and effect as a will first admitted to probate in this state. Section 1299 declares: "Any executor, devisee or legatee named in any will, or any other person interested in the estate, may at any time after the death of the testator petition the court having jurisdiction to have the will proved, whether the same be in writing, in his possession or not, or is lost or destroyed, or beyond the jurisdiction of the state." We take it that no jurist, feeling himself unembarrassed by earlier decisions, and at liberty to treat the question as a new one, would hesitate to say: First, that section 1294 fixes the place of jurisdiction for all grants of original probate, while section 1322 does the same for grants of ancillary probate of authenticated copies of wills proved and probated in foreign jurisdictions. Second, that these laws mean that the will of a resident of the state of California must be proved originally as a domestic will in the county of his residence, and that, so far as the state of California is concerned, it cannot be primarily proved elsewhere and brought into this state for purposes of secondary and ancillary administration. In construing the language of section 1322, attention would be called to the fact that resort with propriety may be had to the title of an act, and often must be had, to determine its true scope and intent; that the title of section 1322, relating exclusively and in terms to foreign wills, will be read in, and of necessity must be read in, to the language of that section, so that "all wills" means and should be read to mean "all foreign wills"; and that "foreign wills," as the phrase is here employed, means all wills other than domestic wills, as plainly appears from the language of the section itself, which describes these wills as all those "duly proved and allowed in any other of the United States, or in any foreign country or state." In illustration, it might be pointed out that if the Legislature had passed an act under the title of "An act for the government of boys in penal and reformatory institutions," and the body of the act had begun with the declaration, "All boys shall," etc., it would unhesitatingly be said that the phrase "all boys" had reference exclusively to all boys in penal and reformatory institutions in this state. We think this same unhampered jurist would point out that the matter of recognizing the judgment of a foreign state rested originally wholly in comity, and that, saving as exacted by section 1, art. 4, of the Constitution of the United States, still rests wholly in comity. It would be pointed out that while the states themselves, as has this state, have by appropriate legislation, provided that full faith and credit should be given to the adjudications of sister states, this never has meant that the state itself has parted with any of its sovereign rights, with any of its rights of primary jurisdiction, nor with any of the rights of its subjects, to have the will of a fellow-resident originally proved in the county of his residence, where, presumptively, he is the best known, and where they may the better litigate all questions touching the validity of the solemn instrument offered for probate.

Recognition would be given to the indisputable principle that every state has plenary power with respect to the administration and disposition of the estates of deceased persons as to all property of such persons found within its jurisdiction. Thus the courts of a state may and do grant original probate upon wills of deceased nonresidents who leave property within that state. In California this is expressly provided for by section 1294 supra, and the rule as to other states is the same. 1 Woerner's Adm. *439; Shields v. Life Ins. Co., 119 N. C. 380, 25 S. E. 951; Gordon's Case, 50 N. J. Eq. 397, 26 Atl. 268; Putnam v. Pitney, 45 Minn. 242, 47 N. W. 790, 11 L. R. A. 41; Walton v. Hall's Estate, 66 Vt. 455, 29 Atl. 803; Jacques v. Horton, 76 Atl. 238. But the limitations of the operation of this principle would also be recognized, namely, that this exercise of original jurisdiction over the estates of nonresidents affects, and can affect, only the property within the state. The judgment admitting the will to probate is valid in all other states only as to the property within the jurisdiction of the court pronouncing the judgment. It has no extraterritorial force, establishes nothing beyond that, and does not dispense with nor abrogate the formalities and proofs which may be exacted by other jurisdictions in which the deceased also left property subject to their laws of administration. 1 Woerner's Adm. *491. And in this connection it would be further pointed out that, if the position contended for by appellant is sound, it involves upon the part of the state a formal surrender of so much of its sovereignty and right of primary jurisdiction, conferring that upon foreign states, and at the same time, to this extent, is subversive and destructive of the rights of its citizens. It would be said with exact truth that the full faith and credit which is accorded to the adjudications of sister states is a full faith and credit, consonant with complete jurisdiction and control of the sovereign state over all its inhabitants, and over all the property within its boundaries. No less would the practical hardships of such an interpretation be pointed out, because, if it were so that all wills, therein including domestic wills of residents of this state, could be primarily proved in a foreign jurisdiction, and by mere exemplification of that proof be entitled to ancillary probate under the laws of this state, it would result in numerous instances that wills of residents of this state would be probated in foreign jurisdictions without the knowledge of those in interest resident in this state, and without an opportunity to them afforded of raising any question of fraud, insanity, undue influence, or the like, affecting the validity of the instrument. Further, it would be pointed out with justice that, if the construction contended for be the true one, it is arrived at by obliterating all distinction between the probate of domestic and foreign wills, by refusing recognition to the language of the Code classifying these foreign wills, and by a surrender of the state's original jurisdiction in these matters, with the result that it places the state of California in an anomalous class by itself. For neither the laws of Great Britain nor of any sister state of the United States ever have permitted, and we venture to say never will permit, any such doctrine, and it may be safely added that no civilized country in the world has ever entertained it. Numerous cases would be cited showing that, while in matters of probate states by comity permit ancillary jurisdiction of foreign wills, they are jealous in the extreme of any invasion of, or attempt to invade, their original jurisdiction in such matters. Manuel v. Manuel, 13 Ohio St. 459; Sturdivant v. Neill, 27 Miss. 157; Stark v. Parker, 56 N. H. 481; Wallace v. Wallace, 3 N. J. Eq. 616; In re Law (Sup.) 80 N. Y. Supp. 410; Moultrie v. Hunt, 23 N. Y. 394; Dial v. Gary, 14 S. C. 573, 37 Am. Dec. 737; Story on Conflict of Laws, § 457; 23 Am. & Eng. Ency. of Law, p. 114; Schouler on Executors, §§ 15 and 57; 2 Redfield on Wills, p. 290; 1 Woerner's Adm. § 226.

In summing up, we think the unhampered jurist would reach the conclusion that our laws not only recognize, but sedulously preserve, the distinction between foreign and domestic wills and the probate thereof; that the law means what it says, namely, that all domestic wills must be proved in the county of which the decedent was a resident at the time of his death, for thus the state preserves its sovereignty and its jurisdiction over matters primarily belonging to it, and thus also, it preserves the rights of its other residents and citizens; furthermore, that all foreign wills may be proved and allowed as provided in section 1322 of the Code of Civil Procedure, et seq.; that in the case of a domestic will all questions touching the validity of the instrument are, and should be, primarily and exclusively cognizable by the courts of the state of the domicile; that in the case of a foreign will, that is to say, of one not a resident of this state, this state and its citizens have less concern with these questions of fraud, undue influence, and the like, and upon the offer of proof of such a will it shall be admitted upon the evidence prescribed by section 1324, without right of contest upon such matters. Code Civ. Proc. § 1913. But, nevertheless and always, when a foreign will is so offered for probate in this state, two questions are open as new and original questions for the determination of our own probate court: First, the sufficiency of the proofs of foreign probate; and, second, the question of the residence of the deceased. For if, upon the question of residence, it shall be determined that the deceased was in truth a resident of this state, it follows of necessity that the proper state court has exclusive, original primary jurisdiction to admit the will to probate, and will not admit it as a foreign will for ancillary proceedings. It does not, of course, follow that because the probate court under such circumstances will not admit it as a foreign will that it will refuse it probate altogether. It will grant it probate, the facts warranting, in proceedings under section 1294 for original probate. Nor can practical difficulty arise because such a will has been probated in a foreign jurisdiction, for the Code (section 1299, supra) meets this precise situation by providing that petition may be made to the court having jurisdiction to have the will proved, whether it be lost, or destroyed, or beyond the jurisdiction of the state.

We have discussed this question under what we have said we were convinced would be the view of a jurist treating the case as one of first impression. We are met, however, with the argument that our own adjudications express a contrary view, and are determinative of the question. Not that alone, but that this view has been adopted by the courts in probate throughout the state, and that the result of the construction of the law here set forth would be to declare void all letters admitting such wills to probate, and cloud the title to untold millions of property in the hands of innocent holders. If such consequences were to result, or if, in fact, there were any such adjudications, a court would pause long and ponder gravely before announcing a construction which would lead to such direful consequences. But the answer is that this court has made no such adjudications, and that no such consequences can follow; for, as has been said, this is the first time that the question upon direct appeal has been presented for determination. The cases to which appellant refers and upon which he relies are those of Rogers v. King, 22 Cal. 72, Goldtree v. McAlister, 86 Cal. 93, 24 Pac. 801, and Estate of Richardson, 120 Cal. 344, 52 Pac. 832. In Rogers v. King the attack was collateral, not direct. The opinion is addressed to this state of facts, and the essential part of it is as follows: "The agreed case states that the executor named in the will filed in the probate court a petition for the probate of the will, and filed therein an authenticated copy of said will, and that the petition stated all the necessary facts. * * * If, as agreed, the petition stated all the necessary facts, then upon its presentation with a copy of the will and the publication of due and legal notice, the court acquired jurisdiction to probate the will, and the judgment of the probate thereafter entered is conclusive. If any irregularities occurred in the proceedings or error in the judgment after jurisdiction was acquired, they could only be corrected by a direct proceeding for that purpose, and cannot be inquired into in this collateral proceeding." This is all that the case of Rogers v. King contains, and it amounts to no more than a declaration that, the court in probate having acquired jurisdiction and having admitted a will to probate, errors in the exercise of its jurisdiction do not render its order admitting the will to probate void, and cannot be considered upon collateral attack. In Estate of Richardson, while it appears from the facts that the testator was a resident of California at the time of his death, and that his will had been originally probated in a sister state, and subsequently had been offered for probate in this state as a foreign will, the sole question at issue which this court was called upon to determine, and did determine, was the right of a nominee of a devisee to testamentary letters. The question now before the court, as to the right to probate the will under any circumstances as a foreign will, was never discussed nor decided. Goldtree v. McAlister was a case originally decided in department and reconsidered by the court in bank. That, too, involved the question, not of a direct, but of a collateral, attack upon the validity of an order admitting to probate as a foreign will the last testament of a resident of this state. The attack was principally directed to the sufficiency of the proof of authentication, and the court said: "An error of the court in deciding that certain documentary evidence not properly authenticated, proved a valid foreign probate of a will, is not different in character or principle from an error in deciding, as in the case of Irwin v. Scriber, 18 Cal. 500, that certain evidence proved that the deceased had her last place of residence in Sacramento county. The error in the former case may have proceeded from a misconception of what constituted a valid foreign probate of a will, or from an error as to what was competent or sufficient evidence to prove it. In the latter case the error may have arisen from a mistaken view of what constituted a residence, or from an error as to what was sufficient or competent evidence to prove it. Such errors may be corrected by appeal, but do not render the judgment void." This case then must be taken to decide, and to decide only, that upon collateral attack an order admitting a will offered as a foreign will to probate is not void for error either in the proof of authentication or in proof of residence, as in Rogers v. King and Irwin v. Scriber. Question may be raised over the strict logic of that opinion, but no doubt can exist as to the strong necessity which called it forth. It must be taken, therefore, as settled in this state, upon the authority of the cases cited, that the probate of such wills is free from attack upon these questions in collateral proceedings, but that, upon the other hand, it is the duty of the court in probate to do as the court here did, refuse probate to a will offered as a foreign will, if the court shall be satisfied from the evidence that the testator was, in fact, a resident of this state at the time of his death.

For the foregoing reasons, the order and decree appealed from are affirmed.

We concur: BEATTY, C. J.; LORIGAN, J.; ANGELLOTTI, J.

VAN DYKE, J. (dissenting). I dissent. The deceased, Clark, it appears, executed his will in 1872, at Keene, Cheshire county, N. H., and left it in the custody of Cain & Benton, attorneys at law, in said county of Cheshire. After his death that will was sent out here and filed for probate in the county of Yolo, but before any action was taken thereon, upon the application of Mary M. Metcalf, a sister of the deceased and devisee and legatee of the estate under said will and the sole executrix named therein, for permission to withdraw said will and have the same proved in New Hampshire, the probate court of Yolo county entered the following order granting said application:

"In the Superior Court of the State of California, in and for the County of Yolo. In the Matter of the Estate of Julius H. Clark, Deceased.

"Upon reading and filing the petition of Mary M. Metcalf, duly verified by her attorney, W. A. Anderson, and it appearing therefrom that it is to the best interests of the estate of said Julius H. Clark, deceased, and also for the best interests of the devisees of the will of the said deceased, and that it is impracticable and very expensive to probate the said will of Julius H. Clark in the state of California, and that the said will was executed in the state of New Hampshire, and that none of the witnesses to said will live in the state of California, but that they did live in the said state of New Hampshire, and that the said executrix, Mary M. Metcalf, is too feeble to come to the state of California, to apply for letters testamentary on said will, and it appearing from said petition that the said executrix desires to have said will probated in the county of Cheshire, state of New Hampshire, and that the said Julius H. Clark left estate in said county at the time of his death: Wherefore it is by the court ordered, adjudged, and decreed that the clerk of the said superior court of the county of Yolo be, and he is hereby, ordered and directed to send the will of the said Julius H. Clark, now on file in his said office, to Mrs. Paul Thomson, at West Hartford, Connecticut, by express, or to deliver to W. A. Anderson, the attorney for Mary M. Metcalf, the said will to be so sent. And the clerk is hereby ordered to preserve a certified copy of said will in his said office. E. E. Gaddis, Judge."

Indorsed: "Filed April 19, 1904. C. F. Hadsall, Clerk."

Thereafter, on May 18, 1904, the proponent Du Bois, to whom an interest in said estate had been conveyed by said Mary M. Metcalf, devisee and legatee of the said will, filed a petition in the superior court of Yolo county for admission to probate of said will upon a duly authenticated copy thereof and its probate in the state of New Hampshire. Upon notice of said application having been given pursuant to the statute, the contestant L. J. Clark, son of the testator, and a legatee under the will, filed objections to the admission of the same upon the exemplified copy, upon the grounds, among others, that said Julius H. Clark, at the time of his death and at the date said alleged will was executed, was a resident of the county of Yolo, state of California; that said alleged will was a domestic will, and that the same could not be admitted to probate by virtue of having been previously admitted to probate by the courts of New Hampshire; that the superior court of Yolo county, state of California, had original and exclusive jurisdiction to hear an original petition to admit said will to probate; and that the courts of the state of New Hampshire had no jurisdiction to admit said will to probate, except for the purpose of carrying on an administration ancillary to that had in the state of California. Upon the hearing of the case, the superior court of Yolo county sustained the objection of the contestant upon the grounds stated, and denied the admission of the authenticated copy to probate, and from this order the appeal is taken. From the record it appears that the copy of the will was duly authenticated in conformity with the laws of New Hampshire, and that such will was valid under the laws of said state admitting it to probate; that all the proceedings thereon were regular, and that there was nothing upon the face of the record to dispute the jurisdiction of the court of such state admitting the will to probate; and that said will was made and executed in conformity, not only with the laws of said state, but also in conformity with the laws of this state. The question, therefore, presented is whether, in the case of a testator, who, at his death, resided in this state, a will filed for probate in this state upon a duly authenticated copy thereof from the court of a sister state, first having been duly probated therein according to the laws of said state, may be admitted to probate, or must the original will be produced here for that purpose? Section 1322, Code Civ. Proc., copied in the prevailing opinion, is taken from the act of 1850 to regulate the settlement of estates of deceased persons, being section 27 of said act. St. 1850, p. 377, c. 129. The language of the Code sections bearing on the subject under consideration is plain and unambiguous, and cannot be controlled by any headlines of the chapter put there by the code commissioners. "The mere classifications can scarcely be deemed part of the law." Endlich on the Interpretation of Statutes, § 70.

In the case of Goldtree v. McAlister, 86 Cal. 93, 24 Pac. 801, the plaintiff sued in the character of trustee of the estate of Jonathan Thompson, deceased, under his last will. The testator was a resident of the county of San Luis Obispo, and left estate therein. His last will had been duly proved and allowed in the Queen's Probate Court of London on the 28th day of October, 1875. His heirs and devisees were residing in this state and in England. Upon petition, filed for the probate of said will from an exemplified copy thereof from said English court, the probate court of San Luis Obispo county, this state, after notice and proceedings as required by the Code, admitted said will to probate in the following order: "It is ordered that the paper heretofore filed purporting to be a copy of the last will and testament of said deceased be admitted to probate as the last will and testament of said deceased; that the said John Thompson and John A. Patchett be and they are hereby appointed executors of said estate; and that letters testamentary issue to the said petitioners upon their taking the oath as required by law." Letters testamentary were accordingly issued to John Thompson and J. A. Patchett, who duly qualified. The will also appointed Thompson, Patchett, and Grierson trustees of the estate, and devised the property to them for the uses and purposes stated in the will. Thereafter, by an order of said superior court, Patchett was removed and plaintiff Goldtree was appointed in his place. On the trial of the case the defendant objected to the introduction in evidence of the record of the California probate proceedings of San Luis Obispo county, on the ground that the probate court of San Luis Obispo county never acquired jurisdiction of the subject-matter of the probate of the will. Defendant's objections were overruled and judgment went for the plaintiffs, which judgment on appeal was affirmed by this court in department. Appellant filed a petition for a rehearing, and made the point that, as Thompson was a resident of California at his death, his will was domestic to the state of California, and that the California court had no jurisdiction to grant ancillary or secondary probate, as was done in that case. A rehearing was granted, and appellant filed additional points and authorities upon the rehearing in bank, in which it is said: "Admittedly Jonathan Thompson was a resident of California at his death. It follows that his will, if any he left, was not a 'foreign' but a domestic will—domestic to the state of California. * * * The English court had no jurisdiction to grant original probate of a will domestic to this state. The California court alone had such jurisdiction. The California court had no jurisdiction to grant auxiliary or secondary probate of the will in question." And appellant's counsel especially relied upon the point of want of jurisdiction in the probate court of this state in the premises, and this question seems to have been fully presented to this court on the rehearing. In the opinion upon the rehearing by the court in bank it is said: "The judgment appealed from in this case was affirmed January 31, 1890. A rehearing was granted, and the case has been argued in printed briefs. We have carefully considered the arguments of the learned counsel for appellant on the rehearing, but find nothing in them having the effect to change the former opinion." Pages 96 and 97, 86 Cal., page 801, 24 Pac. This case, which is the latest expression of this court on the question, seems to hold directly that a will of a resident of this state can be admitted to probate in this state on an exemplified copy of its probate in a court outside of the state.

As already shown, the will in question, upon petition, was ordered by the lower court to be withdrawn and transmitted to New Hampshire, where the deceased left property, to be there first admitted to probate. It can hardly be supposed that the court in doing this at the same time entertained the view that said will could only be admitted to probate in the first instance in Solano county. To suppose so would be to suppose that the court set a snare to entrap petitioners so as to deprive the legatees and devisees under the will of the principal benefit resulting from the same. Under the provisions of the Code, as well as upon the authority of Goldtree v. McAlister, supra, the court below clearly erred in refusing to admit the will in question to probate under the circumstances, as shown, and the order to that effect should be reversed.

McFARLAND, J. (dissenting). I dissent, and think that the order appealed from should be reversed. In my opinion the language of section 1322, Code of Civil Procedure, "all wills duly proven and allowed in any other of the United States, or in any foreign country or state may be allowed and recorded," etc., is entirely too clear and explicit to leave any room for the play of construction. The fact that the section is preceded by the subheading "Probate of Foreign Wills" is not sufficient to overcome the unmistakable meaning of the language of the section. Indeed, the word "foreign" does not necessarily mean in law a country other than a sister state of the American Union. In the majority of instances it includes such sister states, and this view of its meaning is so well established as to have gone into the text-books and law dictionaries as settled law. In "Words and Phrases Judicially Defined," vol. 3, p. 2881, it is said: "For all national purposes embraced by the federal Constitution, the states and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects the states are necessarily foreign and independent of each other; their constitutions and forms of government being (though republican) altogether different, as are their laws and institutions." In Bouvier's Law Dictionary, vol. 1, p. 811, it is said: "The several states of the American Union are foreign to each other with respect to their municipal laws." In Abbott's Dictionary, vol. 1, p. 514, it is said: "In American usage the several states of the Union are foreign to each other with respect to matters governed by their municipal laws; while the relations of the general government and either state are domestic. This consideration qualifies the usage of several of the phrases mentioned under the present head. It is abundantly well settled that a bill of exchange drawn in one state, payable in another, is a foreign bill. The corporations created by one state are constantly called foreign corporations in any other. In each state the judgments rendered in, and laws enacted by, another state are foreign judgments and laws. A port of another state is a foreign port." Therefore the word "foreign," in the subheading, is not at all inconsistent with the language of the section in question. And, of course, the Legislature has full power over the whole subject of wills, descents, distribution of estates, and probate proceedings. There is not a word in the state Constitution limiting its legislative authority in such matters.

SHAW, J. (dissenting). I dissent. So far as the policy of the provisions of section 1322, of the Code of Civil Procedure is concerned, that is a question for the Legislature, and not for the courts. There are considerations both for and against the proposition that the will of a person who dies a resident of this state may be first probated in some other state. In cases of persons who have recently become residents of this state it is often very much more convenient and less expensive to pursue this course. A large part of the population of this state has always consisted of persons who have lived here but a short period of time. It may be that the Legislature, having these circumstances in view, believed it the best policy to provide that this might be done, and enacted this statute for the express purpose of allowing it to be done. But, in any event, in view of the plain language of the section, the matter of policy is immaterial. "A cardinal rule of interpretation is that a statute free from ambiguity and uncertainty needs no interpretation. This must be so, for all interpretation and construction is for the purpose of ascertaining the legislative will. When this is clear, interpretation is not allowable. In such case it cannot be argued that the result is unjust or against policy. The statute is itself conclusive upon these subjects." Davis v. Hart, 123 Cal. 387, 55 Pac. 1060. The section in question must have the same meaning now as it had when it was originally enacted. It first became a part of the statute law of this state in 1850, when it was enacted in section 27 of the probate act (St. 1850, 378, c. 129) in precisely the same language as that contained in section 1322, Code of Civil Procedure, except that the words "superior court" have been substituted for "probate court." In the Probate Act there was no chapter, heading, or subheading which could have any effect. It is inconceivable that the Legislature would have re-enacted the section in the same language, if it had intended to change the meaning, by limiting its application to wills of persons who, at the time of their death, resided out of this state. The phrase "all wills" in the section plainly includes wills of every description, domestic and foreign. Where the language of the statute is clear and unambiguous, as in this case, the title of the act, chapter, article, or subheading of the section cannot be resorted to for the purposes of giving it a different meaning from that which the words import. In re Boston M. & M. Co., 51 Cal. 624; Cohen v. Barrett, 5 Cal. 209; People ex rel. Flynn v. Abbott, 16 Cal. 366; Hagar v. Supervisors, 47 Cal. 232. Furthermore, it cannot be said that the decision will not tend to unsettle titles to real property. While it may be true that the determination of the court upon the question of fact that the residence of the deceased at the time of his death was in some other state or country is conclusive on collateral attack, and that this has been settled by the decisions of this court, yet it has never been decided that where, in case of the probate of a so-called foreign will, the petition on its face avers that the deceased died a resident of this state, but that the will had been first probated in some other state, the fact of lack of jurisdiction is not apparent on the face of the record, and may not be raised upon collateral attack. The records of this court show that there have been several cases where wills of this character have been proven as foreign wills, and it is a fair, if not necessary, inference that the actual cases of that character have been quite numerous. Whatever may be now said in the way of a discriminating review of the previous decisions of this court, it must be admitted that the general opinion has been that, under section 1322, the will of a resident of this state, having been first admitted to probate in some other state, may be probated in this state as a foreign will. I think the court below erred in refusing to entertain jurisdiction.

Response to Petition for Rehearing.

BEATTY, C. J. In their petition for a rehearing counsel for appellant reiterate the argument that our construction of the Code provisions relating to the proof of foreign wills (Code Civ. Proc. §§ 1322–1324) can only be sustained by reading into the statute a qualification of the words "all wills," which will limit its application to wills "of a certain kind," contrary to the intention of the Legislature and the general understanding of the courts of the state and the legal profession. I take leave to doubt this general understanding of the courts and the profession, and again call the attention of counsel to the fact that it is wholly unnecessary to read anything into the statute in order to limit its application to wills of a certain kind. The qualifying words are plainly written in the statute, and the fault is with counsel in ignoring their existence and their force. The statute does not say "all wills," and stop there. Its language is (section 1322) "all wills duly proved and allowed" in any other state or foreign country. Wills that have been duly proved and allowed are wills "of a certain kind," and in order to determine whether a particular will is of that kind we have to give a construction to the words "duly proved and allowed." When, therefore, is a will duly proved and allowed? The proof of a will is a proceeding in rem. To the validity of any judgment in rem—a judgment, which as to the res, binds all the world—there must be adequate public notice of the proceeding, and such notice must emanate from a court which has jurisdiction of the res. When the will of a resident of this state is the res, is it possible that the courts of every civilized country on the globe have a concurrent jurisdiction upon published notice to determine its validity? If we look to our own statute for a test of jurisdiction in such cases, we find that we confine the judisdiction to the county of which the decedent was a resident at the time of his death, and this, it is safe to say, is the ordinary rule. Authority to take proof of wills is confined to courts whose territorial jurisdiction includes the domicile of the decedent. The fact that in this state, as in other states and countries, wills of nonresidents are admitted to probate on original proceedings for the purpose of administering upon their property within the state is no impeachment of this proposition. In such cases it is the property within this state and subject to its jurisdiction which constitutes the res, and proof of the will is allowed as a mere incident or means of determining the disposition of that property. And the decree which has only that purpose is conclusive only to that extent. It binds that property here and everywhere that the decrees of our courts are accorded full faith and credit, whether by comity or by force of the federal Constitution. But such a decree is not binding as to the will itself in other jurisdictions where the decedent may have left property, and still less is it binding upon the courts of his domicile. It is not conclusive in other jurisdictions, simply because, as a will and for all purposes, it has not been duly proved and allowed. It has been proved and allowed so far as it affects the disposition of the property within the particular jurisdiction, but no further.

The considerations thus briefly indicated, it seems to me, ought to have prevented the hasty contruction which we are told has been generally placed upon our statute by the profession and the courts in this state. As to the courts, it is true that in three instances, as shown by our records, the construction contended for by counsel has been accepted by the trial court, but in this court decrees admitting wills of residents of California to probate, on proof of foreign probate, have never been sustained, except as against collateral attack. My own opinion is clear that no will has been duly proved and allowed, within the meaning of sections 1322–1324, Code of Civ. Proc., unless the proof has been taken in a court whose territorial jurisdiction includes the domicile of the testator. When a will has been admitted to probate here on proof of its admission to probate in some other jurisdiction, not including the domicile of the decedent, the decree and proceedings regularly taken under it are, of course, secure against what in Goldtree v. McAlister, 86 Cal. 93, 24 Pac. 801, is held to be collateral attack, and this, irrespective of the question whether that decision can be reconciled with a correct construction of the statute. Correct or not, the rule of that case has become a rule of property, and as such must be upheld upon the doctrine of stare decisis for the protection of vested rights..

148 Cal. 146

LAMBERT v. BATES. (S. F. 3,495.)

(Supreme Court of California. Oct. 14, 1905.)

1. APPEAL—FORMER DECISION—LAW OF THE CASE.

Where, on a prior appeal, the Supreme Court reversed a judgment in favor of defendant and directed the trial court to enter judgment on the findings in plaintiff's favor, such decision constituted the law of the case on the question of the sufficiency of the findings to support a judgment in plaintiff's favor.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4358–4368.]

2. MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS — ASSESSMENT — OBJECTIONS—REVIEW.

Where an appeal was taken by the owner of certain property assessed for street improvements to the city council as required by law, for the determination of objections to the manner in which the work was done, the council's adverse decision on such objections was conclusive, and barred the owner from renewing the same as a defense to a proceeding to foreclose the lien on his property for nonpayment of the assessment.

3. APPEAL—JUDGMENT APPEALABLE.

A judgment entered in the superior court by direction of the appellate court is appealable.

4. SAME—SCOPE OF REVIEW.

Where, on a prior appeal on the judgment roll, the judgment was reversed, and a judgment ordered entered on the findings in favor of the party appealing, the other party may by an appeal on a proper record present for consideration exceptions taken by him on the trial of the action.

Department 1. Appeal from Superior Court, Alameda County; W. E. Greene, Judge.

Action by D. Lambert against George E. Bates. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Freeman & Bates and E. D. Magee, for appellant. Alex. G. Eells and H. K. Eells, for respondent.

ANGELLOTTI, J. This is an action to foreclose the lien of a street assessment. A trial was had, resulting in a judgment for defendant. The plaintiff appealed to this court, and the judgment herein was as follows, viz.: "The judgment is reversed, and the superior court is directed to enter judgment on the findings for the plaintiff, as prayed for in his complaint." Lambert v. Bates, 137 Cal. 676, 680, 70 Pac. 777, 778. Upon the going down of the remittitur, the superior court complied with the mandate of this court, and entered the judgment for plaintiff required thereby. This is an appeal on the judgment roll alone, taken by the defendant from the judgment so entered under the order of this court. There is no claim that the judgment as entered does not fully comply with the directions of this court on the former appeal; the only contention made by appellant being that the findings do not support the judgment.

The rule contended for by appellant that a judgment cannot stand on appeal, unless it be supported by the findings, cannot, of course, be disputed. The decision of this court upon the former appeal is, however, conclusive upon the point that the findings here do support the present judgment, and the contention of appellant is simply a request that this court reconsider its previous ruling. When this court directed this particular judgment to be entered upon these findings, it necessarily adjudicated that question against the contention of appellant, and we are not at liberty to consider the question anew upon this appeal. The decision upon that point has become the law of the case. An examination of the opinion given on the former appeal shows that the particular finding claimed by appellant to be inconsistent with the right of plaintiff to a judgment, viz.: that the plaintiff had failed to perform all the terms and conditions of his contract, and that the macadamizing and guttering had not been done to the official grade, was considered immaterial by this court, in view of the law requiring an appeal by the owner to the city council upon such matters, and the finding that such an appeal had been made and the objections of the owner on such appeal overruled. It was held that, upon the record before the court, the decision of the council upon those questions was conclusive upon the owner, and that the objections were therefore not available to him here. We see no reason to question the correctness of this decision, even if the matter were here open for review.

The right to appeal from a judgment entered in a superior court by direction of the appellate court undoubtedly exists. As has been said, great injustice might be done, if it should be held that such a judgment is not appealable. See Randall v. Duff, 107 Cal. 33–36, 40 Pac. 20. If the lower court enters a judgment that is not in accord with the directions of the appellate court, the error may be corrected on appeal. If, upon an appeal by one party, upon the judgment roll, the judgment is reversed and judgment ordered entered upon the findings in his favor, the other party may, by an appeal upon a proper record, present for consideration exceptions taken by him on the trial of the action. Klauber v. San Diego, 98 Cal. 105, 32 Pac. 876. Other instances of questions that could be considered on such an appeal might be enumerated, but they cannot include such matters as were definitely determined on the former appeal. As to such matters, the doctrine of the "law of the case" makes the former decision conclusive. Klauber v. San Diego, etc., supra.

The judgment is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

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148 Cal. 157

HANSEN v. UNION SAVINGS BANK.

(S. F. 3,512.)

(Supreme Court of California. Oct. 18, 1905.)

1. HOMESTEAD—DECLARATION—SUFFICIENCY.

Civ. Code, § 1262, provides that in order to select a homestead the husband or wife must execute and acknowledge a declaration of homestead, which section 1263 declares shall contain a statement that the person making it is the head of a family, or, when the declaration is made by the wife, that the husband had not made such declaration and that she therefore makes it for their joint benefit. *Held*, that a declaration made by a wife, which failed to allege either that she was the head of a family or that her husband had not made such declaration, was fatally defective.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, § 61.]

2. SAME—STATUTES—APPLICATION.

Civ. Code, §§ 1266–1269, declaring that any person other than the head of a family in the selection of a homestead must execute and acknowledge a certain declaration, etc., relate solely to persons other than a husband, wife, or head of a family, whose homestead rights are declared by sections 1262, 1263.

3. SAME — TERMINATION — PROCEEDINGS—NOTICE.

Under Code Civ. Proc. § 1723, authorizing the filing of a petition to terminate a life estate or homestead interest in certain property, providing that "thereupon, and after such notice by publication or otherwise as the court may order, the court must hear," etc., a notice of such an application posted for 10 days in three prominent places in the county, without notice to persons interested in the property, was insufficient to confer jurisdiction.

4. SAME—STATUTES—SCOPE.

Code Civ. Proc. § 1723, provides that, if any person be dead who was the owner of a life estate in property or was one of the spouses owning land as a homestead, etc., any person interested in the property or title thereto may file a petition to terminate the homestead or community interest vested in the survivor of the community, etc. *Held*, that such proceeding was only to determine that a certain person was dead, on whose death the asserted right of another depended, and that no judgment conclusively establishing a homestead right could be rendered therein.

Department 2. Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by Corine Mathea Hansen against the Union Savings Bank. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

John M. Lewis and I. F. Chapman, for appellant. Reed & Nusbaumer, for respondent.

McFARLAND, J. This is an action to quiet title to a certain described lot of land. Judgment went for defendant, and the plaintiff appeals from the judgment.

On August 26, 1895, the lot in question was owned by appellant's husband, Jens Hansen, since deceased, as community property, and on that day he mortgaged it to respondent to secure his note for $650. Afterwards respondent brought an action to foreclose the mortgage, making said Jens and appellant herein both parties defendant. They both made default, and judgment was rendered foreclosing the mortgage, and at a sale under the judgment respondent was purchaser, and in due time received a deed. On May 12, 1895, before the execution of the said mortgage, appellant made and caused to be recorded the following instrument: "Know all men by these presents, that I do hereby certify and declare that I am married, and that I do now, at the time of making this declaration, actually reside with my family on the land and premises hereinafter described. [Then follows the description of the lot of land involved in this present action.] That it is my intention to use and claim the said lot of land and premises above described, together with the dwelling house thereon, and its appurtenances, as a homestead, and I do hereby select and claim the same as a homestead. That the actual cash value of said property I estimate to be twenty-five hundred dollars." The foregoing is all of the instrument except the date, signature, and acknowledgment. At that time she was the wife of Jens Hansen, and resided on the premises with him; and there was not residing on said premises any one of the persons mentioned in section 1261 of the Civil Code, other than her husband. This instrument was clearly invalid as a declaration of homestead by a married woman living with her husband, because it omitted certain material statements required by the law. By section 1262 of the Civil Code it is provided that "in order to select a homestead the husband, or other head of a family, or in case the husband has not made such selection, the wife" must execute and acknowledge a declaration of homestead; and in section 1263 it is provided that "the declaration must contain a statement showing that the person making it is the head of a family; or, when the declaration is made by the wife, showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit." These statements last above quoted are not in the instrument relied on in the case at bar, and it therefore does not constitute a valid declaration of homestead.

Appellant contends that, although the instrument be invalid under the sections of the code above referred to, still it is good as a $1,000 homestead, under chapter 3 of title 5 of the Civil Code—sections 1266 to 1269—which provides for a "homestead of other persons." But that chapter evidently refers to persons other than a husband, wife, or head of a family, whose rights to a homestead are declared in preceding sections. Clearly a wife's homestead is governed by sections 1262 and 1263 above referred to. When the wife seeks to establish a homestead she must make the declaration provided by section 1263. The code does not contemplate that a husband may establish a valid $5,000 homestead, and that the wife, under the category of "other persons," may have an additional and separate $1,000 homestead.

Appellant makes the contention that the validity of her asserted homestead has been conclusively established as against respondent by a certain proceeding taken and judgment rendered under section 1723 of the Code of Civil Procedure; but this contention is not maintainable. It is provided by that section that, if any person has died who was the owner of a life estate in property, or was one of the spouses owning land as a homestead, or was a married woman and the owner of community property which passed upon her death to the surviving husband, any person interested in the property or the title thereto may file in the superior court his verified petition setting forth these facts, and, thereupon "and after such notice by publication or otherwise as the court may direct," the court shall hear the petition and evidence, and, "if upon such hearing it shall appear that said life estate of such deceased person absolutely terminated or such homestead or community property vested in the survivor of such marriage, the court shall make a decree to that effect," and a copy of the decree shall be recorded and shall have the same effect as a final decree of distribution. Under this section the appellant filed a petition setting up her alleged right of homestead, and praying that it be decreed that the said alleged homestead property vested in her by reason of the death of her said husband, Jens Hansen. The court made an order fixing a certain time and place for the hearing of the petition, and that "notice of said hearing be given by the posting of a copy of this order in three of the most prominent places in the county of Alameda, at least 10 days prior to said day." Afterwards a county clerk made an affidavit that he had posted the said order in three prominent places in said county, naming them, more than 10 days prior to the day fixed for the hearing. There was no notice directed to any person, or to any class of persons. This notice, under the decision in the Matter of Tracy, 136 Cal. 385, 69 Pac. 20, was radically defective, and did not give to the court any jurisdiction to hear the proceeding or render a decree. Moreover, this section 1723 is, in our opinion, only intended as a proceeding to have it determined that a certain person is dead upon whose death the asserted right of another person depends, and not to have the validity of the right conclusively adjudicated. The decree in the proceeding merely determines that, if the party petitioning has any asserted right or title accruing on the death of another person, such asserted right or title has accrued. This view was substantially declared in the Matter of Tracy, supra—although, perhaps, the declaration was obiter—where the court said: "It is proper to remark that the court is not given power under the section [1723] to declare in whom upon termination of a life estate title is vested absolutely. It is empowered to make a decree that the life estate of a deceased party has absolutely terminated." Of course, it is often convenient and important to those interested in or examining a title to have some record evidence of the death of a life tenant, a homestead claimant, or other person upon whose death some right or estate vests.

Under the foregoing views it is not necessary to consider whether the decree in the proceeding under section 1723, initiated by appellant, really undertakes to establish the absolute validity of her homestead claim, or to consider other points made by respondent in support of the judgment.

The judgment appealed from is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

148 Cal. 162

In re WALKER'S ESTATE. (S. F. 3,975.)

(Supreme Court of California. Oct. 25, 1905.)

1. Appeal — Findings — Conflicting Evidence—Review.

Where a finding was based on conflicting evidence, it will not be reversed on appeal, unless it has no fair or reasonable support.

2. Trial—Submission—Reopening Case.

It was not an abuse of the trial court's discretion to refuse to reopen the case after submission to permit a party to introduce additional cumulative evidence.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 166, 889.]

3. New Trial—Newly Discovered Evidence.

Where objector's application to reopen the case after submission for the introduction of cumulative evidence was denied, it was not error to deny a motion for a new trial on the ground that the evidence was newly discovered.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 205.]

4. Executors — Distribution — Right to Object.

Where, on petition for the distribution of an estate, the court found on sufficient evidence that objector had no interest in the estate, she had no standing to object that the findings did not authorize the distribution of the estate to the executors as trustees, etc.

Department 2. Appeal from Superior Court, Humboldt County; E. W. Wilson, Judge.

Application for decree of final distribution in the estate of Jackson Walker, deceased. From an order denying the objections of Nancy Siller Blevins to the distribution of the estate to certain trustees, and from an order denying her motion for a new trial, she appeals. Affirmed.

Gregor & Connick, for appellant. J. H. G. Weaver and Coonan & Kehoe, for respondents.

McFARLAND, J. This is an appeal by Nancy Siller Blevins from a decree of final distribution of the estate of Jackson Walker, deceased, and from an order denying her motion for a new trial. Jackson Walker, deceased, died at or near Ferndale, Humboldt county, Cal., on the 9th day of November, 1901, leaving a will dated and executed on October 14, 1897. The first two clauses of the will provided for the payment of certain expenses, debts, etc., and the material parts of the will are as follows: "Third. I give and bequeath to my sister, Nancy Siller Walker, of Nashville, Tennessee, if still alive at my death, all the rest, residue, and remainder of my estate of every kind and nature, both real and personal. Fourth. If my said sister, Nancy Siller Walker, is not alive at my death, I direct my executors hereinafter named to pay to any nephews or nieces claiming and proving their relationship to me, the sum of fifty dollars each in full of all claims they may have against me or my estate. Fifth. In the event of my said sister, Nancy Siller Walker, being now dead, then I direct my said executors hereinafter named, after paying all expenses and allowances, to divide equally between themselves and James Smith, justice of the peace, of Ferndale, Cal., all the rest, residue, and remainder of my estate of every kind and nature, share and share alike. Sixth. I direct my executors and James Smith, if the estate comes to them, to give one-fourth of said estate to the trustees of the Ferndale Public School, to be used to the best advantage for said school and in such a way as said school trustees and their successors in office may think best. Lastly, I hereby nominate and appoint John H. Trost and Frank G. Williams, of Ferndale, California, the executors of this my last will and testament without bonds, and hereby revoke all former wills by me made." The executors obtained letters testamentary, and afterwards, the estate being in a condition to be distributed, they filed a petition to have it distributed to said Trost, Williams, and Smith. Before a decision on the petition, the appellant, claiming to be the Nancy Siller Walker mentioned in the will, filed an opposition to the petition for distribution, and prayed that the property of the estate be distributed to her. Thereafter this issue as to the proper distribution of the estate was tried before the court sitting without a jury, and the court found that the appellant "is not the person named in said last will and testament of the said Jackson Walker, deceased, and is not entitled to the whole or any portion of the estate of the said Jackson Walker, deceased." A decree was entered distributing the estate to said Trost, Williams and Smith.

The main question presented on this appeal is whether or not there was sufficient evidence to justify the court in finding that appellant was not the Nancy Siller Walker mentioned in the will—whether there was a substantial conflict of evidence on that issue, or whether it was so one-sided in favor of petitioner's contention that we should hold that the evidence affords no fair or reasonable support to the finding. The deceased was either born near Wilkesboro, N. C., or he was born in South Carolina and brought to the former place shortly after his birth. His parents both died when he was only a few years old, and he seems to have lived, during his boy-hood, with his uncle. He stayed about Wilkesboro until, according to his own statement, he was about 12 years old, and, according to the statement of several witnesses, from 14 to 21 years old. He then left that region and had never been back there. He went to several different places, and finally settled at Ferndale, Humboldt county, Cal., about 1875, and lived there continuously until his death in November, 1901. His age at his death was somewhere from 65 to over 70 years. Having left his home in North Carolina when a lad, and having had but little, if any, communication with his relatives, he knew very little about them. The evidence in the case consists of his declarations about his relatives; the testimony of the claimant Nancy Siller Walker given as a witness; the testimony of a number of California witnesses on various subjects; the depositions of a large number of witnesses living in North Carolina and Tennessee, and some documentary evidence. Considering the long period of time since the deceased left his early home, the fact that his parents, who, if living, might have taken special interest in him, were dead; the absence of any trace of him for more than 50 years, and other unusual matters connected with his history, it might well be expected that the issue here involved would be left in great uncertainty and doubt; and such was the fact. The case has been exceedingly well argued upon both sides, and the learned judge of the trial court delivered a written opinion, copied into the respondents' brief, in which he elaborately discussed the evidence. We fully appreciate the force of the arguments of counsel for appellant, and see that they make a strong showing in support of the claim of their client to be the Nancy Siller Walker named in the will. But we cannot say, considering all the evidence, that there was no reasonable ground for the conclusion reached by the trial court, and therefore cannot hold that conclusion erroneous. And it is quite apparent that it would be useless for us to here discuss the evidence, unless we should refer to nearly all of it; but that would swell this opinion to an intolerable length without any corresponding benefit. As showing the conflicting character of the evidence, we will refer to one or two items of it. The appellant testified—and her case seems mainly to rest on the theory—that she and the deceased were the only children of their father, Sion Walker, and their mother, Nancy Walker, formerly Nancy Hall, and that her father was married only once. But the deceased declared that his father and mother had six children—naming them; and several North Carolina witnesses testified to the same thing, giving the names of the children as given by the deceased; and, moreover, they testified that Sion Walker was married before his marriage with Nancy Hall. Again, after appellant left North Carolina—when she was 14 years old—and went to Tennessee, she was called and known, both before and after her marriage, either as Tena, or Christena, and not as Siller. She was married to William L. Blevins in June, 1853, and in the marriage certificate her name appears as Christenah Walker. In 1854, she applied for a bounty warrant under an act of Congress, and in 1855, she made another application for an additional bounty; and in one instance her name appears as Christenor Blevins, and in the other as Christena. The affidavits of witnesses on the application stated her name as Christena, and her age as there stated does not correspond with her age as stated by her at other times. We allude to these matters, not as conclusive, at all, against her claim to be Nancy Siller Walker, but as instances of the contradictions, inconsistencies, confusions, and doubts presented by the evidence which the trial court had to deal with, and as emphasizing our conclusion that we should not interfere with the finding. Our conclusion is that the evidence warranted the finding of the court to such an extent that, under the rule as to conflicting evidence, we would not be justified in setting it aside.

We see nothing in the other points made by appellant for reversal. After the case had been submitted, the appellant moved the court to set aside the submission and allow her to introduce certain additional evidence. The motion was denied, and appellant contends that for this ruling there should be a reversal. The contention is not maintainable. The matter was within the discretion of the court, and we do not think that the ruling was an abuse of such discretion. The proposed evidence was cumulative, and it appears that its admission would not have affected the result. For the same reason it was not erroneous to deny a new trial on the ground of this evidence as newly discovered.

It is contended that the judgment must be reversed, because the court failed to make certain findings which were necessary to entitle the executors and Smith to a decree distributing the estate to them, and also because the finding that the Nancy Siller Walker named in the will had died before the death of the testator is not supported by the evidence. But it is not necessary to discuss these points, because, as under the findings the appellant is not the said Nancy Siller Walker and has no interest whatever in the estate, she is in no position to contest the decree, it matters not to her to whom the estate is distributed. We have not considered the contention of respondent that there is no valid bill of exceptions in the transcript.

The judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

148 Cal. 161

MARKS v. KEENAN. (S. F. 3,482.)

(Supreme Court of California. Oct. 23, 1905.)

1. APPEAL—DISMISSAL OF ACTION—DISCRETION OF TRIAL COURT.

The disposition of a motion to dismiss an action for want of prosecution rests in the discretion of the trial court, and its action thereon will not be disturbed, in the absence of a gross abuse of discretion.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3838; vol. 17, Cent. Dig. Dismissal and Nonsuit, §§ 31, 104.]

2. DISMISSAL—WANT OF PROSECUTION.

Where nothing was done towards serving the summons in an action until more than a year from the filing of the complaint, and service was not in fact made until a year and four months from that time, although defendant was a resident of the city where the action was commenced and the place of his residence was given in the city directory, and there was no good reason why he was not sooner served, it was not an abuse of discretion for the court to dismiss the action for want of prosecution.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Dismissal and Nonsuit, §§ 140–142.]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Edmund Marks against Hugh Keenan. From an order dismissing the action for want of prosecution, plaintiff appeals. Affirmed.

See 73 Pac. 751.

William J. Herrin, for appellant. J. B. Reinstein, for respondent.

PER CURIAM. This is an appeal by plaintiff from an order dismissing the action for want of prosecution. The general rule is that the disposition of a motion to dismiss an action for want of prosecution rests in the discretion of the trial court, and that its action on such motion will not be disturbed here unless such discretion has been grossly abused. We see no such abuse of discretion in this case. After the filing of the complaint and the issuing of the summons nothing was done towards serving the summons until more than a year had elapsed. During that time the summons was not given to the sheriff, nor was any other person employed to serve it. The defendant during this time was a resident of San Francisco where the action was commenced, the place of his residence being in the city directory; and there seems to have been no good reason why he was not served. The service was not made on him until a year and four months after the commencement of the action and the issuance of the summons. Under these circumstances we do not feel called upon to disturb the order appealed from. In Ferris v. Wood, 144 Cal. 426, 77 Pac. 1037, cited by appellant, there were special circumstances which were very different from those appearing in the case at bar.

The order appealed from is affirmed.

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148 Cal. 172

PHILBROOK v. NEWMAN et al. (No. 15,857.)

(Supreme Court of California. Oct. 28, 1905.)

1. APPEAL—VACATING JUDGMENT OF SUPREME COURT—PETITION.

A proceeding by motion or petition in the Supreme Court to obtain an order of such court vacating, setting aside, and declaring void a decision and judgment of the court affirming an order of the trial court denying a new trial will not lie.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4637, 4638.]

2. APPEAL — HEARING — ORAL ARGUMENT — WAIVER.

Where an appellant, after the suspension of his attorney from practice and the striking from the files the brief filed by the attorney, filed a brief in person, and took no steps to procure another attorney, and failed to appear either in person or by attorney at the time fixed for argument, and the cause was submitted to the department on the briefs, appellant was not entitled to oral argument on the cause being ordered submitted to the court in bank, irrespective of the validity of the order of suspension; Sup. Ct. Rule 28, subd. 2 (64 Pac. xii), providing that submitting a case to a department without oral argument shall be a waiver of an oral argument in bank, if the same is ordered to be heard in bank.

3. SAME—SUBMISSION OF CAUSE ON BRIEFS—PRESENCE OF JUSTICES.

Where a cause is submitted on briefs alone, all the justices are deemed present at the argument, within Const. art. 6, § 2, and Code Civ. Proc. § 45, declaring that the concurrence of four justices present at argument shall be necessary to pronounce a judgment in bank; and all or any of the justices are therefore qualified to join in a decision.

4. JUDGES — DISQUALIFICATION — JUSTICES AS PARTIES.

Justices of the Supreme Court, issuing a citation against the attorney for appellant to show cause why he should not be suspended from practice, are not parties to the action in which the attorney appeared and filed a brief which gave cause for the proceedings for suspension, so as to be disqualified to act thereon.

5. APPEAL—DECISION—CONCURRENCE IN JUDGMENT — CONSTITUTIONAL PROVISIONS — COMPLIANCE.

The constitutional provisions that to render a judgment in bank a concurrence of four justices shall be necessary, and that the decisions of the Supreme Court must state the "grounds of the decision," are complied with where four justices concur in a judgment, though they do not concur on the same grounds; the "grounds of the decision" not being the judgment.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4424.]

Motion to vacate judgment affirming order denying new trial. Denied.

Rehearing denied November 27, 1905.

For former opinion, see 46 Pac. 742, 34 L. R. A. 265.

SHAW, J. The above-entitled action was begun in the superior court of the city and county of San Francisco in the name of Ira P. Rankin, who was the plaintiff's predecessor as administrator of the Levinson estate. Judgment was given by said court in favor of the defendants. The plaintiff moved the said court for a new trial of the action, and the motion was denied. From the order denying the motion, the plaintiff appealed to the Supreme Court. Upon that appeal the Supreme Court affirmed the order denying a new trial, the decision being rendered on November 5, 1896. Rankin v. Newman, 114 Cal. 635, 46 Pac. 742, 34 L. R. A. 265. The present proceeding is an attempt, by way of a motion or petition addressed to this court, to obtain an order of this court vacating, setting aside, and declaring void the decision and judgment of this court affirming the order. The petition was filed and the present proceeding begun on July 26, 1905. The application is based on nine alleged grounds or reasons, separately stated and numbered.

The first and second grounds are, in substance, that the final judgment of this court in favor of the defendants, affirming the order of the superior court, is wrong, both as to the facts and the law, and that, notwithstanding the solemn judgments of the superior court and of this court to the contrary, the property sought to be recovered in the action still belongs to the estate of John Levinson, deceased; in other words, that a final judgment is conclusive of nothing, and can always, and at any time, be attacked upon the ground that it is erroneous, and, upon such attack, may be set aside, if the judge who heard the application is of a different mind from the one who gave the judgment. The theory of the petitioner appears to be that there is imposed upon the judicial power some constitutional limitation, whereby all judgments which are not inherently right and just are void or voidable, and that there is no limit of the time within which, nor of the method by which, such judgments may be set aside. This is clearly not the law. The rule that the judgment of a court having jurisdiction of the subject-matter and of the parties is, as to the thing adjudged, conclusive upon all the parties, regardless of the question whether the thing was correctly adjudged or not, that it is not subject to collateral attack in any manner whatever, and that it is not subject to direct attack by appeal, motion or bill of review, except in the manner and within the time prescribed and allowed by law, is too well settled to require discussion to establish it, or the citation of authority in its support. The following authorities, however, fully support both branches of the proposition: People v. Holladay, 93 Cal. 251, 29 Pac. 54, 27 Am. St. Rep. 186; Wolverton v. Baker, 86 Cal. 593, 25 Pac. 54; Reynolds v. Harris, 14 Cal. 679, 76 Am. Dec. 459; Gray v. Dougherty, 25 Cal. 273; Keech v. Beatty, 127 Cal. 184, 59 Pac. 837; Case v. Beauregard, 101 U. S. 692, 25 L. Ed. 1004; Ex parte Henshaw, 73 Cal. 489, 15 Pac. 110; Moore v. Martin, 38 Cal. 436; 1 Beach on Judgments, §§ 244, 261, 262; Freeman on Judgments, § 249 (4th Ed.) p. 244; Leese v. Clark, 20 Cal. 417; Blanc v. Bowman, 22 Cal. 25; Rowland v. Kreyenhagen, 24 Cal. 59; In re Jessup, 81 Cal. 472, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594; People v. McDermott, 97 Cal. 247, 32 Pac. 7; In re Levinson, 108 Cal. 459, 41 Pac. 483, 42 Pac. 479.

The other grounds, in brief, are that the judgment affirming the order is void or voidable for the several reasons that the appellant was not, upon the appeal to this court, allowed the hearing to which he was entitled by law; that the judgment was given without the concurrence of any justice of this court who was present at the argument, and without any argument or waiver thereof; that the appeal was never submitted for decision; that four justices did not concur therein; that before the cause came on for argument in this court the attorney for the appellant was, by this court, improperly and unlawfully, by a void proceeding, adjudged to be suspended from practicing in this court, and was thereby prevented from appearing or presenting the appellant's case on the argument; and that four of the justices who participated in the decision were disqualified to act, because they were parties to the action and had an interest therein adverse to the appellant. The record shows facts somewhat different from these assertions. The appeal from the order denying the motion for a new trial was regularly taken, notice thereof having been duly given and filed and the proper bond executed and filed, and the transcript of the record on appeal was duly filed in this court on August 29, 1894. At that time Ira P. Rankin, as administrator of the estate of John Levinson, was plaintiff and appellant, and Horace W. Philbrook was his attorney of record. On November 30, 1894, the opening brief for the appellant in support of his appeal, prepared by Mr. Philbrook, consisting of 441 printed pages, was filed. On January 5, 1895, in pursuance of certain proceedings in that behalf, taken by this court of its own motion, and after due citation to and appearance therein by Mr. Philbrook, he was, by this court, suspended from practicing as an attorney. On the same day the opening argument, prepared by him as aforesaid, was ordered stricken from the files, and the appellant, Rankin, was allowed 30 days within which to file points and authorities on his appeal. This time was afterwards extended 10 days, and on February 12, 1895, Mr. Rankin, in person, signed and filed his points and authorities on the appeal, which consisted of precisely the same matter, in the same imprint, as the brief of Mr. Philbrook which had been stricken from the files, except some 60 pages which were eliminated. On April 2, 1895, respondents' brief was personally served on the appellant and filed. The appellant filed no reply brief, took no steps, so far as the record shows, to obtain the services of another attorney, and did not, at any time after the order suspending Mr. Philbrook or before, procure another attorney to be substituted for him as attorney of record for the appellant. The cause was thereupon regularly placed on the calendar of this court in department 2 for hearing at its second regular session of 1895, and August 14, 1895, was fixed as the day for the presentation thereof. On that day no oral argument was made by either party, and, in accordance with the usual practice, an order was made that it be submitted on the briefs on file. Thereafter Mr. Rankin resigned as administrator of the Levinson estate, and Mr. Philbrook was duly appointed and qualified as his successor in that trust, and on October 7, 1895, Mr. Philbrook, as such administrator, was duly substituted in this court in place of Mr. Rankin as the plaintiff and appellant in the cause. On March 17, 1896, the justices in department not having agreed upon a decision, the submission to the department was set aside, and, under subdivision 2 of rule 28 (64 Pac. xii) then in force, the cause was ordered submitted to the court in bank for decision. The subdivision, so far as pertinent, is as follows: "A cause submitted to a department without oral argument shall be deemed to be a waiver of an oral argument of the same in bank, if for any reason the same is thereafter ordered to be heard in bank." On November 5, 1896, the cause was decided by the court in bank, affirming the order appealed from; Justices Garoutte, McFarland, Van Fleet, Henshaw, and Temple, and Chief Justice Beatty concurring in the judgment of affirmance. Within 30 days thereafter a petition for rehearing, upon substantially the same grounds as that now before the court, was filed by Mr. Philbrook, as appellant, and this petition was denied on December 5, 1896. There were never any parties to the action other than Mr. Rankin, as administrator, and his successor, Mr. Philbrook, as plaintiff and appellant, and the above-named defendants, who were also the respondents.

The particular facts thus disclosed by the record are not disputed. The propositions of the petitioner are founded entirely on construction and theory. He contends, first, that the order of January 5, 1895, suspending him from practicing as an attorney, was absolutely void. On the assumption that the suspension was void and wholly without effect, the further argument is made that by reason thereof the court somehow lost jurisdiction of the appeal of Rankin in the case of Rankin v. Newman; that no valid order or judgment could thereafter be made in the cause by this court, unless it first allowed Mr. Philbrook, or some attorney for the appellant, to appear and argue in opposition or in favor thereof, and that as he was not thereafter allowed to appear as attorney on the appeal, and no other attorney was substituted for him, all the subsequent proceedings and the final judgment of affirmance are also absolutely void; that hence there was, in law, no hearing or submission of the cause; that, as there was no hearing, there were no justices present at any hearing; and hence that, under section 2, art. 6, of the Constitution, and section 45 of the Code of Civil Procedure, there were no justices qualified to decide the case.

We deem it entirely unnecessary to here consider the question presented as to the invalidity of the order suspending Mr. Philbrook from practicing as an attorney. The following is a sufficient answer to all the propositions based upon the assumption that such order was void: Up to the time of the submission of the cause to the department, and for sometime thereafter, Ira P. Rankin, and not Mr. Philbrook, was the appellant. Mr. Rankin knew that the court had at least assumed to make such an order of suspension, as was evidenced by his appearance thereafter in person. He, treating the order as a valid one having the effect of suspending Mr. Philbrook's right to appear further as attorney for him, and apparently acquiescing therein, without a word of protest, and within the time allowed by the court for the filing of a brief in place of the opening argument stricken from the files, filed a most elaborate brief in support of his appeal, signed by himself in person, and thereafter personally accepted, and by indorsement thereon acknowledged, service of the respondents' brief in reply. Having thus appeared in person, he must be assumed to have known of the regular placing of the case on the argument calendar and of the time fixed for oral argument, and, also, that if he then made no appearance in person, or by some attorney engaged to represent him, such failure would be a waiver of oral argument on his part, and that the case, so far as he was concerned, would, in accordance with the usual practice, be submitted on the briefs on file without oral argument. He did so fail to appear at the time fixed for argument, either in person or by attorney, and the case was so submitted. If Mr. Rankin chose then to acquiesce in the order of suspension, and to submit the case for decision upon briefs, without oral argument, it does not lie in the mouth of his successor (and Mr. Philbrook is here simply as his successor) to repudiate the acts of Mr. Rankin and complain that the privilege of oral argument was denied his predecessor, or that there has been no hearing in the cause. Whatever privilege of argument was apparently desired by Mr. Rankin was accorded to him, and there was never any intimation to the court from him that he desired to be heard in any other way than upon the brief he had filed. The cause, then, was, regardless of any question as to the validity of the order suspending Mr. Philbrook, regularly submitted for decision to the department, without oral argument. When a cause is so submitted on briefs alone, all the justices have an equal opportunity to read the argument, and all are deemed to be present at the argument, within the meaning of the provision of section 2, art. 6, of the Constitution, and all or any of them are qualified to join in the decision.

The record, when given its proper legal effect, shows that the appellant was allowed the hearing to which he was entitled; that six justices concurred in the final judgment of affirmance; that no justice participating in the decision was, in contemplation of law, absent at the time of the argument; and that neither of the six justices who concurred in the judgment were parties to the action or interested therein. The proposition that the action of the justices of this court in issuing a citation against Mr. Philbrook to show cause why he should not be suspended from practicing as an attorney constituted the justices who concurred in the issuance of such order parties to the action of Rankin v. Newman, in which the brief, which gave cause for the proceedings for suspension, was filed, is entirely untenable. The statement in each of the two opinions rendered on November 5, 1896, showing the grounds whereon the justices joining therein, respectively, rested the conclusion that the order should be affirmed, was a sufficient compliance with the constitutional requirement that the decisions of this court must state the "grounds of the decision." The concurrence of four justices is necessary to pronounce a judgment of the court in bank, but it is not necessary to the validity of such a judgment that four shall concur therein upon the same grounds, provided they all concur in the same judgment. The "grounds of the decision" are not the judgment. It is sufficient for any purpose contemplated by the Constitution, if the grounds upon which the respective justices concur in the judgment are somewhere stated in the respective opinions delivered. It must not be inferred, however, from these statements that a judgment of this court would be held void, or even voidable, if it should happen in any case that four or more justices concurred therein, but only three or a less number concurred in any opinion.

We have not considered the merits of the plaintiff's case as involved in the appeal heretofore decided, nor have we examined into the reasons given by the court in support of its decision hereby attacked. The soundness of the conclusions upon which the judgment affirming the order denying a motion for a new trial is based is not material to our present inquiry, and that judgment is conclusive without regard to the reasons given in support of it. In view of what we have said regarding the order suspending Mr. Philbrook from practice, it is proper to say that we are not to be understood as intimating that we have any doubt as to its validity. As already shown, that question is absolutely immaterial here, and we have therefore given no consideration to the matter. We find no sound reason in support of the proposition that the final decision complained of is invalid or should be set aside.

It is therefore ordered that the petition of Horace W. Philbrook, as administrator with the will annexed of the estate of John Levinson, deceased, to set aside and vacate the judgment of this court herein affirming the order of the superior court denying plaintiff's motion for a new trial, be denied.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

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148 Cal. 167

PARTRIDGE v. DEVOTO et al., Board of Election Com'rs. (L. A. 1,834.)

(Supreme Court of California. Oct. 27, 1905.)

1. Elections—Nominations by Certificate—Party Name—Right to Use.

The court, in determining whether a name adopted by persons signing a certificate of nominations of candidates is liable to mislead the voters, within Pol. Code, § 1188, authorizing persons signing a certificate of nomination to adopt a name which must not be so similiar to the name of an existing political party that voters may be misled thereby, may consider matters of public and common knowledge, such as the existence of the old parties and their names in common use, the recent formation of a new party known by the name adopted in the certificate, or the absence of any such organization, and from all the circumstances thus known consider the probability of deception by the name adopted.

2. Same—Validity of Certificates of Nominations.

The Democratic and Republican Parties made nominations for public office by conventions. There had been no dissensions as to any political principle within the respective parties that had been publicly discussed, or which had caused factions known by descriptive titles. Subsequently citizens filed certificates of nominations of candidates, designating the names of the parties as "Independent Republican Party" and "Independent Democratic Party." There had been no previous organizations known by such names. *Held*, that the certificates were invalid, under Pol. Code, § 1188, authorizing the signers of certificates of nomination to adopt a name, which must not be so similar to existing party names that voters may be misled thereby.

3. Same—Statutory Provisions—Objects.

The purposes of the statute concerning nominations by certificate are to permit independent nominations of candidates and to facilitate the formation of new political parties.

In Bank. Application for a writ of mandate by John S. Partridge against James A. Devoto and others, constituting the board of election commissioners of the city and county of San Francisco, to require respondents to omit from the election ballot certain persons nominated by certificates. Writ issued.

Edward F. Treadwell, for petitioner. Thomas V. Cator, for respondents.

SHAW, J. This is an application for a writ of mandate commanding the board of election commissioners of San Francisco to prepare the sample ballot to be mailed to the voters of said city at the election to be held on November 7, 1905, and the voting machines to be used at said election, by omitting from said ballots and from said voting machines the names of certain persons nominated by two separate certificates by voters of the city, who designate themselves by the party designations "Independent Republican Party" and "Independent Democratic Party," respectively, and without any separate columns for the designation of such so-called parties, or the insertion of the names purporting to be nominated by said certificates. It appears that certain citizens filed with the board of election commissioners a certificate of nomination, naming as candidates for the respective offices to be filled at the coming election certain persons, and designating certain other persons to constitute a committee representing the signers of the certificate, as a political party by the name "Independent Republican Party," and that a similar certificate was signed by certain other persons appointing a committee, and designating themselves by the name "Independent Democratic Party," and that the board of election commissioners are about to print the ballots and prepare the voting machines by inserting therein a column headed by the names of such parties, respectively, and containing the names of the candidates nominated in said certificates. Nominations had been previously made by regular conventions of the Republican and Democratic Parties, respectively, and certified under the party names of "Republican Party" and "Democratic Party," respectively.

The Code provides that in case of nominations made otherwise than by a convention the persons signing the certificate may adopt a name to designate their organization as a political party, but that such name must not be the same as that of any existing political party, or so similar thereto that voters may be misled thereby. Pol. Code, § 1188. The decisions on the subject recognize the principle that, where the name thus adopted is in some respects similar to that of a pre-existing party, a court, in determining whether or not the name is liable to mislead the public, may consider matters of public and common knowledge, such as the existence of the old parties and their respective names in common use, the recent formation of a new party known by the name adopted in the certificate, or the absence of any such organization, and from all the circumstances thus known may consider the probability of deception by the designation adopted. In re Greene (Sup.) 41 N. Y. Supp. 179; Phillips v. Curley, 28 Colo. 34, 62 Pac. 837. It is obvious that if there has been no previous organization publicly known by the name selected, and the persons signing the certificate have not made any public avowal of any peculiar political principle or policy the adherence to which has moved them to join in the certificate, and the name selected is similar to that of another party, and has never been known in that vicinity as the name of any party or association of persons until made public by the filing of the certificate in question, the likelihood that the new name will mislead the heedless, indifferent, or uninformed voter is much greater than it would be in case of the selection of a name known to the public as that of an existing organization created to promote some principle or policy concerning which there had been some previous public discussion, and the candidates named are avowed advocates of that principle or policy. The courts have held that the names "National Democratic Party" (Craig v. Brown, 114 Cal. 480, 46 Pac. 870; In re Greene, supra), "Silver Republican Party" (State v. Johnson, 18 Mont. 556, 46 Pac. 440), "Bryan Democratic Party" (State v. Arms, 24 Mont. 447, 63 Pac. 401), and "Social Democratic Party" (In re Social Democratic Party [Sup.] 93 N. Y. Supp. 1023), are not misleading. But in each of these cases there had been a previous organization, well and publicly known by the name in question, which had been created and carried on for the purpose of advancing the peculiar political views and principles of its adherents, and which had been for a long time the subject of much discussion at public gatherings and in the public prints. In each of them, also, the candidates named were, in the main, different from those of any of the pre-existing parties. These party names were so well known that it was extermely unlikely that any voter could fail to perceive their significance or be misled thereby.

In the present case the existing circumstances and conditions are significantly different. There have been no differences or dissensions as to any political principle or policy within the Republican and Democratic Parties, respectively, that have been publicly discussed or generally know, or that have caused factions known by descriptive titles. There has been no organization previously formed for the furtherance of any such principle or policy, or for any purpose, or at all, and the respective names, "Independent Republican Party," and Independent Democratic Party," have been hitherto unknown and unheard of as the names of any distinct political parties or otherwise. They were first presented to the public by the certificates of nomination here in controversy. To make the distinctive names adopted still more meaningless of themselves as the names of distinct parties, the two certificates in question respectively name the same persons as candidates for the respective offices, and those candidates are the same persons previously nominated for the same offices by a party known as the "Union Labor Party." The persons signing said certificates and adopting said supposed party names cannot claim to represent any body of delegates who participated in the conventions of the Democratic and the Republican Parties, respectively, previously held, and who became dissatisfied with the action of their respective conventions concerning the nomination of candidates, nor the persons who voted for such delegates at the primaries; for neither such delegates nor the persons who voted for them at the primaries are permitted by law to join in the nomination of any other persons by the filing of certificates such as those in question. Pol. Code, §§ 1188, 1189. All these circumstances, of course, might be also considered upon the question of the good faith of the persons signing the certificate, if their good faith were in issue. But no charge of bad faith is made in terms, and, even if it is conceded that bad faith would be good cause for rejecting such certificates, we cannot consider the question in this proceeding. Our consideration of these circumstances is confined to the subject of their bearing, if any, upon the question of the deceptive effect of the names adopted.

The purpose of the statutory provision concerning nominations by certificate is twofold. It is intended, in the first place, to permit absolutely independent nominations of persons as candidates who have no political affiliations with any party, and who do not intend to form a party, but who become candidates for reasons personal to themselves or to those who sign the certificates. In the second place, it is intended to facilitate the formation of new political parties, enabling such an organization to get a place on the ballot, and if, at the ensuing election, it receives as much as 3 per cent. of the total vote, it thereafter takes its place as a regular and recognized political party, entitled to nominate candidates by a convention. Under these circumstances it seems clear that the average voter, if at all susceptible to misleading influence, or ignorant of the origin of the certificates in question, as some may be supposed to be, would naturally believe that the party ticket thus designated was a ticket of the party to which he belonged, or of the opposite party known by a similar name; and it cannot be said that he would necessarily know that it was a distinct party from that designated by the same name without the qualifying adjective. There are voters of all degrees of intelligence, who exercise different degrees of care, circumspection, intelligence, or negligence, as the case may be. It is to the public interest, and it is the purpose of the particular proviso of the Code, which is here involved, to secure that end, that the ballot be so framed, with respect to the ticket headings, that even the most ignorant, heedless or hasty voter shall not be unnecessarily misled in regard to the ticket for whose candidates he votes. It is obvious that the words used may have the effect of misleading voters. The nomination is, therefore, in violation of the proviso, and is not a legal designation of a political party, such as it is permitted to place upon the ballot. The certificates do not purport to be independent nominations, but are avowedly nominations by persons claiming to be organized as a party. For that purpose the certificates are invalid, and as they are not independent nominations, and as all the persons named therein are already on the ballot as candidates of the "Union Labor Party" for the respective offices, the attempted nominations by these certificates should be ignored.

For these reasons, we are of the opinion that the petition should be granted, and the writ issued as prayed for; and it is so ordered.

We concur: VAN DYKE, J.; McFARLAND, J.

BEATTY, C. J. I concur in the judgment for the same reasons that induced my dissent from the judgment in the case of Craig v. Brown, 114 Cal. 481, 46 Pac. 870. The organizers of a new party can always find a party designation which is wholly distinct from the name of an existing party. The name "Republican" or "Democratic," though qualified by an epithet, not only may, but inevitably must, deceive some of that class of voters whose protection is the avowed policy of the law, and, when every legitimate purpose of the organizers of a new political party can be accomplished by the adoption of a name entirely distinct and which can deceive no one, they should be required, and under a proper construction of the law they are required, to select such a name.

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148 Cal. 180

STOHR v. STOHR. (S. F. 4,129.)

(Supreme Court of California. Nov. 8, 1905.)

1. EXECUTORS AND ADMINISTRATORS — COLLECTION OF ASSETS—SUITS BY ONE EXECUTOR AGAINST COEXECUTOR INDIVIDUALLY.

A special administratrix brought suit to set aside a deed executed by decedent to defendant, and to have the property decreed a part of decedent's estate. Subsequently a will of decedent naming plaintiff and defendant as executrix and executor was probated, and they qualified as such. Afterwards the court substituted plaintiff in her capacity as executrix in place of herself as special administratrix. *Held*, that the action was maintainable, and defendant could not defeat it on the ground that he could not be sued because he was an executor.

2. CANCELLATION OF INSTRUMENTS — COMPLAINT—SUFFICIENCY.

A complaint, in an action to set aside a conveyance, which alleged that at the time the deed was executed the grantor was suffering from a stroke of paralysis and was physically enfeebled; that her mental faculties were impaired and her will weakened, so as to render her incapable of properly managing her estate; that the grantee lived with her and was her confidential business adviser and exercised great control over her; that the grantee, with intent to take an unfair advantage of the grantor's weakness and gain possession of her property, induced her to make the deed; and that the grantor, on discovering what had been done, demanded a reconveyance—sufficiently stated a cause of action based on the grantor's mental incompetency and grantee's undue influence.

3. APPEAL—RULINGS ON EVIDENCE—BRIEF—SUFFICIENCY.

Where exceptions to the rulings on the admissibility of evidence were referred to in appellant's brief as "Exceptions No. 7, folio 138, and No. 8, folio 142, should have been sustained," without argument, the exceptions need not be reviewed on appeal.

4. TRIAL—FINDINGS.

Findings of the court which seem to be contradictory should be reconciled, when that can be reasonably done.

Department 2. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by C. C. Stohr, special administratrix of Clotilda Richardson, deceased, against Frank Stohr. From a judgment for plaintiff, defendant appeals. Affirmed.

Robert Ash, for appellant. Nowlin & Fassett (H. M. Anthony, of counsel), for respondent.

McFARLAND, J. The plaintiff is the daughter, and the defendant is the son, of Mrs. Clotilda R. Richardson, deceased, who died on the 4th day of March, 1903. Plaintiff and defendant are the only heirs at law of said deceased. Shortly after her death the plaintiff herein was appointed special administratrix of her estate, and commenced this action to obtain a judgment canceling and declaring null and void a certain written instrument dated the 18th day of August, 1902, purporting to be a deed executed by the deceased and conveying to the defendant herein a certain piece or parcel of land, and decreeing that said property belongs to said estate. Judgment went for plaintiff, and from the judgment and from an order denying his motion for a new trial the defendant appeals.

After the commencement of the action a will of the deceased in which plaintiff and defendant are named as executrix and executor was probated, and the said parties qualified as such executrix and executor. Afterwards the court made an order substituting said C. C. Stohr in her capacity as executrix in place of herself as special administratrix, as plaintiff; and appellant makes the point that the judgment is erroneous upon the principle that one executor cannot maintain an action against his coexecutor for exclusive possession of property of the estate, etc. But this principle does not apply to the case at bar. The plaintiff sued the defendant in his individual capacity, and this phase of the case was not changed by the fact that defendant afterwards became an executor. The action is not by one executor to recover from a coexecutor exclusive possession of property admitted by both to be property of the estate. It is an action by an executrix to recover what she claims to be property of the estate from the defendant, who asserts that such property belongs to him in his individual capacity, and is not an asset of the estate. The plaintiff is the proper person to maintain the action; and, if the alleged cause of action is well grounded and the land in question ought to be decreed to be the property of the estate, the defendant cannot avoid a trial of the merits and hold onto the property upon the ground that because he was one of the executors he cannot be sued.

The main contention of appellant is that the material findings of the court are not justified by the evidence. The court found, as alleged in the complaint, in brief, that at the time the deed in question was signed by the deceased she was suffering from a stroke of paralysis and was greatly enfeebled physically, and that her mental faculties were "so impaired and her will weakened and her mind and reason affected to such a degree as to render her incapable of a prudent and proper management of her property and affairs"; that defendant lived with her and was her confidential business agent and had an intimate and confidential association and relation with her, and had her trust and confidence, "and was able to and did exercise great influence and control over her will"; that at the time of the signing of said deed the defendant, well knowing the weakened condition of her mind and her will and her mental incompetency and of his control over her will, and "with intent to take an unfair advantage of the weakness of the mind of the said Clotilda R. Richardson and gain possession of her property, induced and persuaded the said Clotilda R. Richardson to make and acknowledge" the said deed; that said deed was never delivered by the said deceased to said defendant, and was not intended by the said deceased to be delivered to him; that defendant afterwards took said deed from the possession of deceased and had it recorded; that afterwards, when her mind had temporarily brightened, she discovered what had been done and demanded of defendant that he reconvey the property to her, or else convey the undivided one-half thereof to plaintiff herein, so that her property should be equally divided between said plaintiff and defendant; that defendant promised her to do so, and afterwards informed her that he had complied with her request and had executed a deed of the undivided one-half of said property to plaintiff, when in truth and in fact he had not done so. We think there was sufficient evidence to warrant the court in making these findings. There was clearly sufficient evidence of the mental condition of the deceased as found by the court; and while the evidence was not quite so strong as to the other findings, still there was so much evidence to sustain them that we would not be warranted in disturbing them.

Appellant contends here for the first time that the complaint does not state facts sufficient to constitute a cause of action; but, while the complaint would have been in better form if certain technical terms had been used, still we think that it sufficiently states the case of mental incompetency on the part of the deceased and undue influence on the part of the defendant.

There are in the record between 30 and 40 exceptions to rulings of the court as to admissibility of evidence. These are, as a rule, referred to in appellant's brief in a merely formal manner, as, for instance, "Exceptions No. 7, folio 138, and No. 8, folio 142, should have been sustained," with no argument on the exception. This court could hardly be expected to follow such meager references; however, in looking over the evidence, we have noticed these exceptions, and we have seen in the rulings excepted to no prejudicial error.

It is contended that finding 11 is contradictory to the other findings, because in such finding it is found that defendant "made no suggestion and offered no advice to deceased concerning the disposition of her property." It would be strange if the court, after having specifically found that defendant did procure the making of said deed in question, should have afterwards found that he did not do so. It is evident, however, that in the portion of finding 11 above quoted the court was not referring to the deed at all. There was evidence that the deceased had made a will, and it is apparent that in finding 11 the court was referring to her disposition of property by said will and not by the deed. In finding 11, immediately after the part thereof above quoted, is the following: "But it is not true that the deceased made her last will on or about the 18th day of August, 1902." Findings which at first blush seem to be contradictory should be reconciled, when it can be reasonably done; and we think it quite reasonable to hold that finding 11 has reference to a disposition by will and not to the deed out of which this litigation arises.

The judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; HENSHAW. J.

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148 Cal. 200

PEOPLE v. MAHATCH. (Cr. 1,238.)

(Supreme Court of California. Nov. 10, 1905.)

1. HOMICIDE — MURDER — DELIBERATION —PROOF.

The deliberate purpose to kill essential to constitute murder in the first degree need not be proved by express evidence, but may be inferred from proof of such facts as will reasonably warrant the inference of its existence.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 480.]

2. CRIMINAL LAW—PROVINCE OF JURY.

It is exclusively the province of the jury to determine the degree of crime, when there is any evidence supporting the determination.

3. SAME—VERDICT—CONCLUSIVENESS.

A verdict in a criminal case approved by the trial judge can only be disturbed on appeal when the appellate court can say, as a matter of law, that there is no evidence to support it.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3084.]

4. CRIMINAL LAW—PHOTOGRAPHS AS EVIDENCE.

On a trial for homicide, photographs showing the condition of things in the vicinity where the body of decedent was found, and disclosing the presence of objects correctly placed on the ground by witnesses to indicate where decedent's body, the knife, hat, and coat of defendant, and the hat of decedent were located when the scene of the homicide was first visited are admissible.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 893.]

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, Del Norte County; J. L. Childs, Judge.

John Mahatch was convicted of murder in the first degree, and he appeals. Affirmed.

E. E. Winters, for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Deputy Atty. Gen., for the People.

LORIGAN, J. Defendant was tried and convicted of murder in the first degree, and sentenced to be hanged. He appeals from the judgment and order denying his motion for a new trial.

Defendant and deceased, F. Confaglia, on the morning of Sunday, May 15, 1904, went in a rowboat down the Klamath river, in Del Norte county, to a town called Requa, some four miles from their place of residence. Confaglia purchased a sack of flour and some other articles, including a bottle and flask of whisky, and about 4 o'clock in the afternoon they started in their boat to return home, the defendant rowing. Between them they drank the whisky on their way up the river, save a parting drink which defendant claims they took after reaching their point of debarkation —Isle's Landing—an isolated spot on Regan creek, a tributary of the Klamath river. As near as can be ascertained from the evidence, they reached this point about 7 o'clock in the evening. From the time they left Requa. the parties were not seen by any one (except by a boatman they met on the Klamath before they pulled into Regan creek, to whom they gave a drink, and who testified that both were, in his judgment, intoxicated) until the defendant appeared later in the evening near the residence of Martha Isle, about a half mile from the boat landing. Mrs. Isle was standing outside her barn, and as to what took place testified: "Johnnie Mahatch came up and looked scared, and told me he had a row with Mr. Confaglia, and I asked if Mr. Confaglia had gone on home. He said: 'No, he is asleep down there some place.' He had a mark on his face, and I asked him if he scratched his face. He said: 'No,' Confaglia hit him. He had no coat or hat on." Defendant left immediately after this conversation, and Mrs. Isle and others whom she had called repaired to the landing, where they found the dead body of Confaglia. The evidence showed that his body was found lying above the bank of Regan creek, some distance from the landing; that his death was occasioned by a stab wound in the heart, and must have been instantaneous. Some distance from the body was found a large knife, identified by witnesses as belonging to defendant, and in his possession as late as two weeks before the homicide. The hat and coat of defendant were also found at different points in the vicinity of the body. The contents of the boat—the flour, other articles and the boat's sail—had been taken out and deposited on the bank.

The defendant voluntarily appeared as a witness at the coroner's inquest, and testified in his own behalf upon the trial. At the inquest he testified that, when he and Confaglia reached the mouth of Regan creek, Confaglia wanted to take the boat further up than Isle's Landing, so as to deposit the flour and other articles near his residence, but on the suggestion of the witness that it was best to leave the boat where they got it, as it might be needed on the morrow, Confaglia consented to put in at the landing; that they both assisted in unloading the boat, placing its contents above the bank, which being done he asked Confaglia the time, who told him it was about 6 o'clock; that he then told Confaglia that he would have to leave, as he was late for supper, and did leave; that when he left he was pretty full, and forgot his coat; that the last he saw of Confaglia he was standing where the sack of flour had been placed. He further testified that, while he was pretty full, he had sense enough to go home, and knew what he was doing all the time; that Confaglia was pretty full also. He stated that he had no trouble or dispute with Confaglia, at the landing or elsewhere, and denied making the statement testified to by Mrs. Isle. As to the knife found near the body, he denied that it was his, although admitting he had owned one similar to it, which, however, he said he had lost some two months previously. At the trial his testimony was of a similar character, except that the direct inquiry was made of him (which was not made at the inquest) whether he had killed Confaglia or not. To this he answered that he could not tell; he could not tell whether he had fought with him or not; he was so drunk.

The principal point made on this appeal is that the evidence did not warrant the jury in returning a verdict against defendant of murder in the first degree; it being insisted that the evidence fails to show the existence of that deliberate purpose to take the life of Confaglia, proof of which was essential in order to constitute murder of that degree. Counsel for appellant enters into no discussion of this point in his brief, nor does he indicate in what particulars or why the evidence is insufficient to sustain the verdict. He simply summarizes the evidence, and declares that it does not tend to prove deliberate and premeditated killing. As we take it, from the manner in which he states the evidence, he assumes that it was necessary that there should have been express evidence of a deliberate purpose to kill in order to warrant the verdict as returned. But this was not necessary. It could be inferred from proof of such facts and circumstances in the case as would reasonably warrant an inference of its existence. The defendant did not deny that he killed Confaglia. He claimed on the trial that he was so intoxicated as to know nothing about the killing. Under this claim the court properly and clearly instructed the jury, pursuant to section 22 of the Penal Code, upon the matter of intoxication as bearing upon the degree of crime with which he was charged. No exception is taken to the fullness or fairness of the instructions in that respect, and the jury from their verdict found, as they had a right to do under the evidence, against the defendant's claim of intoxication as affecting the intent with which the killing was done. The jury, having found that the only extenuating circumstance which he interposed had no existence in fact, and no claim of any circumstances of mitigation, justification, or excuse for the killing being advanced, had a right to infer from the character of the weapon used, the nature of the wound inflicted, and the acts and conduct of the accused, the existence of a deliberate purpose on his part to kill the deceased when the fatal blow was struck, and, so inferring, were warranted in returning a verdict therefrom for murder in the first degree. This is the general, it may be said the universal, rule. If a different one prevailed, secret murders could rarely be punished by the infliction of the highest penalty. It is exclusively the province of a jury to determine the degree of crime when there is any evidence in the case which will support the determination. We are satisfied that in the case at bar there was sufficient evidence to warrant the jury, within the rule we have stated, in inferring the existence of a deliberate intent to kill. They so found and awarded the highest penalty, and their finding was approved by the trial judge on the motion for a new trial. This is conclusive upon the subject and upon us, as we can only disturb a finding when we can say, as matter of law, that there was no evidence to support it.

It is insisted that the court erred in admitting in evidence certain photographs. These photographs were used simply as diagrams of the locality of the homicide, and as showing the condition of things in the vicinity where the body of deceased was found. They disclosed upon their face the presence of certain objects placed on the ground by one of the witnesses at the time the photographs were being taken (who testified that they were correctly placed by him) to indicate where the body of deceased, the knife, the hat, and the coat of defendant, and the hat of deceased were located when the scene of the homicide was first visited by him. It is urged that the presence of these indicative objects in the photograph was merely hearsay evidence, and for that reason the photographs were inadmissible. An objection similar to this, with reference to the admission of photographs marked to indicate the locality of certain objects, was presented for consideration in People v. Crandall, 125 Cal. 133, 57 Pac. 785, is fully discussed there, and it was held that the objection was untenable.

Appellant lastly contends against the accuracy of certain instructions given by the court to the jury. No useful purpose could possibly be subserved by quoting and discussing them. They are instructions on "intent," "motive," and "reasonable doubt," given in the language common, and usual to instructions on these subjects, and correctly state the law.

Finding no error in the record, the judgment and order denying the motion for new trial are affirmed.

We concur: McFARLAND, J.; SHAW, J.; VAN DYKE, J.; HENSHAW, J.; ANGELLOTTI, J.

BEATTY, C. J. I dissent. There was, in my opinion, no evidence adduced at the trial to warrant a verdict of murder of the first degree. Bare proof of an unlawful killing does, it is true, establish prima facie a case of murder, but only murder in the second degree. It casts upon the defendant the burden of proving that the killing was justifiable or excusable, or attended by circumstances of mitigation which will reduce the offense to the grade of manslaughter; but it leaves with the people, if they demand a verdict of murder of the first degree, the burden of proving, beyond a reasonable doubt, some facts or circumstances from which it may be rationally inferred that there was, on the part of the defendant, a deliberate purpose to take the life of the deceased. This proposition has been established by more than one decision of this court. In People v. Knapp, 71 Cal. 6, 11 Pac. 795, it is said: "And unless the express malice is affirmatively proved, a defendant cannot be convicted of murder of the first degree, even though his commission of the homicide is proved, and there is no evidence that it is manslaughter, or that the killing was justifiable or excusable; but in such case, the verdict should be guilty of murder of the second degree." Other decisions giving the same construction to our statute, dividing murder into two degrees and defining their elements, might be cited, but a further citation is unnecessary—the statute itself being very plain to that effect. What, then, is that express malice which (except where the killing is perpetrated in the commission or attempt to commit certain enumerated felonies) must be affirmatively proved in order to warrant a verdict of murder in the first degree? The statute defines it: "Malice is express where there is manifested a deliberate intention unlawfully to take away the life of a fellow creature." Pen. Code, § 188.

In my opinion there is absolutely no evidence in this record from which it can be rationally inferred that there was any deliberate intention on the part of the defendant to take the life of Confaglia. There was no motive of revenge, of robbery, or of any sort, proved or suggested, but simply the bare fact that he stabbed him with the hunting knife which he habitually carried. The evidence introduced by the prosecution showed that the two were friends prior to the killing, that they went to town together to buy provisions, and that Confaglia bought a quart and a half of whisky, which he and the defendant drank on their way back to the boat landing. It does not appear by any direct statement in the record that the defendant is an Indian, but indirectly it does. We know that, except by a violation of the law, Indians cannot obtain alcoholic beverages, and we know that the law which makes it a crime to sell whisky to an Indian is justified by the fact that intoxication renders them in a peculiar degree irresponsible and reckless. The evidence in this case shows that this defendant was drunk, but entirely friendly up to the time he and Confaglia reached the boat landing; that the contents of the boat were placed upon the high bank of the river, and then that a struggle ensued on the brink of the stream where the knife was found; that the fatal wound was inflicted there; that the defendant went away, leaving his hat, coat, and knife behind him. This is all that the evidence shows. It proves a killing with that malice only which is implied in the absence of evidence of provocation. Evidence of express malice is wholly wanting, and, if so, it is not murder in the first degree.

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148 Cal. 195

CALDWELL v. GRAND LODGE OF UNITED WORKMEN OF CALIFORNIA.

(S. F. 3,517.)

(Supreme Court of California. Nov. 10, 1905.)

1. INSURANCE—MUTUAL BENEFIT—WHO MAY BE BENEFICIARY.

Where insured in a beneficiary certificate told a woman that, if she would marry a certain man, insured would take care of her while he lived, and she did so, and he furnished a house for her, gave her money, and paid her bills, but her husband when he worked earned $2 a day, she was not "dependent" upon insured, within the meaning of a by-law of the order providing that a beneficiary should be some person dependent upon insured.

2. SAME—TERMINATION OF INSURABLE INTEREST.

A designation of a beneficiary, valid in its inception, remains so, although the insurable interest or relationship of the beneficiary has ceased, unless otherwise stipulated in the contract.

3. SAME—BY-LAWS—SUBSEQUENT PROVISIONS.

Where, on joining a beneficial association, a member agreed to abide by and conform to the by-laws in force or subsequently to be adopted, all subsequent rules, regulations, and by-laws, not in themselves unreasonable or against express law or public policy, governed all the rights of the member.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1855.]

4. SAME—REASONABLE PROVISIONS.

A by-law of a beneficial association, providing that a beneficiary must be a member of a member's family or related to him by blood or dependent upon him, is reasonable and valid.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1935.]

5 SAME—APPLICATION—WARRANTY.

Where a by-law of a beneficial association required a beneficiary to be a member of a member's family, related by blood, or dependent upon the member, a statement of a member that the beneficiary named by him was dependent upon him amounted to a warranty.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1861.]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Christina Caldwell against the Grand Lodge of the United Workmen of California. From a judgment in favor of plaintiff, defendant appeals. Reversed.

William H. Jordan and Davis S. Hirshberg, for appellant. Riordan & Lande, for respondent.

HENSHAW, J. The defendant is a fraternal and beneficial association. Plaintiff brought her action to recover from the defendant the sum of $2,000 which she claims under the terms of a beneficiary certificate issued by defendant to Oliver H. Baker, who in his lifetime was a member of the order. Baker joined the order in 1879 and, in his application for a beneficiary certificate, declared as follows: "I do hereby agree that compliance on my part with all laws, regulations and requirements which are or may be enacted by said order, is the express condition upon which I am to be entitled to participate in the beneficiary fund and have and enjoy all the other benefits and privileges of said order." When Baker joined the order the by-laws provided that certificates might be made payable "to any person or persons selected by the member." In 1889 Baker's certificate was payable to the Humboldt Savings & Loan Society as trustee of his estate. While this certificate was so outstanding, the order in 1893 amended its laws so as to read: "Each member shall designate the person or persons to whom the beneficiary fund due on his death shall be paid, who shall in every instance be one or more members of his family, or some one related to him by blood, or who shall be dependent upon him." In 1898, while this by-law was in force, Baker revoked his nominee, the Humboldt Savings & Loan Society, and directed payment of the certificate to be made "to Mrs. Howard W. Caldwell, being no relation to myself, of 9 Langton Street, San Francisco, being dependent upon me." After Baker's death Mrs. Caldwell made demand for the payment of the certificate, which was refused upon the ground that she was not one of the persons contemplated by the above-quoted by-law in whose favor a legal certificate could issue. Upon this controverted proposition the trial was had, resulting in a judgment in favor of the plaintiff, and the defendant appeals.

Respondent meets the appeal with the preliminary objection that the specifications of the particulars wherein the evidence is alleged to be insufficient are objectionable; but we think the specifications fairly comply with the requirements of section 659 of the Code of Civil Procedure. The court found that the plaintiff was a person dependent upon Baker within the meaning of the provision of the by-law above quoted. The facts as to such dependence are, in brief, as follows: Plaintiff was in no way related to the deceased, Baker. The deceased, Baker, had proposed marriage to her and she had refused him, saying that she did not love him and would not marry a man for his money; that she cared for Caldwell, but that he could not afford to marry her. Baker told her to get married, and she did. He furnished a house for her and lived there with her husband and herself, gave her money, paid doctors' bills, and showed himself in many ways most generous to her and her husband. Upon the other hand, Mrs. Caldwell had a husband who earned, when he worked, $2 a day, and it is not pretended that she had the slightest legal claim whatsoever upon Baker. It is not pretended that she had the slightest moral claim upon him, unless it came from the fact that he told her to go ahead and get married and that he would take care of her while he lived; but, as Baker's promise was only to take care of her while he lived, and as he appears to have handsomely fulfilled that promise, this moral obligation certainly ended with his death. The question is whether this state of facts constitutes the plaintiff a dependent person within the meaning of the word as used in the by-laws of the order. Unquestionably it does not. The dependence which is there meant is a dependence resting upon some moral, legal, or equitable ground, not a dependence which is only a matter of favor, which is founded upon the mere whim or caprice of the member, and which may be cast aside by him without violating any legal or moral obligation. Accepting the somewhat strange story told by the plaintiff at its face value, she was married and had a husband capable of supporting her, and accepted presents of money, clothes, and the like from Baker, who lived in her household, and paid her board, without the slightest legal or moral obligation upon his part to continue so to do for one day longer than suited his whim. Moreover, as has been pointed out, the moral obligation to do anything for her ceased, by the very terms of her testimony, with his death. As is said in McCarthy v. New England Order of Protection, 153 Mass. 314, 26 N. E. 866, 11 L. R. A. 144, 25 Am. St. Rep. 637: "Trivial, casual, or perhaps wholly charitable assistance would not create the relationship of dependency within the meaning of the by-laws. Something more is undoubtedly required. The beneficiary must be dependent upon the member in a material degree for support or maintenance, or assistance, and the obligation on the part of the member to furnish it must, it would seem, rest upon some moral or legal or equitable ground, and not upon the purely voluntary or charitable impulse or disposition of the member." Such is the accepted rule, and it cannot be disputed that, in considering the charitable and benevolent nature of these associations, it is the just rule. Supreme Lodge K. of H. v. Oeters (Va.) 29 S. E. 323; Ballou v. Gile, 50 Wis. 619, 7 N. W. 561; Alexander v. Parker, 144 Ill. 355, 33 N. E. 183, 19 L. R. A. 187; American Legion of Honor v. Perry, 140 Mass. 580, 5 N. E. 634; Hellenberg v. B'nai B'rith, 94 N. Y. 580; Gillam v. Dale (Kan.) 76 Pac. 861; Niblack on Benevolent Societies, § 195; Bacon on Benefit Societies (2d Ed.) § 261.

It is, however, contended that, as Baker became a member of the order at a time when its by-laws permitted him to have the certificate issued in favor of any person, a subsequent change in the by-laws limiting the classes of persons to whom such certificate could be issued was an impairment of his contract, and thereby void as to him and as to the certificate actually issued in favor of this plaintiff. It is unquestionably true that, in a policy of life insurance, a designation of a beneficiary valid in its inception remains so, although the insurable interest or relationship of the beneficiary has ceased, unless otherwise stipulated in the contract. Courtois v. Grand Lodge, 135 Cal. 557, 67 Pac. 970, 87 Am. St. Rep. 137; Wist v. Grand Lodge (Or.) 29 Pac. 610, 29 Am. St. Rep. 603. But such is not the proposition here presented. This principle would have been applicable, if refusal had been made by the order after the passage of its amended by-law to pay the certificate in favor of the Humboldt Savings & Loan Society, which was a valid certificate to that institution at the time of its issuance. In this case Baker surrendered that certificate, and while the amended bylaw was in force caused a new certificate to be issued to a person who, under the by-law, was not entitled to it. Baker had not been compelled to designate a new beneficiary, but, having voluntarily undertaken so to do, could he, or could he not, designate a beneficiary not contemplated by the by-law then in force? We entertain no doubt that this he could not do. Baker joined the order, agreeing specifically to abide by and conform to the by-laws in force or subsequently to be adopted. His compliance with such laws as were then in force, or might thereafter be enacted, was by his express agreement made a condition by which he was entitled to participate in the beneficiary fund of the order; and, where the contract between the member and the order is as here disclosed, it is never to be disputed that all subsequent rules, regulations, and by-laws, not in themselves unreasonable, against express law or public policy, enter into and govern all of his rights and relationship with the association. Wist v. Grand Lodge, 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603; Masonic Ben. Association v. Serverson (Conn.) 43 Atl. 192. The amended by-law in question was certainly a reasonable one, and after it went into force Baker had no right to name a beneficiary belonging to any other than one of the classes therein designated. Upon the other hand, he did declare that plaintiff came within the class of dependent persons, and the order was justified in issuing the certificate upon this declaration. It was a statement upon the truth of which the validity of the contract depended. It amounted to a warranty. Hoggins v. Supreme Council, 76 Cal. 112, 18 Pac. 125, 9 Am. St. Rep. 173.

But, as it appears from what already has been said that plaintiff did not belong to the designated class, and that she was not, within the meaning of the word as employed in the by-law, a dependent person, the judgment appealed from must be reversed, and it is ordered accordingly.

We concur: McFARLAND, J.; LORIGAN, J.

148 Cal. 131

ROBERT v. POLICE COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 4,224.)

(Supreme Court of California. Oct. 12, 1905.)

1. CRIMINAL LAW—POLICE COURTS—JURISDICTION — MISDEMEANORS — CONSTITUTIONAL LAW.

San Francisco Freeholder's Charter, § 2, relating to the jurisdiction of the city's police court under power given by Const. art. 11, § 8½, provides that such court shall have exclusive jurisdiction of prosecutions for the violation of ordinances and "concurrent jurisdiction with the superior court" of all other misdemeanors committed within the city and county. *Held*, that since, under Const. art. 6, § 5, conferring on the superior court jurisdiction of misdemeanors "not otherwise provided for" there could be no concurrent jurisdiction of misdemeanors between the police and superior courts, the charter provision was unconstitutional and void.

2. STATUTES—PARTIAL INVALIDITY.

The words "concurrent with the superior court," contained in the San Francisco Freeholders' Charter, § 2, providing that the city police court shall have concurrent jurisdiction with the superior court of all misdemeanors committed in the city and county, rendering such section invalid, could not be rejected as surplusage, and the remainder of the section upheld, and construed to give such police court exclusive jurisdiction of misdemeanors.

In Bank. Petition by Dent H. Robert for writ of prohibition against the police court of the city and county of San Francisco and A. J. Fritz, one of the judges thereof. Writ granted.

Garrett W. McEnerney, for petitioner. Frank H. Gould, for respondents.

LORIGAN, J. This is a proceeding in prohibition, to restrain the respondents from proceeding to try the petitioner in the police court of the city and county of San Francisco before a jury, upon a charge of criminal libel; the question involved being whether, under the freeholders' charter of said city and county, the police court thereof has jurisdiction to try (not to hold a preliminary examination in) a prosecution for such an offense.

It is insisted by the petitioner that the police court has been invested with no such jurisdiction, and that a trial for the offense with which he is charged can only be had before the superior court. There can be no question but that under section 5 of article 6 of the Constitution, conferring jurisdiction upon the superior court in all cases of felony "and cases of misdemeanor not otherwise provided for," the trial of misdemeanors, of the class to which the offense of libel belongs, has up to the present time been had exclusively before the superior court under such constitutional provision. Offenses of this class are popularly known as "high misdemeanors," so designated because, as the Legislature had made no provision for their trial by any inferior court, they are required, under the constitutional provision, to be tried in the superior court. And under such constitutional provision they must still be exclusively tried there, unless their prosecution in some other court is otherwise provided for. Green v. Superior Court, 78 Cal. 556, 21 Pac. 307, 541.

Such provision, it is insisted by respondents, has now been made and exclusive jurisdiction conferred upon the police court of the city and county of San Francisco to try all misdemeanors of which the superior court theretofore had jurisdiction. They base this claim upon the provisions of the freeholders' charter of the city and county of San Francisco, which defines the jurisdiction of the police court thereof, under power conferred by the Constitution which it is contended authorized it to be done. Section 8½ of article 11 of the Constitution, which is relied on as conferring this power, in as far as its provisions are presently involved, declares that: "It shall be competent in all charters framed under the authority given by section 8 of article 11 of this Constitution, to provide, in addition to those provisions allowable by this Constitution and by the laws of the state, as follows: First, for the Constitution, regulation, government and jurisdiction of police courts * * *." The clause in the freeholders' charter, under which it is claimed jurisdiction was conferred upon the police court under the constitutional provision, is as follows: Section 2. The police court of the city and county of San Francisco shall have: First. Exclusive jurisdiction of all prosecutions for the violation of ordinances of the board of supervisors. Second. Concurrent jurisdiction with the superior court of all other misdemeanors and of the examination of all felonies committed in the city and county. Third. Said court or any judge thereof shall have the same powers in all criminal actions, cases, examinations and proceedings as are now or may hereafter be conferred by law upon justices of the peace." The only provision of section 2 which can be insisted upon as conferring jurisdiction upon the police court to try the offense with which petitioner is charged is the second subdivision thereof, which purports to give the police court "concurrent jurisdiction with the superior court of all other misdemeanors." This is obvious from a consideration of the other subdivisions of the section, the first of which provides for jurisdiction in cases of municipal misdemeanors, and the third for the exercise of the same jurisdiction (under the ample designation of "powers") as is possessed by justices of the peace in cases of misdemeanors under the general law. The only other misdemeanors, with jurisdiction to try which said police court could be invested, would be "high misdemeanors" of the class to which criminal libel belongs, jurisdiction to try which theretofore rested exclusively in the superior court.

In fact, it is contended by respondent that this was the purpose sought to be accomplished by the second subdivision, and the only question necessary to consider (though others are presented by counsel for petitioner) is, did it have that effect? It is claimed by petitioner that it did not; that it was not within the power of the freeholders to give jurisdiction to the police court "concurrent" with the superior court of any misdemeanor, and that the attempt to do so is unconstitutional. Under the constitutional provision (section 5 of article 6 it is evident that the jurisdiction conferred upon the superior court in cases of misdemeanors is exercised by it exclusively or not at all. It is a provisional jurisdiction which, however, must be exercised solely by that court until the Legislature, or equally competent authority, has provided for its exercise by some inferior court. When provision is so made transferring this jurisdiction to some other court, the superior court is ousted of its jurisdiction ipso facto. And as it must possess original jurisdiction in the absence of any transfer of jurisdiction to an inferior court, and loses its jurisdiction entirely by the transfer, it is clear that it cannot have concurrent jurisdiction with any other court in any case of misdemeanor. Green v. Superior Court, supra. Hence it necessarily follows that, as the superior court cannot have concurrent jurisdiction with the police court of the city and county of San Francisco in any case of misdemeanor, the attempt of the freeholders to confer concurrent jurisdiction is one to which legal effect cannot be given.

All this is conceded by the respondents, but they insist that the words "concurrent * * * with the superior court" were inserted by the freeholders under either misapprehension of fact or misconception of law, and should be treated as surplusage, and the rest of the section construed to read that said police court shall have "jurisdiction of all other misdemeanors." The legal effect of this construction would be to have the charter declare that exclusive jurisdiction over cases of misdemeanors is conferred upon the police courts. Manifestly, from the use of words of plain, legal import, this is not what the framers of the charter said, and we do not feel warranted, under any rule of construction to which our attention has been called, in saying that they intended to effect a purpose which they did not declare. It is a general rule of construction that, if a provision be unconstitutional, it cannot be given effect in part, if the result of giving it such partial effect would be to accomplish a purpose which the lawmaking power never intended, or where the legislative intent is doubtful. Spraigue v. Thompson, 118 U. S. 99, 6 Sup. Ct. 988, 30 L. Ed. 115; In re Wong Hane, 108 Cal. 683, 41 Pac. 693, 49 Am. St. Rep. 138. Applying this rule to the subdivision of the charter in question, it cannot be said that there is an expression of legislative intent that exclusive jurisdiction should be vested in the police court as to all misdemeanors of which the superior court theretofore had jurisdiction. On the contrary, it is evident that the framers of the charter did not intend to confer it. It was optional with them whether they should confer any jurisdiction at all upon the police court as to the trial of high misdemeanors. They concluded, however, to do so, not by investing the police court in terms with exclusive jurisdiction thereof, but concurrently, only, with the superior court. It was intended, as far as the provision of the charter discloses an intention, to leave the matter of jurisdiction, as between these two tribunals, entirely at large—not to take it away from the superior court, but to permit it to be exercised by either court. It is clear that this attempt to confer concurrent jurisdiction could not be legally accomplished. They supposed they had the power to do so, and it cannot be said that if they were advised they did not have this power they would have disturbed the original jurisdiction of the superior court. They undoubtedly acted under a misconception of law, but this cannot affect the application of the rule of construction. Such misconception is the fruitful source of most invalid legislation. The rule of construction, however, deals only with the matter of legislative intention as disclosed by the language of the enactment. The provision of the charter discloses clearly that it was the intention of the framers thereof to have the jurisdiction of the police court operate concurrently with that of the superior court, and, as it cannot operate as they intended, under the rule of construction we have referred to, it cannot operate at all. To hold otherwise would be to force upon the charter provision an extension of jurisdiction in favor of the police court beyond what the framers thereof clearly and expressly intended, and beyond what it can be said they would have given it had they been advised that it was impossible to confer jurisdiction "concurrent * * * with the superior court" upon it.

From these considerations we are of the opinion that subdivision 2 of section 2 of the charter is invalid; that it is ineffectual to confer jurisdiction upon the police court of the city and county of San Francisco to try the offense with which the petitioner is charged; that original jurisdiction remains in the superior court; that the petitioner is entitled to the writ of prohibition as prayed for, and it is so ordered.

We concur: SHAW, J.; ANGELLOTTI, J.; McFARLAND, J.; VAN DYKE, J.

BEATTY, C. J. (concurring). I concur in the judgment upon the ground discussed by Justice LORIGAN, and upon the further and to my mind more important and more satisfactory ground that the jurisdiction of offenses defined by state law must be regulated by general state law, and that such regulations cannot be altered or qualified by any provision of a freeholders' charter. The trial and punishment of offenses defined by the laws of the state is not a municipal affair. Jurisdiction of such offenses may be conferred upon police courts by act of the legislature, but cannot be conferred by special freeholders' charter, and certainly not in a manner which will impair the operation of general laws.

I concur: HENSHAW, J.

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148 Cal. 50

PEOPLE v. EASTON. (Cr. 1,248.)

(Supreme Court of California. Oct. 7, 1905.)

1. HOMICIDE—MOTIVE—EVIDENCE.

Where, in a prosecution for homicide committed in a house of prostitution, it was proved without objection that defendant was a frequenter of the house, was an associate of the woman who kept it, had been ordered out of town because of a disturbance in the house, and had killed deceased for no other rational motive than jealousy of his attention to the keeper, a question asked of the woman as to how many times during the past year defendant had been at her house was properly allowed, as bearing on defendant's motive, though the answer indirectly reflected on defendant's chastity, which was not in issue.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 320, 323, 328.]

2. CRIMINAL LAW—EVIDENCE—MOTION TO STRIKE.

Where a witness had testified without objection that he thought defendant was capable of distinguishing right from wrong, and gave his reasons therefor, which still remained in evidence, it was not error for the court to refuse to strike his affirmative answer to a subsequent question as to whether, in the witness' opinion, defendant at the time of the trial was able to distinguish right and wrong, which was objected to as not cross-examination.

3. SAME—FLIGHT OF ACCUSED—INSTRUCTIONS.

An instruction, in a prosecution for homicide, that the flight of the person suspected of a crime is a circumstance to be weighed by the jury as tending in some degree to prove a consciousness of guilt, and is entitled to more or less weight according to the circumstances of the particular case, was not erroneous, because the defense was insanity, and because there was evidence that defendant stated he would have surrendered himself before he did, except for his fear of mob violence; the question whether he was insane, and whether he did in fact, flee because of his fear of a mob, being for the jury.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1793, 1857.]

In Bank. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

George Easton was convicted of murder, and he appeals. Affirmed.

Paul C. Harlan and L. T. Hatfield, for appellant. U. S. Webb, Atty. Gen., for the People.

HENSHAW, J. The defendant was informed against for the murder of one Charles J. Horigan, was found guilty of murder in the first degree, and sentenced to be hanged. From the judgment against him, and from the order denying his motion for a new trial, he appeals.

1. It is urged that the court, over defendant's objection, erroneously admitted testimony as to the number of times within the year preceding the trial that the defendant

had been at the house of one Mrs. Quick, who was the keeper of a house of prostitution in the town of Dixon, Solano county, and in whose house the murder took place. The facts of the homicide were that defendant, who had been a not infrequent visitor at the house of Mrs. Quick, and upon many occasions had slept there, was jealous of the woman and of her male associates. Horigan amongst the number. On the evening of November 2d he came to Mrs. Quick's house about 8 o'clock. Horigan was eating supper with Mrs. Quick in the kitchen. The defendant sat down in the kitchen in sullen silence during the time Mrs. Quick, Horigan, and another woman were there. He asked Mrs. Quick for a razor. Mrs. Quick and Horigan went from the kitchen to another room. Horigan sat down, and Mrs. Quick was engaged in trimming the light of a lamp when defendant slipped from the kitchen into the middle room, drew Horigan's head back, and cut his throat with the razor. Defendant then fled from the scene, but surrendered himself to the authorities the next day. Horigan died from his wound. These facts were shown in evidence without objection. It was further shown that, for another difficulty occurring in the same house of prostitution, Easton had been brought before the local magistrate and ordered to leave town, and did so. In like manner it was shown by the testimony of a barkeeper in the saloon opposite the place of the homicide that upon the Monday previous, speaking of the deceased, Horigan, and of other men, the defendant had said: "But she [Mrs. Quick] seems to think more of them than of me. I don't care a damn. I'll get even." And Mrs. Quick's testimony is that, after cutting Horigan's throat, he turned to her and said: "Now I'll give you some of this. You are turning me down; and now I'll fix you." Much evidence of defendant's visits to the house had been admitted without objection. Finally an objection of defendant was addressed to the question: "How many times, during the last year, was the defendant at your house?" Defendant's objection to the question is based upon the ground that the answer affects and reflects upon his chastity, and that, as that was not an issue in the case, the ruling admitting the question was erroneous and prejudicial. Considering the facts that have been narrated above, it would seem that the answer to the question could not have been prejudicial to the defendant. As it was proved without objection that he was a frequenter of the house, an associate of the woman, had been ordered out of town because of a disturbance in her house, and killed Horigan, moved by no other rational motive than that of jealousy, no special injury could have been done under such circumstances by this evidence. Moreover, the question was proper in itself on the subject of motive. As the effort of the prosecution was directed to showing that the defendant murdered the deceased after previous threats because he had been the associate of this prostitute and was jealous of her favors to other men, as showing the nature and frequency of their intercourse, the question was permissible for its bearing upon motive, regardless of the fact that the answer incidentally and indirectly touched upon the chastity of the defendant.

2. The defense was insanity. A witness was asked if he though the defendant then, as he sat in the courtroom, was able to distinguish right from wrong in a particular act, and answered: "I don't know that, as he sits here in the courtroom now, he is able to distinguish right from wrong as to a particular act. I should think he is. The chances are that he has not had any of the drug." "Q. Do you think, or is it your opinion, that the defendant, at the present time, is able to distinguish between right and wrong? (Objected to as not cross-examination.) Witness. I think he would now." It was not error for the court to refuse to strike out this last answer. The witness' whole testimony is to be taken together, and immediately before this last answer he testified, without objection, that he thought the defendant was capable of distinguishing right from wrong, and gave his reasons therefor. Those reasons still remained in evidence and were as applicable to the answer last given upon the subject as to the first.

3. Defendant complains because the court gave an instruction as follows: "The flight of a person suspected of a crime is a circumstance to be weighed by the jury as tending in some degree to prove a consciousness of guilt, and is entitled to more or less weight according to the circumstances of the particular case." No attack is made upon the soundness of this instruction as a proposition of law, but it is said that under the facts of this case, where the defense was insanity, the giving of it was prejudicial to the defendant. Herein it is argued that, if one is insane when he commits a violent and unlawful act upon another, his immediate flight cannot affect the question of his legal responsibility. This is quite true; but it was for the jury to say whether or not the defendant was insane, and, if they so found him, his flight was, of course, meaningless. If he was not insane, then his flight had the significance which the law attaches to it. Appellant's objection to the instruction seems to arise from the mistaken notion that the court was bound, in giving the instruction, to adopt the theory that the defendant was, in fact, insane, whereas, of course, that was essentially and exclusively a proposition for determination by the jury. The second objection raised to the instruction is that the testimony of the witness Eibe to whom the defendant surrendered the next morning, shows that the defendant feared mob violence, and therefore fled. The testimony of Eibe is that the defendant, whom he did not know, came to him the next

morning, and told him that he had had a row in Dixon and thought he had killed a man, but was not sure; that he thought he had killed him; that he used a razor; that he wanted to surrender, "and he said he would have surrendered that night had he not been afraid of the mob." Of course, flight from a mob raises no presumption of guilt (State v. Baker [Mo. Sup.] 19 S. W. 224, 33 Am. St. Rep. 414). But the fallacy of appellant's argument upon this point in regard to the instruction is identical with that in the proposition last discussed. He in effect asks the court to accept as true the self-serving statement which he made the next day to Eibe. In fact there was no mob, and it was for the jury and not for the court to say what might have influenced his flight. Moreover, the defendant, who was a witness in his own behalf, nowhere declares that he fled for fear of a mob. His testimony is: "I don't remember a thing about the killing—not until afterwards. I ran away. After it was done, the excitement and everything, of course, I realized that I had done something, probably made trouble for me. * * * My mind was clear enough that night after this occurred to know that a wrong had been done, and a wrong which might result in my injury. I guess an hour or an hour and a half or two hours afterwards that realization came to me. I was crazy, I guess. Any man would be liable to go out of a house when he was crazy and wild. I suppose that is the reason I ran out of the house and ran away, and hid away —crazy from dope. I was under the influence of dope." Here, again, under all the testimony, it was for the jury to say whether the defendant was suffering from temporary insanity and unconscious of what he was doing, as he testifies, or having committed a cold-blooded and bestial crime, with consciousness of his guilt, he fled from the scene of it. In no event does it appear that he was fleeing from the vengeance of a mob.

These are all the propositions advanced for a reversal of the judgment and order, and as it appears that no one of them is tenable and that in no respect in his trial was any substantial right of the defendant impaired, it is ordered that the judgment and order appealed from be affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; LORIGAN, J.; SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

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148 Cal. 43

In re McDERMOTT'S ESTATE.

(S. F. 4,273.)

(Supreme Court of California. Oct. 6, 1905.)

1. WILLS—EXECUTION—SUFFICIENCY OF EVIDENCE.

In a proceeding for the probate of an alleged last will, evidence *held* insufficient to require reversal of a finding that the alleged will was not executed by deceased.

2. SAME—ORDER OF PROOF.

In a contested proceeding to probate a will, it was not error for the court to require proponent to introduce her preliminary proof before proceeding with the contest.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 763.]

Department 2. Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Application for probate of the alleged last will of Bridget McDermott, deceased. From a judgment denying probate, and from an order denying petitioner's motion for a new trial, she appeals. Affirmed.

William H. Chapman, for appellant. John J. Barrett, L. Seidenberg, George M. Davis, and Morrison & Cope, for respondents.

McFARLAND, J. Bridget McDermott died on the 30th day of December, 1902, in San Mateo, San Mateo county, Cal. Her heirs at law were brothers, sisters, nephews, and nieces. Search for a will was made for a couple of months after her death, and, none having been found, her brother, James Maguire, was in March, 1903, appointed administrator of her estate and qualified as such. Afterwards, on March 28, 1903, her niece, Mary Anne Burns, presented to the court and asked to have probated what purported to be a will of the deceased dated November 24, 1902, to which were attached the names of C. Michener and James Kerwin as subscribing witnesses. Contests were filed by a number of heirs at law upon several statutory grounds, but the only one to which evidence was introduced was that the instrument offered for probate had not been executed by the deceased, and was not her will. A jury was waived, and the court found that the deceased did not execute the said instrument, finding that the instrument "was not subscribed by the said Bridget McDermott herself, nor was her name subscribed by any person in her presence or by her direction; that no subscription of said instrument was made by said Bridget McDermott, or by her direction in the presence of C. Michener and James Kerwin, or either of them, or in the presence of any other person; nor did said Bridget McDermott acknowledge to said C. Michener and James Kerwin, or either of them, or to any other person or persons, that the alleged subscription by her thereto had been made by her authority; that said Bridget McDermott, deceased, did not on the 24th day of November, 1902, or at any other time, acknowledge or declare to C. Michener and James Kerwin, or to either of them, or to any other person or persons whatever, that said instrument was her last will and testament or her will"; and pursuant to this finding the court rendered judgment denying the probate of this alleged will. From this judgment, and from an order denying a motion for a new trial, Mary Anne Burns appeals.

The main question in the case is a question of fact; and the propositions attempted to be maintained by appellant are that the evidence does not present any fair and reasonable grounds upon which the finding of the trial court that the alleged will was not executed by deceased can rest, that it is practically one-sided to the point that she did execute the asserted will, and that upon this issue it is without any substantial conflict. We do not think that these propositions are maintainable. The position of appellant seems to be that, because the two subscribing witnesses testify that the will was executed, therefore, the execution should have been taken as proved, unless there was testimony directly and expressly contradicting the testimony of said witnesses; but, of course, a trial judge is not bound to accept any particular testimony as true. It is his province to pass upon the credibility of witnesses, and, if all the evidence, circumstances, facts, and probabilities in the case convince him that certain testimony is not credible, it is his duty to disregard it. There was a great deal of evidence taken, and we shall not undertake here to notice any considerable part of it. We shall refer only to a few of the main features of the case.

Bridget McDermott had lived continuously in San Mateo for a quarter of a century immediately preceding her death. She had property amounting in value to about $100,000, consisting of notes, mortgages, money, real estate, etc. She executed written instruments in the course of her business, which she always signed with her mark, a cross. In her important business affairs she usually consulted a friend living at San Mateo named D. C. Brown. The evidence tending to show the execution of the will is substantially this: The subscribing witness Kerwin testified that on the day of the date of the alleged will, which was November 24, 1902, he accidentally met the deceased in San Francisco. He thought the meeting was on Market street and near the Chronicle Building, but was not sure about it. He said that the deceased approached him and asked him if he could recommend an honest lawyer who would draw some papers for her. He did not say that she recognized him as an acquaintance, but said that he had seen her two or three times, although he had no intimate acquaintance with her. He said that he took her to the office of C. Michener, a lawyer, and introduced her as Bridget McDermott. Michener testified that Kerwin came to his office with a woman whom he introduced as Bridget McDermott, and said that she wanted him to draw a paper for her; that she told him her name and said that she wanted him to draw her will, and that she wanted to leave $5,000 to one Fannon, and all the residue of her property to Mary Anne Burns the present appellant. He said that she wanted the will executed immediately, and he thereupon prepared it. She requested him to subscribe her name to the will, which he did. He testified that he showed her where to make her mark, and that she made the mark as directed, so that the whole signature was Bridget X McDermott. He repeated in his testimony several times that she herself made the cross, but finally said that he might have made the mark at her request. There was expert testimony that a comparison of this mark with other marks which deceased had made in transacting business showed that it was not made by her, but that the whole writing "Bridget X McDermott" was written by the same person. Counsel for appellant admits that the mark was not made by the deceased, but asserts that it was made at her request. The witness testified that Kerwin and himself signed the instrument as subscribing witnesses at the request of the woman, and that she declared it to be her will, etc.

The testimony of Kerwin was in some respects quite remarkable. Although he made the general statement that he met the deceased on the street in San Francisco and was asked by her to take her to an honest lawyer to draw some papers for her, and that he took her to Michener, yet, upon further examination, he practically declared that he did not know anything on the subject. To a large number of questions he answered "I don't know." We copy here a few of these questions and answers: "Q. What took place between you and Mrs. McDermott at this meeting? A. I don't know. Q. Was there any conversation between you at all? A. I don't know. Q. State all you can remember transpired between you and Mrs. McDermott before you entered Michener's office? A. I don't know. Q. You or did she not say that she desired to have a paper drawn? A. I don't know. Q. When Mrs. McDermott met you on that day, did she ask you to accompany her or not to the office of Michener? A. I don't know. Q. Did you suggest to her, or not, that she go to Michener's office with you? A. I don't know. Q. Did you recommend Michener to her for the purpose of drawing this paper? A. I don't know. Q. Did you recommend Michener to Mrs. McDermott on that day? A. I don't know. Q. Did she request you to take her to any person? A. I don't know. Q. Can you remember any of the circumstances that led you to accompany her to Michener's office? A. I don't know. Q. You remember that you did go with her to Michener's office that day? A. I don't know. Q. What led you to go with her to Michener's? A. I don't know. Q. Did you walk directly from the Chronicle Building, or wherever you met Mrs. McDermott, to the office of Mr. Michener accompanied by Mrs. McDermott? A. I don't know. Q. You don't know whether you walked with Mrs. McDermott from the Chronicle Building to Michener's office? A. I don't know. Q. When you went up there with Mrs. McDermott, did you or did you not go into the office with her? A. I don't know. Q. What? A. I don't know."

The history of the will after its alleged execution, and the circumstances under which it is asserted to have been found, are also somewhat remarkable. Michener testified that it was taken away on the day of its execution by the woman who executed it; and nothing more was ever heard of it until March, 1903. Although Kerwin and Burns were intimate acquaintances, the former never said anything to the latter about a will until March, 1903, when he informed him that a will had been made. The witness Mrs. Foy, who lived near the residence of the deceased, testified that she was in the house of the deceased shortly after her death, and that an hour or two after her death the appellant, Mrs. Burns, who was present, but who lived in San Francisco, took a number of pieces of cloth from some bureau drawers and put them into a basket, saying that she could use them in making clothing for her child, and asked Mrs. Foy to take them to Mrs. Foy's house and keep them until she called for them. This Mrs. Foy did, putting the basket in a closet in the second story of her house. The cloths were never called for until May 13, 1903, several months after she had taken them to her house. On this last-named day John Burns, husband of the appellant, together with a man named Donnelly, appeared at the house of Mrs. Foy, and Burns said that he had come to get those cloths. He had with him an empty basket. He said that when about to leave San Francisco, where he lived, to go to San Mateo, he accidentally met Donnelly, with whom he was well acquainted, and asked him to accompany him. Mrs. Foy got the basket, and, in the presence of Burns and Donnelly, commenced to take the cloths, piece by piece, from the basket in which they had been put by Mrs. Burns, and place them in the basket brought by Burns. After she had thus removed about half the pieces of cloth, when she turned from Burns basket to the other, she discovered lying on the top of the next piece of cloth, but not wrapped in anything, a paper, and said: "What is this? Maybe it is a will;" and Burns immediately said: "That is what it is." The paper was then read and it turned out to be the instrument afterwards sought to be probated as the will of Bridget McDermott. Burns took the paper away with him, but did not take away the cloths, leaving his own basket at Mrs. Foy's house.

There was considerable more evidence in the case, but the foregoing is sufficient for the purpose of this opinion, and to show that there is no foundation for here disturbing the finding of the trial court that the alleged will was not executed by Bridget McDermott. The trial judge had the right to consider much of the testimony of the witnesses for appellant as highly improbable. He may have entirely disbelieved the testimony of the witness Kerwin; and this court certainly cannot say that he ought to have believed it. And without the testimony of Kerwin there is no evidence that Bridget McDermott of San Mateo was in San Francisco on November 24, 1903, and there executed a will. The lawyer who drew the will did not know her, and had no knowledge that the woman who he says appeared before him on that occasion was Bridget McDermott except from information given him by Kerwin. The latter may have imposed upon him another woman who falsely impersonated the deceased, but that is a matter not necessary to be determined. It may be remarked that it was considerably improbable that the deceased, in so important a matter as the making of her will, should have gone away from her home where her friends and advisers were, and intrusted the matter to persons, one of whom was an entire stranger and the other only a casual acquaintance, if indeed she knew him at all. Again, the court may have disbelieved the story of the finding of the alleged will, and may have believed, as argued by counsel for respondents, that it was put among the cloths in the basket, not by the deceased at her direction, but by or at the instigation of Burns, who went to get the cloths, knowing that the will was to be there found, and arranged that Mrs. Foy, an uninterested person, should find the document; and, if the trial judge so believed, there is no warrant for us to say that he should have had a different belief on the subject. Looking at the whole case, we see no reason that would justify us in disturbing the finding that the alleged will was not executed by the deceased.

It is contended that the judgment should be reversed because the court, over the objection of appellant, before proceeding with the contest, required appellant to introduce her preliminary proof on her petition for the probate of the will. This contention is not maintainable. The proceeding on a petition for probate is distinct from the proceeding on a contest of a will. The hearing of the necessary statutory evidence on the petition for probate must be heard by the court at some time, and this can properly be done as well before as after the hearing of the contest. There is in the case at bar no question of the burden of proof on the contest, such as was agitated in Estate of Latour, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441.

There are a large number of exceptions to rulings of the court as to the admissibility of evidence, and it would take a great amount of space to notice them especially. This we do not deem it necessary to do; for, in our opinion, these rulings do not involve matters of sufficient consequence to warrant a reversal, even if some of them could be held to be, in a strict sense, erroneous.

The judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

148 Cal. 61

SEALE v. McCARTY. (S. F. 3,529.)

(Supreme Court of California. Oct. 9, 1905.)

1. ANIMALS—PASTURING HORSES—LIEN.

Under Civ. Code, § 3051, providing that livery or boarding and feed stable proprietors and persons pasturing horses or other stock shall have a lien, dependent on possession, for their compensation in caring for, boarding, feeding, or pasturing such horses or stock, plaintiff was entitled to a lien for feeding and pasturing defendant's horses under contract, though plaintiff was not engaged in the general business of pasturing stock.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Animals, §§ 54, 58.]

2. SAME—PAYMENT—TENDER.

Where plaintiff on September 3, 1901, demanded $175 for pasturing defendant's horses up to that date, for which plaintiff had a lien, as provided by Civ. Code, § 3051, which amount defendant refused to pay, and plaintiff, in order to retain his lien, was compelled to continue feeding the horses and within a reasonable time commenced an action to foreclose such lien, after which, on October 22, 1901, defendant tendered the $175 and demanded possession, such tender was ineffectual to render defendant liable for refusing then to deliver.

Department 2. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Thomas Seale against Dan McCarty. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Henry I. Kowalsky (J. H. Kann, of counsel), for appellant. Bowden & Bowden, for respondent.

McFARLAND, J. This is an action to enforce a lien upon certain horses of defendant for pasturage of said horses. Judgment went for plaintiff, and defendant appeals from the judgment.

Appellant makes only two points for a reversal. First, he contends that the action cannot be maintained because it is not averred nor found that respondent was engaged in the general business of pasturing stock. This contention is not maintainable. Section 3051 of the Civil Code provides that "livery or boarding or feed stable proprietors, and persons pasturing horses or other stock have a lien, dependent on possession, for their compensation in caring for, boarding, feeding, or pasturing such horses or stock." This section expressly and unconditionally gives a lien for pasturing stock; and there is no warrant for judicially inserting into the section the additional provision that one who pastures stock of a particular person has no lien therefor unless he also pastures stock for other people.

Second. It is also contended that there should be a reversal, because the court sustained a demurrer to a cross-complaint filed by appellant. This contention cannot be maintained. It is alleged in the cross-complaint that on the 22d day of October, 1901, which was after the commencement of this action, appellant tendered respondent the sum of $175 as the purchase price of the pasturage; that respondent refused to accept said sum of money; and that, by respondent's refusal to accept said money and to surrender the horses, appellant was damaged in the sum of $5,000 by "being prevented from racing said horses during this season." It is not necessary to examine whether this alleged possibility of profits from racing would constitute a good ground for a cross-complaint, if other averments in such pleading presented the question; but they do not. The plea contains no averment that $175 was the whole amount due on October 22, 1901. It is averred in plaintiff's complaint, and found by the court, that $175 was due on the pasturage contract on September 23, 1901; that on said last-named day respondent demanded of appellant that he pay $175 and remove the horses; and that appellant refused to do so, and has never paid said money or any part thereof. Respondent was therefore compelled to retain possession of the horses and furnish them with pasturage, or lose his lien. He commenced his action within a reasonable time thereafter, and the court found that the continued pasturage of the horses was worth a certain named sum per day. Therefore the averment in the cross-complaint that on October 22d, after the commencement of this action, appellant tendered respondent $175, was of no consequence, and the pleading does not state facts sufficient to state a cause for a cross-complaint.

The judgment appealed from is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

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148 Cal. 96

REED v. BANK OF UKIAH.

(S. F. 3,502.)

(Supreme Court of California. Oct. 11, 1905.)

1. BILLS AND NOTES — CONSIDERATION — INTEREST.

Where a substantial part of certain notes was interest at 10 per cent. per annum, compounded monthly, on sums due on open account, without any previous written agreement to pay an excess of interest over 7 per cent., except that contained in the notes, which were made after the excess had accrued, the notes as to such excess were without consideration.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 193; vol. 29, Cent. Dig. Interest, § 74.]

2. JUDGMENTS—VACATION — FRAUD — UNDUE INFLUENCE.

In a suit to set aside a judgment as obtained by fraud and undue influence, plaintiff is bound to establish, not only that the judgment was in fact obtained by fraud and undue influence, but also that there were good and substantial defenses or partial defenses to the action in which the judgment was obtained.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 849, 850.]

3. APPEAL — EVIDENCE — EXCLUSION — HARMLESS ERROR.

Where, in a suit to set aside a judgment for fraud and undue influence, the court found on sufficient evidence that there was no fraud, but that plaintiff and her husband, since deceased, freely and voluntarily agreed to the entry of such judgment long before it was in fact entered, the erroneous exclusion of evidence that at the time of such agreement plaintiff's husband was in a mentally weak condition and easily influenced was harmless.

4. JUDGMENT — VACATION — MISTAKE — EVIDENCE.

Where, in a suit to set aside a judgment for fraud and undue influence, plaintiff claimed that at the time an agreement was made for the entry of such judgment her husband, since deceased, by mistake did not know that the note contained charges of interest in excess of 7 per cent. without a written agreement therefor, evidence of a verbal agreement between defendant and plaintiff's husband that there should be a charge of the excess of interest over 7 per cent. was admissible to show that the notes were not executed by plaintiff's husband under such mistake.

5. ACKNOWLEDGMENTS—IRREGULARITIES.

Where the acknowledgment to a mortgage recited that on a certain day before the officer personally appeared R. (the grantor), personally known to the officer to be the same person described in, whose name is subscribed to, and who executed the within instrument, and "who" acknowledged to the officer that he executed the same, it was not fatally defective for failure to certify that the grantor actually acknowledged the execution of the mortgage to the officer.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Acknowledgment, §§ 221–223.]

Department 1. Appeal from Superior Court, Mendocino County; J. M. Mannon, Judge.

Action by Anna M. Reed, individually and as executrix of the will of John S. Reed, deceased, against the Bank of Ukiah. From an order denying plaintiff's motion for a new trial after dismissal of the complaint, she appeals. Affirmed.

Rehearing denied November 10, 1905.

Arthur J. Thatcher (J. T. Carey and John H. Marble, of counsel), for appellant. McNab & Hirsh, for respondent.

SHAW, J. The plaintiff, individually and as executrix, appeals from an order denying her motion for a new trial.

The complaint alleges a cause of action in equity to set aside a judgment of the superior court of Sonoma county in favor of the Bank of Ukiah against John S. Reed and Anna M. Reed, rendered on September 18, 1897, during the lifetime of John S. Reed. The grounds alleged are that the judgment sought to be set aside was obtained by means of fraud and undue influence on the part of the officers and agents of the bank, and that the plaintiff, Anna M. Reed, and the deceased, John S. Reed, had good and substantial partial defenses to the action in which the judgment was obtained. In order to support an action of this character it is absolutely necessary that both of these grounds be established, and, if the plaintiff fail upon either, she must fail in the suit, although she may have succeeded in establishing the other. The court found for the defendant on both propositions. The contention of the appellant is that neither finding is supported by the evidence. As we are of the opinion that there is enough evidence to sustain the finding that the former judgment was not procured by the fraud or undue influence alleged, it will not be necessary to consider the sufficiency of the evidence to prove the existence of the partial defenses to the notes and mortgages sued on.

The Bank of Ukiah held three notes against John S. Reed, secured by three mortgages covering certain chattels and a large body of land. On a part of the land embraced in the first mortgage, Anna M. Reed, who was the wife of John S. Reed, had, subsequently to the execution of the mortgages, recorded a declaration of homestead. A substantial part of the amount included in the notes was made up of items of interest at 10 per cent. per annum, compounded monthly, upon sums due on open account; there never having been any written agreement to pay the excess over 7 per cent., except that contained in the notes sued on, which were made after the excess had accrued. As to this excess, the notes were without consideration, under the rule declared in Adams v. Hastings, 6 Cal. 126, 65 Am. Dec. 496. On January 21, 1896, the action was begun against John S. Reed, Anna M. Reed, and others, to foreclose these mortgages. In April of that year the directors of the bank and its attorney had a meeting with John S. Reed and Anna M. Reed, at which it was agreed between the parties that the Reeds should suffer default in the foreclosure suit, and that, in consideration of certain payments to be made and the performance of certain conditions by the Reeds, the bank would not take judgment of foreclosure until January 2, 1897. The agreement was carried out, except that the bank did not procure the judgment until September, 1897. It is charged that the agreement above stated was made by the Reeds in consequence of the fraud and undue influence of the directors and attorney of the bank, and that by means thereof the Reeds were prevented from appearing in the action and making said defenses thereto. According to the allegations of the complaint, the Reeds were ignorant of their legal rights in the matter, and of the facts constituting said defenses and of the meaning of legal terms and processes, and relied on the attorney for the bank and its officers for advice as to their rights and information as to the facts; that they had great confidence in the said attorney and officers, with whom they had been for many years on terms of friendship and close acquaintance; that John S. Reed was mentally weak and infirm to such an extent that he more readily yielded to the fraud and undue influence exercised, and that by certain false protestations of friendship, fraudulent solicitations, requests, and concealment of the facts, all of which are stated at great length, the execution of the agreement, and consequent failure to appear and defend, was procured by said attorney and officers. The court expressly found that neither the said officers or said attorney ever made any false statement or representation to John S. Reed, or deceived him, or did any act, or made any statement or representation to him, or gave him any advice, for the purpose of defrauding him or gaining any advantage to themselves or to the said bank, and that neither of them ever made any false protestations of friendship or false statement whatever to Anna M. Reed, or did any act, or made any statement to defraud her, or obtain any advantage over her, in favor of the bank, and that she did not rely on the friendship or advice of either of them in the matter. The findings also specifically negative each of the particular allegations of fact which make up the charge of undue influence, and further declare that the agreement above mentioned was made by each of the Reeds freely and voluntarily, with full knowledge of all the facts involved, and was not induced by any false or fradulent representations whatever. There was evidence sufficient to sustain these findings, and this alone was sufficient to support the judgment, regardless of the evidence or findings with respect to the alleged defenses to the notes and mortgages sued on.

It is claimed that the court erred in the admission and rejection of evidence relating to this branch of the case. In view of the express findings above recited, these alleged errors are immaterial. Many of them relate to the mental condition of John S. Reed at the time of the transactions in controversy. The fact that he was in a weak mental condition, and therefore more easily subject to undue influence or fraud, although not insane, or incompetent to contract, was a legitimate subject of proof under the allegations of the complaint. But with the facts above established, that no fraud or deceit was practiced upon him, and no acts of undue influence used upon him, his weakness of mind and susceptibility to such fraud and undue influence as might have been, but was not practiced upon him, became entirely immaterial. It is not claimed that his mental weakness was sufficient to make him insane or incompetent to make contracts. Other rulings complained of relate to the other branches of the case, and are, consequently, immaterial, or they were cured by the subsequent examination of the witness, in which the testimony at first excluded was, in substance, given. It is not necessary to notice them in detail.

Another point made upon the appeal requires some consideration. It is contended that, irrespective of the question of undue influence and fraud, the judgment sought to be set aside was obtained through the mistake of the Reeds regarding the facts constituting the alleged defenses, and that if this be true the judgment should be set aside regardless of the good faith of the other parties thereto. Evidently the complaint was not drawn upon any such theory, and it is at least doubtful if this claim was made upon the trial. Some of the errors complained of relate to the subject of mistake and, waiving any failure to predicate the case upon this ground, we think it proper to consider them. Evidence was admitted of a verbal agreement between the bank and John S. Reed that there should be a charge of the excess of interest over seven per cent. which constituted a part of the consideration of the notes. Objection was made to this evidence by the plaintiff. It is urged that the agreement was invalid unless it was in writing, and consequently that no evidence should be received thereof. The offer of the evidence by the defendant was substantially an admission that there was no written contract for such a charge of interest, and we cannot perceive how it could be injurious to plaintiff so far as it tended to prove the absence of such written agreement. So far as it tended to prove knowledge on the part of John S. Reed of the fact that there was no written agreement for such interest, and that there was such a charge contained in the account in settlement of which the notes were given, it was competent, material, and relevant evidence to prove that the notes were not executed by him under any mistake concerning that item, if any such issue was presented. If there was no such issue, then, necessarily, the testimony was harmless in view of the other findings mentioned. There is no claim that he was ignorant of the fact, however.

It is further claimed that the Reeds were mistaken in believing that the first mortgage was paramount to the homestead, whereas, in fact, as it is claimed, a defect in the certificate of acknowledgment to the mortgage made its recordation void and rendered the mortgage subject to the subsequently recorded homestead, and the agreement for judgment was made without knowledge of this defect or of their rights under the homestead in consequence thereof. The alleged defect consisted in the interpolation in the certificate of the word "who" as hereinafter noted. The following copy of the material parts of the certificate shows the word in italics: "On this [giving date], before me [stating name and official character], personally appeared John S. Reed, personally known to me to be the same person described in, whose name is subscribed to, and who executed the within instrument, and *who* acknowledged to me that he executed the same." "It is the policy of the law to construe certificates of acknowledgment liberally, and not to allow a conveyance to be defeated by unsubstantial objections. If words of equivalent import to those of the statute are employed it is sufficient, and the certificate will not be vitiated by unsubstantial clerical errors, nor by the omission of words not essential to an intelligent understanding of its meaning. Where it contains everything required by the statute to be included therein, it will not be vitiated by the insertion of unnecessary words, but such words may be regarded as surplusage." 1 Cyc

583. The purposes of the law in requiring an acknowledgment are to entitle the instruments to record, to prevent disputes concerning the execution of instruments admitted to record, to make them admissible in evidence and to give notice to those examining the record that such execution has been made with due care and circumspection. It is manifest that the officer himself would not be permitted to dispute the sufficiency of the form of the certificate here made, and equally clear that no one, upon looking at the record, would be in doubt as to the fact that John S. Reed did actually acknowledge to the officer that he executed the mortgage. The certificate may fairly be construed to contain a statement to that effect. A very technical construction might show it to be wanting in such a statement and make the clause in question meaningless. Such a construction, however, is to be avoided wherever the words are reasonably susceptible of an interpretation which will give meaning to all its clauses and make it legally effective. We do not think the certificate in question so defective as to render the recordation of the mortgage nugatory and make the homestead paramount thereto. It follows that this supposed defense to the foreclosure suit did not exist, and that it could not be the foundation of a cause of action to set aside the judgment of foreclosure.

The other alleged errors are not of sufficient importance to require notice.

The order is affirmed.

We concur: VAN DYKE, J.; ANGELLOTTI, J.

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148 Cal. 58)

HELLMAN et al. v. LOGAN et al.

(S. F. 3,452.)

(Supreme Court of California. Oct. 9, 1905.)

1. VENUE—PARTIES—RESIDENCE.

Where a complaint on a note and to foreclose a pledge of stock was filed against the pledgor and the corporation in the county of the corporation's residence, and alleged that the corporation claimed some lien on or interest in the stock, which was subject to plaintiffs' rights, and prayed that plaintiffs' debt be declared a first lien on the stock and that the corporation's interest was subsequent to plaintiffs' rights, the corporation was an indispensable party, so that the defendant pledgor, who was a resident of another county, was not entitled to have the venue changed to the county of his residence, under Code Civ. Proc. § 395, providing that actions shall be brought in the county in which the defendants, or some of them, reside, etc.

2. SAME—CHANGE OF VENUE.

The fact that plaintiffs might have maintained an action for part of the relief to which they were entitled, in which only the pledgor could properly have been made a defendant, did not authorize a change of venue of the action alleged.

3. SAME — APPLICATION — DEFENDANTS — JOINDER.

Where the venue of an action as alleged was properly laid, the joinder of all the defendants in a motion for change of venue did not make the change imperative.

Department 1. Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

Action by I. W. Hellman, Jr., and others, against A. D. Logan and the Grangers' Business Association. From an order denying defendants' application for a change of the place of trial, they appeal. Affirmed.

Houghton & Houghton and Octave Du Py, for appellants. E. S. Pillsbury and F. D. Madison, for respondents.

SHAW, J. The defendants appeal from an order denying their application for a change of the place of trial of the action.

The suit was begun in the superior court of the city and county of San Francisco. A. D. Logan was then and still is a resident of Glenn county, and the Grangers' Business Association was then and still is a resident of San Francisco. The ground of the motion is that, Logan being a resident of Glenn county, the city and county of San Francisco is not the proper place of trial, under section 395, Code Civ. Proc. The complaint states a cause of action upon a promissory note executed by the defendant Logan, secured by a pledge of certain shares of stock in the defendant corporation. The defendants contend that Logan was the only proper or necessary party to the action; that no cause of action is alleged against the corporation defendant; and that the plaintiffs cannot defeat the right of Logan to have the cause tried in the county of his residence by making a person residing in San Francisco a party defendant, and stating no cause of action against him, or in any case where such codefendant is not a necessary party. With respect to the corporation defendant, the complaint alleges "that the defendant Grangers' Business Association claims some lien or interest upon said shares of stock by reason of some alleged contractual relation between said defendant and the defendant A. D. Logan, the nature and extent of which lien or interest are unknown to plaintiffs, but plaintiffs allege that said lien or interest, if any there be, is subsequent and subject to plaintiffs' rights in the premises." The relief asked concerning this alleged claim of the corporation defendant is that plaintiffs' debt be declared a first lien on the property, and that it be adjudged "that the lien or interest of the defendant Grangers' Business Association in or to said stock, if any there be, is subject and subsequent to plaintiffs' rights in the premises," and that the said stock be sold and the proceeds applied to plaintiffs' debt by a commissioner appointed for that purpose. It is, of course, true that if plaintiffs had desired no other relief than to obtain a judgment against Logan, and a sale of Logan's interest alone in the stock to satisfy such judgment, the Grangers' Business Association would have been neither a proper nor a necessary party. But the allegation is that the association makes some claim to the stock. A suit against Logan alone would have left the stock, after the judicial sale, subject to the claims of the association, or, at all events, without a foreclosure thereof. It was the right of the plaintiffs to have all of those claims, whatever they may have been, foreclosed by the suit and disposed of by the sale, so that purchasers thereat would obtain absolute title, and thus be induced to offer a higher price. In order to obtain relief of this character, it was not only proper, but indispensably necessary, that the Grangers' Business Association should be made a party defendant. It was not requisite to this necessity that the Association should have an actual interest in the property pledged, nor that the complaint should aver that it had such interest. It was enough to show that it made some claim thereto; for the plaintiff who seeks a judicial sale of pledged property to satisfy his debt is entitled to have a foreclosure of all claims, as well as all subordinate interests, so that he may obtain the full benefit of a sale of all outstanding subordinate interests in the property, free from all claims of every character, whether well founded or not.

The fact that the plaintiffs might have maintained an action for a part of the relief to which they were entitled, and that in an action for such limited relief no person, except Logan, could properly be made a defendant, would not justify a change of venue of the action which they have stated in the complaint. The test is to be made by ascertaining who are necessary parties to the action as it is set forth in the complaint, and what parties are necessary in order to enable the plaintiffs to obtain all the relief which is properly included in the prayer for relief made therein. Greenleaf v. Jacks, 133 Cal. 506, 65 Pac. 1039; Quint v. Dimond, 135 Cal. 572, 67 Pac. 1034. If one of the parties who are thus made necessary resides in the county in which the action is begun, the action is properly begun and may be properly tried in that county, although the other and principal defendant resides in another county. Code Civ. Proc. § 395. The case of Sayward v. Houghton, 82 Cal. 628, 23 Pac. 120, is not contrary to this conclusion. The decision in that case was put upon the grounds that the resident codefendant, which was a corporation, was not in any sense interested in the action; that no cause of action was stated against it; and that the plaintiff could obtain all the relief he demanded without making it a party. This is the effect given to the opinion in Greenleaf v. Jacks and Quint v. Dimond, supra, and anything therein pointing to a different conclusion must be considered as modified by those cases. None of the above-mentioned grounds upon which the decision in that case was based exist in the case at bar.

The joinder of all the defendants in the motion to change the venue does not make the change imperative. Quint v. Dimond, supra.

The order is affirmed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

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148 Cal. 87

KING-KEYSTONE OIL CO. v. SAN FRANCISCO BRICK CO. (S. F. 3,487.)

(Supreme Court of California. Oct. 11, 1905.)

1. SALES—CONTRACT—COVENANT TO PURCHASE.

Where a written contract between plaintiff and defendant, signed by both, provided that plaintiff, for and in consideration of "the following covenants" to be kept by defendant, agreed to sell to and deliver to defendant all the petroleum to be used for fuel at his works in quantities designated at a specified price per barrel, and that all oil delivered under the contract during the previous month should be paid for on or before the 28th day of each month, a covenant on the part of defendant to purchase such oil would be implied.

2. SAME — BREACH — ACTIONS — ISSUES AND PROOF.

Where plaintiff sued for breach of a written contract for the sale of oil and defendant answered, denying that it had ever agreed to receive or purchase the oil, but admitted the execution of certain written contract with reference to the purchase of oil, which was pleaded in full, and which contained an implied agreement on defendant's part to purchase the oil, it was not necessary for plaintiff to prove such agreement.

Department 1. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the King-Keystone Oil Company against the San Francisco Brick Company. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Affirmed.

Fisher Ames, for appellant. Haven & Haven, for respondent.

SHAW, J. This was an action by the plaintiff to recover of the defendant damages arising for the breach of a contract for the sale of oil by the plaintiff to the defendant. Judgment was given in favor of the plaintiff, the defendant's motion for a new trial was denied, and from the judgment and order denying the new trial the defendant appeals.

The only point made upon the appeal is that the case fails to show that the defendant agreed to buy the oil in controversy. The complaint alleges that by the contract "plaintiff agreed to sell and deliver to defendant, and defendant agreed to receive and purchase from plaintiff, all the petroleum or oil to be used for fuel by the defendant, at its works situated in San Francisco," for the period of one year. The answer denies that the parties ever executed a contract whereby the plaintiff agreed to sell or deliver to defendant, or defendant agreed to receive or purchase from plaintiff, all or any of the petroleum or oil to be used for fuel or any other purpose by the defendant at the said works, and alleges that the only contract entered into was a certain contract in writing which is set out in full. The substantial parts of the contract thus set forth are as follows: "This agreement in duplicate made this 13th day of December, 1900, by and between the King-Keystone Oil Company, * * * the party of the first part, and the San Francisco Brick Company, the party of the second part, witnesseth, that the said party of the first part for and in consideration of the following covenants to be duly kept and performed by the party of the second part, does hereby agree to sell and deliver to the party of the second part all the petroleum to be used for fuel at its said works situate in the city and county of San Francisco, California. Said petroleum to be delivered in quantities of 700 to 1,000 barrels of 42 gallons each per month for the next 60 or 90 days from the date hereof, and all deliveries thereafter to be at the rate of 1,200 or 2,000 barrels of 42 gallons each per month. It is further agreed that upon 60 days' notice from the party of the second part the party of the first part agrees to deliver to the party of the second part from 3,000 to 4,000 barrels per month, if the party of the second part should require the same. The price of all oil delivered under this contract to be $1.12 per barrel of 42 gallons loaded in tank wagons of the party of the second part at the works of said party of the first part at 415 Berry street, San Francisco. All oil delivered under this contract to be paid for on or before the 28th day of each month for all deliveries during the preceding month at the price above named." This contract is signed by both parties, and was to remain in force for one year. There are other provisions relating to other matters which are not material to the question before the court.

The contention of the defendant is that this contract contains no covenant on the part of the defendant to buy the oil which the plaintiff agrees to sell, and consequently that it does not sustain the allegation of the complaint that the defendant agreed to receive and purchase the oil in question. The contract in this respect is precisely the same in legal effect as that construed in Preble v. Abrahams, 88 Cal. 245, 26 Pac. 99, 22 Am. St. Rep. 301. In that case, as in this, the contract was signed by both parties, but there was no language expressing an agreement on the part of Abrahams, the purchaser, to buy the property which the other party agreed to sell. Suit was brought by the seller to enforce the contract of Abrahams to make the purchase, and it was alleged that the covenant to purchase on the part of Abrahams was omitted from the contract by the mutual mistake of the parties, and the plaintiff asked that the contract be reformed by inserting the omitted part and thereupon enforced. The court say with respect to this contract: "Everything relating to reformation of the contract may be eliminated from the case, because the contract as reformed means just what it did before it was reformed. Without any reformation, it obligated the defendant as strongly to buy and pay the price specified for the land as it did the plaintiff to sell it for that price." So in the case at bar, in which the contract is much more complete and certain in this respect than the one considered in Preble v. Abrahams, there is a clearly implied agreement on the part of the defendant to buy the oil which the plaintiff thereby agreed to sell. It was not necessary, therefore, under this state of the pleadings, for the plaintiff to offer any evidence in support of this allegation. It was admitted by the answer, and constituted a part of the facts of the case without being expressly stated in the findings. The findings, however, set out the contract in full.

There are no other points made by the defendant which require notice. They are all dependent upon, and relate to, the question of the proper construction of the contract in the respect above mentioned.

The judgment and order are affirmed

We concur: ANGELLOTTI, J.; VAN DYKE, J.

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148 Cal. 80

OLSON v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 3,424.)

(Supreme Court of California. Oct. 10, 1905.)

TAXATION—PLACE OF TAXATION—SHIPPING—HOME PORT.

U. S. Comp. St. 1901, p. 2808, provides that every vessel shall be registered by the collector of the district which includes the home port, which port shall be deemed to be that nearest to which the owner, or, if more than one, the managing owner, of such vessel usually resides. Rev. St. U. S. §§ 4159, 4160 [U. S. Comp. St. 1901, pp. 2823, 2824], provide for a temporary registration, when for some reason a vessel cannot be registered at her home port, to enable her to engage in commerce until she reaches her home port. Pol. Code, § 3644, provides that all vessels, except ferry boats, which may be registered or are required to be registered, must be assessed only in the county or city where the same are registered. Section 3645 provides that vessels registered and plying in whole or in part in the waters of the state, the owners of which reside in the state, must be assessed in the state. Section 3646 provides that all boats and small craft not required to be registered must be assessed in the county where their owner resides. *Held*, that a vessel engaged in commerce on the high seas was taxable in the city and county of San Francisco, where the managing owner of the vessel resided there, although she had been temporarily registered in Washington, had received no permanent registration at San Francisco, and had never been in the waters of California, and though some of her owners resided without the state.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 13, 200, 436.]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Oliver J. Olson against the city and county of San Francisco. From an order denying plaintiff a new trial, he appeals. Affirmed.

Rehearing denied November 9, 1905.

Devoto & Richardson, for appellant. Franklin K. Lane, City Atty., Percy V. Long, City Atty., and W. I. Brobeck, Asst. City Atty., for respondent.

ANGELLOTTI, J. This is an action to recover $264.55, taxes paid under protest, which were levied by defendant upon the lumber schooner Oliver J. Olson for the fiscal year 1901–02. Defendant had judgment, and plaintiff appeals from an order denying his motion for a new trial.

The contention of plaintiff is that the vessel was not subject to taxation in this state for the fiscal year 1901–02. The material facts are as follows, viz.: The vessel was constructed in the state of Washington in the year 1900. At 12 o'clock m. of the first Monday of March, 1901, she had never been in the waters of California, but, having received temporary registration at Port Townsend, Wash., on December 31, 1900, had thenceforth been engaged in commerce on the high seas between said Port Townsend and Sidney, Australia, and Callao, Peru, and consequently had not received permanent registration at San Francisco. At all times since her launching she was owned by some 20 persons; some residing in the city and county of San Francisco, Cal., and some in the state of Washington. At all said times the plaintiff was the managing owner of the vessel, and resided in the city and county of San Francisco, Cal. The temporary certificate of registration of the vessel described her as "of San Francisco." There is nothing in the record to indicate that the conditions as to the vessel were such as to give her an actual or legal situs in the state of Washington, unless that result was effected by her temporary registration at a port within that state, or by the fact that some of her owners, not including the managing owner, resided therein. She was not engaged exclusively within the waters of that state, and was only temporarily therein at certain times, as an incident to her employment as an instrument of commerce on the high seas.

Tangible personal property is ordinarily taxable only in the state wherein it is physically situated. The state wherein such property has its actual situs may always tax it (see Pullman's Car Co. v. Pennsylvania, 141 U. S. 18, 22, 11 Sup. Ct. 876, 35 L. Ed. 613); and, while it has been held that it is within the power of a state to tax such property owned by its residents outside of the state (see same case, page 31 of 141 U. S., page 881 of 11 Sup. Ct. [35 L. Ed. 613]), such power is seldom exercised by a state, as it would lead to double taxation. In the case of such property the actual situs is, therefore, generally the essential factor in determining the question of taxibility, and the residence of the owner is immaterial. When, however, we come to seagoing vessels engaged in foreign or interstate commerce, and not employed in such commerce wholly within the waters of any one state, a species of personal property capable of private ownership and, as such, taxable, we find that from the nature of the property a different rule has necessarily been adopted. Such a vessel cannot be said to have an actual permanent situs. She goes where she may be called in the business in which she is engaged, and is in port in any jurisdiction only as an incident to that business, and therefore cannot properly be held to have an actual situs within any particular state. Under our shipping laws, however, every such vessel has what is called her "home port," the port to which she belongs, and which constitutes her legal abiding place or residence, regardless of her actual absence therefrom. It is only in the collection district embracing such port that she may be permanently registered. It is provided in section 4141 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 2808] that "every vessel, except as hereinafter provided, shall be registered by the collector of the collection district which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the owner if there be but one, or, if more than one, the husband or acting and managing owner of such vessel usually resides." The exception referred to in this section relates to the temporary registration of vessels provided for by other sections, granted, when for some reason a vessel cannot, owing to absence therefrom, be registered at her home port, for the purpose of enabling her to clear and engage in commerce until she reaches her home port, when such temporary registration must be surrendered. Sections 4159, 4160, Rev. St. U. S. [U. S. Comp. St. 1901, pp. 2823, 2824]. Such registration is purely temporary in character, and necessarily implies that the home port is at a different place from that at which the temporary registration is effected (see Morgan v. Parham, 16 Wall, 471, 474, 21 L. Ed. 303), and that the vessel is not, in any proper sense, abiding within the limits of the district wherein such temporary registration is effected.

There can be no question, upon the facts hereinbefore stated, that the home port of the vessel here involved was, at the time of her temporary registration, the port of San Francisco, and that there was no change in this respect up to and including the first Monday of March, 1901. It appears to be thoroughly settled that the legal situs of such a vessel for the purpose of taxation is in her home port, and that her physical absence therefrom cuts no figure. For such purpose she is deemed to be at such place, and is taxable only within the state in which such place is situated. See People v. Com'rs, 58 N. Y.

242; Morgan v. Parham, supra; Hays v. Pacific Mail S. S. Co., 17 How. 596, 15 L. Ed. 254; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 210, 5 Sup. Ct. 826, 29 L. Ed. 158; Pullman's Car Co. v. Pennsylvania, supra; Johnson v. Merchants' Line, 37 Fla. 499, 19 South. 640, 37 L. R. A. 518, note. It is held that such a vessel may, by being indefinitely and exclusively employed within the waters of another state, acquire an actual situs therein which will permit of her taxation there (see Old Dominion St. Co. v. Virginia, [U. S.] 25 Sup. Ct. 686, 49 L. Ed. 1059; National Dredging Co. v. State, 99 Ala. 462, 12 South. 720); but this conclusion is founded on the proposition that by actual use the vessel has acquired a permanent actual situs in another state, and is no longer actually engaged in foreign or interstate commerce, except within the limits of such state (see Old Dominion St. Co. v. Virginia, supra). No such condition exists here, and it is universally recognized that, in the absence of the acquirement of any permanent actual abiding place elsewhere, the rule as to situs for taxation is as first stated above.

In the application of that rule, questions may sometimes arise as to the place within the state, including the home port, where the vessel may be taxed, where the owner resides without the limits of the city where the vessel is registered (see Hooper v. Baltimore, 12 Md. 464); but no such question exists here, in view of the residence of the managing owner within such city and county of San Francisco. The decisions enunciating the general rule generally show that the vessel has been, in fact, registered at her home port, viz.: the port at or nearest to which, at the time of registration, the husband or acting and managing owner usually resides, and some of the opinions speak of the actual permanent registration at a place as determining the home port. But it is apparent that the vessel may have a home port prior to such registration. This home port, under the terms of the statute, conclusively determines the place of registration, and in many cases, as in the case at bar, the vessel with a home port precisely and definitely located, cannot at once be there permanently registered, but must work under a temporary registration. This condition cannot affect the rule requiring taxation to be at the home port, the legal situs of the vessel, the only place at which she can properly be said to be permanently located. In Com. v. Am. Dredging Co., 122 Pa. 386, 391, 15 Atl. 443, 444, 1 L. R. A. 237, 9 Am. St. Rep. 116, it was said: "The rule as to vessels engaged in foreign or interstate commerce is that their situs, for the purpose of taxation, is their home port of registry, or the residence of their owner, if unregistered. * * * These vessels, if they may be so called, were not registered. Hence their situs for taxation is the domicile of the owners. This rule must prevail, in the absence of anything to show that they are so permanently located in another state as to be liable to taxation under the laws of that state." This is but another way of stating that the taxation must be in the state of the home port, at which alone the vessel may be registered. It is also clear, under the statute and decisions, that, where the vessel has several owners, it is only the residence of the managing owner that is material. It is therefore apparent that neither the temporary registration in Washington, nor the residence in that state of one or more of the owners, exclusive of the managing owner, can affect the question before us. Under the well-settled law, this vessel had its legal situs in the city and county of San Francisco on the first Monday of March, 1901, and for the purpose of taxation was at that time within that city and county. It was "property in the state," within the meaning of those words as used in section 1, art. 13, of the Constitution, relating to revenue and taxation, and was by such provision required to be taxed here. As was held in the Pennsylvania case last cited, this must be the rule, in the absence of anything to show such a permanent location elsewhere as to make the vessel liable to taxation there.

Counsel for plaintiff contend that sections 3644 to 3646 of the Political Code specify the only cases in which a vessel other than a ferry boat may be taxed in this state, and that the facts of this case do not bring the vessel within the provisions of such sections. In view of the section of the Constitution requiring all property in the state not specially exempted by constitutional provision to be taxed (section 1, art. 13), the Legislature could not, of course, exempt from taxation a vessel having its legal situs in this state. See Mackay v. San Franciso, 113 Cal. 392, 401, 45 Pac. 696. We are, however, of the opinion that no attempt to do so is evidenced by the sections relied on. Section 3607, Pol. Code, contains the same requirement as to the taxation of all property in the state as does the Constitution. Sections 3644 and 3646 are manifestly nothing more than regulations fixing the particular place within the state, where certain vessels taxable in the state must be assessed and the taxes paid. Section 3646 is in no way applicable here, and the utmost effect that could reasonably be given to section 3644 in favor of plaintiff would be to hold that it forbids the assessment of any unregistered vessel in any other county or city and county of the state than that in which it is required to be permanently registered. It certainly cannot be contrued as exempting altogether from taxation a vessel which has not been registered, or as making the temporary registration elsewhere a bar to taxation here. By section 3645 it was attempted simply to provide for the taxation in this state of vessels permanently registered, licensed, or enrolled outside of the state, where such vessels ply in whole or in part in the waters of this state, and the owners reside in this state. That section is not relied on by defendant in this case, and, under the facts of the case, is in no way applicable. The case of San Francisco v. Talbot, 63 Cal. 486, is not in point. The vessel there involved was permanently registered in Washington Territory where the managing owner resided, did not ply in whole or in part in the waters of this state, and was only transiently herein, where some of the owners, other than the managing owner, resided. Obviously, under the views herein expressed, this vessel was not taxable here, and nothing is said in the opinion in that case at all in conflict with what has here been said.

The finding that plaintiff was the managing owner, and that he resided in the city and county of San Francisco, which is not attacked, renders immaterial the finding complained of as to the residence of the other owners. The amount of interest of the managing owner was also an immaterial factor. The finding that the city and county of San Francisco was the home port of the vessel was not as claimed outside of the issues.

The order denying the motion for a new trial is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

MEYER v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 3,423.)

(Supreme Court of California. Oct. 10, 1905.)

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Albert Meyer against the city and county of San Francisco. From an order denying a new trial, plaintiff appeals. Affirmed.

Rehearing denied November 9, 1905.

Devoto & Richardson, for appellant. Franklin K. Lane, City Atty., Percy V. Long, City Atty., and W. I. Brobeck, Asst. City Atty., for respondent.

ANGELLOTTI, J. This is an appeal from an order denying plaintiff a new trial in an action to recover taxes on a vessel, paid under protest. The legal question involved is the same as that presented by the appeal in Olson v. City and County of San Francisco (S. F. No. 3,424; this day decided) 82 Pac. 850. For the reasons stated in the opinion filed in that case, the order denying the motion for a new trial herein is affirmed.

We concur: SHAW, J; VAN DYKE, J.

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148 Cal. 129

OTIS et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY. (S. F. 4,193.)

(Supreme Court of California. Oct. 12, 1905.)

1. Contempt—Prosecution—Appeal—Scope of Review.

As every court is the exclusive judge of its own contempt, its judgment is subject to review only on the point of jurisdiction.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Contempt, §§ 213, 223.]

2. Same—Judgment Record—Requisites.

A judgment convicting of a contempt of court is invalid, unless the record of the conviction shows on its face that the matters charged were within the court's jurisdiction.

3. Same—Initiatory Affidavit.

Where petitioners were convicted of contempt in criticising proceedings of a grand jury, their acts not being done in the immediate presence of the court, it was essential that the initiatory affidavit should contain a recital of the acts charged, and show that they constituted a legal contempt.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Contempt, § 146.]

4. Same—Acts of Corporation—Liability of Officers.

Where a contempt for which petitioners were convicted consisted in the publication of certain articles criticising the proceedings of a grand jury in a newspaper published by a corporation, and the affidavit merely alleged that the petitioners were the president and general manager and vice president and assistant general manager of the corporation at all times mentioned therein, it was fatally defective for failure to charge that they personally caused, or, being in control, at least permitted, the publication of the articles in question.

In Bank. Certiorari, on petition of H. G. Otis and another to review the judgment of the superior court of Los Angeles county convicting petitioners of contempt. Judgment annulled.

Hunsaker & Britt, for petitioners. J. D. Fredericks and Hartley Shaw, for respondent.

BEATTY, C. J. This is a petition for the writ of certiorari to bring up for review the judgment of the superior court convicting the petitioners of a contempt, alleged to have been committed by the publication in successive issues of the Daily Times, a newspaper published in Los Angeles, of a series of articles criticising the proceedings of the grand jury in respect to matters then under investigation. The petition sets out very fully all of the proceedings in the matter of the alleged contempt, and the question as to the validity of the judgment of the superior court has been submitted on general demurrer to the petition.

There are some propositions included in the case that have been so often decided and are so entirely unquestioned by counsel that they may be briefly stated without any citation of authority. Every court is the exclusive judge of its own contempts, and its judgment is subject to review only upon the point of jurisdiction. But every court in a contempt proceeding exercises a strictly limited jurisdiction, and its judgment convicting of a contempt is invalid, unless the record of the conviction shows upon its face that the matter charged was within its jurisdiction. If the contempt consists of acts done in the immediate view and presence of the court, the judgment must contain a recital of the acts, and must show by its recitals that they were committed in the presence of the court by the party charged, and the acts must come within the legal definition of a contempt. If, as in the present case, the alleged contempt consists in acts not done in the immediate view and presence of the court, it is essential to the jurisdiction that the affidavit upon which the citation is issued should contain everything that in the other case must be recited in the judgment; for nothing can be proved that is not charged, and if the affidavit is materially defective the judgment founded upon it must necessarily be equally defective.

The contention of petitioners is that the affidavit upon which they were cited to show cause why they should not be punished is materially and fatally defective in failing to allege that they were the publishers of the articles which were found to have constituted a contempt of the court. No very serious attempt is made by counsel to combat the careful and able opinion of the respondent in support of his conclusion that the articles in question did constitute a contempt, but they do show that the affidavits failed to connect the petitioners with the publication either by direct averment that they were the publishers, or by any statement of facts leading necessarily to that conclusion. The affidavits, after setting out the articles complained of, and showing that on certain dates they were published in the Los Angeles Daily Times, contained the following averments: "Affiant further says that he is informed, and so alleges it to be a fact, that H. G. Otis is the president and general manager of the Times Mirror Company, the publishers and printers of the said Los Angeles Daily Times, and that he was such president and general manager at all of the times herein mentioned, and that Harry Chandler is the vice president and assistant general manager of said Times Mirror Company, and that he was such vice president and assistant general manager at all of the times herein mentioned." This was not sufficient. An officer of a corporation is not criminally answerable for any act of a corporation in which he is not personally a participant, and it does not follow as a legal conclusion that the manager or assistant manager of a corporation engaged in the publication of a daily newspaper acts at all times, or even at any time, as its editor. To make the petitioners liable in contempt for matter appearing in the Times, it was necessary to show, and therefore essential to charge, that they personally caused, or, being in control, at least permitted, the publication of the articles in question.

On the legal propositions involved in the case, it is, as above intimated, superfluous to cite authority; but we refer to two of our most recent decisions: Rogers v. Superior Court, 145 Cal. 88, 78 Pac. 344; Hutton v. Superior Court (Cal. Sup.) 81 Pac. 409.

The judgment convicting the defendants of contempt is hereby annulled.

We concur: McFARLAND, J.; HENSHAW, J.; VAN DYKE, J.; ANGELLOTTI, J.

SHAW, J., did not participate in the decision of the case.

148 Cal. 262

Ex parte SOHNCKE. (Cr. 1,273.)

(Supreme Court of California. Nov. 27, 1905.)

1. STATUTES—PASSAGE—TIME OF TAKING EFFECT.

Act March 20, 1905 (St. 1905, p. 422, c. 354), regulating chattel loans, prescribed no time when it should take effect, and did not, therefore, become effective until May 19, 1905, under Pol. Code, § 323, providing that every statute, unless a different time is prescribed therein, takes effect on the sixtieth day after its passage.

2. SAME—INCONSISTENCIES—REPEAL.

Act March 20, 1905 (St. 1905, p. 422, c. 354), regulating chattel loans, did not become effective until May 19, 1905, and Act March 21, 1905 (St. 1905, p. 711, c. 550), relating to the same subject, in terms, became effective on its passage. *Held* that, with reference to inconsistencies between the two acts, the provisions of the act of March 21st would not control, nor repeal those of the act of March 20th, if the conflicting parts of the later act were unconstitutional.

3. SAME—GENERAL LOSS—UNIFORMITY OF OPERATION.

Act March 21, 1905 (St. 1905, p. 711, c. 550), provides for the incorporation of associations to lend money on personal security; and section 12 (page 714) declares that no person, firm, or corporation other than corporations organized under the act shall receive any interest greater than 1½ per cent. a month for loans of less than $300 on security of certain specified personal property, and declares that any person violating the provisions shall be guilty of a misdemeanor, and be punished by a fine of $100 for the first offense and by like fine and imprisonment in the county jail for 30 days for the second and each subsequent offense, with the forfeiture of interest on the loan; and section 13 declares that any corporation organized under the act, which shall violate its provisions, shall be liable to a penalty of $100 for each and every day of the continuance of such violation, and shall forfeit its right to do business, also that any director, officer, or employé thereof violating the same shall be guilty of a misdemeanor, and be fined not exceeding $100, or be imprisoned in a county jail for not more than six months, or both. *Held,* that the offenses defined by section 12 and the penal provisions were unequal in operation, and that such section violated the constitutional provision that all laws shall be uniform in operation.

4. SAME.

Act March 20, 1905 (St. 1905, p. 422, c. 354), for the regulation of interest on chattel loans, declares that it shall be unlawful for any individual, etc., lending money on certain specified personal property, to charge more than 1½ per cent. a month interest, etc.; and section 2 (page 423) makes a violation of the act a misdemeanor punishable by fine and imprisonment. *Held,* that since such act regulates loans on chattel security on property mentioned therein, but does not apply to loans on other personal property permitted to be mortgaged by Civ. Code, § 2955, it violates Const. art. 1, § 11 providing that all laws of a general nature shall have a uniform operation.

5. CONSTITUTIONAL LAW — CLASS LEGISLATION.

Such act also violates Const. art. 1, § 21, forbidding the grant to a class of citizens of privileges and immunities not given on the same terms to all citizens.

6. SAME—EQUAL PROTECTION OF LAWS.

The act is also void, under Const. U. S. Amend. 14, as denying the equal protection of the laws.

In Bank. Application by K. Sohncke for writ of habeas corpus. Granted.

Charles W. Slack, for petitioner. John J. Allen, Dist. Atty., and W. H. L. Hynes, Deputy Dist. Atty. (Aylett R. Cotton, of counsel), for respondent.

VAN DYKE, J. The petitioner was charged and convicted of the crime of loaning $100 in money upon the security of a chattel mortgage upon certain furniture and household goods at a rate of interest exceeding 1½ per cent, a month, and charging more than $5 for the examination and valuation of the mortgaged chattels and the preparation of the mortgage. These acts are the subject of legislation in two laws passed by the Legislature of 1905 upon different days, namely, the act of March 20, 1905, entitled "An act fixing the rates of interest and charges upon loans on chattel mortgages on certain personal property, and prescribing the penalties for the violation of the act" (St. 1905. p. 422, c. 354), and the act approved March 21, 1905, entitled "An act to provide for the incorporation of associations for lending money on personal property, and regulating the same, and to forbid certain loans of money, property, or credit" (St. 1905, p. 711, c. 550). Each one of these laws made the particular acts charged in the complaint, upon which the petitioner was convicted, a misdemeanor. The petitioner was convicted and sentenced to pay a fine of $100, with imprisonment, if the fine was not paid. He asks to be released from custody on the ground that the above-mentioned statutes are unconstitutional. The act of March 20, 1905, prescribes no time when it takes effect; hence did not take effect until May 19, 1905. Pol. Code, § 323. The act of March 21st, by its terms, was to take effect immediately upon its passage. Under these circumstances, if the two acts are inconsistent, and both are otherwise valid, that of March 21st, so far as the inconsistency extends, will prevail, and the former act will stand to that extent repealed. Goodwin v. Buckley, 54 Cal. 295; County of San Luis Obispo v. Felts, 104 Cal. 66, 37 Pac. 780; County of Mariposa v. County of Madera, 142 Cal. 55, 75 Pac. 572. If, however, the conflicting part of the latter act is itself unconstitutional, and consequently void, it will not have the effect of repealing by implication the former act. McAllister v. Hamlin, 83 Cal. 361, 23 Pac. 357; Orange Co. v. Harris, 97 Cal. 602, 32 Pac. 594; Los Angeles v. Hance, 122 Cal. 77, 54 Pac. 387.

Upon an examination of the provisions of the act of March 21, 1905, we are of the opinion that the portions thereof which purport to make a criminal offense of the same acts which are the subject of legislation in the previous statute of March 20, 1905, are unconstitutional, and hence that they do not have the effect of repealing the prior act. This act of March 21st authorizes the formation of certain classes of corporations which are to be licensed and empowered to loan money in sums not exceeding $300 to any one person upon the security of pledges or mortgages of personal property, and to charge interest thereon at a rate not over 1½ per cent. a month, and certain sums for expenses in connection with such loans. By section 12 of this statute the acts charged against the petitioner in the complaint under consideration, when committed by any person except the corporations therein authorized, are made a misdemeanor, and punishable by a fine of $100 for the first offense, and by a like fine and imprisonment for 30 days in the county jail for the second and each subsequent offense, and also by a forfeiture of the interest thereon to the borrower. By section 6 the corporations thereby authorized are allowed to charge interest upon loans made by them "at a rate not exceeding 1½ per cent. a month," and by section 13 any director, officer, or employé of such corporation, who shall charge, take, collect, or receive any compensation on a loan beyond the charge therein allowed, "shall be guilty of a misdemeanor and be fined not to exceed $100 or be imprisoned in the county jail for not more than six months, or both." The same section provides that if a corporation organized under the act shall willfully violate any of the provisions of the act, by which any person shall suffer loss or damage, it shall forfeit its right to do business, and the Attorney General shall thereupon take the necessary legal measures to wind up and discontinue the business thereof. The offenses defined in section 12, as above mentioned, are made a misdemeanor by the terms of the section only when the acts constituting the offense are committed by some person, firm or corporation, other than corporations organized pursuant to this act." It is manifest that these provisions of the law transgress that provision of the Constitution requiring that all laws shall be uniform in operation. The same acts are made punishable by different degrees of punishment according as they may be committed by officers, servants, or employés of the corporations authorized by this particular statute, or by other persons or corporations. The punishment, if the acts are committed by officers of such special corporations, may be any sum less than $100, and the imprisonment for the second or any subsequent offense may be for any period less than six months. It will be seen that the punishment may be very much less in such cases than the fixed sum of $100 for the first offense and the same sum and imprisonment for 30 days for the second and each subsequent offense, which is imposed in case the crime is committed by some person other than the officers of such corporations. There can be no valid ground for such discrimination in favor of the officers of such special corporations. If the magistrates in the locality in which such corporations may be doing business should see fit, they could, by imposing light fines, practically allow such corporations to charge the forbidden rates, while all other persons would be prohibited from so doing. The uniformity of operation of the law would depend entirely upon whether or not the fines imposed upon such officers were, in all cases, made precisely the same as those imposed upon other persons, regardless of the character of the circumstances attending the offense. Such legislation is clearly a violation of the constitutional restriction. The penal clauses of section 12 of the act are therefore unconstitutional and void; and, being so, they cannot operate to repeal by implication the previous act of March 20th, nor can they otherwise affect the present case.

The remaining point in the case is the contention of the petitioner that the act of March 20, 1905, is unconstitutional. It is claimed that the law is not uniform in its operation upon those engaged in the business to which it relates, and therefore is contrary to the provision that all laws of a general nature shall have a uniform operation (article 1, § 11); that it secures special privileges and immunities to a part of those engaged in such business which are denied to others, and therefore is in violation of section 21, art. 1 of the Constitution, forbidding the granting to a class of citizens privileges or immunities which, upon the same terms, are not given to all citizens; and that it denies to some citizens the equal protection of the laws, and therefore is in violation of the fourteenth amendment to the Constitution of the United States. Section 1 of the act (St. 1905, p. 422, c. 354) is as follows: "It shall not be lawful for any individual, partnership, association or corporation lending money upon chattel mortgages, where there is taken for such loan any security upon any upholstery, furniture or household goods, oil paintings, pictures or works of art, pianos, organs or sewing machines, iron or steel safes, professional libraries or office furniture or fixtures, instruments of surveyors, physicians or dentists, printing presses or printing material, to have or charge for the use of money so loaned more than the rate of one and one-half per cent. per month interest thereon, and that no additional sum, either in the way of loans or otherwise, shall be required or exacted of the borrower or borrowers; and further, that no charge for examination or valuation of property offered, insurance of same, and preparation, execution and recording of necessary papers shall be imposed, except as follows: For examination or valuation of property offered for mortgage and preparation of papers (both included), no greater sum than five dollars, where the amount loaned does not exceed three hundred dollars. For necessary affidavits, recording of papers, and fire insurance premiums, the amounts actually to be paid for same, provided that the foregoing charges may be deducted from the principal of the loan when the same is made; and provided further, that in no case shall it be lawful to deduct interest in advance, nor make any charge for extension of loans, nor to divide or split up loans under any pretense whatsoever for the purpose of requiring or exacting any other or greater charges than prescribed herein." Section 2 of the act makes any violation of the provisions of the act a misdemeanor, punishable by a fine of $100 for the first offense, and a like fine and imprisonment in the county jail for 30 days for the second and each subsequent offense; and, further, that any agreement to pay interest above that allowed in the act shall be void.

A law which applies alike to all the subjects upon which it acts, or, in other words, a law which applies equally to all persons or things within a legitimate class to which, alone, it is addressed, does not violate the provision requiring laws of a general nature to have a uniform operation, and is neither local nor special. People v. Henshaw, 76 Cal. 446, 18 Pac. 413; Ex parte Halsted, 89 Cal. 472, 26 Pac. 961; Cody v. Murphey, 89 Cal. 524, 26 Pac. 1081; Abeel v. Clark, 84 Cal. 230, 24 Pac. 383; Summerland v. Bicknell, 111 Cal. 569, 44 Pac. 232; Hellman v. Shoulters, 114 Cal. 147, 44 Pac. 915, 45 Pac. 1057. In Hellman v. Shoulters, supra, the court says: "It has been uniformly held that a law is general which applies to all of a class —the classification being a proper one—and that the requirement of uniformity is satisfied, if it applies to all of the class alike. The word 'uniform' in the Constitution does not mean 'universal.' The section intends simply that the effect of general laws shall be the same to and upon all persons who stand in the same relation to the law—that is, all the facts of whose cases are substantially the same." The classification, however, is not a proper one for distinct legislation, if it is not founded upon some natural, intrinsic, or constitutional distinction, a distinction which bears some relation to, or furnishes cause for, the particular legislation embraced in the act. Pasadena v. Stinson, 91 Cal. 251, 27 Pac. 604; Darcy v. Mayor, 104 Cal. 645, 38 Pac. 500; Bruch v. Colombet, 104 Cal. 351, 38 Pac. 45; Rauer v. Williams, 118 Cal. 401, 50 Pac. 691; Budd v. Hancock, 66 N. J. Law, 135, 48 Atl. 1023; 26 Am. & Eng. Ency. of Law (2d Ed.) 683. Upon this subject the Supreme Court of the United States has said that the state, "in prescribing regulations for the conduct of trade, cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class, engaged in the same domestic trade, to do the same things with impunity," and that it cannot discriminate "by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exercise of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates." Connolly v. Union Sewer Pipe Co., 184 U. S. 563, 22 Sup. Ct. 440, 46 L. Ed. 679. This was said with respect to a law prohibiting combinations between persons engaged in trade, but exempting from its provisions farmers and stock raisers. A similar ruling was made in Illinois in regard to a statute restricting the number of persons a lodging house keeper could allow to sleep in a single room, but making no restriction upon the number that might be permitted by the keeper of a hotel or boarding house. Bailey v. People, 190 Ill. 28, 60 N. E. 98, 54 L. R. A. 838, 83 Am. St. Rep. 116. The business of loaning money is as much a part of domestic trade and commerce as any other legitimate business. There is no substantial reason why those who lend money in sums not exceeding $300 on chattel mortgages of upholstery, pictures or works of art, pianos, organs, sewing machines, safes, professional libraries, or office furniture or fixtures, instruments of surveyors, physicians or dentists, printing presses, or printing material should be limited in their charges, and the business they do in that respect made less profitable than it otherwise would be, while they, or others who lend on chattel mortgages upon instruments of a photographer, live stock, agricultural implements, equipments of livery stables, or other property allowed to be mortgaged by section 2955 of the Civil Code (St. 1905, p. 36, c. 40), and not enumerated in the act under consideration, or who lend upon pledges of any kind of personal property, or who lend in sums exceeding $300 upon any kind of security, should be allowed to exact any rate of interest or other charge which they can obtain from the borrower. It is a part of the same kind of business, and there is no distinction between the particular classes of persons or things affected by the act and those exempted from its provisions that will justify special legislation. It may be that such exorbitant charges should be absolutely prohibited, but, if so, the prohibition should be made general, and should extend to all who engage in the business as lenders on the one hand, and should protect all who are made the victims thereof on the other hand, without discrimination in favor of any. There is a clear distinction between this case and the case of Ex parte Lichtenstein, 67 Cal. 359, 7 Pac. 728, 56 Am. Rep. 713, in which the court held valid a law regulating the business of licensed pawnbrokers. The business of pawnbroking is one well known to the law, and constitutes of itself a distinct class of persons and things which may be properly regulated by a law applying to them alone, as was clearly held in the decision in that case.

We are of the opinion that the law violates the constitutional provisions above set forth, that the petitioner has been convicted of a crime which has no legal existence, and that the judgment of conviction is consequently void, and that the petition should be granted.

It is ordered and adjudged that the petitioner be forthwith discharged from custody.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

McFARLAND, J. I concur in the judgment discharging the petitioner.

148 Cal. 208

BURNS v. DUNHAM, CARRIGAN & HAYDEN CO. (S. F. 3,528.)

(Supreme Court of California. Nov. 11, 1905.)

1. Negligence — Evidence — Question for Jury.

In an action for injuries to plaintiff, while approaching defendant's store in a private passageway to the rear thereof, by being struck by a bale of oakum let fall from a suspended floor over the passageway, whether defendant was guilty of negligence in failing to exercise the highest degree of care in the handling of the oakum *held* for the jury.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 289.]

2. Appeal—Jurors—Denial of Challenge—Review.

Where a juror on his voir dire made conflicting statements as to his attitude, so that the evidence would have warranted a ruling either accepting or rejecting him, an order denying a challenge to his competency would not be reviewed on appeal.

3. DAMAGES—PERSONAL INJURIES—EVIDENCE.

In an action for damages for personal injuries, evidence as to the character, continuance, and extent of plaintiff's business after the injury was admissible, as bearing on the issue that because of such injuries plaintiff had been incapacitated from attending to his business, to show that the business continued, was of considerable volume, and that plaintiff regularly attended thereto after his injury.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 490.]

Department 2. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Isidore Burns against the Dunham, Carrigan & Hayden Company. From a judgment in favor of defendant and from an order refusing plaintiff's motion for a new trial, he appeals. Affirmed.

H. A. Powell and W. A. Dow, for appellant. Campbell, Metson & Campbell, for respondent.

HENSHAW, J. Plaintiff brought his action to recover damages for personal injuries alleged to have been received while in the store of respondent. Trial was had before a jury, verdict was for defendant, and, from the judgment which followed and from the order refusing his motion for a new trial, plaintiff appeals.

Defendant was a dealer in hardware merchandise. Plaintiff was familiar with its place of business, and had frequently visited its store upon business. One end of the store was used as a shipping department, and there had been constructed in that portion a U-shaped driveway, or runway, for the use of teams. It was in this driveway, a short distance from the entrance, that the accident occurred. There was a hanging floor along the side of the driveway, from which goods were thrown or lowered into the driveway, to be loaded on teams and transported. The space under this hanging floor was used for storing goods, and also provided a safe passageway for pedestrians entering or leaving the store by that particular entrance. On the day of the accident plaintiff was walking along the passageway, either entering or leaving the store. At the same time Conroy, an employé of defendant, was upon the overhanging floor, preparing to deliver two bales of oakum. The employé pushed one of the bales of oakum, weighing about 50 pounds, into the driveway. In falling it struck Burns, who had gone from the passageway into the driveway, and inflicted the injuries complained of.

Appellant's first contention is that the evidence is insufficient to justify the verdict. The court instructed the jury that "where a defendant is engaged in the handling of an object directly over a passageway where people travel, and have a right to travel, the law demands of the defendant that it exercise the greatest care and caution in the handling of such an object, in order that a person walking in such passageway may not be injured." It becomes unimportant here to consider whether the measure of care required of a storekeeper as to one who is upon his premises by invitation for purposes of business is the highest degree of care, as appellant contends upon the authority of Dixon v. Pluns, 98 Cal. 384, 33 Pac. 268, 20 L. R. A. 698, 35 Am. St. Rep. 180, and Knott v. McGilbray, 124 Cal. 128, 56 Pac. 789, or whether it is the ordinary and usual care announced as the rule in Schmidt v. Bauer, 80 Cal. 566, 22 Pac. 256, 5 L. R. A. 580; for the court instructed the jury that the greatest care was the rule of conduct, and, whether rightly or wrongly, that instruction became the law for the government of the jury upon that trial. But even under this rule it cannot be said as matter of law that the evidence was insufficient. The testimony is that when the employé picked up a bale of oakum, which was some four or more feet from the edge of the hanging floor from which it was thrown, he cried "All clear below!" three several times in so loud a tone of voice as to be heard by men in various parts of the runway, one of them 25 feet from the place of the accident. He shouted his warning again when at the edge of the hanging floor, and just before he threw the bale of oakum out into the runway he looked to make sure that no one was there. During all of this time the plaintiff was walking in the passageway under the hanging floor, was in a place of safety, and was not visible to Conroy. As Conroy called out "All clear below!" for the last time, and was in the act of pushing the bale off into the runway, the plaintiff, who was underneath the deck, "seemed to get excited and ran right out in the driveway and looked up." A teamster who was standing there cried "Look out!" The bale of oakum fell, struck him on the shoulder, and "kinder stumbled him forward; didn't knock him down." Of course, when any degree of care is required in the performance of an act, ordinary, great, or the highest, what constitutes the exercise of that particular degree always has relation to the nature of the act itself. And in this case the question was for the jury, under the evidence, to say whether the defendant had failed to exercise in the handling of goods in a private passageway in its own store (with all of which plaintiff was familiar) the degree of care which the instruction of the court demanded.

Appellant urges as error the fact that the court, after all of his peremptory challenges to the jurors had been exhausted, accepted, over his objection, Juror Pitcher. The case is the usual one where the juror, upon his voir dire, makes what seem to be somewhat conflicting statements as to his attitude. People v. Scott, 123 Cal. 434, 56 Pac. 102. There was sufficient conflict in the evidence to have warranted a ruling by the court either accepting or rejecting the juror, and in such a case, as said by the Supreme Court of the United States in Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244: "The finding of the trial court upon that issue ought not to be set aside by a reviewing court unless the error is manifest. No less stringent rules should be applied by the reviewing court, in such a case, than those which govern in the consideration of motions for new trial because the verdict is against evidence. * * * The case must be one in which it is manifest the law left nothing to the conscience or discretion of the court."

Appellant objects to the introduction of evidence, brought out by the defendant, as to the character, continuance, and extent of his business after the injury, upon the ground that his pecuniary circumstances were not to be considered by the jury; but we think in this that appellant misconceives the reason for the ruling of the trial court in admitting this evidence. It was not addressed to his pecuniary ability or financial standing, but to the proposition advanced by plaintiff that, because of his injuries, he had been incapacitated from attending to his business, and was directed to show that plaintiff's business continued, that it was of considerable volume, and that he regularly attended to it after the injury.

These being all the propositions presented for consideration, the judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

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148 Cal. 206

ERICKSON v. STOCKTON & T. C. R. CO. (S. F. 3,345.)

(Supreme Court of California. Nov. 11, 1905.)

1. JUDGMENTS — AMENDMENT—CLERICAL ERRORS.

Where a judgment contained a mere clerical error in computation, which appeared on the face of the record, the court had power of its own motion to correct it at any time, without vacating the judgment and entering a new one.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 598, 615.]

2. INTEREST—DISPUTED DEMANDS.

Where plaintiff sued on an open account for services rendered and goods sold within two years, claiming $8,000, and defendant denied liability and also controverted the amount demanded, and plaintiff recovered less than $1,500, he was only entitled to recover interest from the date the balance due was ascertained, as provided by Civ. Code, § 1917.

Department 2. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Charles Erickson against the Stockton & Tuolumne County Railroad Company. From a judgment in favor of plaintiff, as amended, he appeals. Affirmed.

E. B. Young, for appellant. J. J. Burt, for respondent.

HENSHAW, J. Plaintiff sued to recover from defendant the sum of $8,765, part of which he alleged was due as the value of certain services rendered by him to the defendant, and the remainder of which was for the value of goods, wares, and merchandise sold to defendant. After trial the court made its findings and conclusions of law, and directed judgment in favor of the plaintiff and against the defendant for the sum of $1,420.65 and costs. By a mere clerical error in computation, which error appeared in the findings and was carried into the conclusions of law, a difference of exactly $54 was made in the amount of the judgment. The judgment should have been for $1,474.65, instead of for $1,420.65. Though this error appeared upon the face of the record, plaintiff made no motion for its correction, but instead gave notice of a motion to vacate and set aside the judgment. and to have a judgment entered in the sum of $1,474.65, with interest from the 30th day of July, 1898, the date of the commencement of the action. The defendant, conceding that a clerical error appeared upon the face of the record, consented that the findings, conclusions, and judgment should be amended to correct this error. This the court did, and denied the motion to vacate the judgment and to award interest. Plaintiff, the moving party, in whose favor judgment had been entered, takes this appeal.

The amendment which the court ordered was, not to make new findings and conclusions of law, but to make the findings and conclusions of law upon their face speak the truth. The error being a mere error in computation appearing upon the face of the record, it was within the power of the court, of its own motion, to correct it at any time; and this it could do without need or occasion for vacating the judgment and entering a new one. Fallon v. Brittan, 84 Cal. 511, 24 Pac. 381; Roundtree v. Lime Co., 106 Cal. 62, 39 Pac. 16; Dickey v. Gibson, 113 Cal. 34, 45 Pac. 15, 54 Am. St. Rep. 321; Chicago Clock Co. v. Tobin, 123 Cal. 378, 55 Pac. 1007; O'Brien v. O'Brien, 124 Cal. 422, 57 Pac. 225.

Plaintiff's demand, as has been said, was for the value of services rendered and for the value of goods sold within two years upon an open account. Not only was the fact of defendant's liability for the demand denied, but the value and amount of the demand were also controverted, and it appears that, while plaintiff was claiming over $8,000, the award to him was less than $1,500. In such a case it is well settled that section 1917 of the Civil Code applies, viz., that interest is payable on all moneys, at the rate of 7 per cent. per annum, due on any settlement of account from the day on which the balance is ascertained. Brady v. Wilcoxson, 44 Cal. 239; Coburn v. Goodall, 72 Cal. 498, 14 Pac. 190, 1 Am. St. Rep. 75; Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164; Heald v. Hendy, 89 Cal.

632, 27 Pac. 67; Easterbrook v. Farquharson, 110 Cal. 317, 42 Pac. 811.

The order appealed from is affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

148 Cal. 233

In re EDELMAN'S ESTATE. (S. F. 4,264.)

(Supreme Court of California. Nov. 18, 1905.)

1. APPEAL—WILLS—ORDER DISMISSING CONTEST—REVIEW ON APPEAL FROM ORDER ADMITTING WILL TO PROBATE.

Under Code Civ. Proc. § 963, subd. 3, authorizing an appeal to the Supreme Court from a superior court from an order admitting or refusing to admit a will to probate, or against or in favor of the validity of a will; section 956, providing that on appeal from a judgment the court may review the verdict or decision, and any intermediate order or decision excepted to which involves the merits or necessarily affects the judgment, except a decision or order from which an appeal might have been taken; and section 1714, providing that the provisions of part 2 of the Code (sections 1307, 1312–1314) relative to new trials and appeals, except in so far as they are inconsistent with the provisions of the title, apply to the proceedings therein mentioned (orders, decrees, trials, appeals, etc.)—an order dismissing the contest of a will for lack of interest in contestant is properly reviewable on appeal from an order admitting the will to probate.

2. WILLS—CONTEST—TRIAL—ORDER OF PROOF.

The contestant of a will must first establish his interest.

3. DESCENT AND DISTRIBUTION—SURVIVING HUSBAND—RELEASE OF RIGHTS.

Where an agreement between a husband and wife to separate, each in turn relinquishing all property rights and rights of succession and inheritance, lived up to by both parties during the wife's lifetime, is relied on by proponents of her will in defense of a contest thereof by the husband, they need not prove the fairness of the contract in order to have equitable effect given thereto.

4. WILLS—CONTEST—PROBATE COURT—SCOPE OF INQUIRY.

The court in probate may take cognizance of transfers, releases, or extinguishments of heirships relied on as a defense by way of estoppel to a contest of a will.

5. SAME—GROUNDS OF CONTEST—TIME FOR PRESENTING.

Where grounds of contest of the admission of a will to probate were not presented when a motion to dismiss the contest was made, though contestant had ample opportunity to then present them, the court properly refused to entertain the objections after its order dismissing the contest.

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Hannah E. Edelman, deceased. From an order admitting to probate decedent's will, Charles Edelman appeals. Affirmed.

Rehearing denied December 18, 1905.

James G. Maguire and J. J. Burt, for appellant. Garret W. McEnerney, for respondent.

HENSHAW, J. The last will and testament of Hannah E. Edelman, deceased, having been offered for probate, Charles Edelman appeared, presenting grounds of contest against its admission, and alleging that he was the husband of deceased, that the deceased at the time of making the will was not of sound or disposing mind, and the will was executed under undue influence. Proponents of the will answered these grounds of contest by denial, and for an affirmative defense pleaded an agreement entered into between Edelman and his wife, wherein it was recited that it being desirable to avoid litigation and controversy and to settle and define all property rights and controversies as to property which might arise between the parties, it was mutually agreed and understood that they would henceforth continue to live separate and apart and would not live again together as husband and wife; that neither would thereafter make or assert any right, claim, or demand upon or against the other for any maintenance or support, and each party in turn "waived and released any and all claim of every kind and nature of, in and to the whole and every part of the real and personal property now or heretofore or hereafter owned, claimed, or possessed by or standing in the name of either party, and waives all right and claim of inheritance to succeed to any part of the property as an heir or successor at law, upon or in the event of death." Trial was had upon the issues thus framed, and the court in its discretion directing the order of proof, heard and decided the question of the validity and legal effect of the agreement above mentioned. It held in favor of the validity of the agreement, and decided that its effect was to deprive appellant of his right of contest of the will of deceased, as being neither an heir nor a party in interest. This decision was embodied in an order dismissing appellant's contest, subsequent to which, the court, taking proof of the execution of the will, admitted it to probate, and from the order so admitting it to probate this appeal is taken.

Respondent makes a preliminary objection to the hearing of this appeal, which is in its essence a motion to dismiss the appeal, upon the ground that the appeal should have been taken from the order of court dismissing the contest; that, if that order is not appealable it cannot be reviewed under this appeal from the order admitting the will to probate, because at the time of the admission of the will to probate, appellant's contest having been dismissed he was not a party aggrieved, nor a party in interest. Reliance is here placed upon the Estate of Garcelon, 104 Cal. 570, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134. That was a contest after probate, and an appeal from the order dismissing the contest was entertained by this court. Support for respondent's position is also sought in the language of this court in Estate of Gregory, 133 Cal. 136, 65 Pac. 315, and the Estate of Latour, 140 Cal. 437, 73 Pac. 1070, 74 Pac. 441; but what was said in those cases was for the purposes of illustration and by way of analogy, and neither of them undertook to say that an order such as here made is not properly reviewable upon appeal from the order admitting the will to probate. The only appealable orders in probate matters are those designated in subdivision 3 of section 963 of the Code of Civil Procedure. Sections 1307, 1312–1314, of the Civil Code, have reference to the proceedings upon contest of the probate of a will. The adjudication to be made is as to the validity or invalidity of the will, and the order here made dismissing a contest is reviewable upon appeal from the final order or judgment admitting the will to probate as is any other intermediate order or ruling which the court may make. Code Civ. Proc. §§ 956, 1714. Thus, in Re Hickman, 101 Cal. 609, 36 Pac. 118, the contest of the public administrator of the probate of a will was met by demurrer, upon the ground that he was not a person interested in the estate. The demurrer was sustained, and the appeal taken by the public administrator was from the order admitting the will to probate as here. There is no difference in principle between the order of the court denying a right of contest for lack of interest upon demurrer, and denying it, as in this case, by a formal dismissal of the contest for lack of interest.

The court, in controlling the order of proof, correctly held that the contestant must first establish his interest. Estate of Latour, 140 Cal. 437, 73 Pac. 1070, 74 Pac. 444. And it further held that contestant had waived his right of heirship and all claim upon the estate of the deceased by the articles of separation and mutual disinherison above referred to. This agreement was carefully drawn, and by its terms was clearly designed to effect the disinherison of the appellant. Estate of Garcelon, 104 Cal. 570, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134; Estate of Davis, 106 Cal. 453, 39 Pac. 756. But it is contended that it was incumbent upon the respondent to have proved the fairness of the agreement, and that the court, therefore, erred in giving equitable effect to it without such proof. It is true that where the heir sought to transfer or convey his interest in the estate of an ancestor to a third person, equity, before it would give effect to such transfer, required evidence from that third person of the good faith and fairness of the transaction, the very apparent reason being that designing persons should not take advantage of the improvidence or penury or inexperience of one to strip him of his prospective inheritance. An additional reason was that such a transfer, made without the knowledge of the ancestor, was in a certain sense a fraud upon him. Both these reasons are eliminated, however, and with their elimination the rule ceases when the release is made to the ancestor himself; for, in the first place, since he has the right absolute to disinherit, he cannot be accused of taking advantage of the heir, and, in the second place, as the release is made to him he is not in ignorance of the fact, and thus could not be deceived into leaving his property to one to whom he never intended it should go. Therefore, where such a release is made to the ancestor, the rule requiring the party relying on it to prove its fairness is no longer in force, but, as said in Appeal of Summerville, 129 Pa. 631, 18 Atl. 554, such a release is "properly admissible, and when once admitted the burden of overthrowing it is cast upon the parties who signed it or whose names are subscribed to it." In this same connection reference may be made to Curtis v. Curtis, 40 Me. 24, 63 Am. Dec. 651, and the whole subject-matter was elaborately argued in Estate of Garcelon, supra. Still less reason, however, exists for the application of the rule requiring proof of the fairness in a contract such as this where there is a mutual relinquishment upon the part of the spouses of their property rights and of their rights of succession and inheritance, and where, moreover, the contract having been fully executed during the lifetime of the parties, the fairness is sought to be drawn in question after the death of one by the other, and particularly when questioned upon the death of the wife by the husband; for, while the freedom of contract between husband and wife is fully recognized in this state and upheld, it is equally well recognized and exemplified in a hundred instances in our law that the wife is regarded as the weaker and more dependent spouse; the one whose interests, therefore, are to be the more carefully safeguarded, even from the exactions of a husband. In Re Noah, 73 Cal. 583, 15 Pac. 287, 2 Am. St. Rep. 829, this court, disposing of a similar argument under a contract of separation between husband and wife, declared that the agreement, "as far as it was an agreement to separate and for her support during separation, was fully executed during the lifetime of the deceased." In this case, as in the Noah Case, the contract had been lived up to by both parties, so far as appears to the contrary, during the lifetime of the wife, and it is a somewhat too tardy discovery upon the part of the husband to find, after her death that the contract was unfair. The question is completely disposed of by In re Garcelon, 104 Cal. 570, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134, Estate of Davis, 106 Cal. 452, 39 Pac. 756, Daniels v. Benedict, 97 Fed. 367, 38 C. C. A. 592, and Crum v. Sawyer, 132 Ill. 443, 24 N. E. 956.

While it is true that the law was unable to, and therefore did not, give effect to such transfers, releases, or extinguishments of heirship, it is equally true that they were always cognizable in equity, and that in proper cases they afforded a complete defense by way of estoppel. And this equitable defense by way of estoppel is cognizable by the court in probate. Estate of Garcelon, supra; Fisher v. Clopton (Mo. App.) 85 S. W. 623. It has been shown that it was not incumbent, under the circumstances, for the party relying upon the agreement to make proof of its fairness. It does not appear, upon the other hand, that appellant was denied the opportunity to prove its unfairness. The record discloses that, upon proof of the agreement (its execution having been admitted), a motion to dismiss was made, upon the ground that, by force of the agreement, the contestant was not a party in interest. The motion was opposed by contestant's attorney, who stated his grounds of opposition as follows: "The first ground of our resistance to the motion is that the contract is absolutely void, and cannot be taken into consideration in this proceeding. The next ground is upon the uncertainty of it. If the contract had any consideration at all it is incumbent upon the proponents to allege and prove it." Upon this the motion was granted by the court, and the order dismissing the contest was entered. At a following session of the court, and when formal proofs of the due execution of the will were being offered looking to its admission to probate, appellant's attorney appeared, renewing his objection in a somewhat more elaborate form, and raising new grounds of objection, amongst the new suggestions being the proposition here disposed of, that the appeal should show affirmatively that the contract was fair and just, and, if that were not so, then contestant asserted the right to show that the contract was not fair and just, but was obtained through fraud and coercion. The court, however, ruled, and ruled very properly that, as those were matters not presented for consideration at the time of the motion to dismiss, when ample opportunity to present them had been afforded, he would not entertain the objection after his order dismissing the contest.

It being shown, as was determined by the lower court, that the appellant was not a party interested so as to entitle him to appear and contest, the consideration of the propositions advanced upon his appeal may well come to an end. It may, however, be added that the court had jurisdiction to grant original probate of the will of the deceased, although a nonresident, since she had left property within this state. Estate of Clark, 82 Pac. 760.

For the foregoing reasons the order and judgment appealed from are affirmed.

We concur: LORIGAN, J.; McFARLAND, J.

(148 Cal. 223)

WELCH v. BRITISH AMERICAN ASSUR. CO. (S. F. 3,522.)

(Supreme Court of California. Nov. 15, 1905.)

1. Insurance—Fire Policy—Construction—Provisions for Forfeiture.

Conditions which provide for forfeiture of the interest of assured in a fire policy or those claiming under it are to be strictly construed against the insurer.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 295.]

2. Same—Conveyance of Property—Forfeiture—Persons Affected—Rights of Mortgagee.

Civ. Code, § 2541, provides that where a mortgagor effects insurance in his own name, the loss to be payable to the mortgagee, or assigns a policy of insurance to the mortgagee, the insurance is deemed to be upon the interest of the mortgagor, and any act of his which would otherwise avoid the insurance will have the same effect, although the property is in the hands of the mortgagee. Section 1442 provides that a condition involving a forfeiture must be strictly interpreted. Section 1654 provides that in cases of uncertainty in the interpretation of contracts the language of a contract must be interpreted most strongly against the one who caused the uncertainty. A fire policy provided that, unless otherwise provided by agreement indorsed thereon, it should be void if any change should take place in the title of the property, and provided that, if an interest "shall exist in favor of a mortgagee, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interests as shall be written upon, attached, or suspended hereto." Subsequent provisions declared that the policy was "subject to the foregoing stipulations and conditions," and that no privilege or permission affecting the insurance should ever be claimed by insured unless written or attached to the policy. After the issuance of a fire policy the premises were mortgaged, and the insurer indorsed on the policy a statement that the loss should be payable to the mortgagee and thereafter the mortgagor sold the premises. *Held*, that the mortgagee was entitled to recover for a loss, since by virtue of the mortgage clause the interest of the mortgagee was free from all such conditions, except such as were at the time of the creation of his interest written upon the policy or attached or appended thereto.

In Bank. Appeal from Superior Court, Alameda County; S. P. Hall, Judge.

Action by George D. Welch against the British American Assurance Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Rehearing denied December 15, 1905.

Nye & Kinsell, for appellant. H. A. Powell and W. A. Dow, for respondent.

SHAW, J. This is an action by a creditor whose debt was secured by a deed of trust of the property insured to recover the sum of $2,000 upon a fire insurance policy issued by the defendant to one George H. Barrett, the maker of the deed of trust. The trust deed was executed after the issuance of the policy, and thereupon a slip was attached to the policy making the loss, if any, payable to the plaintiff, as his interest should appear. The sole proposition presented for decision is the question whether or not, under the terms of the policy and the facts stated in the complaint, a change of ownership of the property insured, subsequent to the issuance of the policy and before the loss, without the written consent of the defendant thereto indorsed on the policy, made the policy void, as against the plaintiff.

The policy contained a paragraph declaring that it should be void upon the happening of either one of a large number of conditions, among which was that it should be void if, without an agreement by the company indorsed on or added to the policy, "any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance, whether by legal process or judgment, or voluntary act of the insured, or otherwise." Following this paragraph, after several other intervening paragraphs relating to other matters, the following clause, called for convenience the "mortgage clause," was inserted: "If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insuance relating to such interest as shall be written upon, attached, or appended hereto." At the close of the policy appeared this clause: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto. * * * Nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." It appeared from the complaint that after the policy was issued and the deed of trust executed, and before the loss occurred, the title to the property had been transferred from Barrett to one J. F. Sanborn, and that no agreement that it should be so transferred was indorsed on the policy or executed by the defendant. Upon this it is claimed that the policy was avoided by the transfer without consent of the company.

It is conceded that, in the absence of any provision in the policy to the contrary, if the title to the property should be conveyed without the consent of the company prior to the happening of a loss, the company would not be liable therefor. The insurance ran to the original owner, to whom the policy was issued, and the subsequent agreement that the loss should be payable to the plaintiff as his interest should appear, if taken alone, left the insurance still running to the owner of the property, and not to the plaintiff, so that, under the rule prevailing in such cases (Civ. Code, § 2541), any act of the owner which, by the terms of the policy, would be sufficient to avoid it as against the owner, would prevent a recovery by the plaintiff, although he was not aware of the violation of its terms and did not consent thereto. The question for decision is, therefore, whether or not the clause above quoted, referring to an interest in favor of third persons, operates to change this rule. We think that it must be so considered. It is well established that conditions which provide for a forfeiture of the interest of the assured, or those claiming under the policy, are to be strictly construed against the insurance company, and, if there is any ambiguity in a policy which may reasonably be solved by either one of two constructions, that interpretation shall be adopted which is the most favorable to the assured, or, in this particular case, to the beneficiary in the deed of trust. It is evident from the insertion of this clause in the policy that the parties thereto contemplated that the assured might thereafter mortgage or hypothecate the property and thereby create an interest in the policy in favor of the creditor for his better security. The mortgage clause was manifestly inserted to facilitate such a transaction. It must be considered as having been directed towards such anticipated creditor of the assured, and as having been made for his benefit. The provision that, in the event of the existence of such an interest in favor of the third person, "the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto," was intended to have the effect of preventing the conditions previously mentioned in the policy from applying to such interest, unless the conditions should be again written upon, attached, or appended to the policy. No other reasonable meaning can be given to the language. It would not be necessary to write them out in full upon the policy, which would be practically impossible. A few words making the provisions, or certain of them, as was desired, applicable to the other interest could readily be inserted in the slip containing what is called the "loss payable" clause attached to the policy. Even, however, if it should be considered necessary to attach the conditions in full, it could be done without inconvenience by simply printing them in the attached slip.

The real contention of appellant is that the last half of the mortgage clause should be interpreted as if it read as follows: "The conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance, *so far as those conditions and provisions relate to such interest* as shall be written upon, attached or appended hereto." This, however, is contrary to the grammatical construction of the clause, as contained in the policy, and does violence to the natural and ordinary meaning of the language. It is also contrary to the rule that a contract must be construed so as to give some effect, if possible, to every part of it. Mickle v. Sanchez, 1 Cal. 202. Without this mortgage clause, under the rule as above conceded, and as expressed in section 2541, Civ. Code, the interest of a creditor to whom the loss is made payable is subject to all the conditions of the policy, and they would apply to such interest, whether the interest was described in any writing made upon, or attached, or appended to, the policy, or not. Therefore, if the above paraphrase correctly states the meaning intended by the mortgage clause, its insertion was idle and useless, for the legal effect of the policy would be the same without it as with it. Furthermore, if this could be considered a reasonable construction, the other is at least as reasonable, and under the rule of strict construction against the insurer who prepares the policy (Civ. Code, §§ 1442, 1654) the meaning we have attributed to it must be adopted. Section 2541 of the Civil Code gives the rule governing the effect of the creation of an interest in a mortgagee or creditor in cases where the policy runs to the mortgagor or debtor and contains no mortgage clause such as that here inserted. It was not intended to, and does not, apply to policies which are not silent on the subject, but themselves provide to what extent its conditions shall apply to such interest, when created.

No conditions with reference to the plaintiff's interest, or statement specifying the extent to which the conditions of the policy should apply thereto, were written upon, attached, or appended to the policy. We are therefore of the opinion that the interest of a third person in the policy is not subject to the conditions in question, and that such third person is not responsible for the acts of the insured in violation thereof, and consequently that the conveyance of the title to Sanborn without the consent of the company did not forfeit the interest of the plaintiff in the policy. The subsequent provisions above quoted do not change the effect of the clause in question. The declaration that the policy is made "subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be endorsed hereon, or added hereto," clearly does not change the effect of the mortgage clause, for that clause is one of the stipulations and conditions to which this last paragraph refers, and it affirms the mortgage clause, as well as the other clauses of the policy, and the effect of the mortgage clause is to except the interest of the plaintiff from the other conditions referred to. The remaining provision, that no privilege or permission affecting the insurance should ever be claimed by the insured unless written on or attached to the policy, is equally ineffective to nullify the mortgage clause. The word "insured" as there used, under the rule requiring strict interpretation against the company, and in view of the language of the mortgage clause above quoted, must be considered as referring to Barrett, the original holder of the policy, or his successor, and not to the plaintiff. The policy considered in Sharp v. Scottish, etc., Co., 136 Cal. 543, 69 Pac. 253, 615, did not contain any provision equivalent to the mortgage clause in the policy here sued on, and that case has no application either for or against the plaintiff.

The mortgage clause in the policy under consideration is a part of the form of policy known as the "New York Standard Form." This form was prescribed by statute in New York, and made obligatory after May 1, 1887, on all insurance companies doing business in that state. 3 N. Y. Rev. St. p. 1663. It has since been prescribed by statute in Pennsylvania (Brightly, Dig. pt. 2, p. 2528), Minnesota (1 Laws Minn. 1891, § 2973), North Dakota (Laws 1890, p. 253 c. 74), Wisconsin (1 Rev. St. 1898, § 1941–53), New Jersey (2 Gen. St. p. 1766), and Michigan (1 How. Ann. St. §§ 4345–4350). Singularly enough the clause in question does not appear to have been the subject of litigation or judicial interpretation in any of these states. It has been construed, however, by the highest courts of Nebraska, Washington, Mississippi, Illinois, Iowa, and Missouri in the following cases: Oakland H. I. Co. v. Bank, 47 Neb. 717, 66 N. W. 646, 36 L. R. A. 673, 58 Am. St. Rep. 663; Boyd v. Thuringia Ins. Co., 25 Wash. 447, 65 Pac. 785, 55 L. R. A. 165; Queen's Ins. Co. v. Dearborn Sav. Ass'n, 175 Ill. 115, 51 N. E. 717; Christenson v. Fid. Ins. Co., 117 Iowa, 77, 90 N. W. 495; East v. N. O. Ins. Co., 76 Miss. 697, 26 South. 691; Senor v. Western, etc., Ins. Co., 181 Mo. 115, 79 S. W. 687. These decisions all concede that, in the absence of such mortgage clause, the mortgagee takes subject to all the conditions expressed in the body of the policy, but hold, as we have held, that by virtue of the mortgage clause in the body of the policy the interest of the mortgagee is free from all such conditions, except such as are repeated at the time of the creation of that interest by being at that time again, in substance at least, written upon the policy, or attached or appended thereto.

For the foregoing reasons, we think the demurrer was rightly overruled.

The judgment is affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; VAN DYKE, J.

McFARLAND, J. (concurring). I concur in the judgment of affirmance. I have reached this conclusion after a great deal of consideration of the main question involved, and have done so mainly in deference to the opinions of judges and decisions of courts in other jurisdictions. The fire insurance policy involved here was issued by appellant to one Barrett. It was to be void if Barrett violated certain named conditions. Barrett did violate one of those conditions, and as to him the policy became void. But after the issuance of the policy Barrett mortgaged the insured property to the plaintiff herein, George D. Welch, and afterwards the appellant, at the request of Barrett, attached to the policy a writing, in these words: "Loss, if any, payable to George D. Welch as his interest may appear." These words, considered alone, did not change the policy. Barrett still remained the insured party, and in case of fire Welch was to recover only what was due Barrett, and could recover nothing if the latter had forfeited the policy. The above proposition is admitted upon all hands. But it is contended that Welch can recover, notwithstanding the policy is void as to Barrett, on account of a clause in the body of the policy, which, leaving out the parts immaterial here, is as follows: "If * * * an interest * * * shall exist in favor of a mortgagee * * * the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended thereto." This language seems to me to be as awkward and as difficult to put any meaning into as any that has come under my observation in judicial investigations. If an insurer intends that when he inserts a clause into the policy that the loss, if any, shall be payable to the mortgagee, the mortgagee is to be relieved from the effect of any act of the insured mortgagor which would invalidate the policy, it is a very simple matter for him to say so.

It is contended that he does say so by the mongrel clause above quoted. If I were entirely free to follow my own notion about the question, my inclination would be to agree with the dissenting opinion of Mr. Justice Anders in Boyd v. Thuringia Ins. Co., 25 Wash. 453, 65 Pac. 785, 55 L. R. A. 165, and hold that such clause was not fairly susceptible of the construction claimed by respondent in the case at bar. But this identical clause, which seems to have originated in New York, has become quite common in insurance policies, and has been before a number of courts for interpretation, and its meaning has almost universally been held to be that none of the forfeiting conditions as against the insured affect the mortgagee, except those which are restated in the "loss payable clause," and that, if there are no such conditions in said last-mentioned clause, the insured can do no act whatever which will in any way affect the right of the mortgagee. It was so expressly held in Oakland Home Ins. Co. v. Bank of Commerce, 47 Neb. 17, 66 N. W. 646, 36 L. R. A. 673, 58 Am. St. Rep. 663; Queen's Ins. Co. v. Sav. Ass'n, 175 Ill. 115, 51 N. E. 717; Christenson v. Fidelity Ins. Co., 117 Iowa, 77, 90 N. W. 495; East v. Ins. Ass'n, 76 Miss. 697, 26 South. 691; Senor v. Fire Ins. Co., 181 Mo. 104, 79 S. W. 687, and Boyd v. Thuringia Ins. Co., 25 Wash. 447, 65 Pac. 785, 55 L. R. A. 165. We have been referred to no cases squarely holding the other way, unless, perhaps, it be Franklin Ins. Co. v. Wolff, 23 Ind. App. 549, 54 N. E. 772. In Oakland Home Ins. Co. v. Bank of Commerce, supra, the Supreme Court of Nebraska construes the clause in question as follows: "That is, in order to render the general conditions of the policy applicable to the interests of the mortgagee, there must be written upon, attached, or appended to the policy, relating to the interest of the mortgagee, some provisions or conditions expressing in what manner the conditions of the policy shall be so applicable. Neither in the 'loss payable clause' nor otherwise by writing upon, attached to, or appended to the policy was there any provision or condition carrying the conditions of the policy into such clause or rendering them in any manner applicable." And the other cases give it the same construction. And I am disposed to follow those courts rather than to rely upon my first impressions, particularly in view of the rule that an ambiguous clause in a policy must be construed against the insurer. And, even if there be doubt as to the correctness of this construction, there is some consolation in the thought that an insurer who puts such a nondescript provision into his policy should hardly be heard to object to any kind of construction which any one chooses to give it.

We concur: HENSHAW, J.; LORIGAN, J.

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148 Cal. 239

AVERY v. AVERY. (S. F. 3,514.)

(Supreme Court of California. Nov. 20, 1905.)

1. DIVORCE — TESTIMONY OF PARTIES — CORROBORATION.

Civ. Code, § 130, prohibiting the granting of a divorce on the uncorroborated testimony of the parties, does not require plaintiff's testimony to be corroborated in every particular. It is enough that it is corroborated in the main particulars.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 407.]

2. SAME—EXTREME CRUELTY—EVIDENCE.

Evidence in a divorce case *held* to sustain a finding of extreme cruelty, within Civ. Code, § 94, defining it as the infliction of grievous mental suffering.

3. SAME—EVIDENCE—IMMATERIAL INQUIRY.

The question asked defendant's father as her witness in a divorce case, in which extreme cruelty was alleged in the complaint, but not in the answer or cross-complaint, if he knew what treatment was accorded defendant by plaintiff, calls for an answer apparently preliminary to an inquiry into plaintiff's general course of treatment of defendant, and so, in its general form, is an immaterial inquiry.

Department 2. Appeal from Superior Court, Marin County; F. M. Angellotti, Judge.

Action by Augustus D. Avery against Evelyn C. Avery. Judgment for plaintiff. Defendant appeals. Affirmed.

John W. Bourdette and Andrew Thorne, for appellant. Albert H. Elliot, for respondent.

LORIGAN, J. This is an action for divorce brought by plaintiff against defendant on the grounds of extreme cruelty and desertion. Defendant answered, denying specifically the charges made, and by cross-complaint alleged desertion on the part of plaintiff, and sought a decree against him for permanent maintenance and support under section 137 of the Civil Code. A decree of divorce was granted plaintiff upon both grounds of his complaint; the cross-complaint of defendant for relief was denied; and from an order denying her motion for a new trial, and from the judgment against her, defendant appeals.

Upon the matter of extreme cruelty, the court found that the principal specific charges made in the complaint were true; that during a period of several years preceding the commencement of the action the conduct of defendant towards plaintiff had been continuously and habitually cruel; that on various occasions at their home in Mill Valley, Marin county, and elsewhere, she had applied to plaintiff abusive, harsh and insulting words and epithets, and with equal frequency had in his presence and in the presence of mutual friends and acquaintances ridiculed him and said humiliating and derogatory things concerning him; that she repeatedly declared to him, and so stated to their friends and acquaintances, that he was too old and settled, that she had no affection for him, and that she wanted to separate from him and marry another man; that she willfully and without cause and falsely accused him of adultery and of having kept a mistress; that, during the two years immediately preceding the commencement of the action, the defendant, without the consent of plaintiff and against his will, absented herself from their home, going to her mother's residence in San Francisco, taking with her their only child, an infant daughter; that defendant would absent herself from him for a period ranging from three days to three weeks during such period of two years, and that during said period of two years she was absent three-fourths of the time; on some occasions she would state that she was going and would go in spite of his protests; on the greater number of those occasions, however, she would leave without warning or notice to plaintiff, and he would not learn that she intended such departure till on returning from his daily avocation he would find her and the child gone, with no message left by her as to where she had gone, how long she intended to stay, or when she was coming back, nor would she during her absence send any word to him; during such portions of said period of two years that she was at home she refused to perform her ordinary household duties or prepare meals for plaintiff, and compelled him to either cook his own meals or take them at restaurants; that on February 21, 1902 (this action was commenced March 17th of that year), defendant announced her intention of going to the home of her mother in San Francisco and taking their child with her, consent to which plaintiff refused on account of a violent storm which was then raging; thereafter, on said day, in the absence of plaintiff, defendant broke most of the dishes in the house, threw it into disorder, took most of the silverware, the sewing machine head, and her own clothing, left with the child for San Francisco, and did not return; before going she secreted plaintiff's clothes in the cellar under the house, and on request refused to tell him where they were; that defendant did not find them till 10 days afterwards, and was compelled to wear his working clothes on all occasions in the meantime. After finding these facts on the matter of cruelty, the court further found: "That all and each of said conduct and acts of defendant to and towards the plaintiff have inflicted upon plaintiff grievous mental suffering and have and has made his life intolerable and miserable."

It is insisted by defendant that the findings with reference to the particular facts set forth are not sustained by the evidence. The point made is, not that there was not evidence before the court as to all these matters found, because the plaintiff's testimony as to them is full and complete, but it is claimed that his testimony was not corroborated as required by section 130 of the Civil Code in order to warrant a decree. It is true that in some particulars his testimony was not expressly corroborated, or was but slightly so, but in the main particulars it was. It was corroborated as to her declarations concerning him to their friends and acquaintances—her loss of affection for him and her desire to separate from him and marry some one else—also as to her failure to discharge her household duties, and her repeated and long absences from their home in the manner and under the circumstances stated in the findings, including her conduct upon her final departure. Not only is his testimony corroborated in these particulars, but we think that independent of this, when the whole testimony in this case is taken into consideration, it in a degree reasonably tends to corroborate all the charges made and testified to by plaintiff as to defendant's conduct toward him, and which the court found to be true. It was not necessary, however, that the testimony of plaintiff should be corroborated in every particular. The statute does not require it. It is only necessary that it be corroborated in the main particulars. As is said in Andrews v. Andrews, 120 Cal. 186, 52 Pac. 298: "* * * Where the cruelty consists of successive acts of ill treatment, it is not necessary that there should be direct testimony of other witnesses to every act sworn to by the plaintiff; it is sufficient corroboration if a considerable number of important and material facts are so testified to by other witnesses, or there is other evidence, circumstantial or direct, which strongly tends to strengthen and confirm the statements of the plaintiff. The main purpose of section 130 is to prevent collusion." It is also recognized that: "In the very nature of the case it would be impossible to lay down any general rule as to the degree of corroboration which will be requisite. Hence the statute only requires that there shall be some corroborating evidence." Evans v. Evans, 41 Cal. 104; Cooper v. Cooper, 88 Cal. 45, 25 Pac. 1062. While the evidence in this case was conflicting, conflicting to the extent that the defendant denied the truth of the statements of plaintiff and the other witnesses upon which the findings were based, yet the credibility of all the witnesses, and the weight of their evidence, was a matter for the trial court. The court found the charges made by plaintiff to be true, and, as in the main particulars his testimony was corroborated, the finding of extreme cruelty, within the rule of the decisions referred to, cannot be disturbed.

In passing from this branch of the appeal it may be said that a consideration of the entire evidence in the case fully warranted the superior court in finding, as it did (we have not set forth all the findings, but only such as were material to a consideration of the principal point urged by appellant against them), that the plaintiff had treated defendant with uniform kindness and consideration, and in concluding that the last four years of their married life had been extremely unhappy, occasioned alone by the conduct of defendant, and that their difference in temperament was productive of this unhappy condition; that for these four years at least the defendant had been thoroughly dissatisfied with her domestic environment, dissatisfied with Mill Valley, her home there, and her husband, and that her declarations concerning her feelings towards him and her repeated and prolonged absences from him and her home were the natural result of that dissatisfaction. While incompatibility of temperament furnishes no ground for divorce in this state, in the present case it could properly be taken into consideration as explaining the course of conduct of defendant. And, taken into consideration by the lower court for that purpose, it afforded a reasonable explanation not only of defendant's general course of conduct toward the plaintiff as testified to by himself and other witnesses, but as a circumstance in the case which tended strongly to corroborate and confirm all the charges made by plaintiff as constituting her general course of conduct towards him, even as to those testified to by plaintiff alone, and which, as found, we are satisfied constitute extreme cruelty.

But it is further contended by appellant that, taking the facts found by the court to be true and sufficiently corroborated, they do not constitute in law extreme cruelty. The Code section (94) defining extreme cruelty declares that it may consist of "the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage." Under this provision it is not necessary that there shall be the infliction of bodily injury to constitute extreme cruelty. A course of conduct which entails grievous mental suffering alone is sufficient. Barnes v. Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660; Andrews v. Andrews, 120 Cal. 187, 52 Pac. 298. Whether in any case the course of conduct complained of constitutes "grievous mental suffering" is a question of fact. This the court must determine from the facts of each particular case considered in connection with the character, temperament, and disposition of the parties to the action. Extreme cruelty is a term of relative meaning, and a course of conduct which would inflict grievous mental suffering upon one person might not have that effect upon another. Hence no fixed legal rule for determining its existence in any given case can be laid down. The judge who tries the action, and has the parties before him for observation in the light of the evidence, is the one to whom the law commits the determination of this question in the first instance, and, as said in Andrews v. Andrews, supra, this court will not disturb a finding that particular acts constitute grievous mental suffering, unless "the evidence in support of the finding is so slight as to indicate a want of ordinary good judgment and an abuse of discretion by the trial court." The evidence in this case is not of that character and presents no such situation as would warrant the application of the rule just announced. These are the only objections by appellant upon the finding of extreme cruelty which need attention.

In addition, however, to finding that the defendant had been guilty of extreme cruelty, the court also found that the defendant had deserted the plaintiff. The defendant attacks this latter finding as unsupported by the evidence. It is unnecessary to consider this attack. As the finding of extreme cruelty supports the judgment, it is immaterial whether the finding of desertion is sustained by the evidence or not.

Attacks are made upon other particular findings; for instance, that the defendant was guilty of great conjugal unkindness after a reconciliation effected between the parties in 1899, and that the house and lot in Mill Valley, occupied as their home, was the separate property of plaintiff. It is insisted that these findings are not sufficiently supported by the evidence, but an examination of the record satisfies us that they are.

The only error of law specified is that the court erred in sustaining an objection to a question put to the father of defendant, a witness in her behalf. He was asked if he knew, of his own knowledge, what treatment was accorded the defendant by plaintiff, and an objection to the inquiry was sustained. We do not think any error which would warrant a reversal was committed by the court in making this ruling. The plaintiff charged the defendant with extreme cruelty, consisting of specific acts. These defendant denied, but she did not set up in her answer any extreme cruelty on the part of the plaintiff towards her, or other marital misconduct, which, under section 122 of the Civil Code, she might have done by way of recrimination, and to defeat the claim of plaintiff for a divorce. If she desired to avail herself of any such claim, it was her duty to plead it. Smith v. Smith, 119 Cal. 188, 48 Pac. 730, 51 Pac. 183. She did not even assert it in her cross-complaint. The inquiry, which was addressed to the witness, was not directed to any particular time or occasion. Its apparent purpose was not to show the conduct of both parties towards each other on any occasion testified to by plaintiff, nor to explain or justify her alleged treatment of him, by showing that his conduct or actions toward her at such time either invited such treatment or excused it. Any inquiries directed to that end would have been proper, and the court would doubtless have allowed them. The inquiry which was not permitted to be answered involved the entire life of the parties; it called for an answer which was apparently preliminary to an inquiry into the general course of treatment accorded her by plaintiff which she had not set up as recriminatory matter, or as constituting cruelty entitling her to a divorce, was not limited in terms towards explaining, excusing, or justifying any conduct on her part complained of by plaintiff, or testified to in the case; and hence was, in its general form, an immaterial inquiry.

We find no error in the record, and the judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

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1 Cal. App. 729

COCHRAN v. BONES.

(Court of Appeal, Third District, California. Oct. 11, 1905.)

1. Malicious Prosecution — Arrest — Misnomer.

Where defendant maliciously caused plaintiff's arrest for petit larceny without probable cause, intending to charge plaintiff with such offense, he could not shield himself from liability, in an action for malicious prosecution, by his mistake in failing to give plaintiff's correct name to the justice issuing the warrant; he having been arrested under the name given.

2. Same—Complaint.

Where a complaint on which plaintiff was maliciously arrested charged that plaintiff "did willfully and unlawfully take and keep one hog" belonging to defendant, and charged plaintiff "with the crime of petit larceny," it was no defense to a suit for malicious prosecution that the complaint did not sufficiently describe such offense as defined by the Code.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Malicious Prosecution, § 9.]

3. Same—Advice of Justice.

Where defendant went before a justice of the peace and maliciously stated to him that plaintiff had unlawfully and willfully taken and kept defendant's hog, and refused to give it up when requested, the same having been kept in plaintiff's possession for several months without having been advertised, but failed to inform the justice that plaintiff had previously told defendant he could have the hog by paying for the damage it had done, the justice's advice that plaintiff was guilty of petit larceny was no defense to defendant's liability for malicious prosecution.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Malicious Prosecution, §§ 45–48.]

Appeal from Superior Court, Sonoma County; Emmett Seawell, Judge.

Action by A. F. Cochran against W. H. Bones. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Affirmed.

Rehearing denied by Supreme Court, December 8, 1905.

J. M. Thompson and J. A. Barham, for appellant. J. R. Leppo and Clarence F. Lee, for respondent.

BUCKLES, J. This is an action for malicious prosecution. Plaintiff had judgment. Defendant moved for a new trial, which was denied, and this appeal is from the judgment and from the order denying the motion for a new trial.

Defendant went before the justice of the peace of Analy township, in Sonoma county, and swore to a complaint charging the plaintiff with petit larceny in stealing a hog, upon which the justice issued his warrant and placed the same in defendant's hands. Defendant, Bones, and plaintiff, Cochran, lived about a mile and a half from each other, and had so lived for several years, but had only a speaking acquaintance, and the defendant did not know plaintiff's name. In April, 1902, one of defendant's hogs strayed upon the farm of plaintiff, who did not know to whom the hog belonged. The said hog was seen on plaintiff's place as often as once a week until October of that year, when plaintiff shut his hogs up for the purpose of feeding them, and drove this stray hog away repeatedly; but it kept coming back, and he finally found it in the pen with his hogs, and did not remember whether he put it there or not, but had no intention of appropriating it to his own use, but let it remain with his hogs until some one should come for it. Defendant came for the hog on a day when plaintiff was absent, when plaintiff's wife requested defendant not to take it away until her husband should return, and defendant complied with her request. On the following day plaintiff went to defendant's home to see him about the hog, when the following conversation ensued between them: Defendant: "You have one of my hogs in your pen?" Plaintiff: "Is that so?" Defendant: "Yes, sir; I was over there to get it yesterday." Plaintiff: "Wouldn't it have been better to have said something to me when you saw me on the road about that being your hog, if it is your hog, and it would look better to come to me like a man and say something to me before trying to take it away?" Defendant: "That is my hog, and I am going to have it." Plaintiff: "I don't think that is a very manly way to get it." Defendant: "You have no right to have him shut up there." Plaintiff: "I think I have, if the hog was doing me damage." Defendant: "You have not posted him, and have no right to shut him up without posting him." Plaintiff: "Didn't you know the hog was there?" Defendant: "No, I didn't." Plaintiff: "Why didn't you come and get him?" Defendant: "I didn't have to." Then defendant said something about plaintiff giving him $8 and keeping the hog, to which plaintiff said: "No, if you want to pay the damages against the hog, you can have him. I don't want him." Defendant then declared he would have the hog and would have plaintiff arrested for stealing. Defendant did not come after the hog again. This conversation above referred to occupied prior to November 3, 1902, when defendant went to the justice's office and stated to the justice that one Schochran, of Green Valley, on the 3d day of November, 1902, at Green Valley, in the county of Sonoma, state of California, did "willfully and unlawfully take and keep one hog belonging to said W. H. Bones, refusing to give the said hog to said W. H. Bones when requested, the said hog having been kept in the possession of said Schochran since the middle of June, 1902; the same never having been advertised according to law." The justice informed defendant that this was petit larceny, and made out the complaint in the words above adding, "and charges the said defendant with the crime of petit larceny." This was all defendant said to the justice, and did not tell him how the hog came to be in the possession of the plaintiff. The plaintiff was tried and acquitted on said charge; the said W. H. Bones not appearing at the trial.

Whatever may be said as to the name of "Schochran" appearing in the complaint and warrant, all the facts point unmistakably to the one fact that defendant, Bones, meant to charge the plaintiff, A. F. Cochran, with petit larceny and in stealing a hog, was quite anxious to have A. F. Cochran arrested on said warrant, and took the warrant himself to the officer, and described to him A. F. Cochran, and urged his arrest under the said warrant, which warrant, legal in every respect, failed only to designate the person intended by the correct name. The evidence shows that there was no person in that neighborhood by the name of "Schochran," no one being at the place designated as the residence of the man who had defendant's hog, by the name of "Schochran," but that, on the contrary, the plaintiff, A. F. Cochran, did live there. The defendant intending, as is clearly shown, to charge A. F. Cochran with petit larceny, and to cause the arrest of A. F. Cochran, cannot now shield himself by his mistake in failing to give the correct name. The case is malicious prosecution. The facts alleged in the complaint before the justice for all intents and purposes, so far as malicious prosecution requires, do charge petit larceny. "Did willfully and unlawfully take and keep one hog belonging to the said W. H. Bones," may not charge petit larceny as defined in the Code. But the concluding part of the criminal complaint clearly makes the accusation of a crime, when it says, "and charges said defendant with the crime of petit larceny." But it is immaterial whether the complaint before the justice charged the crime with all the particularity required to make an absolutely faultless criminal charge, for the defendant was a malicious prosecutor in a criminal proceeding. He went before the justice of the peace, who had the right and power to issue a warrant of arrest for a person charged with a crime. He charged the plaintiff with the crime of petit larceny, and caused plaintiff's arrest without probable cause. And he cannot afterwards be heard to say: "As the complaint does not sufficiently describe the crime of petit larceny, I am not liable for the damage done." In Harrington v. Tibbet, 143 Cal. 80, 76 Pac. 816, it is said: "When one maliciously, and without probable cause, subjects another to a criminal prosecution, the injury is the same, whether it is instituted on a false statement of facts or a false conclusion of law." And we add, or on a faulty description of the offense. "If the reason for the action lay solely in the danger of punishment in which the man [prosecuted] is put, it might be otherwise. But the action lies because of the disgraceful imputation put upon him, the injury caused by his arrest, and the trouble and expense he is put to in defending himself." And this rule, founded, as it is, on good sense and reason, we are sure is the proper rule in such cases.

That the prosecution was without probable cause fully appears, and that it was malicious there can be no doubt. As has been seen, the parties had talked about the detention of the hog, in which plaintiff informed the defendant that the hog had strayed onto his premises, did damage, and was detained until damage done by said hog should be paid for. Defendant knew he could get his hog by paying the damage done, and, instead of doing so, had declared he would have the hog, and would have plaintiff arrested for stealing, and, on going to the justice and stating the case to the justice, he concealed the facts which, if they had been disclosed, would have shown the justice there was no stealing, and that there had been no crime committed. The testimony in the case before the lower court is here in the statement, and it nowhere appears that defendant was ignorant of the facts. He had declared that he would have the plaintiff arrested for stealing, and he must have gone to the justice with that determination in his mind, and there is no dispute but what he knew the facts just as enumerated above; and, if so, he doubtless knew that, if he made a fair and full statement to the justice, that officer would refuse to issue a warrant. What other facts would be necessary to show malice on the part of the defendant? It is true defendant did not appear when the trial was to take place before the justice. But why should he, when he knew that no crime had been committed? He probably had done the plaintiff all the damage and put him to all the trouble and expense defendant's malice prompted. At the trial in the lower court the defendant offered no evidence whatever, relying wholly upon the three points: That plaintiff was arrested upon a warrant in which the name of "Schochran," and not "Cochran," was used; that he had fully stated the facts to the justice, and that the justice advised him the crime was petit larceny; and that the criminal complaint did not charge a crime. The findings are sustained by ample and uncontradicted evidence, and the findings support the judgment.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

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1 Cal. App. 576

HOUGHTON et ux. v. MARKET ST. RY. CO. et al.

(Court of Appeal, First District, California. Sept. 15, 1905.)

1. Appeal—Review of Order.

An appellate court, in reviewing an order granting a new trial, is not confined to the ground on which the trial court based the order, but may sustain it on any other assigned ground.

2. Same—Granting of New Trial.

An order granting a new trial will not be disturbed on appeal, unless the evidence is free from substantial conflict and the record shows that the trial court abused its discretion in making the order.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3862, 3863.]

3. Carriers—Injury to Passenger.

Evidence that a passenger in a street car was injured without negligence on her part by a collision between the car and a truck raises a presumption of negligence against the carrier.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1287.]

4. New Trial—Insufficiency of Evidence—Discretion of Court.

Where plaintiff was injured while a passenger on a street car by reason of the car striking a truck which was being driven alongside, and there was ample room for the truck to have been kept at a safe distance from the track, and also evidence that the driver knew of the approach of the car, and the gripman, although approaching in plain view of the truck did not slacken speed nor give any signal, such facts and evidence were sufficient to have sustained a verdict finding negligence on the part of both or either; and the action of the court in granting a new trial, after a verdict in favor of the railroad company and the owner of the truck, who were sued jointly, on the ground that it was not sustained by the evidence, was not an abuse of discretion.

5. Jury—Competency.

Under Code Civ. Proc. § 198, which provides that "a person is competent to act as a juror if he be * * * assessed on the last assessment roll of the county, or city and county, on property belonging to him," and section 199, which provides that a person is not competent to act as a juror "who does not possess the qualifications prescribed by the preceding section," persons who are not on the assessment roll for the preceding year are not competent to sit as jurors prior to the completion and certification of the assessment roll for the current year, although they may have been assessed for such last year, and the overruling of a challenge for cause on such ground is error.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by George H. Houghton and Olive M. Houghton against the Market Street Railway Company and the San Francisco & Pacific Glass Works. Defendants appeal from an order granting a new trial. Affirmed.

A. A. Moore, Stanley Moore, and M. S. Eisner, for appellants. Sullivan & Sullivan, for respondents.

CHIPMAN, J. The plaintiffs, husband and wife, brought this action to recover damages for personal injuries sustained by the wife through the alleged joint negligence of the defendants, while she was riding as a passenger on defendant railway company's car. The trial was before a jury, and defendants had the verdict. Plaintiffs moved for a new trial upon several grounds, of which the following are urged: (1) Insufficiency of the evidence to sustain the verdict. (2) Error in denying plaintiffs' challenge for cause interposed to jurors. (3) Newly discovered evidence. The court granted plaintiffs' motion, on the ground of insufficiency of the evidence to sustain the verdict. Defendants appeal, and contend that the court abused its discretion in granting the motion.

1. It is well settled that the appellate court is not limited to the ground on which the trial court has based its order, but may review the case and sustain the order upon any other assigned ground. Churchill v. Flournoy, 127 Cal. 362, 59 Pac. 791. The rule is, as conceded by appellants, that this court will not disturb the action of the trial court in granting a motion for a new trial, unless the evidence is free from substantial conflict and the record shows that the trial court abused its discretion in making the order. Appellants rightly state the question to be whether or not the evidence, viewed in the light most favorable to the plaintiffs, would have justified a verdict against the defendants.

2. Appellants, however, contend for a rule which we think is not sustained by authority or reason, namely, that no presumption of negligence arose against either defendant; citing Harrison v. Sutter Street Railway Co. et al., 134 Cal. 549, 66 Pac. 787, 55 L. R. A. 608. That case went no further than to decide that no presumption of negli-

gence arose against both defendants; it appearing that the injury occurred to a passenger on the railway company's car in a collision with the defendant brewing company's wagon. That a presumption of negligence arose as against the defendant railway company in the present case, see Osgood v. Los Angeles Traction Co., 137 Cal. 280, 70 Pac. 169, 92 Am. St. Rep. 171. See, also, Sullivan v. Market St. Ry. Co., 136 Cal. 479, 69 Pac. 143.

3. Plaintiff Mrs. Houghton in the afternoon of August 21, 1900, was a passenger on defendant railway company's car which was running along Haight street easterly in the city of San Francisco; she occupied a seat near the first stanchion on the southerly or right-hand side of the dummy or open portion of the car; between her and the front of the car on her left was another passenger, and on her right were passengers sitting on the same seat; the car stopped on the east side of Webster street and while there defendant Glass Works' truck, drawn by two horses, passed the car on its southerly side going in the same direction; the car started forward and shortly attained its ordinary speed of eight miles an hour, overtook the Glass Works' truck, and, without slacking its speed, passed the hub of the hind wheel safely, but the front stanchion collided with the hub of the front wheel of the truck and caught Mrs. Houghton's foot between the stanchion and wheel, thus causing the injury complained of; the collision occurred between Webster and Buchanan streets, and about 100 or 125 feet from Webster street. Defendants' theory of the case is that the injury was the result of inevitable accident; that the truck was moving along parallel with the track at a safe distance from it; that the driver of the truck looked back and saw the car coming, and hence it was immaterial whether the gripman rang the bell or not; that as the car came alongside of the truck the horses gave a sudden lurch to the left, towards the car, and thus brought the hub of the front wheel in collison with the car stanchion and caused the injury; that the driver was in perfect control of the team, but its movement to the left was so sudden and unexpected that he could not check it in time to avoid the accident. There was some evidence tending to establish this theory. This evidence, however, was in conflict with evidence tending to establish an entirely different explanation of the accident, an explanation which we think would have warranted the inference by the jury that the accident was the result of the negligence of both defendants. The width of the truck between the outer edges of the front wheels was 6 feet 4¼ inches, and the distance between the outer edge of the southerly track rail and the Haight street curb was 11 feet 4½ inches. The lower step of the car extended 19 inches beyond the rail in a southerly direction; from the outer edge of the seat on which Mrs. Houghton sat to the outer edge of the stanchion the distance was 10 inches, and fastened to the stanchion was a grab rail projecting 3½ inches further. The clear distance from the stanchion to the curb was 10 feet 2¼ inches. The width of the truck at the edge of the front wheels being 6 feet 4¼ inches, left the driver 3 feet 8 inches clear space between where Mrs. Houghton's feet were resting and the truck, if he had availed himself of it. Mrs. Houghton testified: "I saw the hind wheel of the truck first. The hind wheel of the truck came very close to the lower edge of the lower platform of the car; it almost touched. I remember that it almost touched my foot. After passing the rear wheel of the truck my foot was caught in the front, between the stanchion and the front wheel. I don't remember much that happened after that." There was evidence that the gripman did not slacken his speed until he had passed the hind wheel of the truck, and, as some of the witnesses testified, almost simultaneously with the collision. There was evidence also that the gripman did not ring his bell until about the instant of the collision. With a clear view of the truck and its proximity to the track it was a question of fact whether the gripman was guilty of negligence in running his car full speed alongside of this truck, and also whether he did so without warning to its driver. We think there was unmistakably a conflict in the evidence as to whether the railway company was guilty of negligence. The driver of the truck knew that the car was behind and must soon overtake him, for he had just passed it going in the same direction; as to whether he looked back and saw the car coming the evidence was in conflict. If the gripman had sounded a timely warning the truck driver might have pulled away from the approaching car, but it was a question in the case whether, knowing that the car would soon be up with him, he was guilty of negligence in driving so close to the track when there was ample room to have avoided doing so. Furthermore, there was evidence admitted as against the Glass Works defendant tending to show that the driver of the truck turned his horses as if to cross the track to pass a laundry wagon that was standing ahead of him and on the same side of the street. The theory of inevitable accident rested principally on the testimony of the driver of the truck, who testified as to the lurching of his horses towards the car. As against the Glass Works defendant a witness testified to admissions made by the truck driver which were inconsistent with the truth of his statement that the collision was caused by the sudden movement of his team towards the car, which he could not control. Without noticing the evidence further, we think it was not without substantial conflict on the question of negligence as to both defendants, and that there was sufficient evidence to have sustained a

verdict for plaintiffs, had the jury so found.

4. The trial occurred in May, 1901. Two of the jurors, as appeared from examination upon their voir dire, were not on the assessment roll for 1900, but had paid personal property tax on property which they owned on the first Monday of March, 1901. Both jurors were challenged for cause by plaintiffs, on the ground that they were not on the last assessment roll. The court overruled the challenges, and plaintiffs excepted. It appeared that plaintiffs were obliged to and did exercise all the peremptory challenges allowed them by law. If the challenges interposed to these two jurors had been allowed, other jurors who sat upon the jury might have been peremptorily challenged by plaintiffs. Lombardi v. Cal. St. Ry. Co., 124 Cal. 311, 57 Pac. 66. Section 198, Code Civ. Proc., provides: "A person is competent to act as a juror if he be * * * (4) Assessed on the last assessment roll of the county, or city and county, on property belonging to him." Section 199 provides: "A person is not competent to act as a juror: (1) Who does not possess the qualifications prescribed by the preceding section;" and a proposed juror lacking the prescribed qualifications may be challenged. Section 602. The question then is: Were these jurors on the last assessment roll within the meaning of the statute? Property in possession or under control of a person on the first Monday in March at 12 o'clock noon is subject to assessment. Section 3629, Pol. Code. The assessor must complete his assessment book "on or before the first Monday in July." Pol. Code, § 3652. Under this section the assessor may complete the assessment roll before the first Monday in July of each year; but it is not claimed that he had done so in this instance; on the contrary, we understand the fact to be that the assessment roll was not completed. All that had happened, so far as concerned these jurors, was that the assessor had collected from the tax on personal property that might appear on the assessment roll for the year 1901, when completed. As the trial took place in May, 1901, the last assessment roll which was then in existence was that for the year 1900. This view would seem to be confirmed by an examination of sections 204 and 205 of the Code of Civil Procedure. It is there provided that jurors shall be selected in the month of January of each year and shall serve during the ensuing year, and that persons thus selected shall be those "who are assessed on the last preceding assessment roll of such county or city and county." In January, 1901, the only assessment roll in existence was that for the year 1900, and the challenged jurors were not on that roll, nor was property at that time assessable for the year 1901. Reading all these sections together, as may be done, we think the assessment roll contemplated by the statute was that for the year 1900. If the assessment roll for any given year has been completed, and a juror is found to be on that roll as a taxpayer when called to sit in a case, he might with some reason be said to be on the last assessment roll. Upon the point, however, we express no opinion, as such a case is not before us. But here there was no last assessment roll and no completed roll at all except that for the year 1900. How can we say, as is contended by appellants, that the assess-roll for 1901 was in contemplation of law completed when we know the fact to be that it was not then completed? It was held, in Allen v. McKay, 139 Cal. 94, 72 Pac. 713, that the tax list or assessment roll, which must be certified by the assessor and delivered to the clerk of the board of the supervisors, is the only record of his final judgment in respect to the valuation of property. He has no other official record of assessments, and, until this record is finally made up, completed, and certified, as required by the statute (Pol. Code, § 3652), it is entirely within the assessor's control and may be altered or changed to conform to the facts; until then it cannot be said that the last assessment roll mentioned in the statute is in existence. The right of trial by jury is a constitutional right given to litigants, in which the persons called to the jury box have no concern and in which no right of theirs is involved. While the right of trial by jury, as contemplated in the Constitution, may not be taken away by the Legislature, it is within its power to prescribe the qualifications of jurors. Litigants are entitled to have remain in the jury box such persons only, if due and timely objection be made, as the statute declares are qualified to sit as jurors. The challenge was for good cause (People v. Thompson, 34 Cal. 671; Code provisions, supra); and plaintiffs could rely upon the error in denying their challenge (Lombardi v. California St. R. R. Co., 124 Cal. 311, 57 Pac. 66).

The order is affirmed.

We concur: HARRISON, P. J; COOPER, J.

1 Cal. App. 626

QUIGLEY v. ELLENWOOD.

(Court of Appeal, First District, California. Sept. 22, 1905.)

JUDGMENT — BY DEFAULT — PROCESS TO SUSTAIN.

Code Civ. Proc. § 1166, provides that, if publication of a summons is necessary, the court may order the summons returnable at such time as may be deemed proper; and section 1167 declares that the summons must be served at least two days before the return day designated therein. *Held* that, where a summons served by publication was returnable on May 26, 1902, and the publication was not completed until the return day, a judgment by default rendered thereon two days thereafter was erroneous.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Matilda Quigley against Charles R. Ellenwood. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Z. U. Dodge, for appellant. James P. Sweeney, for respondent.

COOPER, J. Unlawful detainer. Judgment by default was entered against defendant, from which he appeals.

Summons was issued May 21, 1902, and on the same day the plaintiff filed an affidavit stating that personal service could not be made for the reason that defendant could not be found and was concealing himself to avoid service. The judge thereupon made an order directing that service be made by publication in a daily newspaper published in San Francisco, commencing with the 21st day of May, until and including the 26th day of May, 1902, and directing that the summons be returned on the 26th day of May, 1902, which was the return day named in the summons. The summons was not served until the completion of the period of time prescribed for its publication; that is, May 26, 1902. Judgment by default was entered May 28, 1902. The Code provides (Code Civ. Proc. § 1166) that the summons must be "returnable at a day designated therein, which shall not be less than three days, nor more than twelve days from its date; except in cases where the publication of the summons is necessary, in which case the court or a justice thereof, may order that the summons be made returnable at such time as may be deemed proper, and the summons shall specify the return day so fixed." It is further provided (section 1167) that the summons must be "served at least two days before the return day designated therein." In this case the summons was not served until the return day; that being the day when the publication was complete. The law contemplates that the defendant in any case shall have two days after the summons is served in which to answer. "If, at the time appointed, the defendant do not appear and defend, the court must enter his default, and render judgment in favor of the plaintiff, as prayed for in the complaint." Section 1169. Defendant did not appear and defend at the time appointed, but he had not been served with the summons at said time. He was not served until the expiration of the last day of publication, May 26th. He was not then given two days to appear and answer or defend, for the judgment was entered and recorded May 28th. In taking a judgment by default the plaintiff acts at his peril. He must see that the law has been complied with and that the time for appearance has expired. Otherwise he takes the chances of having his judgment set aside or reversed.

The judgment is reversed, and the default set aside, and the court below directed to allow defendant two days to appear or answer.

We concur: HARRISON, P. J.; HALL, J.

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1 Cal. App. 628

CITY OF MARYSVILLE v. YUBA COUNTY.

(Court of Appeal, Third District, California. Sept. 22, 1905.)

1. FINES — DISPOSITION OF PROCEEDS — COLLECTIONS BY POLICE JUDGE.

Marysville City Charter, § 13, provides that the police judge of the city shall exercise the power granted to him by the Political Code, sections 4424–4431 of which define the criminal jurisdiction of the police court, and declare that proceedings in criminal actions triable in such courts are regulated by Pen. Code, pt. 2, tit. 11, c. 1, which include sections 1457 and 1570, which, as amended, require all fines collected in any court, less the costs incurred, except fines for the violation of city ordinances, to be paid to the county treasurer. *Held* that, where the police court of such city imposed fines for offenses termed "state misdemeanors," he thereby exercised the functions of a justice of the peace, and that such fines belonged to the county under such sections of the Code, notwithstanding the charter of the city also provided that the money collected by the police judge should be paid into the city's general fund.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fines, § 23.]

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action by the city of Marysville against the county of Yuba. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

A. H. Redington, for appellant. M. T. Brittan, for respondent.

CHIPMAN, P. J. Action to recover back certain moneys collected on fines imposed by the police judge of the police court of plaintiff and alleged to have been paid over to defendant for the use and benefit of plaintiff. Defendant demurred to the complaint for insufficiency of facts, and the court sustained the demurrer on this ground alone. Other grounds are stated in the demurrer; but, as they are not mentioned in respondent's brief, they will not be noticed. Plaintiff failing to amend its complaint, judgment passed for defendant, and plaintiff appeals.

It was alleged in the complaint that there existed in plaintiff city a police court presided over by a police judge who had exclusive jurisdiction over municipal misdemeanors committed within the corporate limits of the city; and that he had jurisdiction, concurrently with the justice of the peace, over such offenses under state laws as were within the jurisdiction of the justice court for the judicial township of which the city formed a part. There are two counts in the complaint: (1) To recover certain fines imposed upon and collected from persons adjudged guilty of certain state misdemeanors, which said fines had been paid over to the county treasurer on the assumption that they belonged to the county. (2) To recover certain moneys in cases where fines had been imposed for state misdemeanors and the convicted persons had elected to serve imprisonment in lieu of paying the imposed fine, but afterwards elected to pay the remaining unpaid portion of said fines, and did so pay the same to the county treasurer through the hands of the sheriff of said county. Claims were duly presented by plaintiff to defendant through the board of supervisors for the amounts thus coming into defendant's possession, and were rejected, and in due time this action was commenced.

The city of Marysville was first incorporated by Act March 3, 1857 (St. 1857, p. 40, c. 44). It was reincorporated by Act March 7, 1876 (St. 1875–76, p. 149, c. 149), "with the powers and under the provisions of title 3 of the Political Code of this state" (part 4, presumably, though not so expressed in section 1 of the act). See section 4354 et seq., Pol. Code; Ex parte Mauch, 134 Cal. 500, 66 Pac. 734. Appellant claims under the provisions of section 13 (p. 150) of the act of 1876, supra, which is as follows: "The police judge shall exercise all the powers granted him by the Political Code, except the provision of section 4425. [relating to the appointment of a clerk]. All moneys collected by him as such police judge shall be paid unto the general fund of said city, on the first Monday of each month. He shall receive for such services an annual salary of five hundred dollars. * * *" Pen. Code, § 1457, as it stood when Marysville was reincorporated, read as follows: "Upon payment of the fine, the officer must discharge the defendant if he is not detained for any other legal cause, and apply the money to the payment of the expenses of the prosecution, and pay over the residue, if any, within ten days, to the county or city treasurer according as the offense is prosecuted in a justice's or police court. If the fine is imposed, and paid before commitment it must be applied as provided in this section." The disposition of fines is further provided for as follows: "All fines and forfeitures collected in any court, except police courts, must be applied to the payment of the costs of the case in which the fine is imposed, or the forfeiture is incurred, and after such costs are paid, the residue must be paid to the county treasurer of the county in which the court is held." Section 1570. Both of these sections were amended in 1901. Section 1457 was amended by adding "provided that all forfeitures and fines collected for the violation of any city ordinance, whether in the police court or justices' court, shall be paid over to the city treasurer of the city in which such ordinance is in force." Section 1570 was amended to read: "All fines or forfeitures collected in any court [omitting the exception as to police courts in the original section] must be paid to the county treasurer: * * * Provided, that all fines and forfeitures collected in any court for the violation of any city ordinance shall be paid to the city treasurer in which such ordinance is in force." St. 1901, p. 88, c. 71. In effect these amended sections require all fines collected in any court (less the costs incurred), except fines for the violation of city ordinances, to be paid to the county treasurer. Appellant concedes that these sections affect the police courts established in cities and towns chartered under the general municipal incorporation law of this state (St. 1883, p. 93, c. 49), and those existing in cities which owe their corporate powers to freeholders' charters provided by the Constitution. But appellant contends that municipalities which were incorporated under special acts of the Legislature before the new Constitution went into effect, and which have never elected to incorporate under the general municipal incorporation law, are not bound by these sections of the general law found in the Penal Code, "where direct provision governing the same subject-matter is to be found in the charter itself."

We must, by the terms of the act of reincorporation of plaintiff, look to the Political Code to ascertain the powers of the police judge. Section 4424 et seq. of that Code define the criminal jurisdiction of the police court. Section 4431 also provides as follows: "Proceedings in criminal actions triable in such courts [police courts] are regulated in part 2, title 11, chapter 1, of the Penal Code." It is in this part, title, and chapter of the Penal Code that we find the sections 1457 and 1570, supra, relating to the disposition of fines and forfeitures. To determine the powers of the municipality and of its officers, we must look to the provisions of the Political Code and Penal Code so far as these provisions have, by the charter itself, been made applicable. Appellant contends for the principle that express provisions of the charter, enacted by special legislative act, cannot be changed by the enactment of general laws; citing Smith's Beach on Mun. Corp. §§ 101, 104, 105, and Cooley's Const. Lim. 183. The principle was applied in People v. Hill, 125 Cal. 16, 57 Pac. 669, where it was said of the charter of Salinas City there involved: "The chapter, being the law for a special case, is not in conflict with a general law which provides otherwise. Even a general law subsequently passed does not repeal laws expressly made for special cases, unless an intent that the general law shall have such effect is manifested in some mode in the general law." Assuming that the "moneys collected" by the police judge, mentioned in section 13 of the act of 1876, mean fines and forfeitures, they nevertheless come into his hands by virtue of the provisions of the general law. This general law (the Political Code and the Penal Code) cannot be restricted to its provisions as they stood when referred to by the charter, but must be held to be the provisions as defined from time to time by the Legislature.

Surely the Legislature could amend or repeal these provisions, and, when amended or repealed, they would, we think, control the charter provisions on the same subject, for to no others could the charter then refer.

The powers of the police judge to try cases and impose fines come alone from this general law, and it is sufficiently clear that, when the Legislature made the general law, in effect a part of the charter, it retained its power over the general law to amend or repeal it, and, when it did the one or the other, it became the law, and the only law, to which section 13 of plaintiff's charter could refer. The charter by its reference to the Political Code (see section 4431 of that Code) provided that proceedings in criminal actions triable in police courts shall be regulated by the provisions of the Penal Code. The disposition of fines is part of such proceedings and may be regulated the same as may the jurisdiction of the police judge be regulated. In giving the police court jurisdiction over what are termed "state misdemeanors," that officer is exercising the functions of justice of the peace, who is a county officer, and should be, and, we think, is, subject, in the exercise of this jurisdiction, to the general law so far as applicable to his duties while acting in such capacity. He imposes fines in these cases alone through the authority given him by the general law as he finds it, and not otherwise. The effect of the amendments to the Penal Code upon the disposition of fines and forfeitures is not brought about by the amendment of some general law independent of the charter, but by an amendment to a general law which by the terms of the charter had been made applicable to it. The Legislature may pass general laws affecting municipal corporations without reference to whether such corporations were formed before or after the Constitution of 1879. See cases in notes, article 11, § 6, Treadwell's Ann. Const. Cal.; also Ex parte Braun (Cal.) 74 Pac. 780.

It is claimed, however, that the amendment of the Constitution of 1896 has taken away from the Legislature the power to interfere in "municipal affairs," and that this matter of the disposition of fines is a municipal affair. We do not so regard it. If the charter clearly made these fines a part of the revenue of the city by which, in part, the city was to derive its support, there might be some force in the suggestion. But the charter says nothing about fines. It is in the Penal Code alone we find the mode pointed out for their disposition. The police judge, in imposing fines for violations of state laws, is enforcing the general law as he finds it, and is performing the duties of a justice of the peace concurrently with that officer. Both officers are equally within the regulating power of the Legislature in the trials of offenses punishable by state law, and such trials cannot be said to be "municipal affairs," as contemplated by the Constitution. It would be vain to attempt to extract from the decisions of the Supreme Court a definition of these terms alike applicable to all cases. It seems to be conceded that the court has not undertaken, and probably never will undertake, to give a general definition of these words, but that their meaning must be determined in each individual case as it arises, and upon its own facts. Probably the cases of Fragley v. Phelan, 126 Cal. 383, 58 Pac. 923, and Ex parte Braun (Cal.) 74 Pac. 780, throw as much light on the question as any of the decided cases.

The judgment is affirmed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

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1 Cal. App. 619

HEESER v. TAYLOR.

(Court of Appeal, Third District, California. Sept. 21, 1905.)

1. EXECUTORS AND ADMINISTRATORS — MORTGAGES — FORECLOSURE — PRESENTATION OF CLAIMS.

Where, in a suit to foreclose a mortgage against the property of an intestate, plaintiff expressly waived recourse against any other property of the estate than that covered by the mortgage, no presentation of his claim against the estate was necessary.

2. LIMITATION OF ACTIONS — FORECLOSURE — DEATH OF MORTGAGOR.

Under Code Civ. Proc. § 353, providing that, if a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof and the cause of action survive, an action may be brought against decedent's representatives after the expiration of such time and within a year after the issuance of letters of administration, where a mortgage debt was not due at the time of the mortgagor's death, limitations did not begin to run against the mortgagee's right to foreclose while there was no administration on mortgagor's estate, notwithstanding section 312, requiring all actions on contracts in writing to be brought within four years after maturity, with certain exceptions specified.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Wm. Heeser against John Taylor, as administrator of the estate of Thomas Boyle, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

Thomas, Pemberton & Thomas, for appellant. T. L. Carothers, for respondent.

McLAUGHLIN, J. This is an action to foreclose a mortgage on real property. The defendant demurred to the complaint upon the general ground that no cause of action was stated therein, and also on the special ground that the cause of action pleaded was barred by the provisions of sections 312 and 337 of the Code of Civil Procedure. The demurrer was overruled, and, defendant declining to answer, judgment of foreclosure was entered. From this judgment defendant appeals.

The complaint stated a cause of action. The plaintiff expressly waived all recourse against any other property of the estate, and hence no presentation of his claim was necessary. Code Civ. Proc. § 1500; McGahey v. Forrest, 109 Cal. 67, 41 Pac. 817; Visalia Savings Bank v. Curtis, 135 Cal. 352, 67 Pac.

329; Weinreich v. Hensley, 121 Cal. 656, 54 Pac. 254.

The principal question remaining relates to the defense of the statute of limitations. It appears from the complaint that the note and mortgage in suit were executed by Thomas Boyle to L. E. White, the assignor of plaintiff, on September 19, 1878. The note was for the sum of $360, bearing interest at the rate of 1½ per cent. per month from date, and was payable one year after its date. Thomas Boyle died on December 16, 1878, but no administration of his estate was had until February 3, 1904, when letters of administration were issued to the defendant. The mortgage and the assignment thereof were duly recorded. It is apparent from the foregoing statement that the note was not due at the time of Boyle's death, and upon this fact rests appellant's contention that the cause of action was barred when this action was commenced. It is said in this behalf that section 312, Code Civ. Proc. requires that all actions upon contracts in writing, without exception, be commenced within four years after maturity, and that the cause of action here is not embraced in any of the special classes mentioned in that section. This conclusion is based on the assumption that the cause of action is not saved by the concluding clause of section 353 of the same Code, because no cause of action was ripe when Boyle died, and hence he was not a person against whom an action might be brought within the meaning of that section. In other words, appellant claims that section 353 applies only to cases where the running of the statute had commenced before the death of the payor. Tynan v. Walker, 35 Cal. 634, 95 Am. Dec. 152, and Hibernia S. & L. Society v. Conlin, 67 Cal. 178, 7 Pac. 477, are cited as sustaining this view, and it is earnestly argued that the decision to the contrary in the case of In re Bullard, 116 Cal. 355, 48 Pac. 219, is not supported by reason or the statute. It could serve no useful purpose to indulge in critical analyses of the decisions bearing upon the question before us. In the last-mentioned case the question to be decided here was squarely presented and decided, and, notwithstanding the fact that both of the cases relied upon by appellant were there considered, it was held "that the statute of limitations does not begin to run where no administration exists on the decedent's estate at the time the cause of action accrued." In re Bullard, supra; Smith v. Hall, 19 Cal. 85. The very recent case of Hibernia S. & L. Society v. Boland, 145 Cal. 627, 79 Pac. 365, is "on all fours" with the case at bar, and the rule announced in Re Bullard was there followed.

It is useless to expect this court to ignore or attempt to nullify a rule thus plainly declared and sanctioned by our highest court. Chaos must be the inevitable result if the rights of citizens are to be measured by one rule in that forum, and by varied and different rules in the District Courts of Appeal. Certainty in the administration of justice is essential to the security of personal and property rights, and it needs no argument to convince that conflicting or contradictory decisions, creating uncertainty and confusion, could only impair the usefulness of our present appellate courts, and render harmful a system whch it was hoped might prove beneficial. A hotch potch of conflicting decisions would create intolerable conditions as unnecessary as they would be deplorable. The District Courts of Appeal were not created for the purpose of revising or overruling the decisions of the Supreme Court, and no such power will be here exercised or assumed. Should a justice of this court entertain views irreconcilably in conflict with a decision of the Supreme Court, such justice will, no doubt, fearlessly exercise his privilege of dissent. Should all the justices concur in the view that a decision of the Supreme Court should be overruled, we will manifest our high confidence in that tribunal by courteously calling attention to the supposed error, and requesting that the cause before us, involving the application of the rule or principle questioned, be transferred to that court for final adjudication. In this way we may be relieved from the necessity of blindly following all decisions, however erroneous some of them may seem, and at the same time avoid the dangers attendant upon varied and conflicting decisions touching the same legal principle or abstract right. It is the privilege and duty of every attorney in this state to combat and seek to overthrow judicial precedents which are deemed erroneous, and we would not be understood as discouraging the full and fearless performance of this high duty, nor as minimizing the potency of fair, manly, and intelligent criticism in molding and perfecting an harmonious and correct system of authoritative precedents. No higher tribute could be paid to any court than to seek relief from the effect of error, in the court where the error was committed. We invite respectful, yet fearless criticism, and will be quick to examine and answer appeals to correct errors here committed; but all must realize that the binding force of decisions by our court of final review, can only be impaired or destroyed by the tribunal in which such decisions were rendered. It is but fair to counsel for appellant to remark that the argument which induces the foregoing statement was originally addressed to the Supreme Court, but similar arguments are frequently addressed to district courts of appeal, and a sense of duty to members of the bar compels us to state our view touching the powers of this court in the premises.

In the case at bar there is no dissent from the rule declared in the case of In re Bullard, supra. The purpose of a law furnishes an unerring guide to its correct interpretation, and we are satisfied that such rule is in consonance with the reason and purpose, and is within the scope of section 353, Code Civ. Proc. It is clear to our minds that the amendment to section 312 of the same Code could not and did not affect the interpretation placed upon section 353. The interest was payable from the date of the note, and hence the judgment cannot be modified as suggested. Casey v. Gibbons, 136 Cal. 370, 68 Pac. 1032; Kohler v. Smith, 2 Cal. 597, 56 Am. Dec. 369. No equitable question of laches is here involved, and we cannot decide questions which are not before us.

This case is a harsh one, but inexorable rules of law, binding alike on litigants and courts must be followed, and hence the judgment must be, and is hereby, affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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1 Cal. App. 623

GRUNSKY et al. v. FIELD.

(Court of Appeal, Third District, California. Sept. 21, 1905.)

1. APPEAL—CONFLICTING EVIDENCE—REVIEW.

Where a finding is based on evidence in which there is a substantial conflict, it will not be disturbed on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3983–3989.]

2. SAME — SECOND TRIAL — ASSIGNMENTS OF ERROR—REVIEW.

Where, on a new trial after a disagreement of the jury, it was stipulated that the cause should be submitted to the court "for decision" on the record of the former trial, and there was nothing in the stipulation to show an agreement between the parties and the court that the objections, rulings, and exceptions at the former trial should be considered as made and reserved at the new trial, assignments of error based on such rulings and exceptions could not be reviewed on appeal from the court's decision.

Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Action by Otto Grunsky and another against J. L. Field. From a judgment in favor of plaintiffs, and from an order denying defendant's motion for a new trial, he appeals. Affirmed.

A. E. Percival and Louttit & Middlecoff, for appellant. Nichol & Orr, for respondents.

McLAUGHLIN, J. Defendant prosecutes this appeal from the judgment and from an order denying his motion for a new trial. The action was brought to recover commissions on a sale of real estate, under a contract which reads as follows: "Field Ranch, March 11, 1903. In consideration of one dollar, the receipt of which is hereby acknowledged, I authorize Grunsky & Dietrich, for five months, to sell my farm of 160 acres, including standing crop, for $65.00 per acre, and I agree, if any sale results through the efforts of said Grunsky & Dietrich at above or less price, to pay them the commissions of 5 per cent. J. L. Field." On April 17, 1903, the property was sold to C. J. Bender for the sum of $10,400, and the court found that such sale resulted through the efforts of the respondents.

The main point urged upon this appeal is that such finding is not supported by the evidence. An examination of the record, however, discloses a substantial conflict in the evidence on this point, and under the well-settled rule such finding will not be disturbed. White v. Beer, 105 Cal. 9, 38 Pac. 513; Taylor v. McConigle, 120 Cal. 125, 52 Pac. 159; Raymond v. Glover, 144 Cal. 548, 78 Pac. 3. The bill of exceptions shows that upon a former trial of the cause the jury disagreed, and that upon the second trial, which was before the court without a jury, the respective parties in open court stipulated and agreed "that the cause be submitted to the court for decision upon the record of a former trial of this action before a jury, as shown by the reporter's notes taken upon such former trial." The cause was thereupon argued and submitted for decision upon such record, a copy of which is set forth in the bill of exceptions. Numerous assignments of error based upon rulings made and exceptions reserved at such former trial are urged by appellant, but respondents insist that rulings made at the first trial cannot be reviewed upon this appeal, for the reason that the stipulation contains nothing to warrant such review or justify the assumption that the rulings of the court would have been the same at the second as at the first trial. The stipulation contains no recital saving or reserving objections or exceptions taken at the first trial, and there is nothing in the record here to indicate that the trial court reviewed or passed upon the alleged errors when the motion for a new trial was heard. No authorities have been cited to sustain or defeat respondents' contention, and none have been found which bear upon the novel question thus presented.

It is the duty of an appellant to show error affirmatively, and every intendment favors the action of the trial court. People v. Douglass, 100 Cal. 1, 34 Pac. 490; Landers v. Bolton, 26 Cal. 393; Doyle v. Franklin, 48 Cal. 537. It follows that, unless the legal effect of the stipulation is to compel such review, or it is clearly apparent from the record that the parties and the court understood that such should be its effect, we must presume that nothing of the kind was intended. There is nothing in the subsequent conduct of the parties, as shown by the record here, to throw any light on the intention of the parties; hence it must be assumed that the stipulation fully and clearly expresses the intention of the parties thereto. At the time the stipulation was made the parties to the action stood at the threshold of a new trial. The record of the former trial was functus officio, and they were about to make up a new record upon which the cause would be decided and reviewed. Code Civ. Proc. §§ 646, 650, 657, 661. Under these circumstances, by full consent of the appellant, the cause was submitted for decision upon the old record, which was impotent to help or harm him until such consent was given. It is clear that the parties to the action could not by stipulation or otherwise forecast the action of the trial court. They were powerless to make up a new record based upon the assumption that the same rulings would be made at the new as at the former trial, unless the court clearly and distinctly consented to such an arrangement. No such consent is here shown. There is nothing in the stipulation hinting at the proposition that the parties agreed and the court consented to have objections, rulings, and exceptions at the former trial considered as made and reserved at the new trial. Under such circumstances we are of the opinion that the assignments of error above mentioned cannot be considered. Moreover, the effect of granting a new trial would virtually be to ignore appellant's act in consenting to and sanctioning this record, and to place him in a position practically the same as that occupied by him before he entered into the stipulation. We believe that, where a party to an action is entitled to a rehearing in the trial court, he cannot waive such right, and then expect the appellate court to award him privileges and opportunities thus voluntarily relinquished. "He who consents to an act is not wronged by it," and "acquiescence in error takes away the righ of objecting to it." Therefore, in the absence of an express agreement to that effect sanctioned by the trial court, the appellant will not be allowed to predicate error on a record to which he consented. This is the rule applied in analogous cases, and we think it should be applied here. Hess v. Bolinger, 48 Cal. 354; Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237; Gregory v. Gregory, 102 Cal. 52, 36 Pac. 364; Muller v. Rowell, 110 Cal. 319, 42 Pac. 804.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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1 Cal. App. 612

PEOPLE v. PELTIN.

(Court of Appeal, Third District, California. Sept. 21, 1905.)

1. LARCENY—INDICTMENT—CERTAINTY.

An information for grand larceny, charging defendant with having stolen "about $80 lawful money of the United States of America," was not demurrable for uncertainty as to the amount stolen, as it could not be said that the information failed to charge a larceny of more than $50.

2. SAME—EVIDENCE.

Where, in a prosecution for grand larceny of money from a cash register, a mutilated and alleged counterfeit coin was clearly identified as having been taken from the register at the time the crime was committed and was found on defendant's person when he was arrested a short time thereafter, it was properly admitted in evidence to connect defendant with the offense, though it was not "lawful money of the United States" which defendant was charged with taking.

3. SAME.

In a prosecution for grand larceny of money from a cash register, evidence that defendant had no money just before the crime was committed was admissible.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Larceny, § 142.]

4. SAME.

Where, in a prosecution for grand larceny of money from a cash register, there was no evidence that defendant made any attempt to borrow money prior to the commission of the offense, evidence that defendant's credit was good and that he could have borrowed money was not admissible for the purpose of accounting for the money found on his person.

5. SAME—CHARACTER—INSTRUCTIONS.

Where the evidence as to accused's good character was based largely on personal acquaintance and knowledge rather than on reputation, and other circumstances, such as masquerading under an assumed name, tended to neutralize its effect, it was not error for the court to refuse to charge that "the presumption arising from the possession alone of stolen property is removed by evidence of defendant's good character."

6. SAME — STOLEN PROPERTY — RECENT POSSESSION.

Where accused, when arrested, had on his person the exact number of $5 and $20 pieces taken from a cash register, and the total amount found in his pockets was within a few cents of the amount stolen therefrom, an instruction touching the recent possession of stolen property was justified.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Larceny, §§ 202, 203.]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Sam Peltin, alias Victor Peterson, was convicted of grand larceny, and he appeals. Affirmed.

E. W. Holland, for appellant. U. S. Webb, for the People.

McLAUGHLIN, J. The defendant was convicted of grand larceny, and appeals from the judgment and from the order denying his motion for a new trial.

The first contention of appellant is that the information is indefinite and uncertain, because the property stolen is described as being "about $80 lawful money of the United States of America." This contention cannot be sustained. The word "about" is frequently used as a synonym for the words "nearly," or "approximately," and such use is sanctioned by definitions found in the various standard dictionaries. Understood in this sense, it cannot be said that the information in the case at bar fails to charge the larceny of more than $50, or that there is any material uncertainty as to the value of the property stolen. The use of qualifying words is not commended, for the value of the property taken should be clearly and definitely stated in an information for grand larceny. But when a person of common understanding would readily know what is intended, and no substantial right of a defendant is infringed, the information must be upheld. Pen. Code, §§ 957, 959, 960. We are not informed as to the grounds upon which the demurrer is based, and therefore cannot know whether it was general or special, and it has been held that in the absence of a special demurrer such a statement as to value is sufficient. People v. Richards, 136 Cal. 128, 68 Pac. 477.

A marked and mutilated half-dollar piece which was in the looted cash register was found on the person of the defendant when he was arrested a short time after the crime was committed. Evidence to this effect was received, and the coin was admitted as an exhibit in the case against defendant's objection. It is now urged that such rulings were erroneous, because the coin was counterfeit, and proof of its theft could not sustain the charge made. True, the defendant was charged with stealing lawful money; but, conceding the proposition of law relied upon, and also assuming that the coin was counterfeit, and not merely mutilated, it does not follow that it was error to admit the evidence complained of. This coin was clearly identified as an article taken from the cash register at the time the crime was committed, and the evidence objected to was admissible for the same reason that would make a knife, chain, or other article proper evidence under similar circumstances. It connected defendant with the commission of the offense, and tended strongly to show that he was the person who opened the cash register and abstracted its contents.

It was not error to admit evidence showing that the defendant had no money just before the crime was committed. People v. Kelley, 132 Cal. 430, 64 Pac. 563; People v. Sullivan, 144 Cal. 471, 77 Pac. 1000. Nor was it error to exclude evidence to prove that defendant's credit was good and that he could have borrowed money. If he did in fact borrow money, evidence to that effect would be admissible; but his ability to do so could have no bearing on the case, and could not in the slightest degree tend to account for the money found on his person.

The court refused to instruct the jury that "the presumption arising from possession alone of stolen property is removed by evidence of the good character of the defendant." This is assigned as error; but, giving People v. Hurley, 60 Cal. 77, 44 Am. Rep. 55, due weight as authority touching the legal proposition there declared, we think such instruction was properly refused. The court was not privileged to invade the province of the jury and determine the weight to be given evidence in the case. The evidence as to good character was based largely on personal acquaintance and knowledge, rather than general reputation, and circumstances, such as masquerading under an assumed name, tended to neutralize its effect. If this instruction could be proper under any state of facts, it certainly would not have been proper in the case at bar. The instruction touching the recent possession of stolen property must be read in connection with other instructions, and this done the instructions bearing on this phase of the case contained a full and correct statement of the law. People v. Etting, 99 Cal. 578, 34 Pac. 237. The defendant when arrested had upon his person the exact number of $5 and $20 pieces taken from the cash register, and the total amount found in his pockets was within a few cents of the sum stolen. The instruction was, therefore, based on evidence in the case regardless of the mutilated or counterfeit coin heretofore mentioned.

There was no misconduct on the part of the district attorney. That the defendant was known by another name is not contradicted, and this was the essential part of the statement objected to. The evidence was entirely sufficient to sustain the verdict. The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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1 Cal. App. 61ꝯ

SANTOS v. SILVA.

(Court of Appeal, Third District, California. Sept. 21, 1905.)

TRIAL—TO COURT—SUFFICIENCY OF FINDINGS.

The fact that the trial court made no express finding on the defense of limitation pleaded by defendant does not render the findings insufficient to support a judgment for plaintiff, where they show the date when the cause of action accrued, and it appears therefrom that the action was not barred.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Frank J. Santos against A. J. Silva. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Hopkins & Hinsdale, for appellant. J. Frank Brown, for respondent.

McLAUGHLIN, J. This is an appeal from a judgment resting on the judgment roll alone. The only question presented is the sufficiency of the findings to support the judgment. The court made no express finding on the statute of limitations, pleaded as a defense to the first cause of action set forth in the complaint, and such failure is assigned as error. The findings, however, clearly show the date when this cause of action accrued, and from this it is apparent that the cause of action was not barred by the statute. This was sufficient. Ready v. McDonald, 128 Cal. 664, 61 Pac. 272; Paine v. San Bernardino, 143 Cal. 656, 77 Pac. 659; Krasky v. Wollpert, 134 Cal. 338, 66 Pac. 309; Warren v. Hopkins, 110 Cal. 512, 42 Pac. 986; Breeze v. Brooks, 97 Cal. 77, 31 Pac. 742, 22 L. R. A. 257; Baum v. Roper, 145 Cal. 116, 78 Pac. 466; Eva v. Symans, 145 Cal. 202, 78 Pac. 648. The court omitted to find touching a disputed item of $154.20, and the respondent, upon the argument, confessed error in this regard, and filed a written waiver and release of the judgment to the extent of this sum and the interest thereon amounting to $26.03, and asked that the judgment be modified accordingly, and as so modified that the judgment be affirmed. This course would render the error utterly harmless to appellant.

The judgment is therefore modified by striking out said items, and by reducing the total amount thereof to the sum of $790.73. As so modified, the judgment is affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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1 Cal. App. 617

DRAKE v. DE WITT et al.

(Court of Appeal, Third District, California. Sept. 21, 1905.)

ATTACHMENT — WHEN GRANTED — FOREIGN CONTRACTS.

Where plaintiff's assignor contracted with defendants in Minnesota to sell California lands owned and controlled by defendant on contract, that plaintiff's assignor should have the sole St. Paul agency for the sale of such lands, that commissions should be paid when a sale was influenced by him and effected at the California office, that monthly reports should be sent to such assignor, and that commissions earned were to be paid in money or land at the assignor's option, but did not stipulate for payment in California, the contract was to be performed in Minnesota, and plaintiff, residing in that state, was not entitled to an attachment in an action to recover commissions against defendants, residing in California, under Code Civ. Proc. § 537, authorizing the issuance of an attachment in an action on a contract for the payment of money, where the contract is made or is payable within the state and is not secured by a lien on real or personal property, etc.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Mrs. H. T. Drake against H. G. De Witt and another. From an order dissolving an attachment, plaintiff appeals. Affirmed.

A. M. Drew and F. H. Short, for appellant. Harris & Harris, for respondents..

McLAUGHLIN, J. Plaintiff appeals from an order dissolving an attachment. The action in which such attachment was issued was brought to recover commissions earned by H. T. Drake, plaintiff's assignor, under a written contract made in the state of Minnesota. Under such contract said Drake agreed to take the St. Paul agency for the sale of California lands owned, controlled, or held under contract by defendant H. G. De Witt, and under the terms of the agreement Drake was "entitled to the sole agency for St. Paul, Minn., while engaged in the sale of these lands." Commissions were to be paid when a sale was influenced by Drake, but was finally effected at the home office in California. Monthly reports from the California office were to be sent to Drake, and commissions earned were to be paid in money or land at his option. The defendants reside in California; the plaintiff in Minnesota.

The right to have an attachment issue is purely statutory, and the person claiming such right must show affirmatively that the contract agreed upon falls within the provisions of section 537, Code Civ. Proc. In an early case involving the construction of a similar statute it was said: "The universally admitted rule of construction requires effect to be given, if possible, to every part of a law. We can only follow the rule in this case by denying the right of attachment except where the contract is made within the state, or, if made without it, then accompanied by a stipulation between the parties to it that the money is to be paid here." Dulton v. Shelton, 3 Cal. 208. This construction has been adhered to for more than 50 years, and "upon well-settled principles the court must regard the construction given to the statute in that case as a correct interpretation of the intention of the Legislature." Eck v. Hoffman, 55 Cal. 502; Tuller v. Arnold, 93 Cal. 168, 28 Pac. 863. The contract before us shows on its face that it was made, and was to be performed by Drake, in the state of Minnesota. There is nothing to indicate that commissions earned were to be paid in California. The stipulations touching monthly reports and commissions on sales influenced by Drake, but consummated here, evince a contrary intention, and the presumption is that payment was due where the contract was made and the services were rendered. Bishop on Contracts, § 1391. What the rights of plaintiff might have been had she elected to receive payment in land is a question not before us for decision. Suffice it to say that this clause in the contract does not aid appellant's contention here. Her right to an attachment in any event depends upon the view that this was a contract for the direct payment of money, and it is essential to such right that the agreement itself contain some provision indicating that such money was payable in this state.

There is no express, or even implied, stipulation to this effect in the contract, and the order is therefore affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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1 Cal. App. 637

KNOLL v. MELONE.

(Court of Appeal, First District, California. Sept. 23, 1905.)

1. BILLS AND NOTES — ORDER — CONDITIONAL ACCEPTANCE—LIABILITY.

An owner of one-half of the proceeds of certain bonds and coupons in the possession for collection of defendant, who was the owner of the other moiety, assigned all his interest in the contract for their collection, and, after judgment on the bonds and coupons assigned his interest in the judgment to the same party but before such assignment pledged any interest he might have in the proceeds to plaintiff to secure a pre-existing debt, and defendant accepted written notice of such pledge and an order to pay plaintiff's debt out of any moneys that should come into his hands, belonging to the assignor. *Held*, that defendant was not liable on such acceptance after paying the assignor's interest in the amount collected on the judgment to the executrix of the assignee of the judgment, since after the acceptance defendant never had any money in his hands payable to the assignor according to its terms.

2. PLEDGE—LIENS—EXTINGUISHMENT—LAPSE OF TIME.

Where a debtor's interest in certain bonds was assigned to his creditor as security for a demand note of the same date, the creditor acquired no absolute title to the bonds or the fund to be derived therefrom, but simply had a lien thereon for the payment of the note, which was unenforceable after the right of action on the note was barred, under Civ. Code, § 2911, declaring that a lien is extinguished by a lapse of time within which an action can be brought on the principal obligation.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by H. W. Knoll against Drury Melone. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Beatty & Sanderson, for appellant. C. W. Cross, Franklin P. Bull, and L. A. Wittenmyer, for respondent.

HALL, J. This is an appeal by plaintiff from a judgment in favor of defendant upon the judgment roll alone. The facts that determine this case, as set forth in the findings, are as follows: On the 23d day of April, 1881, J. R. Myers was the owner of certain bonds and coupons of the city of Placerville of the face value of $29,500, and by writing under said date entered into a contract with Drury Melone (defendant) whereby Melone undertook to collect from said city said bonds and interest thereon. By the terms of said contract Melone should have, own, and retain one-half of whatever should be recovered on said bonds or coupons by litigation, settlement, or compromise. May 10, 1882, said Myers, by a writing placed at the foot of said written contract between Myers and Melone, assigned to L. L. Robinson all the interest of Myers in said contract and in said bonds and coupons, as security for the sum of $4,000 due by Myers to Robinson, and evidenced by promissory note of date May 10, 1882, and bearing interest. June 30, 1885, Myers executed to Robinson a renewal note for the principal and interest, then amounting to $5,800, to bear interest at 10 per cent. per annum, and payable one day after date, and as collateral security therefor again assigned to Robinson all the interest of Myers in said contract with Melone and in said bonds and coupons. Robinson did not give notice to Melone of said assignments, and Melone had no knowledge thereof on or before March 5, 1887. October 6, 1886, judgment was entered in the superior court of the city and county of San Francisco in favor of Myers and Melone against the city of Placerville for the amount due upon said bonds and coupons. On September 1, 1887, Myers, by a writing, made an absolute assignment of his one-half interest in said judgment to Robinson in payment of the note for $5,800, nothing having been paid thereon, and said note was canceled, and Robinson released Myers from all claims and demands, and thereafter said Robinson always claimed to be the absolute owner of said one-half of said judgment. That on the 1st day of February, 1887, said Myers was indebted to Davis & Son in the sum of $300, and on said date executed to Davis & Son a promissory note, payable on demand, for $300, and interest at one per cent. per month, and as security for the payment of the sum assigned all his interest in said bonds and said contract with Melone to Davis & Son, and executed and delivered to Davis & Son the following writing: "Oakland, Cal. Feb. 1st, 1887. I hereby pledge and assign to said George A. I. Davis, as security for and of the above note, all my interest in the contract between me and Drury Melone, relating to the bonds and coupons of the city of Placerville, and interest thereon. I hereby direct the said Melone to pay the above note out of any money which may be due me at any time under or by virtue of said contract. J. R. Myers." Melone was notified of said assignment March 5, 1887, and referring to said order signed the following: "The within orders were presented this 5th day of March, 1887, and should money come into my hands payable to J. R. Myers or his wife I will out of such funds pay the above note. Drury Melone." (Mrs. Myers never had any interest in the matter.) Robinson died in 1892, and Sophia G. Cutter was appointed executrix of his will, and on the 4th day of October, 1899, Melone upon a compromise (consented to by said Cutter) collected from the city of Placerville in full satisfaction of said bonds $30,910. The note to Davis & Son had never been paid, and plaintiff is now the owner thereof by proper assignment. In response to a plea of the statute of limitations made by the defendant, the court found that said promissory note to Davis & Son is barred by the provisions of section 337 of the Code of Civil Procedure, but the action upon the writing signed by Melone March 5, 1887, is not barred. The court further found and decided that Melone never collected or received any money payable to J. R. Myers, but that the money collected under said compromise was one-half for Melone and one-half for the executrix of Robinson's will, and gave judgment for defendant for his costs.

The judgment rendered by the trial court is correct. The only promise to pay ever made by Melone is contained in the writing of date March 5, 1887, and was conditional. It is in these words: "The within orders were presented this 5th day of March, 1887, and should money come into my hands payable to J. R. Myers or his wife I will out of such funds pay the above note." No money ever did come into Melone's hands payable to

Myers. The condition upon which Melone promised to pay the Davis note has never arisen. Long before any money was collected Myers had, by an absolute assignment of the judgment which had been recovered on the bonds, parted with all claim to any interest in the bonds, and consequently none of the money collected was payable to him. Melone did not promise to pay out of such money as he might collect on the bonds, but only out of such money as should be payable to Myers. His promise cannot be extended beyond the plain meaning of the words used by him. Indeed, if we understand the contention of appellant, he does not rely so much upon this conditional promise of Melone's, but rather upon the effect of the assignment of the bonds to Davis & Son, February 1, 1887, and the fact that they notified Melone of such assignment before Melone received any notice of Robinson's assignments. Counsel states his position in the form of a supposititious dialogue between his client and Melone, and puts these words into the mouth of his client: "Robinson bought out Myers September 1, 1887, six months after my assignment. As for the lien he had on the fund when I gave my notice, it yielded to me because of that notice. As against his prior *right* you must pay me because of my prior *notice*. As against his subsequent purchase I am protected by my prior *assignment and notice*." Italics are ours. In support of his position appellant has discussed the law as to the relative rights of successive assignees of a chose in action as depending on the order in which they give notice to the debtor or trustee of the fund, as the case may be, and especially relies on Graham Paper Co. v. Pembroke, 124 Cal. 117, 56 Pac. 627, 44 L. R. A. 632, 71 Am. St. Rep. 26. With the doctrine of this latter case we have no quarrel, but it has no application to the facts of this case.

What were the rights secured by Davis & Son under the assignment of February 1, 1887? The assignment was as security for the payment of the promissory note, and by such assignment they did not become the owner of any interest in the bonds or in the contract with Melone, or in the potential fund that might result from the bonds. Myers still remained the owner of the bonds, and Davis & Son as between him and them had a lien thereon as security for the payment of the note. It is perfectly plain that Myers could have extinguished all right Davis & Son had under the assignment and order by simply paying the note. The principle above stated is amply supported by Bibend v. Liverpool Ins. Co., 30 Cal. 78, cited by appellant. In this latter case Wallstein & Mears gave notes to Wegener & Shoenbar for an indebtedness they owed the latter firm, and agreed that Wegener & Shoenbar should hold certain insurance policies as collateral security with the right to collect the insurance in case of loss, and apply the amount on the debt. Subsequently Wegener & Shoenbar assigned the notes and policies to Bibend. A loss by fire occurred, suit was brought, and the court, in discussing the effect of the assignment of the policies, said: "The insurance in this case was effected in the names of Wallstein & Mears, upon their property, and the premiums were paid by them. At the time of the fire the property belonged to them, and so did the policies of insurance. At that time the plaintiff held the policies, not as the owner of them by title absolute, but as evidence of his right under the contract entered into between the firms mentioned to receive of the insurance companies the money due Wallstein & Mears by reason of the loss by fire, and to appropriate sufficient of it to the payment of the amount due on the notes assigned to him by Wegener & Shoenbar. The subject to which the contract of these firms had reference was the money which might become due from the insurance companies in case of a loss of the property by fire. The effect of the contract was not to transfer the title and property of Wallstein & Mears in the policies. They had the power at any time to possess themselves of the policies by paying the amount due to Wegener & Shoenbar. * * * At that time the plaintiff had no more than an equitable lien on the fund created by the concurrence of the loss and the liability of the insurers to pay."

Davis & Sons having acquired, by the assignment to them of February 1, 1887, as security for the demand note of same date, no absolute title either to the bonds, contract, or the fund to be derived from the bonds, but simply a lien thereon for the payment of such note, the next question is, what has become of that lien? The answer is it has long since been extinguished by lapse of time. Upon the face of the complaint (and the finding of the court accords therewith) the note to Davis & Son was barred by the statute long before any money was collected by Melone on the bonds. "A lien is extinguished by the lapse of time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation." Civ. Code, § 2911; Newhall v. Sherman, Clay & Co., 124 Cal. 509, 57 Pac. 387, and cases there cited; and also Conway v. Supreme Council, 131 Cal. 437, 63 Pac. 727, and 137 Cal. 384, 70 Pac. 223 (two appeals). If Myers had not made an absolute assignment of his interest in the bonds to Robinson, and an action had been brought against Myers by Davis & Son to foreclose their lien on the bonds for the payment of the note, at any time subsequent to February 1, 1891, Myers could have successfully pleaded the bar of the statute. The right of action on the note being barred, the right to enforce the lien on the bonds or the proceeds thereof is also barred. Robinson for value purchased the judgment into which the bonds had merged, September 1, 1887, and, as soon as the statute had run against the note from Myers to Davis & Son, he was entitled to all the money that might be collected thereon under the Myers interest, discharged of any lien in favor of Davis & Son.

The judgment is affirmed.

We concur: HARRISON, P. J.; COOPER, J.

1 Cal. App. 643

CUSICK v. BOYNE.

(Court of Appeal, First District, California. Sept. 23, 1905.)

1. ATTORNEY AND CLIENT—ACTION FOR SERVICES—PLEADING.

Where a complaint in an action for attorney's services alleged that the services were performed at defendant's special instance and request and were reasonably worth $1,000, it was not demurrable for failure to allege that defendant promised to pay.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 365.]

2. SAME—EVIDENCE—NATURE OF SERVICES.

In an action for attorney's services in litigation with reference to certain real estate, evidence as to the value of such real estate, or monthly rental thereof, and that a life estate was secured to defendant as a result of the services, was admissible.

3. EVIDENCE—VALUE OF LIFE ESTATE—MORTALITY TABLES.

On an issue as to the value of a life estate in certain property of a person 60 years of age, tables of mortality, showing the average expectancy of life of a person of that age, were admissible, without proof that the person in question was of sound health.

4. ACCOUNT STATED—INSTRUCTIONS.

An instruction that if the jury found from the evidence that a statement of account was rendered to defendant on a certain date, and that the items thereof were explained to her, and that more than three months elapsed after such date without any objection being made by her, the account became an account stated and the items thereof were no longer open to inquiry was not objectionable as a charge on matters of fact.

5. ATTORNEY AND CLIENT—CONTINGENT FEE—BURDEN OF PROOF.

Where, in an action for attorney's services, defendant alleged a special contract that if the attorney was not successful he was to receive nothing for his services, it was not error to charge that the burden of proving such special contract was on defendant, and that, unless she established the same by a preponderance of the evidence, such defense failed.

Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by J. M. Cusick against Elizabeth Boyne. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, she appeals. Affirmed.

C. G. Nagle and Nagle & Nagle, for appellant. R. Percy Wright, for respondent.

COOPER, J. This action was brought for legal services rendered by plaintiff's assignor, as attorney at law, for defendant at her special instance and request between the 2d day of January and the 12th day of September, 1901. The case was tried with a jury, and a verdict rendered for plaintiff in the sum of $900. Defendant made a motion for a new trial, which was denied, and she brings this appeal from the judgment and order denying her motion. There is sufficient evidence to sustain the verdict, and no question is made in that regard. Defendant urges certain alleged errors which occurred during the trial, of which we will notice those deemed most plausible.

The complaint alleges that the legal services were performed at the special instance and request of defendant, and that such services were reasonably worth the sum of $1,000. It is claimed that the defendant's demurrer to the complaint should have been sustained, because there is no allegation that defendant agreed to pay what the services were reasonably worth. If defendant's contention is correct, it would introduce a new departure from the long-settled rules of pleading. It is never necessary to allege a promise where the law implies one. To illustrate: Suppose the defendant made no promise as such, but went to the attorney and asked him to perform services for her, and he did so at her request, and that such services were of the reasonable value of $1,000; is the attorney without a remedy because appellant did not say, "I will pay you"? In all cases where one performs services for another at his instance and request the law implies a promise to pay. When an attorney performs services for another at his instance and request, nothing being said as to payment, the attorney is entitled to recover the reasonable value of his services.

As a circumstance tending to show the value of the services, plaintiff proved the value of the real estate in controversy in the matter concerning which the attorney was employed, the monthly rental thereof, and that a life estate was secured to appellant by way of compromise as the result of the legal services. It is always competent, in a controversy as to the value of legal services, to prove the nature of the litigation and the amount involved.

Plaintiff, under the objection of defendant, was allowed to prove by the witness Stearns, with the aid of the tables of mortality in use in the United States, the average expectancy of life of a person 60 years of age; that being the age of defendant at the time the litigation was terminated. The objection was that the plaintiff did not first prove that defendant was in a sound condition of health. The objection is without merit. The witness testified that the mortality tables are based on the average life of all persons at given ages without regard to the condition of their health. The law presumes that a person of 60 years of age is in the average condition of health and strength of other persons of that age. If for any reason the health of defendant was such that she would be taken out of the general rule, it was incumbent upon her to prove it; and, besides, the matter was not vital, and was only in regard to a circumstance or fact tending to show the value of the legal services.

The court instructed the jury in substance that if they should find from the evidence that a statement of account was rendered to defendant on September 12, 1901, and that the items thereof were explained to her, and that more than three months elapsed after said date without any objection being made by the defendant, the account became an account stated, the items of which were no longer open to inquiry, in the absence of allegation and proof of fraud or mistake. It is not claimed that there was no evidence upon which to predicate the instruction, nor that the proposition of law therein stated is not correct, but that the instruction violates the Constitution as being a charge in respect to a matter of fact. We do not think that the instruction contains a charge as to a matter of fact. The facts were left to the jury; the court merely telling them that, if they found certain facts, the law was as stated. It has always been the practice for trial courts in this state to submit a certain hypothetical statement of fact, concerning which there is a conflict, to the jury, and tell them that, if they find the facts as stated, the law is as stated by the court when applied to such facts. For example, in actions for malicious prosecution, the court in charging the jury will tell them that, if they find certain facts, such facts do or do not amount to probable cause, as the case may be. The court in the instruction complained of did not even intimate that the evidence sustained any fact or proposition, but left it to the jury to find from the evidence as to the facts.

Defendant, as a defense to the action, alleged in her answer a special contract, to the effect that the attorney at the time of his employment agreed that, if he was successful in the said action, he was to be paid what his services were reasonably worth, but, if he failed in said action, he was to make no charge and receive no compensation for his services. The court instructed the jury "that the burden of proving that there was such a special contract rests upon the defendant, Elizabeth Boyne, and unless she establishes it by a preponderance of evidence her defense, founded upon such special contract, fails entirely." The portion of the instruction quoted is complained of as not being a correct proposition of law. The court had elsewhere instructed the jury that the plaintiff must make out her case by a preponderance of evidence. Therefore the instruction applied to the special contract alleged. If an agreement was made that under certain circumstances no charge was to be made for services, the burden was upon defendant to prove it. In other words, the plaintiff, having proved that the services were performed at the request of the defendant, and the reasonable value thereof, would be entitled to recover; but, defendant says, an agreement was made taking the case out of the ordinary rule. The court merely said the burden was upon defendant to prove such special agreement. The burden certainly was not upon plaintiff to prove it. It was no part of plaintiff's case. If the evidence were evenly balanced as to such special agreement, it would not take the case out of the rule that valuable services performed for another at her request must ordinarily be paid for.

It is sufficient, as to other instructions complained of, to say that we have examined them and find no error that would justify a reversal of the case. The parties were before the trial court with a jury. The trial seems to have been fair, and the law carefully stated in the instructions of the learned judge. The decision as to facts on conflicting testimony is final here.

The judgment and order are affirmed.

We concur: HARRISON, P. J.; HALL, J.

148 Cal. 232

Ex parte KROUSE. (Cr. 1,313.)

(Supreme Court of California. Nov. 18, 1905.)

1. FINES—IMPOSITION—IMPRISONMENT.

Under Pen. Code, § 1205, providing that a judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, a judgment finding defendant $100 and directing his imprisonment "until said fine is paid, such imprisonment not to exceed one day for each $20 of said fine that shall so remain unpaid," is not void for using the word "paid," instead of "satisfied," and does not deprive defendant of the right to discharge part of the fine by imprisonment for part of the time.

Application for writ of habeas corpus by H. A. Krouse. Heard in chambers on return of writ. Writ discharged, and petitioner remanded to custody.

H. A. Krouse, in pro. per. Charles L. Weller, Asst. Dist. Atty., for respondent.

McFARLAND, J. A writ of habeas corpus, on petition of H. A. Krouse, was heretofore issued, returnable before me, and upon return of the writ the matter was heard before me and submitted. A similar writ had recently been issued and heard before the District Court of Appeal of the First District, and the petitioner had been remanded. In this present proceeding the petitioner makes one point not made before said Court of Appeal, and that point is the only one calling for especial notice. There are no other sufficient grounds for the discharge of the petitioner.

The petitioner was fined $100 by the superior court of the city and county of San Francisco for contempt of court, and was adjudged, in default of payment of that fine, to be imprisoned at the rate of one day for each $20 of the fine. The language of that part of the judgment of the superior court is as follows: "It is further ordered, adjudged, and decreed that in default of the payment of said fine he be imprisoned in the county jail of the city and county of San Francisco, state of California, until the said fine is paid, such imprisonment not to exceed one day for each $20 of said fine that shall so remain unpaid"—and the new point made by the petitioner is that the judgment of imprisonment is void because the words "until the said fine is paid" are used, instead of the statutory words "until the fine be satisfied," found in section 1205 of the Penal Code. Petitioner contends that by this judgment he is compelled to pay the whole fine or be imprisoned for the entire five days, whereas, if the word "satisfied" had been used, he could pay part of the fine, and satisfy the rest by imprisonment for less than the entire five days. When the case was submitted, I announced as my present impression that, with respect to the question here involved, there was no substantial distinction between the words "paid" and "satisfied," and that, although the former word was used in the judgment, the petitioner would have the right to discharge part of the fine by imprisonment for part of the time; but I deemed the question worthy of further consideration. Since then the district attorney's office has referred me to the case of Ex parte Henshaw, 73 Cal. 486, 15 Pac. 110, where the very question was expressly raised and definitely decided against the contention of the present petitioner, and in accordance with my own views expressed at the hearing. I hold that the point is not well taken.

It is ordered and adjudged that the petitioner herein, H. A. Krouse, be, and he hereby is, remanded to the custody of the sheriff of the city and county of San Francisco, and that this writ be discharged.

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148 Cal. 259

CARGILE v. SILSBEE. (L. A. 1,486.)

(Supreme Court of California. Nov. 27, 1905.)

JUDGMENT—VACATING—FRAUDULENT AFFIDAVIT OF SUMMONS OF PUBLICATION—COMPLAINT—SUFFICIENCY.

A complaint in an action to set aside a judgment annulling a certificate for the purchase of state school lands, on the ground that the judgment was obtained by fraud on a fraudulent affidavit for publication of summons, which alleges that the affidavit for publication was false and fraudulent, but which fails to controvert any of the specific allegations of specific facts contained in the affidavit, does not show the falsity of the affidavit in any essential particular, and fails to show that the judgment was obtained by fraud, and the same will not be set aside.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 883.]

Department 1. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by Anna E. Cargile against Thomas H. Silsbee. From a judgment for defendant, plaintiff appeals. Affirmed.

W. H. Larew and Edwin A. Wells, for appellant. Victor E. Shaw and E. V. Winnek, for respondent.

ANGELLOTTI, J. Plaintiff was originally the holder of a certificate of purchase for certain state school land, issued November 6, 1889, but, because of her nonpayment of interest on the balance due of the purchase price, such certificate was canceled and annulled, and all plaintiff's rights in the land thereunder foreclosed, by a decree of the superior court of San Diego county given and entered in November, 1896, in an action brought by the people of the state of California against her. In that action judgment was given by default, she having failed to appear after service had by publication of summons. Subsequently, in the year 1899, defendant made his application for the purchase of said land, and regularly acquired a certificate of purchase therefor, which he still holds. In 1902, plaintiff first actually heard of defendant's claim to the land, and filed in the office of the surveyor general her notice of contest and demand for a trial of the rights of the parties in the superior court of San Diego county. The surveyor general made an order of reference accordingly. Plaintiff then filed her complaint against defendant in this proceeding, by which she attacks the judgment given in the foreclosure proceeding against her, claiming that the same is void, and sets up her rights under the certificate of purchase originally issued to her, and asks that the judgment annulling her certificate be vacated and set aside, that her certificate be adjudged valid, and that defendant's certificate be adjudged null and void. A demurrer to her third amended complaint having been sustained, and plaintiff having elected to stand upon the same, judgment went for defendant. This is an appeal by plaintiff from said judgment.

It is manifest that if the judgment given in the foreclosure action is not void on its face, and is not vacated and set aside, the complaint shows that plaintiff has no right whatever in regard to the land, and that defendant is entitled to purchase the same. It is urged that the judgment is void on its face, the contention in this respect relating entirely to the service of the summons in the action in which such judgment was given, the principal point made being that the affidavit for publication of summons did not state sufficient facts to give the court jurisdiction to order service made by publication. The question as to the sufficiency of a similar affidavit to give the trial court such jurisdiction has been discussed by this court several times in cases of the same character as this, and the affidavit held sufficient. Every contention made by plaintiff in support of her claim, that the judgment under consideration is void upon its face, has already been answered by decisions of this court, some of which, it should be said, have been rendered since the institution of this action. See Rue v. Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732; Weis v. Cain (Cal.) 73 Pac. 980; People v. Norris, 144 Cal. 422, 77 Pac. 998; People v. Mason, 144 Cal. 770, 78 Pac. 1113; Sharp v. Salisbury, 144 Cal. 721, 78 Pac. 282. Upon the authority of these decisions, it must be held that the foreclosure judgment is not void upon its face.

Plaintiff, however, claims that the judgment should here be vacated for the alleged reason that the same was obtained by fraud on a false affidavit for publication of summons. It is contended by defendant that no such relief can be had in a proceeding of this character, to which, it is said, the state, the prevailing party in the foreclosure proceeding, is in no sense a party, and that if the judgment is valid on its face, it is a full protection to a subsequent purchaser, the defendant here. Waiving this contention, and assuming that plaintiff would be entitled to the relief sought upon such a showing as would warrant the vacating of the judgment, it must still be held, upon the authority of Sharp v. Salisbury, supra, that the plaintiff has failed to state facts sufficient to constitute a cause of action in this behalf. The complaint in that action (Sharp v. Salisbury) attempted to state such a cause of action in a case exactly like this, it being alleged that the affidavit for publication of summons was false and fraudulent in the same particulars as it is here alleged that the affidavit for publication in the foreclosure case was false and fraudulent. The complaints in the two cases were prepared by the same attorneys, at about the same time, and are in all material respects the same. It was held in Sharp v. Salisbury that "the contradictions of the affidavit of publication contained in the complaint were directed only at those general statements and conclusions contained in it which might be drawn from the specific statement of facts therein," and that the truth of any of the "specific allegations of specific facts" contained in the affidavit for publication was not controverted by the allegations of the complaint, and that, consequently, the affidavit for publication was not shown to be false in any essential particular. Without such a showing of falsity there was, of course, a failure to show that the judgment was obtained by fraud. In that case, this court, upon this ground, affirmed the judgment for the defendant rendered upon sustaining a demurrer to the complaint, and a petition for rehearing was denied. That decision disposes of plaintiff's contention that the foreclosure judgment should be vacated in this proceeding upon the facts alleged. There is no other point requiring notice.

The judgment is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

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148 Cal. 269

BROWN v. JORRES. (L. A. 1,458.)

(Supreme Court of California. Nov. 29, 1905.)

Department 2. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by Matilda A. Brown against G. W. Jorres. From a judgment for defendant, plaintiff appeals. Affirmed.

W. H. Larew and Edwin A. Wells, for appellant. W. R. Andrews, for respondent.

McFARLAND, J. A demurrer to the complaint was sustained, and, plaintiff declining to amend, judgment went for defendant. Plaintiff appeals from the judgment.

It appears from the complaint that in 1889 appellant made application to purchase certain school land, and received from the registrar of the state land office a certificate of purchase for said land; that in 1895 an action in the name of the people was brought against appellant to foreclose her rights in said lands and to annul her said certificate for delinquencies in making payments on said purchase; that service was made on appellant by publication of summons; that she made default, and judgment of foreclosure and annulment of her certificate was entered; and that afterward a certificate of purchase for said land was issued to the respondent herein, G. W. Jorres. The purpose of this present action is to obtain a judgment setting aside the former judgment of foreclosure and decreeing the appellant's certificate of purchase to be good and valid, and that the certificate issued to respondent Jorres is null and void, and that plaintiff is the owner and entitled to the possession of said land, etc. The basis of appellant's cause of action is the asserted invalidity of the forclosure judgment, for alleged want of a legal service of summons by publication and other reasons. There is no occasion for discussing here in detail the positions taken by appellant; for we see no substantial difference, as to the contentions which she here makes, between the case at bar and the case of Cargile v. Silsbee (L. A. 1,486; recently decided by this court) 82 Pac. 1044, where the same contentions were held to be not maintainable; and upon the authority of that case, and for the reasons given in the opinion therein, the judgment in the case at bar must be affirmed. See, also, the cases cited in Cargile v. Silsbee.

The judgment appealed from is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

148 Cal. 270

SHEPARD v. MACE. (L. A. 1,418, 1,502.)

WINNEK v. SAME.

(Supreme Court of California. Nov. 29, 1905.)

1. APPEAL—EXCLUSION OF EVIDENCE—HARMLESS ERROR.

Where a judgment relating to land claimed under a certificate of purchase from the state rested wholly on the conclusiveness of a decree foreclosing the right of the purchaser under the certificate and annulling the certificate, the error, if any, in excluding evidence as to the citizenship of the purchaser, was not prejudicial to him.

2. EVIDENCE — PRESUMPTIONS — PERFORMANCE OF OFFICIAL DUTY.

Where, in a suit to quiet title to land claimed by defendant under a certificate of purchase issued by the state, no issue was tendered by defendant on the question whether the judgment foreclosing her rights and annulling the certificate had been filed by the district attorney in the office of the registrar, as required by Pol. Code, § 3550, the court would presume that official duty had been performed and that the filing had been properly made.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 105.]

3. PUBLIC LANDS — CANCELLATION OF CERTIFICATE OF PURCHASE—COMPLAINT—SUFFICIENCY.

A complaint in an action to compel a surrender and cancellation of a certificate of the purchase of state land, which alleged that the purchaser had not paid the amount due and that he was the lawful holder and owner of the certificate, stated a cause of action within Pol. Code, § 3570, which provides that when a purchaser of public land on credit desires to abandon the location he may do so by a surrender of the certificate, though it did not aver that the purchaser had abandoned the title.

Department 2. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Separate actions by Ella G. Shepard against Jennie C. Mace and by Emilus V. Winnek against the same defendant. From judgments for plaintiff in each action the defendant in each action appeals. Affirmed.

W. H. Larew and Edwin A. Wells, for appellant. Victor E. Shaw and E. V. Winnek, for respondents.

HENSHAW, J. These two actions are to quiet title to land. The land in controversy was a section of land unsuitable for cultivation. A certificate of purchase had been issued to defendant, Jennie C. Mace, on November 4, 1899. She paid one year's interest on January 6, 1890, and again a year's interest upon December 27, 1890. She made no further payments of interest, and by reason of her default, proceedings were taken to foreclose her rights. Upon November 20, 1895, suit was instituted by the district attorney of San Diego county, wherein the land was situated. In this action the people of the state of California was plaintiff, and Jennie C. Mace, appellant herein, was defendant. Service of the summons issued in the action was obtained by publication made upon the order of the court, which order, in turn, was based upon the affidavit of the deputy district attorney. Upon November 6, 1896, or nearly a year after the date of the action, a decree was entered foreclosing all the right of the defendant, and vacating and annulling the certificate of purchase which had been issued to her. In May, 1900, nearly four years after the rendition of this judgment, and about nine years after the defendant ceased to pay the annual interest installments due to the state, this plaintiff, Ella G. Shepard, made application to purchase the south half of the section in question, and on October 18, 1901, patent was issued to her by the state. Nearly six years after the date of the decree foreclosing her right to the land, and more than 10 years after her default in the payment of interest due to the state, Jennie C. Mace, without payment or tender of payment of any amount to the state, made claim to the property, and these respondents, learning of the claim, instituted their separate actions to quiet title. The facts recited as to the case of Shepard v. Mace are identical with the facts in the case of Winnek v. Mace, saving that Winnek made application to purchase the north half of the section in question, and obtained a patent from the state at the same time as did Shepard. The propositions advanced upon these appeals may, therefore, be considered together.

The principal contention in both cases is that the judgment of foreclosure was void for failure of the court to obtain jurisdiction of the person of the defendant and the subject-matter of the action, the grounds of this contention being that the affidavit for publication of summons and the order of publication were insufficient. These affidavits and orders, however, are identical with those previously considered by this court, and it becomes necessary, therefore, only to refer, in answer to appellant's contention, to the cases of Cargile v. Silsbee (L. A. 1,486, filed Nov. 27, 1905) 82 Pac. 1044; Rue v. Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732; Weis v. Cain (Cal. Sup.) 73 Pac. 980; Sharp v. Salisbury, 144 Cal. 721, 78 Pac. 282; People v. Norris, 144 Cal. 422, 77 Pac. 998; People v. Mason, 144 Cal. 770, 78 Pac. 1113. It is urged that the court erred in refusing to allow evidence as to the citizenship of Jennie C. Mace, but, as the judgment of the trial court was in no way founded upon the question of citizenship, but rested wholly upon the conclusiveness of the decree in foreclosure, the ruling of the court, if error, could not have been prejudicial. Section 3550 of the Political Code provides that 20 days after the entry of judgment in the foreclosure proceedings the district attorney must file in the office of the registrar and in the recorder's office of the county in which the land is situated, certified copies thereof. Appellant insists that there was no evidence showing that certified copies of the judgment had been filed in accordance with the section, and that the presumption is that they were not so filed. No issue was tendered by the answer upon this question. There is at least a presumption that if the filings had not been properly made, this defendant would have taken advantage of it in her pleadings. No issue having been tendered upon the matter, and the presumption being that official duty has been regularly performed, it will be concluded that the filings were properly made. It is contended that the complaint in the foreclosure action did not state a cause of action, for the reason that the purchaser had the right, under the law, either to pay the amount or surrender title. Section 3570, Pol. Code. The complaint alleged that she had not paid the amount due, but did not aver that she had not surrendered or abandoned her title. The action was to compel a surrender and cancellation of the certificate of purchase, and the complaint averred "that said defendant is now the lawful holder and owner of said certificate of purchase." This averment itself states a cause of action, and in view of the strenuous and technical contest defendant here makes to the matter, it would seem that a further averment that she had not surrendered or abandoned her title would have been quite unnecessary.

No other propositions advanced by appellant merit consideration, and for the foregoing reasons, the judgments and orders appealed from are in each case affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

SHARP et al. v. SILSBEE. (L. A. 1,505.)

(Supreme Court of California. Nov. 27, 1905.)

Department 1. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by Frances W. Sharp and others against Alice Silsbee. From a judgment for defendant, plaintiffs appeal. Affirmed.

Edwin A. Wells and W. H. Larew, for appellants. Victor E. Shaw and E. V. Winnek, for respondent.

ANGELLOTTI, J. This is an appeal from a judgment given in favor of defendant in an action brought in the superior court of San Diego county, under an order referring a contest as to the right to purchase certain school lands, made by the surveyor general. The case is in all material respects the same as that of Cargile v. Silsbee (L. A. No. 1,486, this day decided) 82 Pac. 1044; and for the reasons stated in the opinion filed in that case the judgment of the superior court was correct.

The judgment is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

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148 Cal. 254

DE LEONIS v. WALSH. (L. A. 1,469.)

(Supreme Court of California. Nov. 25, 1905.)

1. RECEIVERS—PURPOSE OF REMEDY—GROUNDS—NECESSITY OF APPOINTMENT.

A party to an action should not, against his will, be subject to the expense of a receiver, unless his appointment is obviously necessary to protect the opposite party.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, §§ 1, 21–28.]

2. SAME—DEATH OF RECEIVER—APPOINTMENT OF SUCCESSOR.

Where plaintiff secured the appointment of a receiver, and he died, the mere fact of the death did not warrant an appointment of a receiver on defendant's motion, against the will of plaintiff.

Department 2. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by M. E. C. De Leonis against F. E. Walsh, as administrator of Laurent Etchepare, deceased. Appeal by plaintiff from an order appointing D. C. McGarvin receiver. Reversed.

Dunnigan & Dunnigan, for appellant. H. H. Appel and Horace Bell, for respondents.

McFARLAND, J. This is an appeal by plaintiff from an order appointing a receiver. Appellant has an elaborate brief on file, and there is no brief or written argument of any kind on the part of respondent, nor did respondent make any oral argument. Under these circumstances we cannot be expected to examine appellant's contentions very thoroughly; our attention not being directed by respondent to any of the reasons why those contentions are not maintainable. We are not called upon to do the work of counsel.

This action was brought in November, 1895, by appellant against one Laurent Etchepare, whom she alleged to have been her confidential agent, to recover certain moneys alleged to be due her from him, and to compel him to convey to her certain lands which, she alleges, he fraudulently procured her to convey to him. (Etchepare is now dead, and the respondent, Walsh, is his administrator.) She averred that he was wrongfully receiving the rents and profits of said lands, and she asked that a receiver be appointed. The complaint showed a proper case for a receiver, and on June 8, 1896, the court appointed one Hewitt receiver, and, he having subsequently resigned, one Wilkerson was appointed. The case was afterwards tried, and on June 3, 1901, judgment was entered decreeing that the lands in question be reconveyed to appellant upon the payment by her to defendant of the sum of $2,444.09, and that she have her costs of suit, etc. Shortly thereafter the receiver, Wilkerson, died, and on December 31, 1902, defendant's attorneys gave notice that defendant would, on January 2, 1903, move the court for the appointment of a receiver, on the ground that the former receiver, Wilkerson, was dead, and on January 6, 1903, the court, against the opposition of appellant, granted said motion and appointed D. C. McGarvin as such receiver.

Of course, a party to an action should not, against his will, be subjected to the onerous expense of a receiver, unless where one may be lawfully appointed and his appointment is obviously necessary to the protection of the opposite party. Looking at the record in this case—and we can look at that alone—we can see no just ground or valid reason for the appointment of the receiver in 1903 at the request of the defendant. Apparently the only ground for the appointment was the death of the former receiver, appointed on appellant's motion before judgment; but that ground is not tenable. If appellant does not now desire a receiver, another one cannot properly be appointed at the request of respondent, without some showing of right to such appointment other than the mere fact of the death of the former receiver.

The order appealed from is reversed.

We concur: HENSHAW, J.; LORIGAN, J.

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148 Cal. 256

UKIAH GUARANTY CO. v. CURRY, Secretary of State. (S. F. 4,422.)

(Supreme Court of California. Nov. 25, 1905.)

LICENSES—CORPORATIONS—PENALTY FOR NON-PAYMENT.

Act March 20, 1905 (St. 1905, p. 493, c. 386) § 2, provides that an annual license tax for all corporations shall be paid between the first Monday in July and the first Monday in August, and that the Secretary of State on the first Monday in October shall report to the Governor a list of all corporations which have failed to pay the tax, and the Governor shall issue a proclamation that charters shall be forfeited unless payment is made within 60 days, with a penalty of $5 in addition thereto. *Held* that, while the license tax becomes delinquent for failure to pay by the first Monday in August, the penalty does not attach until the list is turned over to the Governor and he has issued his proclamation thereon.

In Bank. Petition of the Ukiah Guaranty Company for writ of mandate to Charles F. Curry, Secretary of State. Writ issued.

J. W. Preston and J. M. Mannon, Jr., for petitioner. E. B. Power, for respondent.

HENSHAW, J. The Legislature, by act approved March 20, 1905 (St. 1905, p. 493, c. 386), provided for the payment by all corporations of the state of a certain annual license tax. Section 2 of the act declares that the annual license tax is in the sum of $10, and is to be paid "between the first Monday in July and the first Monday in August of each year to the Secretary of State, who will pay the same into the state treasury to be paid into the general fund of the state." Section 3 provides that any corporation failing to pay the tax shall, because of the failure, forfeit its charter. Section 4 provides that it shall be the duty of the Secretary of State, on the first Monday in October, in each year, to report to the Governor of the state a list of all the corporations which have failed, neglected, or refused to pay the license tax, and the Governor shall forthwith issue his proclamation declaring that the charters of such corporations "will be forfeited unless payment of such license tax is made, as above required, within sixty days from date of said proclamation, together with a penalty of five dollars in addition thereto." Petitioner tendered to the Secretary of State, in payment of its license tax, the sum of $10 after the first Monday in August of the current year, but before the first Monday in October. The Secretary of State refused to accept the tender of $10, and refused to issue the license to the petitioner for any sum less than the sum of $15. Petitioner then sued for this writ of mandate, the sole question involved being the proper construction of the law in this regard. It is contended by respondent that the penalty accrued immediately upon the delinquency arising, or, in other words, immediately after the first Monday in August. If this had been the legislative intent, it would have been an extremely easy matter for the Legislature so to have declared, but what, in fact, the Legislature did declare is, as above quoted, that the Secretary of State shall report the delinquents to the Governor upon the first Monday of October, and that the Governor shall forthwith issue his proclamation requiring, under penalty of forfeit of charter, payment of $10 together with a penalty of $5 in addition thereto. Here is the first place where the penalty is mentioned in the law, and here is a legal notice extended to the corporations that, on or after October 1st, for their delinquency, they have subjected themselves to a penalty. In construing a statute such as this it is to be remembered that penalties are not favored, and that a reasonable interpretation of a statute which avoids a penalty will be preferred to one even equally reasonable which exacts it. It would seem, therefore, under the language of this statute, not only a natural, but the most natural, construction to declare that the Legislature meant the penalty to attach as of the date of the Governor's proclamation. There is a broad difference between a mere delinquency and a penalty attaching because of delinquency. Taxes may be and are often delinquent for long periods of time before penalties for such delinquencies attach. Instances of this may be found in our own tax laws and decisions. Harper v. Rowe, 53 Cal. 233; People v. Reis, 76 Cal. 278, 18 Pac. 309; Lake County v. Sulphur Bank, 66 Cal. 17, 4 Pac. 876; People v. North Pacific R. Co., 68 Cal. 553, 10 Pac. 45. In this case, therefore, it appears that, while the license tax becomes delinquent for failure to pay by the first Monday in August of each year, the penalty for such delinquency does not attach until the list is turned over to the Governor and he has issued his proclamation thereon.

It has been suggested as a possible construction of the law that it was not the duty of the Secretary of State to receive any sum of money after the first Monday in August. The Secretary of State raises no such point. In effect, he expresses his willingness to receive whatever is legally chargeable, but urges that $15 is the proper amount. But to hold that it was not the duty of the Secretary of State to accept this money, would not only be to import into the statute language which it does not contain, but it would be, to do this, to the accomplishment of the very thing, namely forfeiture which the rules of construction command shall be avoided if reasonably possible; for, if it should be said in the absence of a statutory declaration to that effect, that the Secretary of State should not receive the money, it would mean that the corporation could not pay until after the Governor's proclamation, when it would be compelled to pay the $10 with the penalty added. We construe the statute, therefore, to mean that while this license tax becomes delinquent for failure to pay by the first Monday in August, there is a period of grace allowed between that time, and the time of the Governor's proclamation in which the money can be paid and the penalty avoided.

For which reasons let a writ of mandate issue as prayed for.

We concur: BEATTY, C. J.; LORIGAN, J.; McFARLAND, J.; SHAW, J.; VAN DYKE, J.; ANGELLOTTI, J.

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148 Cal. 252

SAN DIEGO GAS CO. v. FRAME et al.

(L. A. 1,522.)

(Supreme Court of California. Nov. 22, 1905.)

CORPORATIONS—ACTIONS—CAPACITY TO SUE—FAILURE TO FILE COPY OF ARTICLES OF INCORPORATION.

Civ. Code, § 299, requires every corporation to file a certified copy of its articles of incorporation in the office of the county clerk of each county in which it holds any property, except the county where the original articles are filed, and provides that a corporation failing to comply with the statute shall not maintain an action in relation to the property. *Held*, that where, prior to the statute, a corporation had substantially complied with the law requiring the original certificate of incorporation to be filed with the county clerk of the county containing the principal place of business of the corporation, and had, prior to the statute, acquired certain real estate in such county, the corporation was entitled to maintain an action to quiet title.

Department 2. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by the San Diego Gas Company against J. A. Frame and others. From a judgment in favor of plaintiff, defendant George Labee appeals. Affirmed.

H. A. Jerauld, for appellant. Withington & Carter, for respondent.

McFARLAND, J. This is an action to quiet title to certain lots of land in the city of San Diego, county of San Diego. Judgment went for plaintiff, and defendant Labee appeals from the judgment and from an order denying his motion for a new trial.

Appellant admitted at the trial that respondent "has the paper title to the land in question," and as there was no evidence tending to show any title or right of appellant to the land, respondent's ownership thereof is not questioned. The only contention made by appellant for a reversal which calls for consideration is the technical one that respondent cannot maintain this action because it has failed to comply with the provision found in the second sentence of section 299 of the Civil Code, which is as follows: "Every corporation now in existence, whether formed under the provisions of this Code, or not, must, within ninety days after the passage of this section, file such certified copy of the copy of its articles of incorporation in the office of the county clerk of every county in this state in which it holds any property, except the county where the original articles of incorporation are filed." And following this it is declared that a corporation failing to comply with the above provision shall not maintain or defend an action in relation to such property. It was found by the court that respondent did file such certified copy with the county clerk of San Diego county on the 10th day of August, 1889; and the evidence actually introduced at the trial would amply warrant this finding, if the question of the sufficiency of the evidence to support the finding were not complicated by the fourth and fifth paragraphs of a "stipulation" signed by attorneys for both parties. However, we do not deem it necessary to discuss that subject, because, in our opinion, the contention of respondent that it was not required by the provisions of section 299 above quoted to file such copy of its articles of incorporation in the office of the county clerk must be maintained. It is averred in the complaint that plaintiff was "duly incorporated under the laws of the state of California, and has been such corporation, ever since the 10th day of October, 1870, with its principal place of business in the city of San Diego, state of California"; and this averment is not denied in the answer. Indeed, at the trial appellant expressly admitted "that plaintiff is a corporation." It is found by the court that plaintiff became the owner of the property in contest on the 17th day of July, 1871. This case was here once before on appeal, and this court then held—upon the same facts touching the question as those which appear in the case at bar—that the law requiring the original certificate of incorporation to be filed with the county clerk of San Diego county, was substantially complied with on September 28, 1870. San Diego Gas Co. v. Frame, 137 Cal. 441, 70 Pac. 295. Now, the provision of said section 299 was not enacted until March 21, 1872, and as the plaintiff was incorporated and the property in question, which is situated in San Diego county, acquired before that time, the plaintiff is within the exception "of the county where the original articles of incorporation are filed."

The judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

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148 Cal. 246

ALAMEDA COUNTY v. DALTON et al.

(S. F. 3,524.)

(Supreme Court of California. Nov. 21, 1905.)

1. TAXATION—POLL TAX—STATE TAX.
The poll tax levied and collected for the benefit of the state school fund, as required by Const. art. 13, § 12, is a state tax.

2. EVIDENCE—JUDICIAL NOTICE—COUNTIES—CLASSIFICATION.
The courts will take judicial notice of the fact that a particular county is of a certain class within the statutory classification.

3. TAXATION—POLL TAXES—COLLECTION—COMPENSATION OF COLLECTORS.
By County Government Act 1897 (St. 1897, p. 503, c. 277) § 160, subd. 7, the assessor of counties of the third class is prohibited from receiving any compensation for collecting poll taxes; but section 215 (page 572) provides that such officer, though prohibited from receiving compensation for collecting personal property taxes and for the making of the military roll, shall receive and "retain for his own use" 15 per cent. of the poll tax collections, as provided by Pol. Code, § 3862. *Held*, that such sections, in so far as they related to the assessor's compensation for collecting poll taxes were in irreconcilable conflict, and section 215, being a later section, controlled and entitled the assessors of such counties to 15 per cent. for the collection of poll taxes therein.

Department 2. Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by Alameda county against Henry P. Dalton and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Campbell, Fitzgerald, Abbott & Fowler, for appellants. U. S. Webb, Atty. Gen., and John J. Allen, Dist. Atty., for respondent.

LORIGAN, J. The defendant and appellant Henry P. Dalton was the assessor of Alameda county during the year 1899, and the other defendants and appellants were his official bondsmen. As such assessor, Henry P. Dalton, during said year, collected state poll taxes amounting to $25,501, and retained for his own use $3,825.15, being 15 per cent. thereof, to which he claimed that he was entitled as commissions allowed by law for collecting the same, and turned the rest into the treasury of said county. This action was brought to recover the amount so retained by him. In their answer, defendants admitted the facts alleged in the complaint, but claimed that defendant Henry P. Dalton retained said sum of $3,825.15 as matter of right, because allowed him as compensation under the laws of the state for collecting said state poll taxes. Judgment was rendered for plaintiff upon the pleadings, and defendants appeal therefrom, and come here on the judgment roll alone.

The sole question presented on this appeal is whether the appellant Henry P. Dalton, as such assessor of Alameda county, was entitled to receive and retain such percentage for his own use and benefit, and its solution involves a matter purely of statutory construction. The state poll tax, compensation for the collection of which is the matter in question here, is a per capita tax, which, under section 12, art. 13, of the Constitution, is authorized to be levied and collected by the Legislature, and which is required to be paid, when collected, into the state school fund. It is distinctively a state tax, and, as said by this court in County of San Luis Obispo v. Felts, 104 Cal. 64, 37 Pac. 781: "It is fair, reasonable, and just that they [the poll taxes] should be charged with such expense [of their collection], and, indeed, the fact that they are exclusively a state tax makes it peculiarly appropriate that the agents of their collection should be compensated by a percentage of their collection, rather than out of the salary or general funds of the county." It is provided by section 3840 of the Political Code that the assessor must collect this tax, and by section 3862 that "the assessor for services rendered in collection of poll taxes shall receive the sum of 15 per cent." In the case above quoted from—San Luis Obispo County v. Felts—the constitutionality of the latter section was in question and decided to be valid. For the purpose of regulating the compensation of county officers the several counties of the state were, by the county government act of 1897 (St. 1897, p. 452, c. 277), classified, and under such classification the county of Alameda became (as the court will take judicial notice) a county of the third class—the only one of that class in the state. The sections of that act, in as far as they affect the rights of assessors of counties of the third class to retain commissions for the collection of poll taxes, are as follows: Subdivision 7 of section 160 (page 503) declares that: "It is hereby further provided, that in counties of this class [the third class] the assessor shall receive no commission for his collection of taxes on personal property, nor shall such assessor receive any compensation or commission for the collection of poll taxes or road poll taxes. * * *" And section 215 (page 572) of the same act provides: "The salaries and fees provided in this act shall be in full compensation for all services of every kind and description rendered by the officers herein named * * * provided * * * the assessor shall be entitled to receive and retain for his own use six per cent. on personal property tax collected by him * * * and fifteen per cent. of all amounts collected by him for poll taxes and road poll taxes, and also five dollars per hundred names returned by him as subject to military duty, as provided in section 1901 of the Political Code; * * * provided, however, that in counties, and cities and counties, of the first, second and third classes, the assessor shall receive no commission for the collection of taxes on personal property, nor shall such assessor receive any compensation for making out a military roll of persons returned by him as subject to military duty, as provided by section 1901 of the Political Code. * * *"

These sections constitute the law upon the subject of the compensation of the assessor for the collection of state poll taxes. Each section is directed to that subject, and assumes to deal completely and exclusively with the matter. It is quite apparent at first glance, however, that the above quoted provisions are radically at variance with each other. Subdivision 7 of section 160 declares that the assessor shall not receive compensation for the collection of poll taxes, while section 215 not only declares that he shall receive it, but that he shall retain it for his own use and benefit. Both of these sections cannot be made to apply to the county of Alameda, and the question presents itself: Which one of them prevails as to that county—whether the prohibition in subdivision 7 of section 160 is to be considered as a special exemption to the general provision in section 215, or whether the sections are irreconcilable, and, if they are, must section 215, which is later in position in the general act than subdivision 7 of section 160, be deemed the latest expression of legislative intent upon the subject, and for that reason prevail over the subdivision of the prior section? It is insisted by respondent that the court should apply the rule, as stated in Bateman v. Colgan, 111 Cal. 586, 44 Pac. 240, that: "Where two statutes treat of the same subject, one being special and the other general, unless they are irreconcilably inconsistent, the latter, though latest in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject-matter, so far as coming within its particular provisions." But the rule there announced cannot avail this respondent, because it can be applied only in cases where there is no irreconcilable inconsistency between the special and the general statute. In the case at bar it is quite apparent that there is such irreconcilable conflict between these two provisions of the statute. There is no way in which they can be harmoniously construed. By the very terms of both sections special reference is made to counties of the third class, of which, as we say, we will take judicial notice that Alameda county is of that class. Nor can it be said with exactness that section 215 is a general provision, as far as the county of Alameda is concerned. It is as specially directed to that county as is subdivision 7 of section 160. It deals with the matter of the compensation of the assessor of Alameda county as well as does the prior section, as it specifically provides that in the class of counties to which Alameda belongs the assessor shall receive no compensation for collection of taxes on personal property, or for the making of the military roll.

But conceding, however, that section 215 is general, notwithstanding it refers to and applies specifically to Alameda county as a county of the third class, still the general rule stated in Bateman v. Colgan, supra, cannot apply, because that rule has application only where the special and general provisions are not radically inconsistent. Here there can be no doubt of such inconsistency in the sections. A comparison of both discloses that by the earlier section (160) the assessor of Alameda county is prohibited from receiving any compensation for the collection of personal property taxes, for making the military roll, or for the collection of poll taxes. By the subsequent section, that officer is still prohibited from receiving compensation for the collection of personal property taxes and for the making of the military roll, but is expressly authorized to receive and "retain for his own use" 15 per cent. of the poll tax collections contemplated by section 3862 of the Political Code. The one section prohibits him from even receiving compensation by way of commission in the collection of poll taxes; the other section provides that he may not only receive, but retain, it for his own benefit. It would be difficult to suggest a more clear and direct inconsistency and repugnancy between distinct provisions of an act purporting to deal with the same subject. Under this condition of conflicting legislation, the rules of interpretation and construction are clear. In Black on Interpretation of Laws, p. 118, it is said: "There is no rule of law which prohibits the repeal of a special act by a general one. Nor is there any principle forbidding such repeal without the use of express words declarative of the legislative intent to repeal the earlier statute. The question is always one of intention, and the purpose to abrogate the particular enactment by a later general enactment is sufficiently manifested when the provisions of both cannot stand together, and it is a cardinal doctrine in the construction of statutes that, if possible, full effect shall be given to all their parts." State v. Williamson, 44 N. J. Law, 165. And when, upon a consideration of different sections, or parts of a statute, it is apparent that an irreconcilable conflict exists between them, the controlling rule of construction is that the latest legislative expression upon a given subject must govern; that where inconsistent provisions are found in an act, that provision which is latest in position in the act is deemed to express the last, final legislative intent, and prevails over prior repugnant provisions, though all are found in the same act and are intended to take effect at the same time. The rule is thus stated in People v. Dobbins, 73 Cal. 259, 14 Pac. 860: "It is an old and well-settled rule that, when two laws upon the same subject, passed at different times, are inconsistent with each other, the one last passed must prevail. So it has always been the rule that, when different provisions of a statute, all passed at the same time, could not be reconciled, the one that came last in point of position must prevail. And this was upon the theory that effect should always be given to the latest rather than to an earlier expression of the legislative will; the presumption being that the latter part of the statute was last considered." This rule is further supported by Dillon v. Bicknell, 116 Cal. 111, 47 Pac. 937; Davis v. Whidden, 117 Cal. 618, 49 Pac. 766; Sutherland, Stat. Const. § 160; Sedgwick on Stat. Const. Law, 415; 26 Am. & Eng. Ency. of Law (2d Ed.) p. 619.

Applying these rules of construction to the case at bar, as subdivision 7 of section 160 and section 215 are irreconcilably inconsistent upon the subject as to what compensation the assessor of Alameda county shall receive for the collection of poll taxes, section 215, being the last expression of legislative intent upon the subject, must control. It follows, therefore, that the assessor of Alameda county was justified by the provisions of the latter section in receiving and retaining to his own use the 15 per cent. of the state poll tax collected by him, and the judgment denying him this right is therefore reversed, with directions to the lower court to enter a judgment for defendant upon the pleadings.

We concur: HENSHAW, J.; McFARLAND, J.

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1 Cal. App. 690

MAIONCHI v. NICHOLINI et al.

(Court of Appeal, Third District, California, Oct. 2, 1905. On Rehearing, Oct. 30, 1905.)

1. PLEADING — AMENDMENT TO CONFORM TO PROOF—SERVICE OF AMENDED PLEADING.

Under Code Civ. Proc. § 469, providing that no variance shall be deemed material unless it has actually misled the adverse party to his prejudice on the merits, and section 470, declaring that where the variance is not material the court may direct the fact to be found according to the evidence and may order an immediate amendment without costs, an amendment may be made to cure an immaterial variance and to conform the pleading to the proof, at any time before judgment, without serving a copy thereof on the adverse party or his attorneys.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 607.]

2. SAME—NEW CAUSE OF ACTION.

Civ. Code, § 38, provides that a person entirely without understanding has no power to make a contract of any kind, but is liable for necessaries; and section 39 declares that the contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission. *Held* that, where a complaint alleged a cause of action to rescind a transfer of a note on the ground that plaintiff was of unsound mind merely, he was not entitled to add a nongermane cause of action by amendment, alleging that at the time of the transfer he was entirely without understanding.

3. INSANE PERSONS—CONTRACTS—VALIDITY—EVIDENCE.

Where, in an action by an insane person to set aside an assignment of a note, he appeared as a witness and his answers disclosed that, though he was of unsound mind, he was not wholly without understanding at the time of the trial, and his incapacity had not been judicially determined at the time of the transfer, the evidence, though sufficient to sustain a finding that the transfer was voidable, as provided by Civ. Code, § 39, was not sufficient to show that it was void, within section 38, declaring that a person entirely without understanding has no power to contract.

Appeal from Superior Court, Sonoma County; A. G. Burnett, Judge.

Action by Leopold Maionchi against Florindo Nicholini and others. From an order denying defendant's motion to strike out an amendment to the complaint, and to set aside a finding and judgment based thereon, defendants appeal. Reversed.

Rehearing denied by Supreme Court, December 1, 1905.

R. M. Swain and Butts & Weske, for appellants. W. F. Cowan, R. F. Poppe, and Barham & Barham, for respondent.

McLAUGHLIN, J. It is alleged in the complaint herein that on March 18, 1901, plaintiff was the owner and holder of a note for the sum of $1,000, executed and delivered to him by the defendants Chauvet, and that on said day he indorsed and delivered such note to defendant Florindo Nicholini; that at the time of such indorsement, "and for a long time prior thereto, and ever since, plaintiff has been an old and infirm man, enfeebled in mind and body, and unable to attend to his property interests or rights, and was and is very susceptible to the overtures of others, and was and is easily influenced, and such weakness of mind was and is of such character and degree that plaintiff was and is unable to attend to any business affairs in which he is concerned without independent advice"; that plaintiff had implicit confidence and faith in each of the defendants Nicholini, and believed that they advised him in good faith and would protect him; that said defendants fraudulently procured and induced plaintiff to indorse and deliver said note, under a promise that they would provide food, clothing, shelter, and the necessaries of life for plaintiff during the remainder of his natural life; that plaintiff never received anything of value for said note, and "said defendants have not provided plaintiff with clothing, food, shelter, or necessaries of life." The prayer was "that said agreement be declared rescinded, and said note and everything of value obtained from plaintiff as aforesaid be returned, and for costs, and that defendants be restrained from collecting the same, and for such other relief as is proper." After the action was commenced plaintiff was adjudged insane, and a guardian ad litem was appointed. The action was dismissed as to defendants Chauvet, and the other defendants, answering, denied all the averments of the complaint. The court found against the defendant Florindo Nicholini on the issues thus joined, and rendered judgment that plaintiff was "the owner of and entitled to the possession of the said promissory note." From such judgment and the order denying his motion for a new trial, defendant Florindo Nicholini appeals upon a bill of exceptions specifying particulars in which the evidence is insufficient to support the findings and containing many assignments of error. After the cause had been submitted for decision, and on the same day the findings and judgment were filed, without notice to appellant or his attorneys, the complaint was amended by inserting the following amendment: "That during all the times mentioned herein said plaintiff was of unsound mind and entirely without the capacity of understanding or comprehending the nature of said transaction and of the transactions in said complaint set forth, and that Florindo Nicholini knew and had knowledge of said facts and circumstances." The court found in accordance with such averment, and, after the judgment was entered, the appellant in due time and form made his motion to strike out such amendment, and to set aside the finding and judgment on the grounds that said amendment was not served upon appellant or his attorneys, "and that the said amendment was not made to meet the proofs in said cause and was not justified thereby." The motion was denied, and appellant appeals from the order denying said motion. This appeal is supported by a separate bill of exceptions, and we think that the vital questions involved should be considered first.

Section 469 of the Code of Civil Procedure provides that "no variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits," and the next section provides that "where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs." Under these sections there can be no doubt that, when evidence pro and con has been admitted touching a fact material to the cause of action stated in the complaint, the court may pursue either or both of the methods mentioned, at any time before the rendition of judgment. And it is equally clear that the words "immediate amendment," by necessary implication, exclude the necessity for service and further hearing. "The law neither does nor requires an idle act," and it would be idle to require service or a trial de novo when the subject-matter of the amendment had been gone into upon the trial, and it is only in such contingency that amendments to conform to proof can be allowed. Board of Directors v. Tregea, 88 Cal. 358, 26 Pac. 237; Firebaugh v. Burbank, 121 Cal. 186, 53 Pac. 560; Lee v. Murphy, 119 Cal. 364, 51 Pac. 549, 955; Herman v. Hecht, 116 Cal. 559, 48 Pac. 611; Duke v. Huntington, 130 Cal. 274, 62 Pac. 510; Jackson v. Jackson, 94 Cal. 462, 29 Pac. 957.

The objection that "the amendment was not made to meet the proofs, and was not justified thereby," is so intimately connected with the point that the findings based on such amendment are not sustained by the evidence that both of these contentions should be considered together. Sections 38 and 39 of the Civil Code emphasize the difference between contracts made by persons of unsound mind who are "entirely without understanding," and contracts by persons of unsound mind who are "not entirely without understanding" made before incapacity has been judicially determined. The plaintiff's incapacity was not judicially determined until March 12, 1904, nearly three years after the note was transferred, and this fact must be kept in mind in considering the question before us. A careful analysis of the averments of the complaint shows beyond question only a cause of action to rescind a voidable contract. More v. Calkins, 85 Cal. 188, 24 Pac. 729. And a similar analysis of the amendment shows an averment rendering the contract absolutely void under said section 38. It is obvious that evidence that plaintiff was of unsound mind would be sufficient to support the allegations of the complaint, while something more, showing his entire want of understanding, would be essential to support the amendment. The importance of this distinction between averments and proof relating to void, as distinguished from voidable contracts, has been recognized in many well-considered cases, and such distinction cannot be ignored in reaching a correct solution of the problem under consideration. More v. Calkins, 85 Cal. 190, 24 Pac. 729; Castro v. Geil, 110 Cal. 296, 42 Pac. 804, 52 Am. St. Rep. 84; More v. More, 133 Cal. 494, 65 Pac. 1044; Murphy v. Crowley, 140 Cal. 150, 73 Pac. 820.

Actions to rescind a contract are necessarily based on the theory that there is a contract binding upon the parties, unless rescission is had. Civ. Code, §§ 1688, 1689, 1691, 3406, 3408. And the mere statement of this proposition should suffice to show that an amendment alleging in effect that there was no contract could hardly be germane to the original cause of action. But waiving this, and viewing this as an action to set aside or cancel the indorsement and to recover the note, still the amendment and finding cannot be justified or sustained. Granting the utmost weight to all evidence bearing on his mental capacity, it only shows that he was of unsound mind. There is not a scintilla of evidence showing that he was at any time entirely without understanding. He was called as a witness, and the examination to test his competency as such clearly indicates that he understood the questions and answered them quite as intelligently as could be expected of one whose knowledge of the English language was limited. The learned judge of the trial court believed him quite rational as to most subjects, and so stated. Indeed, his answers at that time, and even his self-serving declarations narrated by other witnesses, create a strong impression that he fully understood the transaction here assailed, and only desired security for its faithful performance by Nicholini. The witnesses as to his sanity seemed to agree that his condition at the time of the trial was, to say the least, no better than it was at the time the agreement was made, and, if so, it certainly cannot be said that he was entirely lacking in understanding. As his incapacity had not been judicially determined at the time the contract was made, it follows from the foregoing that the amendment was unauthorized, and that the finding based thereon is not sustained by the evidence. With this finding eliminated, the judgment, which was evidently based on the assumption that the agreement and indorsement were absolutely void, is unsupported by the findings. Even if it could be considered as a judgment for rescission, however, there is no finding as to facts essential to support such a judgment. Civ. Code, §§ 39, 1691, 3408; More v. Calkins, 85 Cal. 190, 24 Pac. 729; Wilson v. Sturgis, 71 Cal. 229, 16 Pac. 772; Marten v. Burns, 99 Cal. 357, 33 Pac. 1107; S. P. R. R. v. Choate, 132 Cal. 280, 64 Pac. 292; Kelly v. Owens, 120 Cal. 510, 47 Pac. 369, 52 Pac. 797. And if there was such finding, there is no evidence in the record to support it. It could serve no useful purpose to consider other specifications or assignments, inasmuch as the objections urged may be obviated upon a retrial of the cause.

The judgment and order are reversed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

On Petition for Rehearing.

McLAUGHLIN, J. The earnestness and sincerity manifested by counsel for respondent in their petition for a rehearing herein has prompted a careful re-examination of all the evidence contained in the record. As counsel evidently misapprehend the decision rendered, we are admonished that perhaps it is not as clear as decisions of an appellate court should invariably be, and hence we deem it but just that an additional opinion be substituted for the terse formula usually adopted in passing upon such petitions. We did not intend to be understood as holding that there is no evidence to support a judgment of rescission. The evidence is entirely sufficient to do so. The judgment, however, is not that the contract be rescinded, the indorsements canceled, and the note restored, but "that the plaintiff is the owner of and entitled to the possession of" the note. Such judgment could only be based on the amendment and resultant finding that plaintiff's mental condition was such that as a matter of law the transaction was an absolute nullity. If the judgment be considered as for rescission, however, it must fall because the court failed to find on issues pertinent to rescission tendered by the last three denials in the answer. More v. Calkins, 85 Cal. 190, 24 Pac. 729. The evidence is ample to show that plaintiff was of unsound mind and hence to render the contract voidable and subject to rescission under section 39 of the Civil Code. Our re-examination but strengthens the conviction that there is no evidence to show such want of understanding as would render it void under the preceding section. The utmost that can be said of the evidence touching his condition at the time of the transaction is that he did not fully understand the agreement or mode of carrying it into effect. The evidence hardly shows as much as was pleaded in More v. Calkins, 85 Cal. 182, 24 Pac. 729, or proven in Castro v. Geil, 110 Cal. 295, 42 Pac. 804, 52 Am. St. Rep. 84, and yet the court there held that such facts did not show such want of understanding as would render the contract void.

The rehearing is denied.

We concur: CHIPMAN, P. J.; BUCKLES, J.

1 Cal. App. 749

PHILIP WOLF & CO. v. KING & STARRETT.

(Court of Appeal, Third District, California. Oct. 14, 1905.)

SALES—CONTRACT—OFFER AND ACCEPTANCE.

Defendants, being offered a certain price for hops, answered, accepting the offer on certain conditions, to which plaintiffs consented, but inclosed a form of agreement for signature embodying other provisions not referred to in the correspondence. Defendants immediately replied that the contract did not suit one of them, and no further arrangements were made. *Held*, that the correspondence did not constitute a mutual agreement "upon the same thing in the same sense," as required by Civ. Code, § 1580, and did not, therefore, constitute a contract of sale.

Appeal from Superior Court, Sonoma County; A. G. Burnett, Judge.

Action by Philip Wolf & Co. against King & Starrett. From a judgment in favor of defendants, and from an order denying plaintiffs' motion for a new trial, they appeal. Affirmed.

A. Heynemann and W. F. Cowan, for appellants. Butts & Weske, for respondents.

CHIPMAN, P. J. Action to recover damages for the breach of an alleged contract for the sale of hops by defendants to plaintiffs. The court found that no contract was entered into between the parties, as alleged in the complaint, or at all, and defendants had judgment. Plaintiffs appeal from the judgment and from the order denying their motion for a new trial.

The judgment of this court entered on September 30, 1905, was vacated and set aside, for the reason that, upon suggestion of diminution of the record made before submission of the cause but not called to the attention of the court when the opinion was being written, the notice of intention to move for a new trial was shown to have been duly served, the motion for a new trial duly heard and denied by the court, and that the appeal was taken within 60 days after judgment was rendered. It therefore becomes unnecessary to consider the points made by respondent based upon the nonappearance of the foregoing facts.

The sole question in the case is, as suggested by appellants in their reply brief (now before this court, but which was not in the record when cause was submitted on the August calendar of this court, although claimed by appellants to have been filed with the Supreme Court on April 4, 1905): Did the correspondence between the parties constitute a contract? On May 22, 1903, plaintiffs wrote defendants (who are hop growers) offering 15 cents per pound for 20,000 pounds of hops in advance of the harvest. On May 28th defendants replied, saying among other things not material: "We have concluded to accept your offer, provided you will put up one thousand dollars cash inside of thirty days, without interest, and the balance when the hops are in bale." On May 29th plaintiffs replied: "We have your favor of yesterday and now note that you accept our offer of 15 c for 20,000 pounds of your coming crop, and for which inclose contracts which sign and return one of them to us. This is the same form of agreement signed by the various Santa Rosa growers when ["whom" is doubtless meant] we have contracted with. As to the freight, will arrange the same as we did with our last purchase. The $1000 is ready whenever and how you may want it, and free from interest." On June 2d one of the defendants replied: "The contract does not suit Mr. Starrett [the other defendant]. He will be down in a week or ten days and arrange matters with you." Mr. Starrett called at plaintiffs' office on July 2d and talked the matter over with plaintiffs, but no agreement was reached then or at any other time, except as may be derived from the above correspondence. In the case of Wristen v. Bowles, 82 Cal. 84, 22 Pac. 1136, the court dealt with the principles governing contracts entered into by correspondence. Briefly summarized, these principles are: That it is for the court to determine whether letters which have passed between parties constitute an agreement between them; that to constitute a binding contract made in this form there must be a proposal squarely assented to; if the acceptance be not unqualified, or go to the actual thing proposed, there is no binding contract: that a proposal to accept, or an acceptance based upon terms varying from those offered, is a rejection of the offer; that an offer imposes no obligation, unless accepted upon the terms proposed, and the acceptance must be absolute and unqualified, for, if qualified, it is a new proposal. See, also, Pacific, etc., Co. v. Railway Co., 90 Cal. 627, 27 Pac. 525; Harvey v. Duffey, 99 Cal. 401, 33 Pac. 897; Niles v. Hancock, 140 Cal. 157, 73 Pac. 840; Four Oil Co. v. United Oil Producers, 145 Cal. 623, 79 Pac. 366, 68 L. R. A. 226; Civ. Code, § 1580.

Guided by the principles above set forth it is quite clear to our minds that the consent of the parties to the same subject-matter in the same sense is not shown by the correspondence. In replying to plaintiffs' letter of May 22d, defendants did not submit an absolute and unequivocal acceptance, but coupled it with a new condition. Plaintiffs responded by accepting the condition, but in turn coupled their acceptance with what we think must have been intended as a still further condition, namely, that defendants execute the contract inclosed with plaintiffs' letter of acceptance, which bore plaintiffs' signature. Plaintiffs by their language indicated that they accepted defendants' offer on condition that they execute the contract inclosed, and that defendants so understood the acceptance is shown by the letter of June 2d written by one of the defendants to plaintiffs. The contract sent by plaintiffs to defendants for their execution contained conditions other than those mentioned in the correspondence, and, considered as part of plaintiffs' acceptance, constituted a new proposal to which it is not pretended that defendants ever consented. There was then no contract for lack of mutual consent by agreement "upon the same thing in the same sense." Civ. Code, § 1580.

The judgment and order are affirmed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

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1 Cal. App. 752

ENNIS BROWN CO. v. HURST et al.

(Court of Appeal, Third District, California, Oct. 16, 1905. On Rehearing, Nov. 14, 1905.)

1. Contract—Correspondence—Construction—Question for Court.

Whether certain letters which passed between the parties to an action for alleged breach of contract constituted a contract is a question for the court.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 143.]

2. Sales—Contract—Question for Court.

Where defendant made plaintiff an offer to sell certain potatoes, whether the acceptance by plaintiff, with statement as to when he wanted them shipped, rendered the acceptance conditional, must be determined by the court, under Civ. Code, § 1649, by the sense in which the promisor believed at the time of making it that the promisee understood it.

3. Sales — Contract — Offer and Acceptance.

Plaintiff, having a contract for the purchase of three car loads of potatoes from defendants, only one of which was ready for delivery, and the last of which did not go forward until May 1, 1901, wired defendants on April 13, 1901, for offer of two additional cars for shipment "next week," to which defendants replied, offering them at 55 cents net f. o. b. Oregon, and plaintiff replied, accepting the offer and directing shipment of one car "the latter part of this week and the other the first of next week." Such cars were not shipped; defendants having subsequently notified plaintiff that they canceled plaintiff's "order" because they were unable to obtain the potatoes. *Held*, that the date of shipment so specified in the acceptance did not introduce a new condition, requiring its acceptance in order to constitute a contract.

4. Same.

Where defendants offered to sell plaintiff two cars "choice" potatoes at a specified price, an acceptance requiring the potatoes to be strictly choice did not constitute a variance from the terms of the offer, in view of evidence that there was no difference between the grade "choice" and "strictly choice" potatoes.

5. Contracts — Inability to Perform—Notice—Effect.

Defendants having notified plaintiff of their inability to perform and having canceled the contract, plaintiff was not bound to show its ability or readiness to pay in order to recover for breach thereof.

6. Pleading—Amendment—Time.

The court may permit an amendment of the complaint to conform to the proof, after the evidence has been closed and the cause has been submitted, but before decision.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 605.]

7. Appeal—Harmless Error—Evidence.

Where, in an action for breach of contract for the sale of potatoes to be delivered in Oregon, the court found that the contract called for delivery as late as April 20, 1901, and in awarding damages adopted the lowest price at any time shown by the evidence, defendants were not injured by evidence of the price of potatoes after April 15th in Sacramento, less freight from Oregon on car load lots.

8. Appearance—Process—Service—Waiver.

Where defendants appeared by demurrer and answer and submitted to the jurisdiction of the court, they were not thereafter entitled to object that they were not properly served by reason of nonresidence.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appearance, § 126.]

9. Appeal—Harmless Error—Evidence.

Where, in an action for breach of a contract for the sale of potatoes, the potatoes were not in fact purchased for or tendered to plaintiff in Oregon or elsewhere, as required by the contract, defendants were not prejudiced by the admission of evidence as to when and how the potatoes were to be paid for and that each car was to be inspected at destination before payment should be made.

Appeal from Superior Court, Sacramento County; P. J. Shields, Judge.

Action by the Ennis Brown Company against W. S. Hurst and others, doing business as W. S. Hurst & Co. Judgment was rendered in favor of plaintiff, and from an order denying defendants' motion for a new trial on a bill of exceptions, they appeal. Affirmed.

Hinkson & Elliott, for appellants. White & Miller, for respondent.

CHIPMAN, P. J. This is an action for damages growing out of a contract alleged to have been entered into between the plaintiff, residing in Sacramento, Cal., and defendant, residing in Aurora, Or., for the delivery by defendant to plaintiff of certain two car loads of potatoes. The complaint alleges that on or about the 15th day of April, 1901, defendant entered into a contract in writing with plaintiff whereby defendant sold to plaintiff and plaintiff purchased from defendant two car loads of potatoes at the agreed price of 55 cents per hundred pounds, "which said two car loads of potatoes were to be within a week thereafter delivered by defendant to plaintiff." The complaint further alleges demand for the delivery and neglect and failure upon the part of defendant to comply therewith, resulting to plaintiff's damage in the sum claimed in the complaint. There was a demurrer interposed by defendant on the ground of insufficiency of facts, which was overruled, and defendant answered, denying specifically the material allegations of the complaint. As a separate answer defendant alleged that he was at all times mentioned in the complaint absent from and was a nonresident of the state of California, and is and was a resident of the state of Oregon, and that no personal service of summons was ever made upon him other than by publication thereof. It is further alleged in the answer that all the transactions and negotiations and writings that took place between plaintiff and defendant consist of letters and telegrams exchanged between them, and did not and do not constitute a contract between defendant and plaintiff. The court found that on the 13th day of April, 1901, the defendant "doing business under the firm name of W. S. Hurst & Co. entered into a contract in writing with plaintiff whereby the said defendant sold to plaintiff and plaintiff purchased of said defendant two car loads of potatoes at the agreed price of 55 cents per hundred pounds, which said two car loads of potatoes were to be delivered by defendant to plaintiff within a week thereafter"; that plaintiff demanded delivery thereof, but defendant refused and neglected to deliver the same, to plaintiff's damage in the sum of $420; "that said defendant based his refusal to deliver said potatoes solely upon the ground that no potatoes were to be had; that speculators and buyers had bought up all potatoes which could be found; and that lots which defendant had bought had fallen short and defendant was unable for those reasons to deliver the potatoes to plaintiff." As conclusions of law the court found that plaintiff is entitled to judgment for the sum above named and judgment was thereupon duly entered. Defendant moved for a new trial, which was denied, and he appeals from the order upon bill of exceptions.

The contract in question rests upon the letters and telegrams exchanged between the parties, and an understanding of the questions involved requires that this correspondence should be fully set forth. On Saturday, April 13, 1901, plaintiff sent the following telegram to defendant: "Wire lowest two cars choice Burbanks, free from disease. Shipment next week." This telegram was followed by letter of the same date from plaintiff to defendant, as follows: "Your letter of 10th inst. at hand, and contents carefully noted. We note that you are shipping potatoes north. Suppose they are for the Alaskan trade. We telegraphed you today: 'Wire us lowest two cars choice Burbanks, free from disease. Shipment next week'—and now confirm the same, and we hope to receive your reply in a short time. If your price is reasonable, we will order two more cars for shipment next week." Plaintiff received from defendant at 8:20 p. m. the same day, dated at Aurora, Or., the following reply: "Offer two cars choice Burbanks, fifty-five cents net, f. o. b. Oregon, from Aurora, C. F. X. nineteen six eight one." The concluding words of the telegram, "from Aurora," etc., refer to car of the number stated, which was one of a three-car lot of potatoes previously ordered. On the same day (April 13th) defendant wrote to plaintiff, following this telegram of that date, reading: "Inclosed find invoice and shipping receipt for first car of three sold you at 47½ cents net f. o. b. cars here in Oregon. We have your wire requesting lowest price on two cars more, and wired you tonight offering two cars at 55 cents net f. o. b. Oregon. We are buying up potatoes at several points, and do not know where we will ship any certain car from, so make our prices good for any point along the line. We have your favor giving shipping instructions and will try to have cars follow each other five days apart. We ship with vents open as required." The shipping instructions referred to in the last clause of the above letter manifestly must refer to previous instructions relating to other cars given in the letter dated April 11th, found in the record. The next day, April 14th, was Sunday, and on Monday, April 15th, the following telegram was sent by plaintiff to defendant: "Accept offer two cars choice Burbanks fifty-five cents see letter shipping instructions." And on the following day, April 16th, plaintiff wrote defendant as follows: "Received your telegram yesterday offering two cars choice Burbanks fifty-five cents net f. o. b. Oregon, from Aurora, C. F. X. nineteen six eight one. We immediately wired you, 'Accept offer two cars choice Burbanks fifty-five cents see letter shipping instructions,' and now confirm the same. Please ship one of these cars the latter part of this week and the other car the first of next week, and please see that we get strictly choice stock." On April 17, 1901, plaintiff wrote to defendant acknowledging receipt on that day of the car previously referred to as No. 19,681, and called attention to a few sacks that were of poor quality, and stating, "Wish you would see that the balance of our potatoes are of good size and well graded and choice potatoes. Do not ship us anything that is not properly graded." The letter also called attention to short weights of the car, and stated that defendant must make allowances for shrinkage, closing as follows: "We trust the balance of your potatoes will be all right and that the weights will hold out." On April 18, 1901, plaintiff wrote defendant stating that a draft for the car numbered 19,681 had been presented and paid that day, and said: "We expect you to make the shrinkage good on the cars you ship later." On April 19, 1901, defendant mailed a letter to plaintiff, inclosing invoice of the second car of potatoes going forward that day, and acknowledging receipt of plaintiff's letter of April 17th, and stating that defendant is selling the potatoes f. o. b. cars in Oregon, and that he does not think he should stand the shrinkage. Among other things, he said: "We think you will find this shipment runs better than the first car. All of our potatoes now come in small lots, and it is impossible except in rare instances to have car lots run even; that is, all of one lot. We are obliged to take several different lots to make up a car. Potatoes are getting scarce, and we find we were a little too fast in selling you three cars at 47½ cents, but will make shipments just the same." The next day, April

20th, plaintiffs sent the following telegram: "Wire lowest two cars choice Burbanks free from disease. Answer quick." To which defendant replied on the same day by telegraph: "No spuds to offer today getting scarce." On the same day plaintiff wrote to defendant, stating that it had telegraphed for prices on potatoes, acknowledging the receipt of his answer of the same day, and concluded the letter as follows: "Should you have a car or two to offer by Monday or Tuesday, please wire us your lowest price. We hope by that time you will be able to scrape up one or two cars." Defendant on the same day, April 20th, wrote to plaintiff: "We are practically out of the market for potatoes, and do not care to sell any more until we get cleaned up on what we have sold. Should we have any later on, we will write or wire you." On April 24th plaintiff wrote defendant as follows: "As we haven't heard from you, suppose you have no more potatoes to offer. Should you have a car or two to offer, we would be pleased to have you wire us your lowest price on receipt of this letter." On April 30th plaintiff telegraphed defendant: "Wire car number date shipment last car also quote lowest prices three cars choice Burbanks. Answer quick." May 1, 1901, defendant telegraphed: "Shipped 24th S. P. 38,570 none to offer now." On the same day, May 1st, plaintiff telegraphed defendant: "Our records show two more cars to be delivered fifty-five cents hundred f. o. b. when will you ship answer quick." On the same day defendant telegraphed to plaintiff: "No potatoes to be had. Have canceled order. See letter." On Sunday defendant wrote plaintiff: "Your wires at hand. We are sorry to be compelled to cancel your last order for two cars of potatoes at 55 cents per 100. We have had a hard time to find the potatoes to fill the first order of three cars. We find that speculators and buyers from Portland have gone out and bought up every lot of potatoes that could be found, and now it is impossible to pick up any potatoes at all. This, with the great falling short of lots that we had bought, has made it utterly impossible for us to continue shipping. So we are practically out of the market for this season." There were some later letters, but they were excluded by the court.

In the case of Wolf v. King (Cal. App.) 82 Pac. 1055, we had occasion to state briefly the rules or principles governing contracts entered into by written correspondence, as follows: "It is for the court to determine whether letters which have passed between the parties constitute an agreement between them. To constitute a binding contract made in this form, there must be a proposal squarely assented to. If the acceptance be not unqualified, or go to the actual thing proposed, there is no binding contract. A proposal to accept, or an acceptance based upon terms varying from those offered, is a rejection of the offer. An offer imposes no obligation, unless accepted upon the terms proposed and the acceptance must be absolute and unqualified; for, if qualified, it is a new proposal." See cases there cited. Appellant claims that there were two material particulars in which plaintiff's acceptance differed from its original proposal: First, the time of shipment was changed from two cars during the week following April 13th to one car that week and one car the first of the week thereafter; and, second, the quality of the potatoes was changed from "choice" to "strictly choice." It will be noticed that in plaintiff's letter of April 16th the offer of defendant is confirmed in the exact terms stated by him. Following this absolute confirmation plaintiff requests that defendant ship the first car that week and the second the beginning of the following week, which might have been complied with by no greater delay from the offer and acceptance than a day; for he could have shipped the first car on Saturday of the first week and the second on the following Monday. The trial court manifestly did not regard this request as introducing any new or material condition into the transaction or changing its effect in any material respect. Defendant had offered two cars for delivery f. o. b. that week, extending to Saturday, and the request could have been complied with, as just suggested, by sending one car that day and one car on the following Monday. Defendant's telegram of April 15th was an absolute acceptance, and completed all the essential elements of a contract, and the letter following the telegram on the 16th was of similar import, unless the request as to the shipment of the potatoes and the request that "strictly" choice potatoes be shipped constituted a new proposal or a rejection of the first one. An instructive case as to when a request, following an absolute acceptance, will be regarded as a modification of a proposal, is found in Turner v. McCormick (W. Va.) 49 S. E. 28.

If there was uncertainty or ambiguity as to whether plaintiff meant to make the request as to shipment a new condition, we may look to the surrounding circumstances and to the subsequent conduct of the parties to discover whether such uncertainty was not removed or waived. Civ. Code, § 1647; Code Civ. Proc. § 1860, and section 1870, subd. 12. In such case the contract "must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." Civ. Code, § 1649. There can be no doubt but that if defendant had shipped the potatoes plaintiff would have been bound to receive them. At this time plaintiff and defendant were dealing with each other in the same commodity. There was a contract for three car loads of potatoes then being filled, and but one of these was ready for delivery, the second one did not go forward until April 19th, and the third not until May 1st. During this time defendant appears to have been endeavoring to find potatoes and plaintiff was endeavoring to place with him additional orders. On April 20th defendant wrote plaintiff, in reply to an inquiry for more potatoes: "We are practically out of the market for potatoes, and do not care to sell any more until we get cleaned up on what we have sold." And on May 1st, in reply to plaintiff's inquiry as to the two cars in question, defendant telegraphed: "No potatoes to be had. Have canceled order. See letter." On the same day defendant wrote plaintiff: "Your wires at hand. We are very sorry to be compelled to cancel your last order for two cars of potatoes at 55 cents per 100. We had a hard time to find potatoes to fill the first order of three cars." The letter explains that the reason why defendant could not comply was because others "had gone out and bought up every lot of potatoes that could be found," and also because "the great falling short of lots we had bought has made it impossible for us to continue shipping." These letters and telegrams justify the inference that defendant was endeavoring to comply with his contract, and when explaining his inability to do so he did not put his failure on the ground that there was no contract, but upon the sole ground that he could not procure the potatoes for the reasons stated. When he spoke of canceling plaintiff's "order," he must have referred to the contract in question, which he did not cancel until May 1st. His letter of April 20th will bear the construction that he had in mind the two cars as among the potatoes sold to plaintiff. We think plaintiff had the right to assume that defendant understood plaintiff's acceptance as plaintiff understood it, and the contract "must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." Civ. Code, § 1649. As already observed, defendant, in his telegram and letter of May 1st, for the first time mentions that he has canceled the order, and on the sole ground found by the court. This, together with other facts appearing, would justify the inference that defendant had all along treated the contract as subsisting, and that plaintiff had relied on its being performed by defendant. Defendant having notified plaintiff of his inability to perform and of having canceled the contract, plaintiff was not called upon to show its ability or readiness to pay. Pierce v. Lukens, 144 Cal. 397, 77 Pac. 996. It is urged that the failure of plaintiff to call attention to the unfilled contract shows that it was not relying on these two cars under the contract, and gives rise as much to an inference against plaintiff as defendant's silence does against him. But it may be answered that defendant had not, up to May 1st, completed the delivery of the three cars, and was meanwhile doing all he could to find potatoes for shipment. Plaintiff might well infer that the contract for the two cars would be taken up as soon as the three cars were delivered, and as soon as they were delivered plaintiff reminded defendant of the unfilled contract for the cars in question.

As to the claim that the request that defendant "see that strictly choice stock" is shipped was a change in the original proposal, there might be force in the contention if it could be said that on the face of the letter the word "strictly" was unmistakably intended to designate a potato of different grade from one denominated as "choice," or if by usage of the trade there was a recognized grade of "strictly choice." We do not think, however, that requesting plaintiff to see that it got strictly choice stock was anything more than a caution that defendant would see that the potatoes came up to the grade agreed upon. Witness Brown testified as to the grades of potatoes then in the Oregon market: "There are three grades, good, or field run, choice, and fancy. A good potato or field run potato is a potato just as it comes from the ground, that is not graded. A choice potato is one that is graded, some of the poorer ones thrown out, but not graded as close as fancy. Fancy potatoes are all the finest ones selected. There was no difference at that time between a potato designated as choice and one designated as strictly choice." Witness, on cross-examination, was asked why he used the words "strictly choice," if it meant the same as choice. The reply was that the word "strictly" was used "to designate just what we want, to impress it, so a man would not make any mistake in delivering something not up to choice grade." And this would seem to be no more than the natural import of the word as it was used.

Appellant claims that the acceptance must be identical with the offer, as well as unconditional (citing 9 Ency. Law & Prac. subd. II, p. 267), and that if the offer is to do a definite thing, and another accepts conditionally or introduces a new term into the acceptance, his answer is either an expression of willingness to treat or it is a counter proposal, and in neither case is there an agreement. If it be meant by "identical" that the language of the acceptance must be absolutely identical, we cannot agree with appellant. Any form of expression showing clearly an intention to accept on the terms proposed—i. e., a consent to the same subject-matter in the same sense—would be sufficient, if not coupled with some new condition, or new term implying a new condition, and of this the court must judge in giving interpretation to the correspondence.

The court could permit an amendment of the complaint after the evidence had been closed and the cause had been submitted and taken under advisement and before decision. Maionchi v. Nicholini (Cal. App.) 82 Pac. 1052; Lee v. Murphy, 119 Cal. 364, 51 Pac. 549, 955. The court recited in its order that by the amendment "defendants were not in any manner misled by the variance between said pleadings and proofs, and that said variance is immaterial." Defendant did not ask to have the case reopened in order to enable him to submit additional evidence, made necessary by the amendment, nor did he by affidavit or otherwise show that the amendment would result to his injury unless the case was reopened and he given opportunity to present further evidence.

It is claimed that the court erred in allowing plaintiff to prove the price of potatoes after April 15th, and also to prove the price at Sacramento. The evidence went to the price in Oregon, and also in Sacramento, less freight from Oregon on car load lots. The contract as found by the court called for delivery as late as April 20th. The market price at no time after the 20th was less than the evidence showed, and as the court adopted the lowest price at any point shown by any of the evidence defendant was not injured by showing the price at Sacramento.

The motion for nonsuit was rightly denied. Immediately after the motion was denied plaintiff obtained leave to reopen his case, and no motion for nonsuit was thereafter made. There was sufficient evidence when the motion was made to go to the jury. The point that the court was without jurisdiction of the person of defendant was not well taken, for he appeared by demurrer and answer and submitted himself to the jurisdiction of the court.

Error is urged because the court permitted plaintiff to prove when and how the potatoes were to be paid for, and that each car was to be inspected at Sacramento before the draft for its payment was made. It is, perhaps, not apparent why this evidence was admitted, unless it was to meet a claim that delivery and payment were to be made in Oregon f. o. b. cars. The evidence was that in previous similar contracts payment was made at Sacramento after plaintiff had inspected the potatoes, the seller sending draft, with bill of lading and invoice, and this was the usage, as the evidence showed. In no event can we see that the evidence could have been prejudicial. The potatoes were not in fact purchased for or tendered to plaintiff in Oregon or elsewhere.

We have endeavored to dispose of the points made in appellant's brief, and, finding no prejudicial error in the record, the order is affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

On Petition for Rehearing.

CHIPMAN, P. J. In his petition for a rehearing appellant calls attention to one point urged in the opening brief which was not noticed in the opinion, namely, that a custom and usage prevailed between plaintiff and defendant, and between plaintiff and other persons in Oregon with whom it had dealings, to the effect that the sale was not complete until plaintiff's acceptance of the seller's offer was confirmed by the latter. There was evidence tending to establish the custom as claimed by defendant, but there was evidence the other way sufficient to produce a conflict. Besides, if there had been a usage between the parties in former dealings, it could be disregarded or waived by them in any particular transaction. We think the evidence in the present case shows that both parties treated the order as accepted without further confirmation on the part of either.

We have re-examined the other questions and do not find error in our former conclusions. We think appellant disposed, in his argument, to overlook the force of the rule where the evidence in the case is conflicting.

Rehearing denied.

We concur: BUCKLES, J.; McLAUGHLIN, J.

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1 Cal. App. 718

BLACK v. VERMONT MARBLE CO.

(Court of Appeal, First District, California. Oct. 10, 1905.)

1. CORPORATIONS—FOREIGN CORPORATIONS—REGULATION—STATUTES.

Act April 1, 1872 (St. 1871–72, p. 826, c. 566), as amended by Act 1899 (St. 1899, p. 111, c. 94), declaring that every foreign corporation within 60 days from the date it commenced to do business within the state should designate a resident of the county in which its principal business was conducted on whom process might be served, which designation should be filed with the Secretary of State, etc., did not prohibit a foreign corporation from engaging in business within the state before filing such designation, nor affect the validity of any transaction or contract entered into by it prior to that time.

2. SAME—RIGHT TO SUE.

Act April 1, 1872 (St. 1871–72, p. 826, c. 566), as amended by Act 1899 (St. 1899, p. 111, c. 94), requiring foreign corporations to file a designation of a person on whom process may be served within 60 days after commencing business within the state, and providing that unless it does so it shall not "maintain" any action in the courts of the state, does not deprive foreign corporations of the right "at any time to commence an action for the protection of its property or the enforcement of its rights by complying with the provisions of the statute.

3. CORPORATIONS—FOREIGN CORPORATIONS—PROCESS—DESIGNATION OF AGENT—STATUTES—CONSTRUCTION.

Act April 1, 1872 (St. 1871–72, p. 826, c. 566), as amended by Act 1899 (St. 1899, p. 111, c. 94), requires every foreign corporation within 60 days after commencing business within the state to designate a person on whom process may be served and file such designation in the office of the Secretary of State, and section 3 declares that every foreign corporation complying therewith shall be entitled to the benefit of the laws for the limitation of civil actions. *Held*, that such section is prospective only, so that a foreign corporation, not having filed such designation until after commencement of an action against it, was not entitled to the benefit of limitations as a defense to such action.

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by Annie Black, as administratrix, etc., against the Vermont Marble Company. From a judgment in favor of defendant, and from an order denying plaintiff's motion for a new trial, she appeals. Reversed.

Rehearing denied by Supreme Court December 8, 1905.

George A. Sargent, for appellant. F. William Reade, for respondent.

HARRISON, P. J. Action to recover from the defendant certain moneys received by it upon a sale by the sheriff of certain merchandise belonging to the defendant. The facts connected with the transaction are given in the opinion in an action between the same parties reported at 137 Cal. 683, 70 Pac. 776; the difference between the two actions being that the former was an action in claim and delivery for property purchased by the defendant at the sheriff's sale therein referred to. while this is for moneys received by the defendant from the sheriff upon the sale by him to other persons. The defendant sets up in his answer, as special defenses to the action, the statute of limitations and the pendency of another action. Upon this latter defense the court found that the action referred to was not for the same cause of action as that set forth in the complaint herein, but found that the plaintiff's cause of action accrued more than three years prior to the commencement of the present action, and is barred by subdivision 1 of section 339 of the Code of Civil Procedure. Judgment was thereupon rendered in favor of the defendant, from which, and from an order denying a new trial, the plaintiff has appealed.

The only question presented upon this appeal is whether the plaintiff's cause of action is barred by the statute of limitations. The defendant is a foreign corporation, and the present action against it was commenced October 3, 1900. The appellant contends that the statute of limitations is not available to the defendant as a defense herein, for the reason that it did not at any time prior to May 2, 1901, file with the Secretary of State any designation of a person upon whom process against it might be served, as is required under the act of April 1, 1872 (St. 1871–72, p. 826, c. 566), as amended by the act of March 17, 1899 (St. 1899, p. 111, c. 94). The right of a state to prescribe the terms upon which a foreign corporation may carry on business within its territory is well established. Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137. "Having no absolute right of recognition in other states, but dependent for such recognition and enforcement of its rights upon their assent, it follows as a matter of course that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment may best promote the public interest. The whole matter rests in their discretion." Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357. In Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297, the same court said: "The state of California has the power to exclude foreign insurance companies altogether from her territory, whether they were formed for the purpose of doing a fire or marine business. She has the power, if she allows any such companies to enter her confines, to determine the conditions on which the entry shall be made. * * * The power to exclude embraces the power to regulate—to enact and enforce all legislation in regard to things done within the territory of the state, which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, subject, always, of course, to the paramount authority of the Constitution of the United States." See, also, Doyle v. Continental Insurance Company, 94 U. S. 535, 24 L. Ed. 148.

By the aforesaid act of April 1, 1872, the state of California has declared that every foreign corporation shall "within sixty days from the time of commencing to do business in the state designate some person residing in the county in which the principal place of business is, upon whom process may be served, and file such designation in the office of the Secretary of State"; and in the second section of the act has prescribed, as a penalty for failing to make and file such designation, that it "shall be denied the benefit of the laws of this state limiting the time for the commencement of civil actions." The statute of limitations is purely a matter of legislative creation. In the absence of any statute upon the subject, lapse of time would not constitute a defense to the right to enforce an obligation. The Legislature has prescribed different periods of time within which different species of obligations may be enforced, and to some obligations it has declared that there shall be no limitation of time for their enforcement through its courts. Code Civ. Proc. § 348. It would have been competent for the Legislature to declare that there should be no limitation of time against the enforcement of any obligation of a foreign corporation; and its declaration that upon its failure to file the above designation with the Secretary of State it shall be denied the benefit of the statute of limitations was only an exercise of this admitted power. We have not been cited to any authority in which a statute like the one under consideration contained prohibitory provisions like the foregoing. Lawrence v. Ballou, 50 Cal. 258, relied upon by the defendant, was decided before the enactment of the above statute; and what was there decided was that a foreign corporation, having a managing agent exercising his authority as such in this state, is not "absent from the state" so as to prevent the running of the statute of limitations or deprive it of the benefit of the statute. This principle is all that was declared in Turcott v. Railroad, 101 Tenn. 102, 45 S. W. 1067, 40 L. R. A. 768, 70 Am. St. Rep. 661, and King v. National M. Co., 4 Mont. 1, 1 Pac. 727. In Harrigan v. Home Life Ins. Co., 128 Cal. 531, 58 Pac. 180, 61 Pac. 99, it was held that the statute was inapplicable to a foreign insurance corporation by reason of other statutes directly applicable to such corporations.

The foregoing provisions in the act of 1872 were not changed by the amendatory act of 1899; the amendments therein merely providing that the person to be designated by the corporation should reside in this state, and adding to the penalty for failure to make and file the declaration that the corporation "shall not maintain or defend any action or proceeding in any court of this state unless such corporation shall have complied with the provisions of section 1 of this act." By this legislation the state of California does not purport to prohibit a foreign corporation from engaging in business before filing the designation therein named, or to affect the validity of any transaction it may enter into or any contract it may make. Fritts v. Palmer, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317. Neither does the provision that it shall not "maintain" any action in the courts of the state deny it the right at any time to commence an action for the protection of its property or the enforcement of its rights (Utley v. Clark-Gardner L. M. Co., 4 Colo. 369); and it is within its power at any time after the commencement of the action to comply with the statute and thereafter "maintain" such action (Cal. S. & L. Soc. v. Harris, 111 Cal. 133, 43 Pac. 525; Ward Land & Stock Co. v. Mapes (opinion filed Sept. 19, 1905) 82 Pac. 426; Carson Rand Co. v. Stern, 129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420). Whether the prohibition against defending an action in case of its noncompliance with the statute would authorize a judgment against the corporation as upon a default may be open to dispute. It is not to be supposed that the Legislature, by taking away the right to defend any action, intended that the corporation should be without the protection of the law, or that its property might be confiscated through the forms of law without any right to defend against the same. See Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914. The question, however, is not presented upon the present appeal. The corporation herein is not the plaintiff, and the action was not brought upon any contract or transaction made by it, but was brought to recover from it the damage sustained by reason of a tort committed by it within this state. Its right to defend the action was not questioned in the court below; and it did in fact interpose an answer to the complaint, traversing many of its allegations and setting up the foregoing special defenses, and at the trial appeared and contested the plaintiff's right of recovery. Under section 462 of the Code of Civil Procedure its special defense of the statute of limitations (section 339, subd. 1) was deemed controverted by the plaintiff, and by section 458 it then became incumbent upon the defendant to establish at the trial facts showing that the cause of action was so barred.

The averment in the complaint that the plaintiff's cause of action arose from the conversion by the defendant of certain merchandise made the above statute of limitations applicable; but by reason of the further averment therein, admitted by the answer, that the defendant was a foreign corporation, the above-mentioned act of 1899 took from the defendant the right to avail itself of this defense, unless it should show that it had complied with that act by filing with the Secretary of State the designation therein specified. The admission that for seven years prior to the commencement of the action it had maintained a branch office and place of business at a specified place in San Francisco, and had been there represented by its general managers, who were at all times in charge thereof, coupled with the facts shown at the trial and the admissions in the pleadings, sufficiently showed that it was "doing business" within the state. To meet the above requirement the defendant introduced and read in evidence a document, certified by the Secretary of State to be a correct copy of an original "Certificate of the designation of agent" of the defendant on file in his office, in which the defendant, after reciting that it is a foreign corporation "having a branch office and doing business" in San Francisco, appoints and designates M. J. Hawley as a person upon whom process may be served and as its agent and representative for that purpose. This instrument is not signed by any officer of the defendant, nor is it authenticated by its corporate seal; but it purports to have been made by M. J. Hawley as attorney in fact of the defendant. It is without date, and was filed in the office of the Secretary of State May 2, 1901. It is executed by Hawley, is not itself in any way authenticated, nor was there any evidence of any authority from the defendant to Hawley to make such designation. It is contended that for these reasons it fails to show that the "corporation" ever designated Mr. Hawley as a person upon whom process against it could be served. As, however, we are of the opinion that for other reasons the judgment must be reversed, it is not necessary to determine the validity of these objections.

The defendant contends that, by virtue of section 3 (page 112) of the aforesaid act, the effect of filing the designation with the Secretary of State after the present action had been commenced was to create in its favor the same right to invoke the statute of limitations against the plaintiff's actions herein as it would have had if such designation had been filed before the action was commenced or its obligation to the plaintiff was incurred. We are, however, unable to assent to this proposition. Section 3 of the act declares that every foreign corporation which shall comply with the provisions of section 1 shall be entitled to the benefit of the laws for the limitation of civil actions. This section is by its terms prospective in its operation, and under well-recognized rules of statutory construction would entitle the defendant to only such benefit as might accrue after filing the designation. The present action was commenced in 1900. At that time, and until the day before the trial thereof was had, by virtue of the above declaration of the Legislature, the defendant was not entitled to the benefit of the statute of limitations; and the plaintiff had therefore a right of recovery irrespective of the lapse of time subsequent to the accrual of her right of action. A statute of limitations enacted by the Legislature after the commencement of an action, which would deprive plaintiff of his right of recovery therein, would be invalid, and the statute in question is not to be construed as having that effect or as giving to the defendant a defense which it did not have when the action was commenced. The Legislature did not intend by this section that, upon filing a designation after an action had been commenced, the facts which, in the previous section it had declared should not be available as a defense, should constitute a defense. The cause of action existing in favor of the plaintiff when she filed her complaint was property of which she could not be deprived by the subsequent enactment of any statute, and a statute which should operate to give such effect to any subsequent act of the defendant would be equally invalid. The superior court therefore erred in holding that the plaintiff's cause of action was barred by the statute of limitations.

The judgment and order denying a new trial are reversed.

We concur: COOPER, J.; HALL, J.

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1 Cal. App. 634

ALPER et al. v. TORMEY et al. (WITTENMYER, Intervener).

(Court of Appeal, Third District, California. Sept. 23, 1905.)

FIXTURES—BETWEEN VENDOR AND PURCHASER—UNLAID RAILS.

Intervener, as assignee in insolvency of a corporation, conveyed to plaintiff certain land, together with all the buildings, machinery, fittings, and appurtenances erected or in process of erection, and all the railroad tracks and railroad superstructures previously built by the corporation and used in connection with the improvements and machinery. Thereafter a controversy arose as to whether certain property on the premises sold and used in connection with the business was "personal property not sold at said sale" or was fixtures passing with the freehold, which was compromised by a stipulation containing an admission that all of the property "in and about said premises" should pass as fixtures with the realty. *Held*, that neither the conveyance nor the stipulation passed to the plaintiff certain unlaid rails which were not on the property sold, of the existence of which the assignee had no knowledge and which plaintiff the following year requested to be assessed as personal property under the designation of "old iron."

Appeal from Superior Court, Contra Costa County; William S. Wells, Judge.

Action by A. Alper and others against Patrick Tormey, in which L. C. Wittenmyer, assignee of the Union Stockyard Company, intervened. From a judgment in favor of intervener, plaintiffs appeal. Affirmed.

Louis Brownstone, for appellants. R. H. Latimer and W. S. Tinning, for respondents.

McLAUGHLIN, J. This is an action to recover 60 tons of steel rails. At the time the action was commenced the property in controversy was in the possession of defendant Tormey, but at the trial he expressly disclaimed all interest in the rails. Subsequent to the commencement of the action defendant Wittenmyer, as assignee of the Union Stockyard Company, an insolvent debtor, filed his complaint in intervention, and set up his claim to the possession and ownership of said rails as such assignee. Judgment was entered in favor of the intervener, and plaintiffs appeal from an order denying their motion for a new trial.

Appellants contend that the evidence is insufficient to sustain the findings, and the question thus presented, boiled down to its essence, involves the ownership of the rails here in controversy. It is admitted that the rails were owned by the insolvent corporation, and passed to the intervener by virtue of the assignment to him. But it is claimed that they were included in a sale of certain property of such corporation made by the assignee to plaintiff Alper. At the time the action was commenced the rails were lying upon land owned by defendant Tormey. They had been brought there and, as he put it, "stored" on the land with his consent. The Union Stockyard Company owned a plant which covered about 35 acres, and in connection therewith operated spur tracks which passed over Tormey's land. These rails were not laid, but were lying on the ground about 50 feet from such tracks, at a point about 300 feet from the line of the Union Stockyard Company's property. The undisputed facts touching the sale out of which this litigation arose may be briefly stated as follows: On November 12, 1900, the intervener, as assignee, sold to plaintiff Alper all the right, title, and interest of said insolvent and said assignee in and to certain blocks of land in Rodeo, Contra Costa county, "together with all the buildings, machinery, and fittings, corrals, pens, sheds and appurtenances now erected or in process of erection upon said blocks, and all and every the railroad tracks and railroad superstructures, which have heretofore been built by the Union Stockyard Company of San Francisco * * * and used or intended to be used in connection with the improvements and machinery in said blocks." This sale was confirmed by the court, but disputes arose touching the payment of taxes, and "whether certain property in and upon the above-described premises and used in connection with the business formerly carried on there was personal property and not sold at said sale," or "fixtures passing with the freehold, said property consisting among other things of two safes, tools and traveling hooks." On December 19, 1900, the parties entered into a stipulation embodying the foregoing facts, and reciting that the matters in controversy should be submitted to the court for consideration. Two days later the assignee filed a petition for leave to compromise such disputes, and on December 22d the court made its order authorizing a compromise pursuant to the terms of the stipulation, and the delivery of a conveyance of the assignee's interest in the real property sold, with an admission that "all of the property in and about said premises shall pass as fixtures with said realty." Thereupon said intervener executed and delivered to Alper an instrument reciting that intervener had sold all of his right, title, and interest in and to "all property used in connection with the Union Stockyard Company of San Francisco unto A. Alper, and has agreed that all property which might possibly be considered under the circumstances as personal property in and about the buildings is to be considered as fixtures, and as passing with the real property." It is admitted that, at the time of the sale and compromise, the assignee did not know of the existence of the rails in controversy. It is also conceded that plaintiffs jointly own the property acquired by virtue of such sale.

It is clear from the foregoing statement that the rails did not pass to plaintiffs. It cannot be pretended that anything more than real property, and that which ordinarily passes with real property, was included in the sale originally, nor can it be said that all personal property passed by virtue of the compromise. The stipulation entered into by the parties shows on its face that such was not the fact. The dispute which led to the compromise, as far as such dispute is germane to the problem before us, involved only the question whether certain property in and about the premises was personal property "not sold at said sale," or was to be considered as "fixtures passing with the freehold." If all of the personal property had been included in the sale, it is difficult to imagine how a dispute as to the "fixtures" could be possible. If such was the understanding, it is equally difficult to guess why "personal property not sold at said sale" was mentioned in the stipulation upon which the compromise was based. Great stress is placed upon the words "all property" contained in the instrument executed by the assignee pursuant to the order authorizing the compromise. It is said that this language is comprehensive enough to include all of the personal property. Waiving the proposition that the compromise could not be made broader than the authorization, the words relied upon must be construed in the light of surrounding facts and circumstances. So construed, it is clear that such words could only refer to the real property, and to personalty in and about the buildings, which was to be considered as included in the term "fixtures." These rails were not even on the land. They were 50 feet from any of the spur tracks used by the insolvent, and far removed from any of the buildings. The argument as to the intent of the parties is far from convincing. We cannot understand how the assignee could have intended to include specific personal property, worth at least $2,000, when he was ignorant of the existence of such property. Nor can we understand how such intent could exist, when such property was not mentioned during the dispute nor in the stipulation. It is evident that the plaintiffs did not class the rails as "fixtures," for the following year, at their request, such property was assessed as personal property under the designation of "old iron."

The order is affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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1 Cal. App. 652

CITY AND COUNTY OF SAN FRANCISCO v. HARTNETT et al.

(Court of Appeal, First District, California. Sept. 27, 1905.)

1. BAIL—AUTHORITY TO FIX—STATUTES.

Under Pen. Code, §§ 821, 823, 824, 1268 1269, 1273, 1277, providing a complete scheme for admitting to bail persons charged with crime, under which the order fixing the amount of bail is required to be made by a court or magistrate, San Francisco City Charter, art. 5, c. 8, §§ 5, 6, providing that the warrant and bond clerk may issue bail bonds when the liability does not exceed $2,000, and order the discharge of prisoners for whom bonds are issued, and may take cash bail to the extent of $1,000, and that in the matter of fixing the bail and ordering the release of prisoners the clerk shall be subject to the judges of the police court, do not authorize such clerk to fix the amount of bail for the discharge of a prisoner.

2. SAME — VOID BOND — COMMON-LAW OBLIGATION.

Where bail given for the discharge of a prisoner was fixed by the warrant and bond clerk of the city of San Francisco without authority, the bond given was unenforceable as a common-law obligation.

Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by the city and county of San Francisco against Daniel Hartnett and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

L. F. Byington and I. Harris, for appellant. Sullivan & Sullivan, for respondents.

HALL, J. This is an appeal from a judgment in favor of defendants, entered after failure of plaintiff to amend complaint upon order sustaining defendants' general demurrer to the complaint. The action was brought against defendants as the sureties on a bail bond given by them to secure the appearance of one Calnan to answer to the charge of grand larceny in the police court of the city and county of San Francisco. Respondent, the demurring party in the trial court, urges that the bond sued on is void for the reason (among others also urged) that, as appears by the allegations of the complaint, the amount of the bail was fixed by the assistant warrant and bond clerk, and not by order of a court or magistrate. Appellant contends that the charter of the city and county of San Francisco vests authority in the warrant and bond clerk to fix the amount of bail by persons charged with crime, and also that, if this is not so, the bond in suit is nevertheless good as a common-law bond.

Passing the point made by respondent that a charter provision, vesting in the warrant and bond clerk the power to admit to bail, would be unconstitutional, as vesting judicial functions in a ministerial officer (upon which we express no opinion), we are unable to find anything in the charter that gives such clerk the power to fix the amount of bail to be given by persons charged with crime. Appellant relies upon the provisions of sections 5, 6, c. 8, art. 5, of the charter. Section 5, after providing for the appointment of a warrant and bond clerk and three assistants, etc., provides as follows: "The warrant and bond clerk shall endorse upon the bond the time when it was issued by him or when it came into his possession. He may issue bail bonds and appeal bonds when the liability therefor does not exceed two thousand dollars ($2,000.00), and order the discharge from custody of the prisoners for whom these bonds are issued; and he may take cash bail to the extent in any one case of one thousand ($1,000.00) dollars. * * *" Whatever the framers of the charter meant by the words, "He may issue bail bonds and appeal bonds when the liability therefor does not exceed two thousand dollars," it is certain that they did not mean by such language to vest the clerk with the power to fix the amount of the bond. The limitation of the amount beyond which he may not "issue" bonds clearly indicates that the amount is to be fixed by some other authority. Otherwise, he would have power to admit to bail in all cases; for, by simply fixing the amount of bail at a sum not exceeding $2,000.00, he would vest himself with authority to admit to bail in any case, no matter how aggravated or heinous the crime might be. Section 6 of the same chapter and article contains this provision: "In the matter of fixing bail and ordering the release of prisoners, the warrant and bond clerk shall be subject to the judges of the police court, etc." We do not think that we are justified in holding that this language invests the warrant and bond clerk with authority to fix the amount of bail. It seems rather to have been inserted in the charter ex industria for the purpose of making it clear that such power lies with the judges of the police court. The Penal Code provides a complete scheme for admitting to bail persons charged with crime, under which the order fixing the amount of bail must be made by a court or magistrate. Pen. Code, §§ 821, 823, 824, 1268, 1269, 1273, 1277. We therefore hold that the warrant and bond clerk has no power to fix the amount of bail to be given by persons charged with crime.

Appellant next urges that, if it be held that the clerk had no authority to fix the amount of bail, yet the bond may be recovered on as a good common-law obligation. Undoubtedly a bond is not rendered void by a mere irregularity, such as the failure of sureties to justify; it being held that the justification is no part of the bond, but a matter for the benefit of the obligee only, which he may, of course, waive. Murdock v. Brooks, 38 Cal. 603, is a type of this class of cases. See, also, People v. Shirley, 18 Cal. 121; People v. Penniman, 37 Cal. 273; Moffat v. Greenwalt, 90 Cal. 371, 27 Pac. 296; Carpenter v. Furrey, 128 Cal. 669, 61 Pac. 369. The only states in which it has been held that a bail bond given on the order of an officer not authorized to admit to bail is valid at all we believe to be Iowa and Georgia. State v. Canon, 34 Iowa, 325; Dennard v. State, 2 Ga. 137; Park v. State, 4 Ga. 329; Jones v. Gordon, 82 Ga. 570, 9 S. E. 782. In the Iowa case no authorities are cited, and the matter is disposed of in a few sentences. In Georgia the ruling of the court seems to be in part founded on a statute peculiar to that state, and the doctrine laid down in the Georgia cases has been discredited in other jurisdictions, and especially by Freeman in his note to Harris v. Simpson, 14 Am. Dec. 101.

On the other hand, it has been held that where the amount of the bail bond has been fixed, or the bail bond accepted and approved, by an officer not authorized by the law so to do, such bail bond is entirely void, in the following states, viz.: Kentucky, Oregon, Colorado, Massachusetts, Indiana, Texas, New Jersey, Maine, Nebraska, Ohio, Missouri, and other states. Commonwealth v. Roberts, 1 Duv. (Ky.) 199; Williams v. Shelby, 2 Or. 145; Rupert v. People, 20 Colo. 424, 38 Pac.

702; People v. Meller, 2 Colo. 705; Haney v. People, 12 Colo. 345, 21 Pac. 39; State v. Winninger, 81 Ind. 51; State v. Russell, 24 Tex. 505; State v. Kruise, 32 N. J. Law, 313; State v. Young, 56 Me. 219; Dickenson v. State, 20 Neb. 72, 29 N. W. 184; Harris v. Simpson, 14 Am. Dec. 101; Powell v. State, 15 Ohio, 579; People v. Brown, 23 Wend. 45; Couchman v. Lisle, 15 Ky. Law Rep. 543. In Williams v. Shelby, 2 Or. 145, a justice without authority took the bail bond, and the court said: "There was no statute in existence at the time of the proceeding authorizing the justice to take such a bond. Therefore it must be treated as void. [Vose v. Deane] 7 Mass. 280; [Commonwealth v. Otis] 16 Mass. 199; [Commonwealth v. Loveridge] 11 Mass. 337; [People v. Brown] 23 Wend. 47. The circuit court held that, although there was no statute then in existence authorizing the taking of this bond by the justice, yet it might be sustained and held valid as a common-law undertaking; that the discharge of the principal for the time being was a sufficient consideration to sustain the promise and agreement entered into. This holding, we think, cannot be sustained by the authorities. In fact none have been produced to that effect. Authority has been cited to this effect, that another class of bonds might well be sustained from their form and structure without the aid of statute, such as injunction bonds, replevin bonds, bail bonds in civil cases, forthcoming bonds, appeal bonds, and all such as are made payable to the beneficiary or interested party. Such have been held valid at common law, without resorting to the statute to give them effect, but it is held otherwise in criminal cases." In Rupert v. People, 20 Colo. 424, 38 Pac. 702, the Oregon case just referred to is cited, and the court said: "The recognizance, therefore, having been taken and approved by an officer without authority, is void, both as a statutory bond and as a common-law obligation." To the same effect are Morrow v. State, 5 Kan. 563; U. S. v. Goldstein, 1 Dill. 413, Fed. Cas. No. 15,226; Vose v. Deane, 7 Mass. 280; Commonwealth v. Loveridge, 11 Mass. 336. In State v. Winninger, 81 Ind. 51, it is said: "It is well settled that a bond or recognizance taken by a court without jurisdiction, or an officer without authority, is utterly void." In Benedict v. Bray, 2 Cal. 251, 56 Am. Dec. 332, and People v. Cabannes, 20 Cal. 529, it was held that a bond exacted by a justice of the peace without authority was void. In Commonwealth v. Roberts, 1 Duv. (Ky.) 199, after holding that a bond taken without authority is void, the court said: "It is not within the province of courts to invest persons with authority to take bonds and discharge prisoners from custody from whom the Legislature have withheld such authority; nor should courts, by recognizing such as binding on either party, contravene the policy of the commonwealth in designating by law the officers authorized to bind her."

Inasmuch as the warrant and bond clerk has no authority to fix the amount of bail to be given for the release of persons charged with crime, to hold the bond in this case valid would be for this court in a measure to sustain a practice whereby persons charged with crime might be released from custody contrary to the plain mandate of the statute. This we cannot do.

The judgment appealed from is affirmed.

We concur: HARRISON, P. J.; COOPER, J.

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1 Cal. App. 657

In re BOUYSSOU'S ESTATE.

(Court of Appeal, First District, California. Sept. 27, 1905.)

1. WILLS—PROBATE OF WILL—REVOCATION OF ORDER—APPEAL.

An order revoking an order refusing to admit a will to probate, not being specified in Code Civ. Proc. § 963, specifying the appellate jurisdiction of the Supreme Court in probate matters, is not appealable.

2. ADMINISTRATORS — PROCEEDINGS FOR APPOINTMENT—SEPARABLE ORDER.

The proceeding for the appointment of an administrator with the will annexed, as authorized by Code Civ. Proc. §§ 1350, 1426, and that for the admission of a will to probate being entirely distinct, and there being nothing in a bill of exceptions to indicate that the appointment of appellant as administrator did not proceed upon a record separate from that for the probate of the will, or that it was in any respect dependent on the order denying probate of the will, an order granting a motion "to vacate order refusing probate to the will and appointing administrator" should be construed distributively and regarded as severally applicable to the former orders.

3. SAME—APPOINTMENT—VACATION—APPEAL.

Where an order granted a motion to vacate an order refusing probate of a will and appointing an administrator, that part of it vacating the order appointing the administrator was appealable under the express provisions of Code Civ. Proc. § 963, subd. 3.

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Application for probate of an alleged last will and testament of Paul Bouyssou, deceased. The application was denied on objections of Alexander Vayssie, and from an order granting a motion to vacate an order refusing probate and appointing an administrator, Jean Bouyssou appeals. On motion to dismiss appeal. Motion granted in part.

Philip I. Manson (Lucius L. Solomons, of counsel), for appellant. Jacob Samuels, for respondent.

HARRISON, P. J. A document purporting to be the last will and testament of the above-named deceased, together with a petition for its probate, was filed with the superior court in and for the city and county of San Francisco November 2, 1904, and on November 17th the court made an order denying it probate. Thereafter, December 9th, upon the application of the respondent herein, an order was made by the court vacating this order of November 17th. From this latter order an appeal was taken by the administrator of the estate. The respondent now moves to dismiss the appeal upon the ground that it is a nonappealable order. The Constitution has conferred upon the Supreme Court appellate jurisdiction only in such probate matters "as may be provided by law," and in section 963, Code Civ. Proc., the Legislature has enumerated such matters as it has deemed appropriate to have reviewed by the Supreme Court. An order revoking an order refusing to admit a will to probate is not named in that section, and consequently is not within the appellate jurisdiction of the Supreme Court. See Estate of Cahill, 142 Cal. 628, 76 Pac. 383.

The appeal herein purports to be taken by the administrator of the estate of the above-named decedent, and at the hearing of the motion it was urged on his behalf that, as an order revoking letters of administration is expressly made appealable by section 963, the appeal from that portion of the order should not be dismissed. The bill of exceptions merely refers to the order of November 17th as "denying probate of will and appointing administrator," without setting forth the order at length, and the order from which this appeal is taken is in the following words: "Motion to vacate order refusing probate of will and appointing administrator granted." Although this is in form a single order, yet, as the order refusing probate of the will and the order appointing appellant as administrator were distinctive proceedings before the superior court, this order revoking them must be read distributively and regarded as severally applicable to the former orders. The proceedings for the appointment of an administrator of the estate of a deceased person and for admitting a will to probate are entirely distinct, and are conducted upon different lines of procedure. The appointment of an administrator with the will annexed is to be made in the manner as provided for the granting of letters in cases of intestacy. Sections 1350, 1426. There is nothing in the bill of exceptions which indicates that the appointment of the appellant as administrator of the estate of the deceased did not proceed upon a record separate from that for the probate of the will, or that it was in any respect dependent upon the order denying probate to the will; and, as the order vacating this appointment is appealable, the respondent's motion to dismiss the same must be denied.

The appeal from the order vacating the order denying probate to the will is dismissed. The motion to dismiss the appeal from the order vacating the appointment of an administrator is denied.

We concur: HALL, J.; COOPER, J.

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1 Cal. App. 648

CASTLE v. SIBLEY, Sheriff, et al.

(Court of Appeal, Third District, California. Sept. 26, 1905.)

1. Appeal—Conflicting Evidence.

Conflicts in the evidence must be resolved on appeal in favor of the opinion of the trial court.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3983–3989.]

2. Execution—Claims by Third Persons—Proceedings for Establishment—Evidence.

In an action to recover the proceeds of personal property levied on, claimed by plaintiff under a sale from the judgment debtor, evidence *held* to sustain a finding that the sale had been made by the debtor before the levy and was accompanied by immediate delivery and followed by actual and continuous change of possession, required by Civ. Code, § 3440.

Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Action by D. O. Castle against Walter F. Sibley and another. From a judgment in favor of plaintiff, and from an order denying defendants' motion for a new trial, they appeal. Affirmed.

R. C. Minor and W. A. Washington, for appellants. Nicol & Orr, for respondent.

McLAUGHLIN, J. This is an action to recover a sum of money held by the defendant sheriff in lieu of certain hay attached by him in a suit brought by defendant Crane against Hayes Nicewonger and others. The plaintiff had judgment, and from such judgment, and an order denying their motion for a new trial, defendants appeal.

The pivotal question argued in the briefs, and upon which the determination of this appeal depends, is whether a sale of the hay levied upon, made by Hayes Nicewonger to plaintiff prior to such levy, was accompanied by an immediate delivery and followed by an actual and continuous change of possession as required by section 3440 of the Civil Code. The findings in this regard are assailed as not supported by the evidence, and a brief summary of such evidence will suffice to indicate the points upon which such contention is based. It appears that plaintiff owns the land upon which the hay in question was produced, and that Hayes Nicewonger, his brother-in-law, occupied the same from October 1, 1902, to September 30, 1903, under a contract whereby Nicewonger was to farm the land and yield to plaintiff one-third of the crop produced. During the term of Nicewonger's occupancy of the land he maintained a residence in Stockton, and came home nearly every night, returning to the ranch in the morning. After the termination of the contract above mentioned, there was little, if any, apparent change in the manner of his general occupancy of the premises. At the time the hay was harvested he was indebted to the Farmers' Union & Milling Company; such indebtedness being secured by a mortgage on the crop produced on this land. The company was pressing this demand against him, and on September 23, 1903, pursuant to an understanding between Nicewonger, the plaintiff, and the officers of said company, plaintiff bought this hay and paid Nicewonger the full market value thereof, and the purchase price was applied to the payment of the above-mentioned indebtedness. There is not the slightest conflict as to the sale and payment of the purchase price, nor is there any evidence tending to show that such sale was fraudulent or designed to hinder or delay other creditors. Immediately after the sale was made plaintiff instructed Cary Nicewonger to go out to the ranch and take charge and possession of such hay, and prepare to deliver it whenever and wherever directed to do so by plaintiff. Cary went out to the ranch, and that evening went down to the place where the contractor baling the hay was at work, drove some hogs away from it, and was down there nearly every day thereafter. He prepared teams to deliver the hay, kept it in sight all the time, and, while he did not place any signs on stacks or bales, nor cause it to be immediately moved from its position on the land, there is evidence sufficient to sustain the conclusion that he had charge of it, and that it was delivered under his direction pursuant to orders from Castle. At the time of the sale the hay was stacked at different places on the land; there being about 60 or 70 tons in each stack. At that time but 44 tons had been baled, and the contractor continued to bale the remainder, concluding his labors about September 30th. The total amount baled was 155 tons. The contract for baling was made by Hayes Nicewonger before the sale, but after the sale the contractor was holding possession and claiming a lien on the hay, and plaintiff paid his demand in full. After the sale Castle made repeated efforts to sell the hay, and on September 29th he sold it to Rumenapf & Co., and instructed Cary to deliver it on board the cars at French Camp as speedily as possible. His directions were obeyed without delay, and on October 3d about five carloads, or 60 tons, had been so delivered. On that day, and while the hay was in course of delivery to Rumenapf & Co., defendant sheriff, by virtue of an attachment issued in the case of George E. Crane v. Hayes Nicewonger et al., levied upon the hay remaining on the land, and out of such attachment this controversy arose. At the time of the first sale to plaintiff his portion of the hay had not been separated from the general mass, nor delivered to him. After September 23d about five tons of the hay was delivered to one Fohls at Stockton by plaintiff's order, and on the day of the sale a load was placed in the barn of Hayes Nicewonger in that city. One employé of Hayes Nicewonger assisted in the delivery of the hay and Nicewonger's teams were used for the purpose; but there is nothing to show whether plaintiff compensated Nicewonger for such service. Hayes Nicewonger sometimes went to French Camp while the hay was in course of delivery, but there is positive testimony to the effect that each load was delivered under Cary Nicewonger's personal supervision. The defendants do not dispute plaintiff's right to the proceeds arising from the sale of hay actually delivered to Rumenapf & Co., and it was stipulated that the remaining hay should be delivered to them, and that the purchase price of such remainder should be paid to the sheriff, instead of plaintiff, and held by such sheriff pending the result of this action. Cary Nicewonger is the son of Hayes Nicewonger and the nephew of plaintiff. His residence was in the city of Stockton, where he had lived about 32 years. About September 10, 1903, he was in San Francisco, but came back to Stockton at plaintiff's request, and on the last-mentioned date went out to the ranch to care for plaintiff's stock and attend to other interests of plaintiff on this ranch. During his stay there he lived in the only dwelling on the premises, which dwelling was also occupied by his father.

The evidence shows, without conflict, that he went out to the ranch on September 10th and remained there as the employé and servant of plaintiff, and that he did no work and performed no service whatever for his father. Evidence was introduced tending to contradict some statements made by plaintiff as a witness in the case, and it is said that his testimony is entitled to no weight. But the court cannot say that evidence clearly relevant and competent should have been rejected or accepted by the trial court in reaching a conclusion as to matters of fact. Under the well-settled rule conflicts in the evidence must be resolved in favor of the action of the trial court, and the only question here to be passed upon is whether there is sufficient evidence in the record to sustain the findings. We are of the opinion that this question must be answered in the affirmative. Aside from plaintiff's interest in the hay, and the fact that the purchase price was used to redeem the crop from the lien of the crop mortgage, he also redeemed it from the asserted lien of the contractor who baled the hay. But waiving these considerations, there is sufficient evidence to show that after the sale the hay was under his exclusive dominion and control, and under the authorities the findings cannot be disturbed. Feeley v. Boyd, 143 Cal. 286, 76 Pac. 1029, 65 L. R. A. 943; Dubois v. Spinks, 114 Cal. 292, 46 Pac. 95; Porter v. Bucher, 98 Cal. 459, 33 Pac. 335; Byrnes v. Moore, 93 Cal. 394, 29 Pac. 70; Claudius v. Aguirre, 89 Cal. 503, 26 Pac. 1077; Hickey v. Coschina, 133 Cal. 83, 65 Pac. 313.

The briefs are entirely silent as to the many assignments of error contained in the bill of exceptions, and for this reason we do not feel called upon to examine or consider such assignments.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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1 Cal. App. 672

SACRAMENTO PAVING CO. v. ANDERSON et al.

(Court of Appeal, Third District, California. Sept. 30, 1905.)

1. MUNICIPAL CORPORATIONS — RESOLUTIONS OF COUNCIL—APPROVAL BY MAYOR—NECESSITY.

Act March 27, 1897, providing that every resolution of the council of any municipality shall, before it takes effect, be presented to the mayor for his approval, has no application to Sacramento, operating under the freeholders' charter adopted February 7, 1893, which does not require a resolution to be approved by the mayor.

2. SAME — PUBLIC IMPROVEMENTS — PRELIMINARY ESTIMATES—NECESSITY.

The Vrooman act (Pol. Code 1886, § 4409), relating to local improvements, does not require as a prerequisite that the council shall have an estimate of street work before it passes the resolution of intention, unless it desires to issue bonds for the work or to place the same in a district.

3. SAME—RESOLUTION FOR IMPROVEMENT—NOTICE OF PASSAGE—SUFFICIENCY.

The statute which requires the street superintendent to conspicuously post along the line of a contemplated street improvement, at not more than 100 feet in distance apart, and not less than three in all, a notice of the passage of the resolution providing for the improvement, does not require the posting of notices along the street in a block which is not to be improved.

4. SAME—CONTRACTS FOR IMPROVEMENT—VALIDITY.

A city provided for the improvement of a street, excepting the part between certain cross-streets. The fact that this part was not included in the contract for the work tended to lessen the rate per front foot, while, if the work had been let in two contracts, there would not have been as many curbs and curves to pay for in one part of the street. *Held*, that it was not improper to include the entire improvement in one contract.

5. STATUTES—PASSAGE OF BILLS—EVIDENCE—JOURNALS.

Where a bill itself, with its indorsements thereon, shows that it was properly enrolled, authenticated, and deposited with the Secretary of State as having been passed by the Legislature, the journal of either house cannot be looked into to rebut the presumption raised that the bill was properly passed.

Appeal from Superior Court, Sacramento County; P. J. Shields, Judge.

Action by the Sacramento Paving Company against James Anderson and others. From a judgment for plaintiff, defendant James Anderson appeals. Affirmed.

R. Platnauer, for appellant. Holl & Dunn and J. H. Leggett, for respondent.

BUCKLES, J. This is an appeal from an order denying defendants' motion for a new trial in a case of street assessment work on Eighteenth street in the city of Sacramento. Work commenced at the south line of the alley between B and C streets and running south to the north line of E street; from the south line of E street to the north line of G street; from the south line of G street to the north line of H street; and so on to L street, omitting the cross-streets. Then, commencing again at the south side of M street, running south, omitting the cross-streets N, O, P, and Q, to the north line of R street. The judgment was for the plaintiff, and the defendant appeals. The appellant sets forth the following as assignments of error: (1) The resolution of intention and the resolution ordering the work was not presented to the mayor, and should have been presented to him for his approval. (2) The city surveyor did not furnish estimates of the cost of the proposed work to the board of trustees before the adoption of the resolution of intention. (3) The notice prescribed by the statute was not given. (4) The defendants' property was assessed for the cost of work for which it was not legally liable. (5) Section 19, art. 11, of the Constitution, as adopted in 1879, has never been amended, and the Vrooman act is unconstitutional.

As to the first assignment of error, Sacramento was operating under a freeholders' charter adopted February 7, 1893, when the street work began. That charter did not require a resolution to be presented to the mayor for his signature. March 27, 1897, the Legislature passed an act providing that every ordinance and every resolution of the city council of any municipality, * * * which shall have passed the city council, shall, before it takes effect, be presented to the mayor for his approval. But this act has no application in this respect to a city working under a freeholders' charter. Morton v. Broderick, 118 Cal. 486, 50 Pac. 644.

As to the second assignment of error, the law (Vrooman act [Pol. Code 1886, § 4409]) does not seem to require as a prerequisite that the city council should have an estimate of street work before it passes the resolution of intention, unless the council should be desirous of issuing serial bonds for the work, or to place the work in a district. Petaluma Pav. Company v. Singley, 136 Cal. 618, 69 Pac. 426.

As to the third assignment of error: Along Eighteenth street, between the north line of L and the south line of M, there was no street work in this contract, and no notices were put up for a distance of one whole block, a distance of more than 500 feet; the work coming down Eighteenth street from the north to the north line of L street, and continuing south on Eighteenth street from the south line of M street. Notices were put up properly along the frontage where any work was done, and, as no work was let and none done on Eighteenth street, where the blocks between L and M streets fronted, it would seem that no notices were necessary. The statute prescribes that the street superintendent shall "cause to be conspicuously posted along the line of said contemplated work or improvement, at not more than 100 feet in distance apart, but not less than three in all, or where the work to be done is only upon a certain crossing, or any part thereof, in front of each quarter block and irregular block liable to be assessed, notice of the passage of said resolution." "In proceedings where the property of the citizen is to be taken, every requirement of the statute having the least semblance of benefit to the owner must be complied with; and, when the form of a statutory proceeding is prescribed, its observance becomes essential to the validity of the proceedings." Shipman v. Forbes, 97 Cal. 572, 32 Pac. 599; Chase v. Treasurer Los Angeles et al., 122 Cal. 545, 55 Pac. 414. If it is necessary to put up notices along this 500 feet where no work is to be done, then, of course, the notice is not sufficient to give the city council jurisdiction. The notice required by the statute is clearly to give the persons interested a chance to know what is intended, so that such interested persons can appear and object, if any objections they have. None are legally interested, except those having a frontage on the proposed work, the landowners liable to assessment for the work; and none others can object. It would be idle to put a notice where none are entitled to have notice. Where there is one block along a street proposed to be improved, and this block on the street in front of it is not included in the improvement, then, for the purposes of the notices, it appears to us that such block is not "along the line of said contemplated work or improvement." It is not in such work, and therefore we may ask, "need any notice be posted on such block?"

But appellant offers the following authorities as sustaining his position that notice must be posted on the blocks along Eighteenth street, between L and M streets, where no work was to be done: Hewes v. Reis, 40 Cal. 255; Hixon v. Brodie, 45 Cal. 275; Shipman v. Forbes, 97 Cal. 572, 32 Pac. 599; Chase v. Treasurer Los Angeles et al., 122 Cal. 540, 55 Pac. 414; and Dowling v. Hibernia Savings & Loan Society, 143 Cal. 425, 77 Pac. 141. In Hewes v. Reis, supra, the notice was posted but three days, when the statute required it should be posted five days. It was held this was such a defect as to render all subsequent proceedings void. Hixon v. Brodie has no bearing on the questions whatever, further than to approve of Hewes v. Reis. In Shipman v. Forbes, supra, the question was as to a date in the assessment, which read "San Francisco, 1885," and the court held this insufficient and not to comply with the statute as to giving date. In Chase v. Treasurer Los Angeles et al., 122 Cal. 540, 55 Pac. 414, the notice of intention was published in a newspaper without the previous order of the board that it should be published in that paper. This made the publication of notice void. In Dowling v. Hibernia Savings & Loan Society, supra, the resolution stated that it was the intention of the board to order the following street work, viz.: "That granite curbs be laid in Henry street, between Sanchez and Noe streets, where not already laid, and that the roadway thereof be paved with bituminous rock, where not already so paved." Some of the street in front of some of the lots on Henry street, between Sanchez and Noe streets, had already been paved, and was not included in the work to be done. The proof showed that notices had been conspicuously posted along the line of Henry street, between Sanchez and Noe streets—notices not more than 100 feet in distance apart, and six notices in all. Held, that "along the line of Henry street" was along the line of the contemplated work described in the resolution of intention. The court said in that case: "The line of the contemplated work or improvement, within the meaning of the statute, is precisely the same as if no such exception of work already done had been made"—and we understand from this expression that, had the resolution of intention read "that granite curbs be laid in Henry street, between Sanchez and Noe streets, and that the roadway thereof be paved with bituminous rock," then the notices would have had to be posted just as they were. That the law, reasonably construed, requires the notice to be posted along the entire line of the contemplated work, there can be no doubt. The whole line of improvement was between two streets 560 feet apart, and the record shows that the block had been improved its full width part of the way, and had been improved part of its width on one side of the street and part of its width on another portion of the street, so that it was irregular portions of the street in that block that were to be improved. In the case before us no mention whatever is made of the street between L and M streets, and the approved rule laid down in the Dowling Case, supra, does not and cannot be made to mean that a portion of a street, a whole block and upwards, not mentioned in the resolution of intention, no portion of the land fronting on which can be assessed for the work, is "along the line of the contemplated work" merely because some work is done on the street in front of the other blocks on both sides of such block, so that notices of such work must be posted along such block on which no work is to be done. Putting notices along Eighteenth street between L and M streets, might tend to confuse the property owners along said part of Eighteenth street, and could be of no benefit or information to landowners in other blocks, who would become liable for the work done under the resolution of intention. The notices were sufficient, and accomplished all intended by the statute.

As to assignment of error No. 4: Just how defendants' property was assessed for the cost of work for which it was not legally liable does not appear. All the work to be done on Eighteenth street was let in one contract. The fact that the portion of Eighteenth street between L and M streets was not included in the contract would tend to lessen the rate per front foot, while, had the work been let in two contracts, there would not have been as many curbs and curves to pay for in the part south of M street—the part in which defendants' property is located—and probably the cost to him in that event might have been a little less per front foot. In the case cited by appellant, that of Bates v. Twist, 138 Cal. 52, 70 Pac. 1023, it was held that the designation of a street or portion of a street which is to be improved, with a description of the work to be done thereon, becomes thereby a distinct and several improvement, whether it be the only improvement specified in the resolution of intention or in the resolution ordering the work, or whether other improvements are included in it, and that, when the character of the improvements on different portions of the same street are different, they are of necessity different. They are of necessity independent items of street work. But in the case at bar the work is not different on any part of Eighteenth street, and no reason is appearent why the work should have been divided up in two or more contracts.

As to assignment of error No. 5: Appellant asks this court to override a constitutional amendment which has been before the Supreme Court on at least three different occasions upon the same question, and the validity of the amendment upheld each time. He alleges that, upon every occasion in which this question has been presented to the court, the facts have been misstated, and alleges the true facts to be that the amendment under discussion was never entered in the journal of the assembly, either by identifying reference or in any other manner. If section 19, art. 11, was not amended in 1883, then the Vrooman act would be in violation of that section as it was originally adopted, for, as it originally stood, no street work chargeable to private property could be contracted for or commenced until the money had been collected and was in the treasury. The court below found: "And I further find that constitutional amendment No. 1, proposed by the Legislature of the state of California at its regular session of 1883, and which constitutional amendment No. 1, known as 'Senate Bill No. 10,' was entered in the journals of the two houses of said Legislature, with the yeas and nays taken thereon, as provided in section 1, art. 18, of said Constitution of the state of California, and that said constitutional amendment No. 1, amending section 19, art. 11, of the Constitution, was duly adopted and ratified and is now a part of the Constitution of the state of California, and was at all times during the proceedings of the board of trustees of the city of Sacramento alleged in the complaint in this action." The evidence showed that in one or two instances the written journal, when the constitutional amendment was up for discussion, refers to Senate Bill No. 17, when it is plain Senate Bill No. 10 was intended, and the evidence before the lower court showed that this clerical error had been corrected in the printed journal. But, aside from this, the bill itself, with its indorsements thereon, shows that it was properly enrolled, authenticated, and deposited with the Secretary of State as having been properly passed by the Legislature; and the journal cannot be looked to to rebut or set aside the presumption thus raised that this constitutional amendment was properly passed. The evidence before the trial court further shows that the proposed amendment to section 19, art. 11, was properly submitted to the people at the general election in 1884 as constitutional amendment No. 1. The evidence supports the finding.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

SACRAMENTO PAVING CO. v. MARTYR et al.

(Court of Appeal, Third District, California. Sept. 30, 1905.)

Appeal from Superior Court, Sacramento County; P. J. Shields, Judge.

Action by the Sacramento Paving Company against Robert Martyr and others. From an order denying a motion for a new trial, defendants appeal. Affirmed.

R. Platnauer, for appellants. Holl & Dunn and J. H. Leggett, for respondent.

BUCKLES, J. This is an appeal from an order denying defendants' motion for a new trial in an action to recover for street assessment for improving Eighteenth street in the city of Sacramento. The questions involved are exactly the same as in Sacramento Paving Company (a corporation), Plaintiff and Respondent, v. James Anderson, Appellant, and H. J. Goethe and M. I. Enos, Defendants (No. 50, this day decided by this court) 82 Pac. 1069.

The judgment in this case is affirmed, upon the authority in that case.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

1 Cal. App. 687

MARTIN v. MARKARIAN & CO.

(Court of Appeal, Third District, California. Oct. 2, 1905.)

1. APPEAL—REVIEW—ORDER GRANTING NEW TRIAL—CONFLICTING EVIDENCE.

An order granting a new trial will not be disturbed on appeal, where one of the grounds assigned in the motion therefor was that the verdict was not supported by the evidence, and there was a substantial conflict in the evidence.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3871.]

2. SAME — SCOPE OF REVIEW — GROUNDS FOR SUSTAINING DECISION NOT CONSIDERED.

In reviewing an order granting a new trial, the appellate court is not confined to the ground on which the trial court based the order, but may sustain it on any other assigned ground.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3406.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Peter Martin against Markarian & Co., a corporation. Plaintiff appeals from an order granting a new trial. Affirmed.

H. H. Welch and George Cosgrove, for appellant. F. H. Short and A. M. Drew, for respondent.

BUCKLES, J. This is an action to recover the price of figs sold and delivered on August 19, 1903. The parties entered into the following written contract: "This certifies that Peter Martin has sold to Markarian & Company, and Markarian & Company has bought, all the White Adriatic figs produced during the year 1903 on Gordon, Patterson, Grant Orchard Farm, F. Travers, Sanger, Gardenie, Harrison, C. Liman, Starwalt, and Beasley places, and estimated to be 100 tons. The seller, as a condition of sale, warrants all said fruit well cured and merchantable, and free from unmatured fruit, and agrees that he will deliver said fruit to buyer at their packing house in Fresno as fast as cured, said delivery to commence on or before August 22, 1903, and all fruit to be delivered by Nov. 1, 1903. Until delivery is made, seller waives payment of purchase price, and assumes all risk of injury to or loss of said fruit. The buyer agrees to pay in cash at delivery for all figs delivered of quality and condition as above, and in lots, as received, 3½ cents per pound, and 50 cents per ton for hauling. This is intended to be and is an absolute sale, and title to said fruit has passed to buyer, subject to foregoing conditions. Seller: Peter $\overset{\text{his}}{\underset{\text{mark}}{\text{X}}}$ Martin. Witness to mark and signature of Peter Martin: H. H. Welsh. Markarian & Company, per H. Markarian. Witness: W. C. Nixon. Dated Aug. 19, 1903." Some of the figs were then growing upon the trees. There is some confusion in the pleadings as to the amount of these dried figs which were delivered. The complaint alleges there were 71.1015 tons delivered, and claims as a balance due the sum of $435.91; while the answer denies that plaintiff delivered $66^{1}/_{6}$ tons of figs, or any other number of tons or greater amount than $65^{97}/_{250}$ tons, and denies that there remains due and unpaid plaintiff the sum of $437.50, or any other sum. The case was tried by a jury, which found a verdict for plaintiff for the sum of $435, and judgment was rendered for plaintiff for that amount. A motion was made for a new trial on the grounds that the evidence is insufficient to justify the verdict; that said verdict is against law; that "on account of errors of law occurring at the trial and excepted to by the defendant," and on account of newly discovered evidence, etc. The motion was granted, and the appeal is from the order granting the motion, and it appears from what the trial judge said on the hearing of the motion that the same was granted "for the reasons, as well as others not here adverted to, the verdict is against law, and should be set aside and a new trial granted." The written opinion of the trial judge is set out in appellant's reply.

The evidence is contained in the statement, and shows a substantial conflict in that which is most important and material, and, this being a fact, under the well-established rule that the order granting a new trial will not be set aside when there is a substantial conflict in the evidence, the order should not be disturbed. But appellant claims that the motion was not granted because the evidence did not support the verdict, but because the trial court, in passing on the motion, said: "The sole question arising on this motion necessary to be considered is, was there a delivery of the goods by the plaintiff and an acceptance of the same by the defendant?" The defendant had, however, made its grounds of motion on other points as well, and the trial judge had no right to limit the grounds, and, indeed, the judge seems to have come to that conclusion, but he says at the end of his opinion: "For these reasons, as well as others not here adverted to," etc. In Churchill v. Flournoy, 127 Cal. 362, 59 Pac. 791, it was held that "this court is not confined to the ground on which the court below placed its order, for, as was said in Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124, the court below 'cannot, by stating in its order (and, we may add, or in its opinion) that the motion is granted upon one ground only and denied upon the others, deprive the other party of the right to a review by this court of the entire record.'" See Houghton v. Market Street Railway Co. (No. 53, decided by First District Court of Appeal September 15, 1905.) 82 Pac. 972.

The order is affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

1 Cal. App. 666

RUPPEL v. UNITED RAILROADS OF SAN FRANCISCO.

(Court of Appeal, First District, California. Sept. 29, 1905.)

1. New Trial—Discretion of Trial Court—Verdict Against Evidence.

It is the duty of the trial judge, on a motion for a new trial, to exercise his judgment and discretion in reviewing the evidence, and even though it is conflicting, to grant a new trial if he does not believe that the verdict is the correct conclusion from all the evidence; and his action in so doing will not be interfered with on appeal, except in case of an abuse of discretion.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3871-3874; vol. 37, Cent. Dig. New trial, § 10.]

2. Street Railroads—Negligent Operation—Sufficiency of Evidence.

In an action against a street railroad for the death of the driver of a wagon, caused by collision with a street car, an order of the trial court granting a new trial, on the ground that the evidence did not support the verdict, which was for defendant, but showed negligence on defendant's part, *held*, in view of the evidence, not an abuse of discretion.

3. Death—Actions—Measure of Damages.

Under Code Civ. Proc. § 377, providing that, when the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, and such damages may be given as under all the circumstances of the case may be just, the amount of recovery in actions for wrongful death is limited to the value of the pecuniary interest of the persons entitled to such recovery in the life of the person killed; but such pecuniary interest need not be measured and demonstrated by the evidence as a precise sum of money, and the fact that it is not shown that a husband, on account of whose death damages are claimed by his widow, was in sound bodily health and in receipt of monthly wages or salary, is not fatal to a recovery of more than nominal damages.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 111.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Eliza Ruppel, as administratrix of the estate of Conrad Ruppel, deceased, against the United Railroads of San Francisco. From an order granting a new trial, defendant appeals. Affirmed.

Rehearing denied by Supreme Court, November 24, 1905.

Morrison & Cope, for appellant. Stafford & Stafford, for respondent.

COOPER, J. This is an action by the plaintiff, as administratrix of the estate of Conrad Ruppel, deceased, to recover damages, alleged to have been sustained by the heirs of the deceased, by reason of his death, resulting from the alleged negligence of the defendant corporation in the operation of its cars on the public streets of the city of San Francisco. The jury returned a verdict for defendant. On motion of plaintiff the court below granted a new trial, on the ground that the evidence does not support the verdict, but shows negligence on the part of the defendant. This appeal is by defendant from the order.

The judge of the trial court saw the witnesses and heard the evidence while looking at them, and for this reason is much better qualified to judge of their credibility and the value of the evidence than we are. It is the duty of the trial judge, on a motion for a new trial, to exercise his judgment and discretion in reviewing the evidence, and, even though it is conflicting, to grant a new trial if he does not believe the verdict is the correct conclusion from all the evidence. The power of the trial court to so review the evidence is a salutary one, and often prevents great injustice from being done by an erroneous verdict. It is only in cases of abuse of discretion that this court will interfere. We have carefully examined the evidence and find no such abuse of discretion. The evidence tends to show that early in the morning of April 5, 1902, the deceased, in a light wagon, was driving a single horse along and down Mission street in the city of San Francisco at a place where there was a slight incline in the grade. A street car belonging to defendant, on which there were passengers, a motorman, and conductor, going in the same direction, ran up from behind, and struck the hub of the left hind wheel of deceased's wagon, precipitating him to the ground in a violent manner and killing him almost instantly. The car and wagon were in full sight of each other for several hundred feet prior to the collision, and the wagon was in full sight of the motorman. It is not clear from the evidence whether any portion of the wagon was on the defendant's track at the time of the collision or not, but it is not material, as it is clear beyond question that the left hind wheel of the wagon was, if not on the track, near enough to it that the car, instead of passing, struck it, thus causing the death. There is evidence that the car was going pretty fast, and one witness testified that in his opinion it was going at the rate of about 10 miles an hour. All the evidence shows that the motorman did not ring the bell until in close proximity to the wagon, some of the witnesses placing it at 10 feet. The motorman testified that he rang the bell when within about a car's length (26 feet) of the wagon; that it would be a good stop to stop the car in half its length (13 feet); that when he saw he could not pass the deceased he was a car's length distant. He not only did not stop the car, but it ran 8 feet beyond the point where it struck the wagon, making 34 feet after the motorman saw he could not pass the wagon. The motorman testified that as he approached the wagon at some distance, it was not on the track, but, as he arrived in dangerous proximity to it, it "swerved" in toward the track, making it impossible for him to stop the car in time to avoid the collision. It is not our province on this appeal to determine the question as to the truth of this evidence.

The court below, in granting the new trial, had the right to reject it. The evidence tending to show that the defendant's car approached deceased at a rapid rate of speed, and ran into his wagon, which was in plain view for several hundred feet, and this without ringing a bell until too late to give warning, required careful consideration at the hands of the trial judge.

Appellant contends that there was no evidence as to damages, and invokes the rule that the court should not grant a new trial in a case where the plaintiff would only be entitled to nominal damages. The evidence shows that the deceased left surviving him a widow (plaintiff) and four children, the youngest child being a minor 12 years of age. At common law all right of action for personal injury, whether it be the cause of death or not, is extinguished by the death of the injured party. 4 Sutherland on Damages (3d Ed.) § 1259, and cases cited. In most, if not all, the states, the statutes or Codes provide for recovery of damages by the heirs against the party who causes the death of another by negligence. Our statute provides (Code Civ. Proc. § 377): "When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just." The theory of the above section, and of similar statutes, is that those who are so entitled to recover damages have a pecuniary interest in the life of the person killed, and hence the amount of recovery is limited to the value of that interest.

But pecuniary interest does not mean a precise sum in money measured and demonstrated by evidence. The language of our statutes does not so limit it because it allows such damages as under "all the circumstances of the case may be just." It is said in 4 Sutherland on Damages (3d Ed.) § 1263, quoting from Tilley v. Hudson River R. Co., 29 N. Y. 257, 286, 287, 86 Am. Dec. 297: "A liberal scope was designedly left for the action of the jury. They are to give such damages as they shall deem a fair and just compensation with reference to the pecuniary injury resulting from such death. They are not tied down to any precise rule. Within the limit of the statute as to the amount, and the species of injury sustained, the matter is to be submitted to their sound judgment and discretion. They must be satisfied that pecuniary injury resulted. If so satisfied, they are at liberty to allow them from whatever source they actually proceeded which could produce them. If they are satisfied from the history of the family, or the intrinsic probabilities of the case, that they were sustained by the loss of bodily care or intellectual culture, or moral training which the mother had before supplied, they are at liberty to allow for it." In Beeson v. Green Mountain G. M. Co., 57 Cal. 37, an instruction even by the lower court that the jury might take into consideration the pecuniary loss "suffered by this plaintiff in the death of said George Beeson by being deprived of his support; also the relations proved as existing between plaintiff and deceased at the time of his death, and the injury, if any, sustained by her in the loss of his society," was approved, and the court in in commenting on Code Civ. Proc. § 377, applied to the instruction, said: "We think that the social and domestic relations of the parties, their kindly demeanor toward each other, the society, were parts of 'all the circumstances of the case' for the jury to take into consideration in estimating what damages would be just, from a pecuniary point of view, especially as there is nothing in the case to show that the jury might give damages by way of solace." The Beeson Case has since been cited and approved Morgan v. Southern Pacific Co., 95 Cal. 517, 30 Pac. 603, 17 L. R. A. 71, 29 Am. St. Rep. 143; Keast v. Santa Ysabel Mining Co., 136 Cal. 260, 68 Pac. 771. The late case of Storrs v. Los Angeles Traction Co., 134 Cal. 91, 66 Pac. 72, is directly in point. The court there said: "The objection of the appellant that, as there was no specific testimony that the plaintiff was earning anything at the time of the injury, or of the amount that he was capable of earning, any verdict of the jury under this instruction would be merely conjecture, is untenable. * * * If the circumstances which were before the jury show that by reason of the injury he has become unable to perform the labor or transact the business which he was accustomed to transact or perform prior thereto, he is entitled to recover damages therefor; and from the nature of the investigation the amount of such recovery must be left to the wise discretion of the jury."

While we think that, if the plaintiff had proven that deceased was a man in sound bodily health and in receipt of monthly wages or salary, these matters would have been very important circumstances to be considered by the jury in estimating the pecuniary damages to which plaintiff would be entitled, yet we do not deem the absence of such proof conclusive of the fact that plaintiff is only entitled to nominal damages. We cannot say, as matter of law, that plaintiff can only recover nominal damages for the death of her husband if caused by defendant's negligence while he was driving a horse upon the public highway. Not only this, but the point seems not to have been raised in the trial court. The case of Burk v. Arcata & Mad River R. R. Co., 125 Cal. 364, 57 Pac. 1065, 73 Am. St. Rep. 52, is not in conflict with, but supports, the views herein expressed. That action was brought by adult collateral heirs. The court said: "The statutes upon this subject seem to be framed upon the idea that the heirs would always constitute the family of deceased. In some states the beneficiaries of this statute are so limited. We can easily understand that a life may be of great pecuniary value to such persons. Collateral heirs, at all events, must prove probable loss, or their recovery will be limited to nominal damages."

The order is affirmed.

We concur: HARRISON, P. J.; HALL, J.

1 Cal. App. 659

ENSCOE v. FLETCHER.

(Court of Appeal, Third District, California. Sept. 28, 1905.)

1. Administrators — Actions on Claims — Conformity of Action to Claim.

In an action upon a claim presented to and rejected by an administrator, the recovery must be had on the same cause of action as that set up in the claim, and no other or different contract or cause of action can be alleged or proven.

2. Same—Complaint.

Code Civ. Proc. § 1500, provides that no holder of a claim against an estate shall maintain any action thereon unless the claim is first presented to the administrator. A claim presented to an administrator sought payment on one-half the principal and interest due on certain notes, of which the claimant and deceased were joint makers. A complaint, filed after the rejection of the claim counted on the same notes, made the same demand of payment, and further stated that plaintiff became the owner of the notes by virtue of a decree of distribution of the estate of the payee. *Held*, that the complaint sufficiently appeared to be based on the same demand as the claim to satisfy the requirements of the statute.

3. Same.

The fact that a complaint on a rejected claim presented to an administrator segregated and lumped certain classes of items in the claim, without increasing or diminishing the amount of any item, and without alleging any different contract as to liability on any of the items than appeared on the face of the claim, was no ground of objection on the complaint.

4. Payment—Liquidation by Joint Debtor —Right to Contribution.

Where two or more persons are jointly liable on an obligation, and one of them makes payment of the whole, the obligation is thereby extinguished, and the one paying the same has a new obligation against the others for their proportion of what he paid for them.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contribution, § 10; vol. 39, Cent. Dig. Payment, § 135.]

5. Release—Operation—Joint Debtors.

Under Civ. Code, § 1543, providing that a release of one or more joint debtors does not extinguish the obligation of any of the others, a decree of distribution of the estate of the payee of a joint note, awarding the note to one of the joint makers, does not constitute a payment of the note, nor an extinguishment of the obligation of the other debtor for his proportion of the same.

6. Administrators—Claims Against Estate — Expenditures by Administrator — Priorities.

Money expended by an administrator for insuring the property of the estate under a contract made after the death of the decedent is not properly a claim against the estate, but is an item of expense incident to preserving the property during the course of administration, which is entitled to payment prior to the payment of the debts of the estate, and its allowance as a debt cannot be prejudicial to the estate.

Appeal from Superior Court, Plumas County; C. E. McLaughlin, Judge.

Action by Joseph R. Enscoe against Joseph H. Fletcher, administrator of the estate of W. E. McNeil, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

Rehearing denied by Supreme Court November 24, 1905.

Goodwin & Webb, for appellant. L. N. Peter and Solinsky & Wehe, for respondent.

BUCKLES, J. This is an action on a claim presented to the administrator of the estate of W. E. McNeil, deceased, which claim was allowed in part and rejected in part—allowed for $145.92, and rejected for $3,437.50. The claim consisted of the amount due on four promissory notes, which were set forth in full in the claim, with interest thereon, and other items. The disallowance was mainly on the notes. A copy of the claim is contained in the complaint. These notes were all made at the same time, to wit, February 1, 1891, and for $1,000 each, and were payable on February 1, 1898, February 1, 1899, February 1, 1900, and February 1, 1901. The notes are joint notes; one J. Enscoe being the payee and J. R. Enscoe and W. E. McNeil being the joint makers. The claim does not set forth the relationship of J. Enscoe, the payee, and J. R. Enscoe, the joint payor, nor does it state how J. R. Enscoe became the holder or owner of said notes, nor what right he had to ask payment to himself of one-half of said notes, further than whatever presumptions might arise from the facts that he was in possession of the notes and that he was a joint maker. The complaint shows that the payee, the said J. Enscoe, was the father of J. R. Enscoe, and died October 19, 1894; that his estate was probated, and that on May 19, 1898, the superior court by its decree and judgment distributed the said notes to the said J. R. Enscoe as the heir at law of the said J. Enscoe; that on November 30, 1901, the other joint maker of the said notes, W. E. McNeil, died, and the defendant, Joseph Fletcher, became the administrator. The answer alleges payment of said notes by J. R. Enscoe, May 19, 1898, the date of the decree distributing the notes to him, and that, the obligation on the notes being extinguished, plaintiff became entitled to contribution from said W. E. McNeil, and that such right of action accrued to plaintiff, and that more than two years had elapsed since such right accrued and before McNeil's death, and that it is therefore barred by the provisions of subdivision 1, § 339, Code Civ. Proc. Judgment was for plaintiff, the court finding the estate of W. E. McNeil to be liable for one-half the principal and interest due on said notes, to wit, the sum of $3,320, and that other items of said claim, amounting to $220.42, were also a charge against said estate, and rendered judgment for the sum of $3,540.42. The judgment was made up of the following items: Notes, $3,320; amount allowed on the claim, $145.92; and for insurance, the sum of $74.50. The appeal is from the judgment.

Appellant contends that the claim as presented to the administrator cannot be reconciled with the complaint in this: that the demand is not the same in the complaint as made in the claim. In an action upon a claim presented and rejected in an estate of a deceased person, no recovery can be had for anything outside of the items of the claim itself; that is to say, the recovery must be upon the same cause of action as set up in the claim. Lichtenberg v. McGlynn, 105 Cal. 45, 38 Pac. 541. A claimant cannot come into court and allege and prove any other or different contract or cause of action from that stated in his claim. In Etchas v. Orena, 127 Cal. 590, 60 Pac. 45, the claim presented was for services rendered the deceased for six months in each year at $30 per month, and during the other six months at the rate of $5 per month; the claim amounting to $2,100. A payment of $900 having been made, there was a balance of $1,200 still due. The complaint alleged that "deceased promised plaintiff and agreed to pay her the reasonable value of her services * * * by making provision in her will for plaintiff for a sum equal to the value of the said services, and in consideration of such promise plaintiff rendered the services." The items were the same in amount in both claim and complaint, but the contract under which the services were rendered being different from the contract stated in the claim, the court there held that no recovery could be had. Gallagher v. McGraw, 132 Cal. 601, 64 Pac. 1080. In the case before us the complaint sets forth the identical notes on which the claim is based and which are also set out in full in the claim. The claim shows upon its face that plaintiff seeks to recover only one-half the amount of principal and interest due on the said notes of which he is joint maker. It also appears on the face of the notes that the other of the joint makers bears the same name as did the deceased against whose estate the claim was presented, to wit, W. E. McNeil. The complaint sets forth more facts in relation to the notes than does the claim, but the cause of action is not changed. The demand in the claim was for payment of the one-half of the notes just as he had obligated himself to do in his lifetime, and the complaint is for exactly the same thing. There is therefore no difference in the demands, and all the additional facts stated in the complaint are but explanatory of the demand, and neither add to nor take away a single thing. Both demands are identical in every respect, and it seems to us that is all that is required under section 1500, Code of Civil Procedure, and the authorities cited by the appellant, to wit: Lichtenberg v. McGlynn, 105 Cal. 45, 38 Pac. 541; Barthe v. Rodgers, 127 Cal. 54, 59 Pac. 310; McGrath v. Carroll, 110 Cal. 88, 42 Pac. 466; Etchas v. Orena, 127 Cal. 590, 60 Pac. 45; Gallagher v. McGraw, 132 Cal. 601, 64 Pac. 1080; Morehouse v. Morehouse, 140 Cal. 88, 73 Pac. 738. The fact that plaintiff in his complaint has segregated and lumped certain classes of items of the claim without increasing or diminishing the amount of any item, and without alleging any different contract as to liability on any such items than appears on the face of the claim, seems to us to be without reason for objection.

We now come to consider what seems to be the real point in the case, and the one to which appellant has directed the greater part of his argument—that the notes were paid when distributed to plaintiff and the obligation extinguished and that the only claim J. R. Enscoe could have made was one of contribution, and that such a claim would be barred by the statute of limitations. It is clear the notes were never paid to the original payee, J. Enscoe, for he died while he was yet the owner and holder of the notes, and prior to May 19, 1898, the date at which appellant contends the payment was made. There can be no dispute as to the rule that where two or more persons are jointly liable on an obligation, and one of them makes payment of the whole, that obligation is thereby extinguished, and the one paying has a new obligation against the others for their proportion of what he paid for them. If these notes were paid and the obligation extinguished, it is solely by operation of law and brought about by the death of the payee and the distribution of his estate, including the notes, to his heir who was a joint maker of the notes. And, as we understand it, this is the earnest contention of appellant, who cites the following cases in support of that contention: Gordon v. Wansey, 21 Cal. 79; James v. Yeager, 86 Cal. 186, 24 Pac. 1005. In the first case one H. and three others made their joint and several negotiable promissory notes. The payee afterwards assigned the notes for valuable consideration to said H. This was before maturity. After maturity, for valuable consideration, H. assigned the notes to Gordon, the plaintiff, and Gordon brought his action on the notes and against all the joint makers and recovered judgment, and the Supreme Court declared such judgment to be erroneous. The court also says in that case that the first assignment amounted to payment, and that the notes became functus officio, and were not revived by the second assignment.

In the second case the court said: "The purchaser of a note from the maker, after maturity, cannot claim to be an innocent holder, nor can he claim, as against the maker or any one else, that the note has not been extinguished if it has, in fact, been paid." In that case the joint note was paid to the payee by one of the makers and the note was delivered to the joint payor who had paid it. Of course, if these notes in the case before us come within the rule in the cases cited, then the plaintiff has no right to recover. In applying this rule that payment by a joint maker extinguishes the obligation, we understand that "payment" means payment in full for everything due on the obligation. In Yule v. Bishop, 133 Cal. 574, at page 579, 62 Pac. 68, at page 70, Justice Henshaw uses the following language: "In this state, therefore, it seems to be well settled, both by the language of the Code and by the decisions of this court under it, that full payment and performance by the surety extinguishes the primary obligation." Here the obligation was never performed, and plaintiff has never been entitled to an action against McNeil for contribution. The obligation of the joint makers is presumed to be equal, and all that was ever satisfied or paid by the distribution to plaintiff was his equitable share, the one-half of the principal and interest due on said notes. When the notes came to the heir by the decree of distribution, but one had matured, so that there could have been no compulsion on the part of plaintiff to have made any payment on any of the notes, save the one which fell due February 1, 1898. But under the view we take of the case that there was never a time when contribution could have been maintained, it is useless to pursue that point further. The defendant claims that the effect of the decree of distribution was to transfer or assign the notes to a joint maker and thus extinguish the obligation. In this connection it would be well to examine the law of transfer performance, relinquishment, and joint obligations. Under section 1039, Civ. Code: "Transfer is an act of the parties, or of the law, by which the title to property is conveyed from one living person to another." Surely the case before us does not come under or within this definition, for the notes descended from the dead to the living. Transfer rests upon acts of parties to a contract, as does assignment, which is but a written transfer. Here there is no act of omission or commission by any of the parties. The law simply changes the position of the parties. Then section 1457, Civ. Code, says: "The burden of an obligation may be transferred with the consent of the party entitled to the benefit, but not otherwise." In this instance the payee, J. Enscoe, being dead, could not consent. His heir is certainly entitled to every benefit arising from the obligations descending to him, consistent with equity and fair dealing toward his opponent, and he has not consented. The notes are negotiable and are transferable only by indorsement. There was no indorsement. It seems to me that an analysis of these rules declared by our Code points a wide difference between "succession," as defined and regulated in title 7, division 2, and "transfer of obligation," as defined and regulated in title 3, division 3.

The question is, of course, were the obligations of the notes extinguished? Section 1473, Civ. Code, provides: "Full performance of an obligation, by the party whose duty it is to perform it, or by any other person in his behalf, and with his assent, if accepted by a creditor, extinguishes it." Section 1474 provides: "Performance of an obligation by one of several persons jointly liable under it, extinguishes the liability of all." Section 1478 provides: "Performance of an obligation for the delivery of money only is called payment." Section 1541, Civ. Code, provides: "An obligation is extinguished by a release therefrom given to the debtor by the creditor upon a new consideration, or in writing, with or without a new consideration." Section 1543, Civ. Code, provides: "A release of one or two or more joint debtors does not extinguish the obligation of any of the others, unless they are mere guarantors; nor does it affect their rights to contribution from him." Section 3164, Civ. Code, provides: "The obligation of a party to a negotiable instrument is extinguished: (1) In like manner with that of parties to a contract in general, or (2) by payment of the amount due upon the instrument at or after its maturity, in good faith and in the ordinary course of business, to any person having actual possession thereof and entitled by its terms to payment." Section 1524, Civ. Code, provides: "Part performance of an obligation, either before or after breach thereof, when expressly accepted by the creditor in writing in satisfaction, or rendered in pursuance of an agreement in writing for that purpose, though without any new consideration, extinguishes the obligation." We think that in a careful reading and fair analysis of these sections, when considering the facts in this case, it is clear there was no performance, no payment of the amount due in good faith, and in the due course of business, or at all, and no satisfaction, except as to the one-half due from plaintiff (which comes merely by reason of the operation of the law), and therefore there could be no extinguishment of these obligations, unless it could in some mysterious way be brought about by reason of the plaintiff being released from payment by operation of law which it is claimed canceled the obligation to which he was a party, and to the benefit of which he had succeeded without any act of his. A release of J. R. Enscoe by the payee in his lifetime, upon the payment by the said J. R. Enscoe of one-half the whole obligation, under the provisions of said section 1543, would not have released McNeil nor extinguished the obligation. McNeil was not mentioned in the decree of distribution, the instrument by which it is claimed the obligation was extinguished. Of course, it would have been otherwise had J. R. Enscoe paid the whole amount due, and then plaintiff's remedy would have been for contribution. Northern Ins. Co. v. Potter, 63 Cal. 158; Roberts v. Donovan, 70 Cal. 114, 9 Pac. 180, 11 Pac. 599. In Wristen v. Curtiss, 76 Cal. 6, 18 Pac. 81, it is held that a release of one of several jointly liable on a promissory note, who are not mere guarantors, does not release the other obligors. No matter what theory may be put forth as to the release of one jointly liable and the extinction of the obligation, nor what the law may be on the subject in other states, "the Code establishes the law of this state respecting the subject to which it relates, and the Code (section 1543) says a release of one joint debtor does not extinguish the obligation." So that, if plaintiff had actually paid one-half of the whole amount due on said notes, the obligations, the notes would have still held good as against McNeil. See McDowell v. Jacobs, 10 Cal. 390.

The $74.50 expended by the administrator for insuring the property of the estate, having been contracted after McNeil's death, is not properly a claim against his estate, yet it is a charge against the estate, being an item of expense incident to preserving the property during the course of administration, and is entitled to payment prior to payment of debts and its allowance as a debt could not be prejudicial to the estate. We see no vital objection to the amount allowed by the administrator, to wit, $145.92.

For the reasons herein stated, the judgment is affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

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1 Cal. App. 707

RUSSELL-VAIL ENGINEERING CO. v. KIRBY, County Treasurer.

(Court of Appeal, Third District, California, Oct. 5, 1905. On Rehearing, Nov. 3, 1905.)

ESTOPPEL—GROUNDS—FILING CLAIM AGAINST COUNTY.

Petitioners contracted to construct a heating plant in a county hospital for the county for $2,250, and later by another contract agreed to install a ventilating plant in the building for $3,988. Petitioners thereafter filed a sworn claim against the county for $2,000 as "part payment of the heating system, county hospital," which was paid, and thereafter made a further demand for payments of $1,687.50 for said heating plant, claiming that the first claim had been based on the wrong contract. *Held*, that petitioners were estopped as against the county from showing that their verified claim for $2,000 was not a payment on the heating contract.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Mandamus, on petition of the Russell-Vail Engineering Company, against G. W. Kirby, as treasurer of Merced county. From a judgment denying the writ, petitioner appeals. Affirmed.

Rehearing denied by Supreme Court, December 4, 1905.

Budd & Thompson and T. C. Law, for appellant. F. W. Henderson, for respondent.

BUCKLES, J. This is an application for a writ of mandate against the county treasurer of Merced county to compel him to pay a warrant to plaintiffs for work, etc., done under a contract with the board of supervisors, amounting to the sum of $1,687.50. The case comes up on the judgment roll, and the facts appear to be as follows: On June 6, 1903, petitioners entered into a contract with the board of supervisors to install a heating plant in the county hospital, then in course of erection, for the sum of $2,250, to be paid as follows: On July 31, 75 per cent. of the cost of all labor and material then furnished. Other payments were to follow in like manner. On August 15th petitioners entered into another contract with said board to install in said building a ventilating plant, for which petitioners were to receive $3,988. On September 17, 1903, petitioners presented a demand against Merced county in due form and duly verified, which claim or demand is as follows: "Demand of Russell-Vail Engineering Co. on the treasury of the county of Merced, state of California, for the sum of two thousand dollars, being for part payment for heating system. Sept. 17, 1903. Part payment on heating system, Co. Hospital, $2,000.00." This claim was allowed September 21, 1903, the county warrant issued and presented to the county treasurer for payment on September 24th, and indorsed "not paid for want of funds." On December 11, 1903, it was again presented and was paid.

On November 5, 1903, the demand which is the subject of this action was presented to the said board, and is as follows: "Demand of Russell-Vail Engineering Co. on the treasury of the county of Merced, state of California, for the sum of sixteen hundred and eighty-seven and 50-100 dollars, being for heating plant contract at County Hospital. November 4th, first payment on account of contract for installing of steam heating plant at County Hospital, $1,687.50." This demand was for 75 per cent. of the actual cost of labor and material furnished up to July 31, 1903, under the provisions of the contract of June 6, 1903. The claim was duly sworn to, and on the 11th day of November the board allowed it. The auditor drew his warrant, which was presented to the treasurer, and on November 16th was indorsed, "Not paid for want of funds." The warrant was presented again on January 4, 1904, when it is admitted there were funds on hand sufficient to pay it, but payment was refused.

The trial court found the facts as above stated, and found, further, that petitioners intended said $2,000 claim to be a payment on the contract of August 15th and that it was a claim on said ventilation contract, and that the county treasurer had paid the same, believing it to be a claim founded on said ventilating contract of June 6, 1903. As conclusions of law, the court found that appellants were estopped from showing that their verified claim for $2,000 was and is not a payment on the contract for the heating plant. We think the conclusion just mentioned and the findings upon which it is based support the judgment, and, without intimating any opinion as to whether the county is estopped to question the validity of the contract, or whether the board should have advertised for plans and specifications, or whether the heating plant comes within the provisions of subdivision 8 of section 25, p. 459, of the county government act of 1897, so as to require 30 days' notice for bids, and basing our opinion on the one ground that the findings above mentioned support the judgment, we affirm the judgment.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

On Petition for Rehearing.

BUCKLES, J. Application for rehearing. We have gone carefully over our opinion rendered herein, and reviewed the facts in the case, and considered the matters suggested in the petition herein, and can see no reason for granting a rehearing. If true, as alleged, that the heating contract was extended and made a part of the ventilating plant, and plaintiff was to have $2,250 for the heating plant and $3,988 for the ventilating plant, making $6,238 for both contracts, and it having received $2,000 thereon, or on either of the contracts, there would remain due from the county the sum of $4,238; and still we do not pass upon the validity of either contract. We are still of the opinion that the findings support the judgment rendered in the court below.

Rehearing is denied.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

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1 Cal. App. 696

JORDAHL v. HAYDA et al.

(Court of Appeal, Third District, California. Oct. 4, 1905.)

1. Injunction — Boycott — Sufficiency of Evidence.

In an action to restrain members of a labor union from boycotting and picketing plaintiff's restaurant, findings that defendants had been guilty of acts of intimidation in threatening prospective customers of the restaurant, and had interfered with them, driven them away, or prevented them from patronizing plaintiff, were sustained by evidence of conversations, etc., had by defendants with such customers, without evidence that defendants had exercised physical force or actual violence toward such customers, etc.

2. Constitutional Law—Free Speech.

The constitutional guaranty of free speech does not authorize members of a labor union by threats, intimidation, etc., to induce prospective patrons of a place of business to refrain from patronizing the same; the proprietor being also guarantied the right by the same instrument to acquire, possess, and protect property, and to possess and obtain safety and happiness.

3. Appeal—Conflicting Evidence—Findings of Trial Court.

Findings of the trial court based on conflicting evidence will not be disturbed on appeal.

4. Injunction—Decree—Certainty.

A decree enjoining defendants from stationing themselves in a doorway of plaintiff's restaurant or on the sidewalk in front thereof, and from interfering with plaintiff's business by intimidation, insults, or threats to his patrons, thereby inducing persons not to patronize plaintiff, and especially enjoining defendants from in any manner interfering with plaintiff's business by means of threats or intimidation of any kind or nature directed against plaintiff's patrons, and from interfering by means of threats and intimidation with any person that may be working for plaintiff or may desire to work for him, was not objectionable for indefiniteness and uncertainty as to the acts defendants were enjoined from performing.

Appeal from Superior Court, Humboldt County; G. W. Hunter, Judge.

Action by Andrew Jordahl against J. A. Hayda and others. From a judgment in favor of plaintiff, and from an order denying defendants' motion for a new trial, they appeal. Affirmed.

Coonan & Kehoe, for appellants. Henry L. Ford and George B. Callons, for respondent.

CHIPMAN, P. J. The defendants are members and agents of the Cooks' and Waiters' Alliance, Local No. 220, of the city of Eureka, and plaintiff is the proprietor of the so-called Fairwind Restaurant at that city. The action is for an injunction restraining defendants "from the commission of any acts or the use of any methods within or in the immediate vicinity of the plaintiff's said restaurant and premises, which will tend to hinder, impede, or obstruct the plaintiff in the transaction of the business of said plaintiff at said Fairwind Restaurant in said premises, or hinder, intimidate, or annoy the patrons or customers of plaintiff as they visit said restaurant and premises and depart from the same, and from annoying and intimidating persons who may desire to work in plaintiff's said premises." Plaintiff had judgment, from which defendants appeal, and from the order denying their motion for a new trial.

The brief of appellants is confined to a discussion of the alleged insufficiency of the evidence to sustain the findings. The particular parts of the findings thus attacked are quoted in the brief and are as follows: That defendant members of said association "have interfered with and intimidated persons who desired to visit said restaurant for the purpose of patronizing the same, by telling them that they were making a mistake in patronizing said restaurant, and that nothing but a scab would go in there [meaning plaintiff's restaurant]; * * * that they would be sorry for themselves if they continued to patronize said restaurant, and thereby willfully and maliciously intimidated the patrons and intended patrons of said restaurant and caused them to refrain from patronizing said place of business," etc. (finding 4); that "the said defendant Harry Smith and other defendants have followed persons who intended to patronize plaintiff's said place of business and have prevented them from entering said place of business and patronizing the same" (finding 5); that said defendants "willfully and maliciously patrolled the sidewalk in front of plaintiff's said place of business for the purpose of driving said customers or patrons away from said restaurant" (finding 6). Appellants contend that the words used in the findings, such as "threats," acts of "intimidation," "interfered with," "driven away" or "prevented," as applied to the conduct of defendants toward the patrons of plaintiff, imply force, and that "the evidence does not warrant a finding that implies that force was used." We do not think these words as used in the findings and judgment imply that it was necessary to show physical force on the part of defendants towards anyone. Persons might have been "prevented" from patronizing plaintiff, or "driven away" from his place of business, or "interfered with" in an attempt to go into or out of his restaurant, by conduct falling short of actual violence, and yet the conduct might be of such character as to effect the object of defendants to the injury of plaintiff in a way which could not be adequately measured in an action for damages.

We are cited by appellant to section 9, art. 1, of the Constitution of California, which guaranties the right to every person to "freely speak, write, and publish his sentiments on all subjects," etc. It is argued that it is not unlawful for any person to go to or stay away from plaintiff's restaurant, and hence there could be nothing unlawful in any one of defendants requesting any patron of plaintiff's restaurant to remain away therefrom; that the motive of the person in making the request is immaterial; and if the request can be made of one it can be made of all patrons of plaintiff. Furthermore, if this may be done verbally, it may be done in writing, and he may make the request on a banner such as was used in front of plaintiff's restaurant which read: "Boycott. Fairwind Restaurant, declared an unfair restaurant by Cooks' and Waiters' Alliance, Local No. 220. Public is asked not to patronize the place." It is also argued that "boycotting" is not actionable per se, and so with "picketing" and hence, as we infer, not restrainable by injunction. We do not find it necessary to enter upon a discussion of the right of labor to organize for mutual benefit and self-protection. All sane thinking persons concede this right. And it cannot be doubted that organized labor has the right to effect its objects and purposes by all lawful means, lawfully exercised. Nor are we called upon to lay down general rules by which labor organizations should be governed in their relation to the business interests of the country and to society. We are to deal alone with the facts presented in his particular case, and the principles of law by which they shall be governed.

While the right of free speech is guarantied to all citizens by the Constitution, there is also guarantied to them by the same Constitution the right of "acquiring, possessing and protecting property, and possessing and obtaining safety and happiness" (section 1, art. 1); and it is a maxim of jurisprudence prescribed by the statute law of this state that "one must so use his rights as not to infringe upon the rights of another" (Civ. Code, § 3514). These guaranties are equally important to and equally necessary for the protection of all classes of citizens. The difficulty in most cases is to apply the principles governing these correlated rights in particular cases as they arise. Appellants concede that boycotting and picketing may become "objectionable by reason of the acts done, in prosecuting the boycott or in picketing"; and, this much conceded, it follows that they may be resorted to by such unlawful means and in such reprehensible manner as to bring the persons therein engaged within the restraining power of the courts. That a boycott was declared and being enforced against plaintiff by defendants is not disputed. One of the defendants testified to its object as follows: "We wanted to keep people from patronizing Mr. Jordahl's while he refrained from getting a union card. We wanted to keep everybody from patronizing him as much as we could. It did not matter who it was, everybody we could keep from patronizing him we would do the best we could to keep them away. If Mr. Jordahl had come in and acceded to our terms, that minute the boycott would have been declared off, and would have been kept on as long as he wouldn't, had it not been for the injunction of the court. The boycott would have been on now if it had not been for the injunction of the court. I was a member of the committee that had exclusive power to act in this particular matter." The evidence was conflicting as to the acts which the court found amounted to intimidation of the patrons of plaintiff and to an unwarrantable interference with the peaceable prosecution of his business and to plaintiff's pecuniary injury. The well-settled rule of the Supreme Court, and therefore must be folowed by this court, is, that the findings of the trial court will not be disturbed, but must be accepted, where there is a substantial conflict in the evidence. And under this rule the appellate court is not permitted to determine where the preponderance of the evidence rests. If there was any substantial evidence to support the findings we must hold it sufficient. The responsibility of weighing the evidence is upon the trial court or the jury, where the trial is by jury. Upon a careful examination of the record we think there is sufficient to sustain the findings. We do not understand that the trial court decided that carrying a banner, such as was carried in this instance, in the street in front of plaintiff's restaurant, was unlawful or that the judgment necessarily rested on such acts, and no question involving such acts is before us. The judgment enjoins defendants "from stationing themselves in the doorway of said restaurant or upon the sidewalk in front of the same and there interfering with the business of plaintiff by intimidation, insults, or threats to his patrons, thereby inducing persons not to patronize the restaurant of said plaintiff; and said defendants, * * * are hereby especially enjoined from in any manner interfering with the said business of plaintiff by means of threats or intimidation of any kind or nature, directed against the patrons or customers * * * of said plaintiff and from interfering by means of threats or intimidation with any person that may be working for plaintiff, or may desire to work for him in his said restaurant."

Appellants finally complain that the judgment should be reversed because "it is so indefinite and uncertain that it is impossible to ascertain therefrom what acts defendants are enjoined from performing." The court was not called upon, nor was it practicable to enumerate the particular acts which in its opinion would be regarded as acts of intimidation to customers or threats used for the purpose of diverting patrons from plaintiff's restaurant. Defendants are presumed to be intelligent and law-abiding citizens, and, as such citizens, the court was content to leave to them the determination of what particular acts they could in future safely resort to without violation of its directions. The meaning of the judgment is plain enough, and so long as defendants keep within the intention expressed by the court they will be within their rights so far as any violation of this judgment may be involved.

The judgment and order are affirmed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

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7 Cal. Unrep. 241

PROUTY v. ADAMS, et al.

(Court of Appeal, Third District, California. Oct. 4, 1905.)

APPEAL — LAW OF THE CASE — PLEADING — —AMENDMENT.

Where, on a prior appeal, it was held that defendants' rights were limited by a written contract of indemnity, and that no defense at variance with the terms of the indemnity could be interposed, and judgment was reversed, with directions to the court to strike out or otherwise refuse to entertain a special defense objected to, whereupon the court struck the amended answer "according to the directions of the Supreme Court" and granted leave to amend, such decision was the law of the case, and defendants were not entitled to file an amended answer merely omitting all mention of the written contract and pleading the defense so stricken.

Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Action by S. Prouty against Robert Adams and another. From an order granting plaintiff's motion to strike certain matter from an amended answer, defendants appeal. Affirmed.

A. C. White and C. H. Fairall, for appellants. R. C. Minor, for respondent.

BUCKLES, J. This is the second appeal in this cause. Prouty v. Adams, 141 Cal. 304, 74 Pac. 845. The facts are fully stated in the decision upon such former appeal. It was there held that the rights of the defendants were limited by a written contract of indemnity executed contemporaneously with the execution of the note sued upon, and that no defense at variance with the terms of that indemnity could be interposed. The judgment and order denying a new trial were there reversed, "with directions to the trial court to strike out or otherwise refuse to entertain the special defense above adverted to." Upon the going down of the remittitur, the trial court made the following order: "On motion of Avery C. White, Esq., counsel for defendants, the court made an order striking out the amended answer of defendants herein, according to the directions of the Supreme Court, and granted defendants 15 days in which to file an amended answer herein." Thereafter, and within the time so granted, the defendants filed an answer wherein all mention of the written contract of indemnity was omitted, and the selfsame special defense included in the order of the Supreme Court, and mentioned and stricken out by the order granting leave to amend, was again pleaded. The plaintiff moved to strike said matter from the amended answer, and from the order granting said motion defendants prosecute this appeal.

Appellants claim that additional matter by way of "novation" or "substitution" was included in the matter stricken out, but an examination of the record shows that, no matter what this alleged new matter may be called, it is within the very letter of the decision upon the first appeal which became the law of the case. Appellants also contend that the order of the trial court permitted the amendment made. We do not think so. The Supreme Court directed the lower court to strike out or otherwise refuse to entertain this very defense, and the order of the court below, construed in the light of this direction, could only mean an amendment in accordance with the law of the case as laid down by the Supreme Court. Such was the construction placed upon its order by the court making it. An order directing that certain matter be stricken from an answer can hardly be distorted into an order permitting its reinsertion. It is said, however, that the amendment avoids the law of the case laid down on the first appeal, and that neither the lower court nor this court can have knowledge of the fact that there was a written indemnity. In answer to this it may be said that the court below certainly was compelled to take cognizance of the order expressly excluding the very matter here pleaded, and no amount of sophistical pleading or reasoning could destroy the force of that order or nullify the rule of law applied to the facts which the defendant placed before the court. The amendment, including matter stricken out by the court below in accordance with the mandate of the Supreme Court, was therefore unauthorized. The mere omission of reference to the written indemnity could not nullify such order, and, if it could, such an amendment would be so plainly sham that the court would strike it out anyway. The law does not impute to a court such ignorance of its own records and the decisions of the Supreme Court that matter may be repleaded which has not only been eliminated by express order, but which would be brought within the law of the case in any event and thus neutralized and destroyed, by the mere introduction of the written indemnity at the trial. Nor are courts so impotent that chicanery cannot be frowned upon, or playing fast and loose with courts of justice prevented.

The order is affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

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1 Cal. App. 701

WHELAN v. ROSSETER.

(Court of Appeal, First District, California. Oct. 4, 1905.)

1. Vendor and Purchaser—Conveyance of Perfect Title.

A purchaser of land under a contract calling for a perfect title is entitled to a title fairly deducible of record, free from reasonable doubt and litigation.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 234, 238.]

2. Same—Incumbrances—Building Restrictions.

Building restrictions in grants of real estate are incumbrances on the title.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 258.]

3. Same—Rescission by Purchaser—Defect in Title.

A vendor contracted to sell real estate. The purchaser was given 15 days in which to examine title, and, if found defective, he was to state his objections in writing and the vendor was to have a reasonable time to perfect title. The abstract showed building restrictions on the land. A suit involving their validity was pending. *Held*, that the purchaser was entitled to rescind and recover the part of the price paid; the title being doubtful, even though the covenants did not run with the land, for equity might enforce them.

4. Same—Title—Duty of Purchaser to Examine.

A purchaser of real estate is not required to make investigations as to facts that may affect the title not disclosed by the abstract furnished under the contract of sale by the vendor or actually known by the purchaser.

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by James J. Whelan against John H. Rosseter. From a judgment for plaintiff, defendant appeals. Affirmed.

W. S. Goodfellow and John S. Drum, for appellant. Joseph Hutchinson, for respondent.

HALL, J. This is an appeal upon the judgment roll from a judgment in favor of plaintiff whereby he recovered $2,000, deposit on a contract for sale of a piece of real estate. By the terms of the contract 15 days were allowed to examine title, and, if found defective, purchaser was to state his objections in writing, and seller was to have a reasonable time to perfect title; abstract of title to be furnished by seller. The abstract was furnished by defendant, and in due time plaintiff in writing specified to defendant his objections to the title, and thereafter defendant announced to plaintiff that he could not remove the restrictions and incumbrances upon said title complained of, and plaintiff thereupon demanded the return of his deposit, and on refusal brought this action. The contract was dated February 18, 1901. The objections to the title were as follows: It appeared from the abstract that, on the 26th day of August, 1874, all the then owners in fee, as tenants in common of all of Western Addition block 689, in which the property described in the contract is situated, and also of the adjoining blocks 684, 702, 703, and part of 685, entered into an agreement in writing in and by which, for the express purpose therein stated of directly benefiting all of said property and enhancing the value of all of said lands, they covenanted and agreed as follows: (1) That no buildings were to be erected upon any part of said lands, except for private residences. (2) That no building, or any part thereof, erected upon any part of said premises, should be used or occupied as a blacksmith or other shop, or as a grocery store, or saloon, or place of public amusement. (3) That no buildings or superstructure erected upon any part of said lands, except fences, should be built within 20 feet of the street. (4) That no alleyway or private street should be opened through any portion of said lands. By said agreement all the covenants thereof were expressly made binding upon all the parties thereto, their heirs, executors, administrators, and assigns, and any and all persons who claimed or derived their title or possession through any of the parties to said agreement; and said agreement further provided for injunction suits and suits for damages in case of violation. The agreement was recorded April 3, 1877. On the 18th day of November, 1898, defendant joined with other parties then interested in a portion of said block in an action in the superior court of the city and county of San Francisco, for the purpose of declaring invalid and canceling said agreement, on the ground that the same constituted a cloud or incumbrance upon said property. The complaint alleges that "said writing is a cloud upon the title of said plaintiffs to the lands owned by them * * * and the so-called covenants contained in said writing * * * greatly interfere with and hinder the sale of said lands and the obtaining of loans upon mortgages upon said lands, and largely detract from the value of said lands." The prayer was to quiet title. The defendant in said action answered, and set up said agreement, and claimed that the same was legal and valid according to its terms. In that action judgment went for plaintiff January 29, 1901, but defendant therein perfected an appeal to the Supreme Court, which was pending at the time of the trial of this present action. Defendant deraigned title from some, but not all, of the parties to said agreement. It appeared of record in the county recorder's office, but not by said abstract, that one of the owners signing said agreement had, before the signing thereof, mortgaged his property, and that the mortgagee had foreclosed and obtained a title free from the effect of such agreement, and after the date of said agreement, but before the recordation thereof, others of the owners had made conveyances of lands for value.

Appellant insists that, notwithstanding the agreement above referred to, and the litigation concerning it then actually pending, the title to the lot was not defective. In this regard it is insisted that the covenants in said agreement are not such as run with the land (Civ. Code, §§ 1460–1462), and therefore do not affect the title to the land. But a purchaser of land under a contract calling for a perfect title, or a title free from defects, is entitled to a title that is fairly deducible of record, free from reasonable doubt and litigation. Muller v. Palmer, 144 Cal. 305, 77 Pac. 954; Turner v. McDonald, 76 Cal. 177, 18 Pac. 262, 9 Am. St. Rep. 189; Reynolds v. Borell, 86 Cal. 538, 25 Pac. 67. Building restrictions and the like contained in grants of real estate are incumbrances on the title. Reynolds v. Cleary, 61 Hun, 592, 16 N. Y. Supp. 421; Wetmore v. Bruce, 118 N. Y. 319, 23 N. E. 303; Kramer v. Carter, 136 Mass. 504; Jeffries v. Jeffries, 117 Mass. 184; Van Schaick v. Lese [Sup.] 66 N. Y. Supp. 64; 29 Am. & Eng. Ency. of Law, 612. In Wetmore v. Bruce, supra, it is said: "It is entirely competent for adjoining owners of land by grant to impose mutual and corresponding restrictions upon the lands belonging to each, for the purpose of securing uniformity in the position of buildings. The covenants, being mutual and imposing such restrictions in perpetuity, are in effect reciprocal easements, the right to the enjoyment of which passes as appurtenant to the premises. Observance of such covenants will be enforced by a court of equity." The fact that the covenants do not run with the land is not the test as to whether a title is good. In some cases equity will enforce personal covenants. In the Law of Real Property in Conveyancing (Jones) it is said: "One who takes land with notice of a restrictive agreement affecting it cannot equitably refuse to perform it, though the agreement may not be a covenant which runs with the land, or creates a technical qualification of the estate conveyed." The author also quotes from Whitney v. Union Railway Co., 11 Gray, 359, 71 Am. Dec. 715, where it is said: "The precise form or nature of the covenant or agreement is quite immaterial. It is not essential that it should run with the land. A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding on him merely because he stands as an assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform." To the same effect is Tulk v. Moxhay, 2 Phil. 774, 13 Jur. 89; 18 L. J. N. S. Ch. 83. In Los Angeles, etc., Co. v. S. P. R. R. Co., 136 Cal. 36, 68 Pac. 308, it was conceded that there are personal covenants enforceable in equity against the grantee of the covenantor. Thus we see that, notwithstanding that under the Civil Code the covenants in the agreement may not run with the land, there is authority for the contention that a vendee of the land with notice could be compelled to perform them.

The title offered in this case was, therefore, one that was exposed to litigation (in fact, litigation concerning it was then pending), and was therefore doubtful. In Swayne v. Lyon, 67 Pa. 436, it is held that a title is not good or marketable that exposes the vendee to litigation. In this case the doubt as to the title concerned a matter of law. Every title is doubtful which invites or exposes the party holding it to litigation. Speakman v. Forepaugh, 44 Pa. 363; Reighard's Estate, 192 Pa. 111, 43 Atl. 413; Michenor et al. v. Trustees, etc., 49 La. Ann. 360, 21 South. 552. In Herman v. Somers, 158 Pa. 424, 27 Atl. 1050, 38 Am. St. Rep. 851, it is said: "In equity a marketable title is one in which there is no doubt involved, either as to matter of law or fact." In Spencer v. Sandusky, 46 W. Va. 582, 33 S. E. 221, it was held that a vendee for value purchasing a good title cannot be compelled to accept a litigious or clouded title, if there is reasonable ground to apprehend litigation with regard thereto, although the same may be satisfactory to a lawyer or speculator. In Fleming v. Burnham, 100 N. Y. 1, 2 N. E. 905, it was held that a purchaser of a good title will not be required to determine a disputed question of fact or a doubtful question of law with reference thereto. In Daniell v. Shaw, 166 Mass. 582, 44 N. E. 991, the freedom of the vendor's title from incumbrances depended on the constitutionality or unconstitutionality of a certain statute, and the court said: "The plaintiff concedes that his title is not good if the statute is constitutional. The parties also differ in their construction of the statute. The city of Boston is interested in both of these questions. It has been allowed to file a brief, but it is not a party to the record, and would not be precluded from litigating the same questions anew if an opinion in the present case were for the plaintiff. The defendant would be exposed to the chance of such litigation if compelled to accept the title now offered. * * * The plaintiff asks us to declare his title good by declaring the statute unconstitutional. The defendant ought not to be compelled to accept such a title"—and cites Jeffries v. Jeffries, 117 Mass. 184; Chesman v. Cummings, 142 Mass. 65, 7 N. E. 13; Hunting v. Damon, 160 Mass. 441, 35 N. E. 1064; Abbott v. James, 111 N. Y. 673, 19 N. E. 434; Fleming v. Burnham, 100 N. Y. 1, 2 N. E. 905.

At the time of the execution of the contract of sale which gives rise to this litigation, there was litigation actually pending concerning the validity and effect of the agreement affecting the land sold. We cannot under the authorities say that the questions of law involved were so free from doubt that the vendee should decide them at his peril. If he had completed the purchase he would have been obliged to proceed with the litigation, probably employ counsel at much expense, or take the chances of an adverse result in the Supreme Court. We have not overlooked the claim made by appellant that by reason of matters appearing of record, but not shown in the abstract, the agreement had become of no effect. Aside from the consideration that litigation was actually pending affecting the validity of the agreement, we do not think that a purchaser is required to make investigations as to facts that may affect the title, not disclosed by the abstract furnished under the contract by the vendor or actually known to the vendee. Smith v. Taylor, 82 Cal. 533, 23 Pac. 217.

For the reasons above set forth, the judgment is affirmed.

We concur: HARRISON, P. J.; COOPER, J.

1 Cal. App. 678

GRIFFIN v. PACIFIC ELECTRIC RY. CO.

(Court of Appeal, Second District, California. Oct. 2, 1905.)

1. APPEAL—FINDINGS OF COURT—CONSTRUCTION.

Findings of a trial court are to be so construed as to uphold the judgment, and when, from the facts found, other facts may be inferred which will support the judgment, the inference will be presumed to have been made by the court below.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3764.]

2. TRIAL—FINDING—DAMAGES FOR PERSONAL INJURY—CONSTRUCTION.

A finding that a specified sum will compensate one for a personal injury negligently inflicted means the amount necessary to compensate him as fixed by Civ. Code, § 3333, providing that the measure of damages is the amount which will compensate for the detriment proximately caused by another's breach of obligation not arising from contract.

3. CARRIERS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

Where a passenger on a street car notified the servants in charge of the car to stop at a crossing, and the car as it approached the crossing slackened its speed as if to stop, the passenger, in leaving his seat and proceeding to the door for the purpose of alighting when the car came to a stop, was not guilty of contributory negligence as a matter of law, precluding a recovery for injuries received by reason of the sudden jerking of the car occasioned by the sudden turning on of the electric current.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1386.]

4. SAME—NEGLIGENCE OF CARRIER—PRESUMPTIONS.

Where a street car was so operated as to violently throw therefrom a passenger who had notified the servants in charge of the car to stop at a crossing, and who, on the car slackening its speed as if to stop at the crossing, had left his seat and proceeded to the door for the purpose of alighting when the car came to a stop, a presumption that the servants were not exercising the utmost diligence for the safety of the passengers as required by law, but were negligent, arose.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1286.]

5. SAME—DUTY AS TO TRANSPORTATION OF PASSENGERS.

The care which a carrier must exercise towards its passengers is the utmost care, involving such constant supervision over and observation of the passengers as will insure to the employés information as to the condition and position of the passengers; and, when the means of knowledge in relation to the position of a passenger is in the carrier, the same rule applies as when actual knowledge exists.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1087.]

Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by James H. Griffin against the Pacific Electric Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Bicknell, Gibson, Trask, Dunn & Crutcher and N. S. Sterry, for appellant. Job Harriman and Camp & Lissner, for respondent.

ALLEN, J. This is an action to recover damages by a passenger on one of defendant's cars, based on the claim of negligence in the operation of a car upon which plaintiff was being carried. Trial was by the court, with findings and judgment against defendant, from which, and an order denying a new trial, defendant appeals.

The court finds that on September 26, 1902, plaintiff was a passenger on one of defendant's cars which were being operated on Raymond avenue within the city of Pasadena; that it was the duty of defendant to stop such car at the crossing of Union street with Raymond avenue in said city; that when approaching such street crossing plaintiff notified defendant's servants to stop thereat that the plaintiff might alight from such car; that the speed of the car was slackened as if to stop, and plaintiff arose from his seat and proceeded to the rear door of the car, which was open, and stood there waiting for the car to come to a full stop; that, while standing, the defendant's servants carelessly and negligently caused the electric power to be turned on suddenly, thereby giving the car a sudden jerk, by reason of which plaintiff was thrown out of the door of the car and violently to the ground, and was injured and wounded so that he became sick, sore, and disabled and for a long time was unable to perform his usual work; that the amount which will compensate him for the detriment proximately caused by such injury is $1,000. The court further found that plaintiff was guilty of no contributory negligence, and rendered judgment in plaintiff's favor for $1,000.

Defendant first contends that the judgment is unsupported by the findings; that the finding that $1,000 will compensate plaintiff for the detriment caused is not the equivalent of a finding that he was damaged to the extent of $1,000, upon the theory that if he were damaged in a less sum the finding would still be true. Findings of a trial court are to receive such construction as will uphold rather than defeat its judgment, and whenever from the facts found by it other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court, and upon appeal from that judgment this court will not draw from those facts any inference of fact contrary to that which may have been drawn by the trial judge for the purpose of rendering his judgment. Breeze v. Brooks, 97 Cal. 77, 31 Pac. 742, 22 L. R. A. 257. And in this case, where the court finds the amount which will compensate, it will be taken to mean the amount necessary to compensate, if for no other reason than that which follows the presumption that a court in the proper discharge of its duty fixed no sum greater than was necessary and proper under the facts before it. That which will compensate for all the detriment proximately caused by the breach of duty is fixed as the measure of damages by section 3333, Civ. Code, and when such sum is found and determined it is a fixation of the damage.

Appellant next claims that the finding that defendant negligently and carelessly failed to stop said car at or near Union street, but instead, and without notice to plaintiff, caused said electric power to be turned on suddenly, causing the car to give a sudden jerk, thereby throwing plaintiff to the ground, is unsupported by the evidence because it does not appear therefrom that the car did not come to a full stop at Union street. Whether the car eventually stopped at Union street or not is of little consequence in this case. The act which produced plaintiff's injury occurred before such street was reached. Under the circumstances of this case, plaintiff possessed the right to proceed to the door preliminary to alighting. In McCurrie v. Southern Pac. R. Co., 122 Cal. 562, 55 Pac. 325, the court says: "It cannot be said as a matter of law that the plaintiff, by leaving his seat after the train had stopped, and attempting to go to the platform for the purpose of meeting his son, was guilty of any negligence which contributed to his injury." Neither can we say in this case that the conduct of the plaintiff in leaving his seat and proceeding to the door was negligence as a matter of law. And if, as found by the court, the car was so operated as to violently throw plaintiff therefrom, the law presumes that defendant was not exercising the utmost care and diligence for the safe carriage of the passenger. The injury is shown to have been produced by the carrier in operating the instrumentalities employed in its business. The presumption of negligence follows. Babcock v. Los Angeles, etc., Co., 128 Cal. 178, 60 Pac. 780. The court found no contributory negligence on the part of plaintiff, and there is ample evidence in its support. That the injury was the proximate result of this sudden application of the power is found by the court, and has support in the testimony. Appellant lays much stress upon the proposition that the record does not disclose that defendant had knowledge of the position of plaintiff when the sudden acceleration of speed was attempted, and that it was not negligence to increase the rate of speed, unless the servants of the defendant knew that the result might be injurious to the passenger. Whatever may be the rule in other jurisdictions, in California the care which the carrier must bestow is the utmost care. This involves such constant supervision and observation over and of passengers as will insure to its employés accurate information as to the condition and position of those under their charge; and when, as in this case, the means of knowledge in relation to the position of plaintiff was in the company, the same rule should apply as would obtain when actual knowledge exists. The finding of negligence on the part of defendant is supported and exists by reason of the want of care in taking precautions to ascertain before applying the current the position of those under its charge and the reasonable effect to be apprehended by a sudden start.

We find no error in the record, and the judgment and order are affirmed.

We concur: GRAY, P. J.; SMITH, J.

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1 Cal. App. 682

COX v. ODELL.

(Court of Appeal, Second District, California. Oct. 2, 1905.)

1. Appeal—Judgment—Time.

An appeal from a judgment, not perfected until after the lapse of a year from its rendition, is ineffective for any purpose.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1926.]

2. Same—Harmless Error—Admission of Evidence.

Where, in an action for damages from the collection and discharge of surface water, the court's findings demonstrated that no obstruction other than defendant's embankment was considered, defendant was not prejudiced by the introduction of evidence relating to certain obstructions existing on the side of a street which contributed to the overflow of plaintiff's land.

3. Waters—Surface Water—Detention and Discharge—Damages—Evidence.

In an action for damages to plaintiff's land by the retention and discharge of surface water by defendant on adjoining land, evidence as to the cost necessary to put plaintiff's land in repair was admissible.

4. Same—Proximate Cause.

Where defendant during the irrigation season constructed an embankment for the retention of surface water, which in a state of nature flowed evenly and without injury over plaintiff's land, and took no precautions to provide outlets or to strengthen the embankment to restrain the waters collected in the event of a storm, and water so collected broke the embankment and flowed on plaintiff's land, tearing deep gullies therein and carrying off large bodies of soil, fertilizers, etc., defendant's neglect in the manner of construction and failure to provide outlets were the proximate cause of plaintiff's injury.

5. Same—Complaint—Defects.

Where a complaint in an action for damages by the collection and discharge of surface water averred that the parties owned separate tracts of land, plaintiff's adjoining defendant's on the east, with a road extending along their northerly line which was not denied, this was a sufficient description of the land for the purpose of such action, so that an erroneous allegation that a certain road and defendant's ditches, complained of, extended along the northern boundary of both tracts, was surplusage.

Appeal from Superior Court, Los Angeles County; J. S. Noyes, Judge.

Action by W. J. Cox against J. H. Odell. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Affirmed.

Earl Rogers, H. T. Gordon, and J. S. Chapman, for appellant. John E. Daly and E. W. Freeman, for respondent.

ALLEN, J. Appeal from an order denying defendant's motion for a new trial. The record discloses an attempt at appeal from the judgment, but inasmuch as the same was not perfected until after the lapse of one year from the rendition of judgment, the same is ineffectual, and must be dismissed. Entertaining the views hereafter expressed, we may disregard the motion to dismiss the appeal from the order. The only points in the record in this case here presented are that the evidence is not sufficient to justify the findings, or that errors of law warranting reversal of the order occurred at the trial.

As to the first point, while there is a conflict in many respects, there is evidence sufficient to support the findings. The findings and the evidence develop that the defendant's land adjoins the land of plaintiff on the east, and is of a higher elevation than the land of plaintiff, and the water coming to said lands during rains flowed naturally westward in no definite channel, but widely and evenly diffused over the whole surface, and doing no damage to plaintiff's land. The defendant, along his west line, being the dividing line between the lands of plaintiff and defendant, constructed an embankment for use in the irrigating season, by which he could accumulate and retain the surplus irrigating water the better to utilize it in the irrigation of the trees growing upon the lower part of his premises. This embankment was permitted to remain during the entire irrigating season, and until, from heavy rains in November, 1902, large bodies of water fell upon defendant's lands and the lands above; that by reason of such embankment, the waters gathered upon the lands of defendant beyond the capacity of said embankment to hold, and the embankment broke away and the waters in separate channels were thrown upon plaintiff's land, tearing deep gullies therein, carrying off large bodies of soil and, in addition, certain fertilizers theretofore placed thereon. The court further finds that good husbandry did not require that said embankment be maintained; that said waters so accumulating were not the result of unprecedented storm, nor were the said rains of November, 1902, of an unusual character. During the progress of the trial the court permitted the plaintiff to state his opinion as to whether such water would have been carried off had an outlet been made in the south end of the embankment. Assuming the objection of defendant to this evidence as well taken, and the opinion unwarranted, yet an examination of the whole answer shows that it contained a statement of the physical conditions surrounding the premises, upon which such opinion was based. The answer relieved itself from the force of the objection. People v. Wynn, 133 Cal. 72, 65 Pac. 126.

It is contended further that the court upon the trial erred in its admission of testimony in relation to certain obstructions existing on the north side of the street which contributed to the overflow on plaintiff's land. While under the pleadings it was not competent to show damages, other than those resulting from the obstruction complained of and specifically set forth, yet the court, by its finding, demonstrates that no obstructions other than the embankment were considered; and no prejudice therefore resulted from the introduction of such testimony.

We perceive no error in the admission of testimony as to the costs necessary to put the land in repair. In the similar case of Sabine, etc., Ry. Co. v. Joachimi, 58 Tex. 456, it was held that the cost and expense of restoring the land to its former condition, and the loss sustained by being deprived of its use, were the measure of damages. While, as a general rule, the damages are to be measured by the difference in the market value before and after the injury, yet it is not invariably applied. It might prove oppressive. Shearman & Redfield on Neg. § 602.

The principal contention of the appellant is that the evidence is insufficient to justify the decision, on the theory that the defendant in the construction of the embankment was but exercising rights and performing acts demanded by good husbandry in and about the cultivation of his own lands; that the embankment was not constructed for the purpose of diverting surface water the result of rainfall, and that the proximate cause of the injury was an unprecedented and unlooked-for rain, which occurred before defendant had an opportunity to remove the embankment. As to all of these matters, other than the object of the original construction of the embankment and the time afforded to remove the same, the court has found against the defendant. Whatever may have been the moving purpose in constructing the embankment, or its maintenance, the effect was, in the event of heavy rainfall, to accumulate the water upon defendant's land, and, should the embankment prove insecure and breaks occur therein, to cast the same in restricted areas across plaintiff's land, thereby working injury. In the case of surface waters having no definite channel of escape, and the owner of the land upon which they are found being impotent to rid himself of their presence, the law wisely provides that the laws of nature should be left untrammeled in their disposition. Rudel v. Los Angeles County, 118 Cal. 50 Pac. 400; Ogburn v. Connor, 46 Cal. 352, 13 Am. Rep. 213. While it is true that one may occupy, use, and possess his own in a manner agreeable to himself, yet, in the exercise of this right, he may not do injury to his neighbor. The defendant possessed the right to construct this embankment, but in its construction he was bound to consider its effect upon his neighbor's land, in the event of heavy rains, which, from the testimony appear to be not infrequent in that locality. It is clear from the findings and from the testimony that he did not exercise the degree of care which was incumbent upon him in the maintenance of the embankment, either in its strength or providing outlets in the event of storm. Had proper outlets been provided, it is apparent that the time afforded to remove the embankment between the last irrigation and the commencement of the rains would not have been material. His neglect in regard to the manner of construction and failure to provide outlet for the water was the proximate cause of plaintiff's injury.

Defendant, however, contends that the complaint being on account of negligence and the findings being in line therewith, under the facts of the case the action was not one on account of negligence, but the act itself gave rise to the cause of action. And an effort is made to distinguish as between cases where the act is the basis of the action and those wherein negligence produces the injury. We are unable to appreciate the distinction between the two classes of cases in applying the rules laid down in this state in respect of the rights of the servient tenement in relation to surface waters naturally flowing over from the dominant tenement. The wrong having been committed, and consisting, as it did, in the neglect to provide proper outlets at appropriate places before the rainy season commenced, or before rains might reasonably be apprehended, we are unable to see how this distinction could avail, except, possibly, where the statute of limitations was involved.

It is further urged that it was error to refuse a new trial, because it affirmatively appears by reading the description of the tracts in the complaint, as well as in the findings, wherein reference to their governmental subdivision is made, that of necessity the lands of defendant would lie south of plaintiff's premises, and it would not be possible for the road or ditches complained of to extend along the northern boundary of both tracts. This is true, but the complaint avers that the parties own separate tracts of land, plaintiff's adjoining defendant's on the east, with a road extending along their northerly line, and this is not denied and no finding is necessary in that regard; and for the purposes of an action of this character is a sufficient description, if we ignore the erroneous particular description in the complaint.

Order affirmed.

We concur: GRAY, P. J.; SMITH, J.

1 Cal. App. 715

WHITE v. GAFFNEY.

(Court of Appeal, First District, California. Oct. 10, 1905.)

1. APPEAL—JUDGMENT—PERFORMANCE IN PART —DISMISSAL.

Where a judgment appealed from directed the abatement of a nuisance and adjudged that plaintiff recover $292.50 for costs, expenses, and counsel fees, the allowance of such costs, etc., was a substantial part of the judgment, so that plaintiff was not entitled to a dismissal of the appeal on the abatement of the nuisance, leaving the judgment for costs, etc., unpaid.

2. SAME—NATURE OF JUDGMENT — APPELLATE JURISDICTION.

Under the Constitution, giving the Supreme Court appellate jurisdiction in actions to abate a nuisance, where an appeal was taken from a judgment directing such abatement and awarding plaintiff $292.50 costs, expenses, and counsel fees, the court, on the abatement of the nuisance, was not deprived of jurisdiction of the appeal because the only matter remaining for determination involved less than $300.

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Suit by Rebecca G. White against Anna Gaffney. From a judgment in favor of plaintiff, defendant appeals. On motion to dismiss. Denied.

John S. Partridge, for appellant. Sooy & Dorn, for respondent.

HALL, J. This is a motion by respondent to dismiss an appeal taken by defendant from a judgment in favor of plaintiff and against defendant, directing that defendant abate a certain nuisance, and further adjudging that plaintiff have and recover of and from defendant the sum of $292.50 as and for costs, expenses, and counsel fees incurred in the prosecution of said action.

Counsel for plaintiff insist that, defendant having since the judgment abated the nuisance, the judgment has been complied with, although the costs and counsel fees have not been paid, and that defendant cannot be heard to question the allowance of the costs and counsel fees, as costs and counsel fees are mere incidents of the judgment. There is no merit in this contention. We do not conceive that even counsel for plaintiff will admit that the abatement of the nuisance satisfies the judgment for costs and counsel fees. If we should grant his motion and dismiss this appeal, we have no doubt that, when he applies to the clerk of the trial court for a writ of execution to collect the judgment for costs and counsel fees, he will insist that it is a very important and substantial part of the judgment remaining unsatisfied. Certain it is that if the defendant be finally compelled by a writ of execution, or otherwise, to pay this judgment, she will have a realizing sense of its substance and importance. That part of the judgment awarding costs and counsel fees is as much a part of the judgment, subject to review on appeal from the judgment, as any other part of it. We are not now discussing an order of the court taxing costs on a disputed cost bill filed subsequent to a judgment awarding costs, but we are discussing the judgment itself that awards costs and counsel fees. The cases are numerous where, on an appeal from a judgment awarding costs, the appellate court has reviewed and modified the judgment in that respect. We will cite but a few. Schmidt v. Klotz, 130 Cal. 223, 62 Pac. 470; Quitzow v. Perrin, 120 Cal. 255, 52 Pac. 632; Kelly v. C. P. R. R. Co., 74 Cal. 565, 16 Pac. 390; People v. Campbell, 138 Cal. 11, 23, 70 Pac. 918; Benson v. Braun, 134 Cal. 41, 66 Pac. 1; Fox v. Hale & Norcross S. M. Co., 122 Cal. 219, 54 Pac. 731; McCarthy v. Gaston Ridge Mill, etc., Co., 144 Cal. 542, 78 Pac. 7. In Kelly v. C. P. R. R. Co., supra, the appeal was taken only from that part of the judgment awarding costs to plaintiff, and that part only of the judgment was reversed. In Schmidt v. Klotz, the judgment was modified in regard to costs on an appeal from the judgment, which, in this regard, was erroneous on its face. The same is true in Quitzow v. Perrin, Benson v. Braun, and Fox v. Hale & Norcross S. M. Co. Where the judgment on its face shows that costs and counsel fees have been awarded contrary to the law, no bill of exceptions is necessary, as the question is presented by the judgment roll.

It is also insisted that no appeal lies in this case for the reason that the only matter now involved is less than $300. This matter has been finally settled in this state contrary to the contention of the plaintiff in Harron v. Harron, 123 Cal. 508, 56 Pac. 334, which reviews and overrules preceding cases relied on by plaintiff. See, also, Southern Cal. Ry. Co. v. Superior Court, 127 Cal. 417, 59 Pac. 789. Harron v. Harron was an action for divorce, and it was held that, as the Constitution gave appellate jurisdiction to the Supreme Court in such actions, a motion to dismiss an appeal from an order allowing $140 for costs and counsel fees would not lie. The Constitution gives this court appellate jurisdiction in actions to abate a nuisance. This gives us appellate jurisdiction over the whole and every part of the judgment in such an action.

The motion to dismiss the appeal is denied.

We concur: HARRISON, P. J.; COOPER, J.

2 Cal. App. 112

LEWIS et al. v. CITY AND COUNTY OF SAN FRANCISCO.

(Court of Appeal, First District, California, Oct. 30, 1905. On Rehearing, Nov. 28, 1905.)

1. APPEAL—FINDINGS—REVIEW—RECORD.

In the absence of a bill of exceptions containing the evidence, a finding that payment sought to be recovered was involuntary and compulsory will be held on appeal to have been sustained by the evidence.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2433.]

2. PLEADING—CONCLUSIONS—PAYMENT.

A mere allegation of the ultimate fact that a payment sought to be recovered was involuntary, being insufficient on demurrer, the sufficiency of a complaint to recover such payment must be determined by considering the probative facts pleaded.

3. PAYMENT—ILLEGAL CHARGES—COMPULSORY PAYMENT—REMEDIES.

Where a county clerk refused to file the inventory and appraisement of the executors of an estate, except on payment of illegal fees, and a failure to file the inventory and appraisement would have rendered the executors prima facie liable to removal from office and to other penalties, the payment of such fees under protest was involuntary, notwithstanding the executors by writ of mandate could have compelled the clerk to have filed the papers without paying such fees.

On Rehearing.

4. MUNICIPAL CORPORATIONS — MONEY PAID UNDER PROTEST—RECOVERY — JUDGMENTS—INTEREST.

In an action against a city to recover money paid under protest, interest cannot be recovered prior to the entry of judgment against the city.

5. APPEAL—QUESTIONS NOT ARGUED—WAIVER OF ERROR.

That appellant's failure to present in his opening brief an existing ground for the reversal of the judgment constitutes a waiver of the error, and, if presented for the first time in the closing brief, will not be considered by the appellate court, is not a right which may be invoked by the respondent, the appellate court being at liberty to decide the case on any points that its proper disposition may require whether urged or not.

6. SAME—ERRORS ON THE FACE OF THE RECORD—REVIEW.

Where an error appearing on the face of the appeal record is brought to the attention of the appellate court before its judgment has become final, the court will be justified in setting its judgment aside, even though appellant had not pointed out the objection or the court's attention had not been called to the error until after its opinion for affirmance had been filed.

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Azro N. Lewis and others, as executors of the will of Miranda W. Lux, deceased, against the city and county of San Francisco. From a judgment in favor of plaintiffs, defendant appeals. Modified on rehearing.

Percy V. Long and John P. Coghlan, for appellant. Bishop, Wheeler & Hoefler, for respondents.

HARRISON, P. J. The plaintiffs, as executors of the last will and testament of Miranda W. Lux, deceased, presented to the county clerk of the city and county of San Francisco an inventory and appraisement of the estate of their testatrix on July 31, 1895, and requested him to file the same. The clerk refused to receive or file the document unless the plaintiffs would first pay to him the sum of $770 as a fee therefor. This demand was made by reason of the provisions of section 163 of the act entitled: "An act to establish a uniform system of county and township governments," approved March 24, 1893. St. 1893, p. 389, c. 234. The plaintiffs protested against the said demand, claiming the right to have the inventory and appraisement filed by him without the payment of any fee in addition to what they had already paid; but, notwithstanding said protest, the clerk refused to receive or file the same or permit it to be filed except upon the prepayment of said sum of money. By reason of such refusal, and in order to enable them to continue in the exercise of their official duties as such executors, the plaintiffs thereupon paid said fee to the clerk, and it was by him paid into the city and county treasury. The act under which the said fee was demanded was thereafter declared invalid (Fatjo v. Pfister, 117 Cal. 83, 48 Pac. 1012), and the plaintiffs thereupon brought the present action to recover the money so paid by them. The cause was tried by the court, and in addition to the above facts the court found, in accordance with allegations in the complaint, that the payment of said money by the plaintiffs "was wholly involuntary and compulsory on the part of the said executors; that the said executors could not otherwise than by making such payment procure the acceptance of said return or the filing of said inventory and appraisement; that if they had not paid the said pretended additional fee and illegal tax of $770, in accordance with the aforesaid demand of said clerk, he would not have received or filed the said inventory and appraisement, or permitted the same to be filed in said court, and there would not and could not have been any effectual return of said inventory and appraisement within the time required by law or at any time or at all; and that by reason of the nonreturn thereof the said executors would have become prima facie liable to removal from their office as such executors, and to other penalties under the statutes in such case made and provided, and could not have escaped said liability except by pleading and proving the facts." Judgment was thereupon rendered in favor of the plaintiffs, and the defendant has appealed therefrom upon the judgment roll alone without any bill of exceptions.

In the absence of a bill of exceptions containing the evidence before the court, the finding that the payment was involuntary and compulsory must be held to have been sustained by the evidence. It is, however, contended by the appellant that the complaint is insufficient; that the averment therein that the payment was involuntary is only a legal conclusion, and that the facts connected with the payment as set forth in the complaint from which that conclusion is drawn show that the payment was voluntary. Whether the payment was voluntary or involuntary was an ultimate fact to be found by the court from the evidence presented at the trial, and the allegation in the complaint that it was involuntary was an allegation of the ultimate fact upon which the plaintiffs' right of recovery depended; but, as in the case of a cause of action depending upon fraud or negligence, the allegation of this ultimate fact would have been insufficient as against a demurrer unless supported by an averment of the probative facts, and the sufficiency of the complaint is therefore to be determined by a consideration of these probative facts.

It is further contended by the appellant that, inasmuch as the clerk had no authority to demand a fee for filing the document, and the plaintiffs could have compelled him under a writ of mandate to file the same, their payment of the money instead of resorting to an action at law to compel him to receive and file it rendered it a voluntary payment, for the reason that it was made with full knowledge of its illegality, and was not made for the purpose of protecting their property or person or releasing the same from any custody or restraint. When an illegal demand is made against the person or property of an individual which can be enforced only by a judgment therefor in an action at law wherein he can contest its legality, or if made under a threatened sale of his property, and he can contest the validity of the proceedings whenever an attempt is made to disturb his possession, and he pays the claim or demand rather than be subjected to such action or to have his property sold, such payment is voluntary, to the extent that it cannot be recovered in an action therefor. If, however, an illegal demand is made by a person holding an official position, with the color of authority to enforce the same, and such demand operates as a restraint upon the exercise of an undoubted right or privilege, and in its enforcement there is no opportunity of contesting its validity, a payment of the demand in order to remove such restraint is compulsory, and not voluntary. The distinction to be observed is between a payment made for the purpose of protecting or securing the present enjoyment of a right to which the person is immediately entitled, and a payment made to prevent a threatened disturbance of such right made without any authority to interfere with its enjoyment until the right of the threatening party shall be established in a judicial proceeding in which the rights of the respective parties may be presented and determined. In the latter case, a payment to avoid such threatened contest is regarded as voluntary, while in the former case it is compulsory.

The exaction by a clerk or other official against the protest of a party of illegal fees as a condition for filing a document in his office which the party presenting it is entitled to have filed by him renders the payment of such fees compulsory, and it is none the less compulsory that the party could have procured a writ of mandate compelling him to file the document without paying the fees demanded. His right to file the document was immediate, and the payment of the fee under the alternative of bringing such action and incurring the expense and delay thereof is not voluntary. Steele v. Williams, 8 Exch. 625 [20 Eng. L. & E. 319]; Lum v. McCarty, 39 N. J. Law, 287; Steamship Co. v. Young, 89 Pa. 186; Townshend v. Dyckman, 2 E. D. Smith, 224; Ogden v. Maxwell, 3 Blatchf. 319, Fed. Cas. No. 10,458. "When the payment has been made to secure a right which the party paying was entitled to without such payment, and which right was withheld by the party receiving the payment until such payment was made, such payment was not voluntary, and the money can be recovered back. Corkle v. Maxwell, 3 Blatchf. 413, Fed. Cas. No. 3,231. "If a person illegally claims a fee colore officii the payment is not voluntary, so as to preclude the party from recovering it back." Swift Company v. U. S., 111 U. S. 22, 4 Sup. Ct. 244, 28 L. Ed. 341. "Whenever a person is compelled to pay to a public officer, in order to induce him to do his duty, fees which he has no right to claim, they can be recovered back." Robinson v. Ezzell, 72 N. C. 231. See, also, Robertson v. Frank Brothers Co., 132 U. S. 17, 10 Sup. Ct. 5, 33 L. Ed. 236. "The rule is well settled that a payment exacted by and paid to a public officer in excess of his legal fees in order to obtain the performance of his official duty, to which the payor is entitled without such payment, is compulsory and may be recovered back." 22 Am. & Eng. Ency. of Law, 619. In a note to Marriott v. Hampton, 2 Smith's Leading Cases (6th Am. Ed.) *401, it is said: "The distinction is plain to common sense between the case of money paid upon a claim made by a public officer, who is judge in his own cause and has power of withholding by his own mere motion the ordinary rights of a subject, from the adverse party till his demand is complied with, and money paid under a claim made by a private individual who has no power of enforcing it except by adopting the ordinary legal remedies." In County of La Salle v. Simmons, 5 Gilman, 518, the county commissioners were authorized to grant licenses for ferries whenever considered necessary by them, and to impose an annual tax therefor of $100 on each ferry. The plaintiff had kept the ferry for some time previously, and was an applicant for a license to continue the same; but the commissioners gave notice that they would grant the license to the person who would donate the largest sum of money to the county, and accordingly put the same up at auction, and after competition thereat the plaintiff bid $500, which he paid to the county. In an action therefor the court held that the payment was not voluntary, and that it might be recovered, saying: "The money was exacted from the plaintiff under circumstances that stripped the transaction of all the features of a voluntary payment. It was in law and fact a compulsory payment, as much so as the payment of usurious interest which the lender exacts from the borrower; or the payment of illegal charges which an officer demands as the condition of the performance of official services." In American Exchange F. Ins. Co. v. Britton, 8 Bosw. 148, the laws of the state provided that a corporation desiring to engage in the business of fire insurance should pay to the state controller a fee of $20, and that the controller should make an examination of its assets, and if found satisfactory give it a certificate to that effect. At the request of the plaintiffs the controller caused the examination to be made, and gave the certificate requested, and demanded $300 for the services therein. Upon the plaintiffs' objecting to this amount they were informed that unless it was paid they would not receive their license, whereupon they paid the same and then brought an action for its recovery. The court held that the payment was not voluntary, but "was an exaction made without right under cover of official control in the matter," and that the plaintiffs "were not bound to take the hazards of delay, and the risk of having to litigate the question and treat the requirements and threats of the appointees of the controller as idle words"; adding: "Persons dealing with public officials and their deputies and agents do not stand with them upon equal ground."

None of the cases cited on behalf of the appellant present the question here involved. In Bucknall v. Story, 46 Cal. 589, 13 Am. Rep. 220, the assessment was void on its face, and it was held that, as the party paying it was bound to know this fact, there was no compulsion, and the payment was voluntary. In Maxwell v. San Luis Obispo, 71 Cal. 466, 12 Pac. 484, the payment was made under a threat of litigation by the tax collector to prosecute the parties unless they took the license for which the payment was demanded; but the court held that as the invalidity of the law which authorized the collector of license taxes would have been a perfect defense to such prosecution, the payment was voluntary. In Phelan v. San Francisco, 120 Cal. 1, 52 Pac. 38, the payment was held to have been voluntary upon the ground that the invalidity of the assessment appeared upon the face of the proceedings, and would be a defense to any action for the recovery of the property which the officers threatened to sell. Brumagim v. Tillinghast, 18 Cal. 265, 79 Am. Dec. 176 was an action to recover money voluntarily paid in the purchase of some stamps to be affixed to bills of lading. No claim of compulsion was made, but the right of recovery was based upon the invalidity of the law requiring such tax.

It must be held, therefore, that the payment alleged to have been made by the plaintiffs was not voluntary, and that the complaint states a cause of action.

The judgment is affirmed.

We concur: COOPER, J.; HALL, J.

On Rehearing.

HARRISON, P. J. After the opinion herein was filed, the appellant presented a petition for a modification of the judgment therein ordered by limiting the affirmance of the judgment appealed from to that portion which awards to the plaintiffs a recovery of the money originally paid to the clerk, but without any interest thereon; and in support of this petition has called our attention to the cases of Savings & Loan Society v. San Francisco, 131 Cal. 356, 63 Pac. 665, and Columbia Savings Bank v. Los Angeles, 137 Cal. 467, 70 Pac. 308, in which the Supreme Court has held that in an action against the state or any of its subdivisions to recover moneys paid under protest the court is not authorized to include in its judgment interest thereon during any of the time that elapsed prior to the entry of the judgment.

At the hearing of the appeal herein the argument on behalf of the appellant was confined to the question of its liability to the respondents, and neither in the oral argument nor in the printed brief on behalf of the appellant was our attention called to the question presented by the above petition, or to the form of the judgment under consideration, and in their reply to the petition the respondents urge that for this reason the petition should not be granted. In support of their position they have cited several cases in which the Supreme Court has held that the appellant, by his failure to present in his opening brief, or point out in the record, grounds which may exist for the reversal of the judgment, will be deemed to have waived such error and, if presented for the first time in his closing brief, they will not be considered by the court. This, however, is not a right which may be invoked by the respondent, but, as was said in Webber v. Clarke, 74 Cal. 11, 15 Pac. 431: "The court is at liberty to decide the case upon any points that its proper disposition may require whether taken by counsel or not."

While a court might hold that, by failing to point out an error involving the decision or investigation of a controverted question of law, an appellant had thereby waived the right to subsequently urge such error, it does not follow that, if it should be brought to the attention of the court before its judgment had become final, that upon the face of the record the judgment appealed from was in contravention of some statute or of a well-established rule of law, it would not be justified in setting its judgment aside, even though the appellant had not pointed out the objection, or its attention had not been called to the matter until after it had filed an opinion for affirming the judgment. Courts are established for the purpose of protecting individuals in the enjoyment of their rights and vindicating them against wrongs; and it should be the aim of an Appellate Court to prevent the judgments brought before it for review from violating any statute or rule of law defining or establishing those rights. In their answer to said petition the respondents do not controvert the proposition of the appellant that the judgment of the superior court is violative of this rule as defined in the above-named decisions of the Supreme Court; and we cannot assume that they would desire us to affirm a judgment which they concede to be in contravention of the law. Under these principles the petition must be granted.

The judgment heretofore entered herein is set aside, and instead of that the following judgment will be entered: The superior court is directed to set aside its judgment heretofore rendered, and to enter judgment in favor of the plaintiffs and as against the defendant, as of September 16, 1904—the date of its decision—for the sum of $770, said judgment to bear interest from that date at the rate of 7 per cent. per annum.

We concur: COOPER, J.; HALL, J.

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1 Cal. App. 724

GALLETLY v. BOCKIUS.

(Court of Appeal, First District, California. Oct. 10, 1905.)

1. QUIETING TITLE—EVIDENCE—FINDINGS.

Where, at the time of the trial, plaintiff only owned an easement of a right of way over the land in controversy, the fee of which belonged to defendant's grantee, subject to such easement, a finding that plaintiff was the owner and entitled to possession of the land was not sustained by the evidence.

2. EASEMENTS—OWNER OF FEE—RIGHTS.

An owner of the fee of certain land subject to an easement of a right of way held by plaintiff is entitled to use the land, subject to the easement, or dispose of the entire tract, as he may choose, provided such use and disposition are not inconsistent with plaintiff's right of way.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Easements, §§ 114–116.]

3. SAME — SERVIENT OWNER — ADDITIONAL EASEMENTS.

While the owner of a dominant tenement cannot increase the burden of the servient tenement against the will of the owner, yet the latter, by virtue of his right of disposition, is not limited as to the number or character of the easements to which he may subject his land.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Easements, §§ 114–116.]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Charles Galletly against Godfrey M. Bockius. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Joseph H. Skirm, for appellant. Lindsay & Netherton, for respondent.

HARRISON, P. J. Action to quiet title. Judgment was rendered in favor of the plaintiff, and the defendant has appealed.

The land described in the complaint is the southerly 20 feet of a tract of about 40 acres bordering upon the county road from Watsonville to San Jose, and extending easterly therefrom about 1,700 feet, and which, for convenience of reference, is styled herein as "tract A." The plaintiff is the owner of a tract of land, herein called "tract B," contiguous thereto and lying easterly therefrom, and the defendant is the owner of a tract, called herein "tract C," lying southerly from the above tracts and contiguous to each of them. All of the land was at one time owned by John S. Barrett, who, in September, 1884, conveyed to Ascencio Mendia tracts A and B, and in August, 1887, conveyed tract C to the defendant. September 30, 1886, Mendia conveyed tract A to Francisco Mora, with the following reservation in the deed of conveyance: "The party of the first part reserves the right of way 20 feet wide along the boundary line of the within-mentioned tract and lands of J. S. Barrett. Said right of way is to commence at the county road and along the line of lands of Barrett until it reaches the lands of A. Mendia." December 1, 1891, Mendia executed to Mora another conveyance of tract A "to perfect and correct the description" in his former deed, and inserted therein the following: "Said Ascencio Mendia reserves the right of way 20 feet wide along the easterly boundary of the above-described tract and lands of G. M. Bockius. Said right of way is to commence at the county road and continue along the line of lands of said Bockius until it reaches the land of A. Mendia." December 9, 1891, Mora executed to the defendant a conveyance of tract A, "save and except from the above-described tract a right of way 20 feet wide along the eastern boundary thereof reserved by A. Mendia." August 29, 1892, Mendia executed to the plaintiff a conveyance of a tract of land whose description included tracts A and B, excepting therefrom, however, the premises conveyed to Mora by his deed of December 1, 1891. With the title to the land in this condition, the defendant herein in June, 1893, commenced an action in the superior court for Santa Cruz county against the plaintiff herein to quiet his title to tract A, in which judgment was entered March 28, 1895, declaring him to be the owner in fee simple of said tract A, and that the plaintiff herein is the owner of a right of way in the southerly 20 feet of said tract as appurtenant to tract B, and that he has no other right or interest in tract A than said right of way. Subsequent to the entry of this judgment, viz., April 11, 1895, the defendant herein conveyed to one Martinelli tract A, describing the same as the same land conveyed to him by Mora by the aforesaid deed of December 9, 1891, and containing the following reservation: "The said Godfrey M. Bockius hereby reserves for himself, his heirs and assigns, the use of the right of way mentioned in aforesaid deed as an appurtenance to his adjoining premises." The present action was commenced April 11, 1900. At the trial thereof the court found that at the commencement of the action the plaintiff was the owner of and entitled to the possession of the land described in his complaint, and that the defendant had no estate, title, or interest therein, or in any easement or right of way in or over same, and rendered judgment accordingly. Upon the aforesaid evidence it clearly appeared that at the commencement of the action Martinelli was the owner in fee of the land described in the complaint, and that the present plaintiff had only an easement therein of a right of way. The finding, therefore, that he was the owner, and entitled to the possession of the land described in his complaint, is not sustained by the evidence.

This is not seriously controverted by the counsel for the respondent, but he contends that the reservation by the defendant in his conveyance to Martinelli of an easement of a right of way as appurtenant to his adjoining land in land which was already subject to a similar easement held by the plaintiff for another tract of land was unauthorized in law, and therefore void, and that for this reason the error was harmless. No authority has been cited in support of this proposition, and at the argument herein counsel for respondent admitted that he had not been able to find any such authority. It must be borne in mind that, by the reservation in his conveyance to Martinelli, the defendant was not in the position of the holder of a dominant tenement seeking to extend the burden of an easement created for certain lands to other lands for which it had not been created, but was rather in the position of the owner of land already subject to a servitude, and providing for placing an additional servitude thereon. At the time of his conveyance to Martinelli he was the owner in fee of the lands so conveyed, subject to the easement in the southerly 20 feet thereof held by the plaintiff; and as such owner he had the unquestioned right to make such use and disposition of the entire tract as he might choose, provided such use was not inconsistent with the use of the same by the plaintiff for his right of way. Atkins v. Bordman, 2 Metc. (Mass.) 457, 37 Am. Dec. 100; Washburne on Easements, *195. He had the right to use this strip for all purposes of travel and at all times, so long as he did not by such use interfere with or impair the plaintiff's enjoyment of his easement. Wells v. Tolman, 156 N. Y. 636, 51 N. E. 271. If he had conveyed to Martinelli all of tract A lying to the north of the 20-foot strip—retaining for himself the ownership of the remainder—his right, as aforesaid, to use the strip as a passageway to the county road, could not be questioned. As owner of the tract, he had the right to dispose of it as a whole or in subdivisions, and could make such disposition absolute, or qualified, or limited, or with such reservation or exception as might be agreed upon between him and his vendee. We are not aware of any principle of law which precludes the owner of a tract of land from subjecting it, or suffering it to be subjected, to the easement of a right of way in favor of or as appurtenant to different tracts of land, whether the same be owned by the same person or by different persons. While the owner of the dominant tenement cannot increase the burden of the servient tenement against the will of the owner of the latter, yet the owner of the servient tenement, by virtue of his jus disponendi, is not limited in the number or character of the easements to which he may make his land subject. The reservation by the defendant in his conveyance to Martinelli was, therefore, within his right, and Martinelli, by accepting the deed containing such reservation, assented to the servitude thereby imposed upon the land conveyed to him. The plaintiff did not acquire any additional interest in the land, or any further right to its use, by reason of this transaction between the defendant and Martinelli, but the use and enjoyment of the easement by the defendant must be such as will not interfere with the enjoyment by the plaintiff of the easement appurtenant to his land. Herman v. Roberts, 119 N. Y. 37, 23 N. E. 442, 7 L. R. A. 226, 16 Am. St. Rep. 800. The rights of the plaintiff under that easement, as between him and the defendant, are defined in the aforesaid judgment between them, and were not varied by the transaction between the defendant and Martinelli. The superior court, therefore, erred in holding that the defendant has no right or interest in the lands described in the complaint.

The judgment and order denying a new trial are reversed.

We concur: COOPER, J.; HALL, J.

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1 Cal. App. 710

DOWNING v. DONEGAN et al.

(Court of Appeal, Second District, California. Oct. 7, 1905.)

1. Bills and Notes — Actions — Answer — Equitable Defense.

In an action on a note, an answer alleging an agreement between defendant and the payee by which the latter was to redeem certain land belonging to the maker from a mortgage foreclosure sale and hold the land as an additional security for the note and redemption money, and that the payee redeemed the land and sold it for $6,500, which sum was sufficient to satisfy defendant's indebtedness to plaintiff and leave the latter indebted to defendant, was sufficient, in the absence of a special demurrer.

2. Appeal — Issues — Failure to Find—Review.

Where the findings are sufficient to support the judgment and contain nothing inconsistent with it, a failure to find on some issue, a finding on which would simply invalidate the judgment supported by the findings made, was not ground for reversal, in the absence of a statement or bill of exceptions showing that evidence was submitted in relation to such issue.

3. Bills and Notes—Payment—Burden of Proof.

Where the execution and delivery of a note sued on was admitted, but defendant pleaded payment, the burden of proof of such issue was on him.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 1695–1697.]

4. Appeal—Findings—Judgment—Modification.

Where, in an action on a note, the amount found due was $52.16 in excess of the amount shown by the facts found, the error could not be corrected on appeal by a modification of the judgment.

5. Same — Issues — Failure to Find — Presumptions.

Where, in an action on a note, defendants pleaded payment and an equitable defense, and the court filed findings that there was due on the note $1,364.46, thereby fully disposing of the issue of payment in favor of plaintiff, it would be presumed, on appeal from the judgment, in the absence of the statement or bill of exceptions, that no evidence was offered to support such equitable defense on which no finding was made.

Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by H. E. Downing against D. F. Donegan and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Charles H. McFarland, for appellants. Bernard Potter, for respondent.

SMITH, J. Appeal from a judgment for the plaintiff. This is a suit by the assignee of a note of date May 9, 1898, executed by the defendants to one Joyce, the plaintiff's assignor, for the sum of $1,200, with interest at the rate of 8 per cent. per annum from date, compounded quarterly. The complaint alleges that no part of said promissory note, or the interest thereon, has been paid, and that the amount thereof, with interest, is now due and owing from the defendants. The answer denies these allegations, or that there is due to the plaintiff the amount claimed, or any amount, and further alleges that the amount mentioned in the note, with interest, has been fully paid and discharged. There is also what is called a "supplemental and amendatory and additional answer," alleging that the note executed to Joyce was secured by a chattel mortgage upon certain horses, and also setting up the equitable defense stated below. This document, as it is written, is without coherence or sense, by reason of the words "plaintiff" and "plaintiff and his wife" being written therein, instead of the words "defendant" and "defendant and his wife," which were plainly intended. Correcting it in this respect, it appears from the allegations therein contained that certain lands of the defendants mortgaged to one Hawkinson had been sold under foreclosure to the mortgagee, and that there was an agreement between defendant and Joyce for the latter to redeem from the sale, and thus to acquire title and to hold the same as an additional security for the note in suit and the money paid by him for redemption. It is further alleged that Joyce sold the property for the sum of $6,500, which he has kept for his own use. It does not appear what amount was paid by Joyce for the redemption. But it is alleged, in effect, that at the time of the sale the amount due on the note did not exceed the sum of $500, and that the proceeds of the sale were sufficient to satisfy the defendants' indebtedness to the plaintiff, and leave the latter indebted to the former; and, in the absence of special demurrer, this must be regarded as sufficient.

The findings of the court are, in effect, that the note sued on was executed by the defendants to Joyce as collateral security for the payment of a note previously executed to him by the defendant Donegan for the sum of $2,000, of date June 1, 1897; that some months prior to the execution of the note sued on (March 5, 1898), there was an account stated between Joyce and Donegan, showing a balance on the older note of $1,448, bearing interest at the rate of 8 per cent. per annum; "that on the 26th day of November, 1900, the sum of $660, and no more, was paid on account of said amount due, as per said account stated;" and "that the amount of the principal and interest now due and unpaid, according to the terms of said account stated, and the said note sued upon herein, is $1,416.62," for which amount judgment was entered. The several objections urged by the appellants to the judgment are, in effect, that the court has failed to find upon the issues raised by the "amendatory answer," also that it has failed to find on the issue as to payment raised by the original answer, and that the actual findings on which the judgment is based are outside the issues in the case.

As to the issues referred to in the first point, there is obviously no finding; and the only question, therefore, is whether the case is one in which it is to be presumed, in support of the judgment, that there was no evidence on those issues. The rule on this point, as expressed in the leading case—after very careful consideration—is: "The findings must be sufficient to support the judgment, and must contain nothing inconsistent with it; but a failure to find upon some issue, a finding upon which would simply have effect of invalidating a judgment fully supported by the findings made, will not be held ground for reversal, unless it is shown by statement or bill of exceptions that evidence was submitted in relation to such issue." Himmelman v. Henry, 84 Cal. 106, 107, 23 Pac. 1098; Winslow v. Gohransen, 88 Cal. 451, 26 Pac. 504; Dolliver v. Dolliver, 94 Cal. 646, 30 Pac. 4; Southern Pac. R. Co. v. Dufour, 95 Cal. 621, 30 Pac. 783, 19 L. R. A. 92 (Paterson, J.); Estate of Carpenter, 127 Cal. 587, 60 Pac. 162; Eva v. Symons, 145 Cal. 205, 78 Pac. 648. The rule is stated somewhat more broadly in some other cases, but what is said by the court must be construed with reference to the facts involved, which were such as to bring the cases within the application of the rule as originally expressed. Woodham v. Cline, 130 Cal. 499, 62 Pac. 822; De Tolna v. De Tolna, 135 Cal. 578, 67 Pac. 1045; Horwege v. Sage, 137 Cal. 539, 70 Pac. 621. The rule is to be understood, therefore, as applying only to cases where there are findings sufficient to support the judgment. Nor can it well be carried further without abrogating altogether the provisions of sections 632 and 634 of the Code of Civil Procedure, and restoring the law to what it was under the statutory provisions previously existing, which those sections were enacted to repeal. Prac. Act, § 180.

The actual question involved, therefore, is whether there is a sufficient finding on the issue of payment made by the allegations of the complaint and the denials of the answer—the other allegations of the complaint being admitted. On this issue, indeed, the burden of proof was on the defendants, but it will be assumed for the purposes of this decision that a finding upon the issue was necessary. Estate of Carpenter, 127 Cal. 587, 60 Pac. 162. On this question the findings are somewhat complicated; but it is found, in effect, that the only payment made upon the note in suit was the sum of $660, paid November 26, 1900, on the original indebtedness. For this the note in suit was given as collateral, and all that can be recovered is the principal debt. Calculating the amount due upon this, with simple interest at 8 per cent. per annum to the date of credit, the amount due thereon, and consequently on the note in suit, would be $1,103.34; and this, with simple interest at the rate of 8 per cent. per annum, would amount at the date of the finding to the sum of $1,364.46, which is $52.16 less than the amount found to be due. The issue of payment seems, therefore, to have been fully disposed of. The amount found to be due, indeed, is $52.16 in excess of the amount shown by the facts found, but this error can be cured by modifying the judgment. With regard to the equitable defense set up, it must be presumed, therefore, there was no evidence offered to support it.

As to the third point, the findings seem to touch upon points outside of the issues, but the facts found are pertinent to the ultimate issue as to payment, and all that can be objected to them is that the court, or the counsel who drew them, pursued an unnecessarily roundabout way of disposing of that issue.

The case is remanded to the lower court, with directions to modify the judgment as above indicated; and as thus modified it will stand affirmed.

I concur: ALLEN, J.

GRAY, P. J. I concur in the judgment for the following reasons: The due execution of the note in suit, and its assignment to plaintiff, and that the latter is the "owner and holder" thereof, is admitted by the defendants' failure to deny the same. Inasmuch as the execution of the note and ownership in plaintiff were admitted by the pleadings, if the case had been submitted without any evidence the plaintiff would have been entitled to a judgment for the principal and interest of his note. The burden was on defendants to prove their affirmative defense as to the trust fund. It was also on them to prove their affirmative defense of payment. It is held that while the plaintiff must allege nonpayment in his complaint, yet he need not prove this negative allegation, but the defendant must prove payment, if he relies upon it as a defense. The admission of the execution and ownership of the note established an indebtedness, and such indebtedness would be presumed to continue until it was shown to have been extinguished. Melone v. Ruffino, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127; Thompson v. Thompson, 140 Cal. 545, 74 Pac. 21. There being no evidence in the record, it is impossible for us to determine whether payment or the other affirmative defense was established at the trial, and, unless we can determine from the record that there was evidence given necessitating findings in defendants' favor upon those defenses, we cannot disturb the judgment for want of such findings. It will be presumed in support of the judgment that there was no evidence offered in support of those affirmative defenses. De Tolna v. De Tolna, 135 Cal. 575, 67 Pac. 1045; Woodham v. Cline, 130 Cal. 497, 62 Pac. 822; Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504. "The rule, then, is that an appellant from a judgment against him in the court below will not be heard to complain that the court failed to find upon some issue tendered by him, unless he brings up the evidence, and thereby shows that he litigated that issue in the trial court and introduced evidence upon the issue which would have justified a finding in his favor. One reason for this rule is that, since he had the affirmative upon that issue, if he introduced no evidence, the finding would necessarily have been against him, and therefore he is not injured by the failure of the court to make a finding." Estate of Carpenter, 127 Cal. 587, 60 Pac. 162; Eva v. Symons, 145 Cal. 202, 78 Pac. 648. Of course, a finding as to what was "due on the note" would have been a mere conclusion of law, and entirely unnecessary. The amount due is a mere matter of calculation on the face of the note, the due execution of which and assignment to and consequent ownership in the plaintiff have been admitted by the pleadings. Of course, the defendants cannot be heard to complain that the judgment against them is for less than such computation shows to be due.

Appellants also complain that the findings of the court were entirely outside the issues, and this seems to be the fact. But such findings should be entirely disregarded, and cannot be ground for reversal. The judgment is within the case as made by the complaint, and rests for support on the admission of the answer that the note was duly executed and is now in the hands of the plaintiff as the owner thereof; and these findings outside the issues are entirely unnecessary to the support of the judgment, and may be treated as mere surplusage.

I am therefore of opinion that the judgment should be affirmed as it stands, and upon this, I concur in the judgment as reduced, upon the theory that the greater includes the less.

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2 Cal. App. 6

McCOLGAN et al. v. MUIRHEAD et al.

(Court of Appeal, First District, California. Oct. 17, 1905.)

1. CONTRACTS — INCAPACITY OF PARTIES — PLEADING.

Where, in an action on a judgment against defendant's testator, recovered pursuant to an arrangement between him and plaintiff and another, that on obtaining the judgment plaintiff should sue for the vacation of a deed of trust made by testator, the answer alleged that testator in February, 1893, and for a long time prior thereto, was improvident and addicted to the constant use of intoxicating liquors, and was thereby incapable of transacting business, it sufficiently alleged that he was so addicted and was incapable of transacting business on the 1st day of February, 1893, on which the arrangement was made.

2. SAME—PARTIES—"IN PARI DELICTO."

Defendant's testator, who was an inebriate, executed a note to his own order and deposited it with W. for discount. Shortly thereafter he also executed a deed of trust on certain real estate, and, the note never having been discounted, while he was incapable of transacting business and for the purpose of invalidating the deed of trust, he consented to deliver the note to plaintiff and another without consideration, that they as creditors might sue to set aside the deed of trust as a fraud on testator's creditors. Judgment was recovered on the note against testator, but the deed of trust was not set aside. *Held*, that testator was not in pari delicto with the assignees of the note, so as to preclude his executors from denying the validity of the judgment thereon as a claim against his estate.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 681–685.]

3. LIMITATION OF ACTIONS—FRAUD.

Code Civ. Proc. § 338, subd. 4, providing that an action for relief on the ground of fraud is barred within three years, does not apply to fraud pleaded as an equitable defense against a judgment which was without consideration, though the court rendering the same had jurisdiction.

Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by R. McColgan and another against Louisa M. Muirhead and another, as executrix and executor of the estate of C. Walter Willey, deceased. From an order sustaining a demurrer to defendants' answer, they appeal. Reversed.

Rehearing denied November 16, 1905.

Charles W. Slack and Timothy J. Lyons, for appellants. E. M. Massey, for respondents.

COOPER, J. This is an action to recover upon a judgment obtained by plaintiff McColgan, who has assigned an undivided half of said judgment to plaintiff Athearn, against C. Walter Willey, in the superior court of the city and county of San Francisco, on the 14th day of March, 1893, for the sum of $1,076.70. Willey died in January, 1898, and the defendants are the executor and executrix of his last will. The judgment was duly presented as a claim properly verified, and was rejected. The defendants answered, and in their answer, as a defense only, alleged in substance: That on October 11, 1892, Willey made his promissory note of even date, payable to his own order, for $1,000 with interest thereon at the rate of 5 per cent. per month, from maturity, indorsed it, waiving demand and protest, and delivered it to one Welch for the purpose of having it negotiated, but it was not negotiated, and Welch retained possession of it until February, 1893. On the 28th day of October, 1892, the said Willey, jointly with one Amasa P. Willey, each owning an undivided one-half thereof, executed and delivered to William Boericke a deed of conveyance of certain real estate upon the trusts therein expressed, the said real estate being fully described in the answer. The answer further alleges: "That the said C. Walter Willey attained his majority on the 24th day of September, A. D. 1892; that the said C. Walter Willey, in the month of February A. D. 1893, and for a long time prior thereto, was improvident and addicted to the constant and excessive use of intoxicating liquors, and was thereby incapable of transacting business; that on or about the 1st day of February, A. D. 1893, the said McColgan and Athearn, for the purpose and with the intent of unjustly obtaining from the said C. Walter Willey the property so conveyed by him, as aforesaid, by taking advantage of his said condition and of his pecuniary necessities, proposed to the said C. Walter Willey that the said instrument above set forth should be procured from the said Welch by the said McColgan, and that an action should be instituted thereon by the said McColgan against the said C. Walter Willey, in which said action a judgment should be obtained by the said McColgan against the said C. Walter Willey, and that after such judgment should be thus obtained, another action, based upon such judgment, should be instituted by the said McColgan against the said C. Walter Willey and the said Boericke to attack and set aside the said deed of conveyance as fraudulent and void as against the creditors of said C. Walter Willey, but that the said instrument above set forth and the said judgment should not be otherwise made use of, and thereupon the said McColgan and Athearn, taking advantage of his said condition and of his pecuniary necessities, and for the purpose and with the intent aforesaid, induced the said C. Walter Willey to assent to the said proposal." That accordingly the said note was, without consideration, delivered to said McColgan, who thereupon, on February 15, 1893, commenced an action against Willey upon the same, and, upon Willey making default, judgment was entered against him, being the judgment upon which this action is brought; that after McColgan procured the said judgment against Willey he had execution issued thereon, which was returned unsatisfied, and, as a creditor of Willey, he brought an action in the superior court of the city and county of San Francisco for the purpose of attacking and setting aside the said trust deed to Boericke, as being fraudulent and void against the creditors of Willey; that McColgan did not succeed in setting aside said trust deed in said action, but judgment was entered in favor of Boericke for his costs. The prayer of the answer is, that plaintiffs take nothing, and that defendants recover their costs. Plaintiffs demurred to the answer, upon the grounds that it does not state facts sufficient to constitute a defense to the complaint and that the defense therein alleged is barred by section 338, subd. 4, Code Civ. Proc. The trial court sustained the demurrer, and judgment was entered in favor of plaintiffs. Defendants prosecute this appeal from the judgment, and contend that the court erred in sustaining the demurrer. The facts stated in the answer must be conceded to be true for the purpose of passing on the demurrer.

It is urged by plaintiffs' counsel that the answer does not allege that the said Willey was incapable of transacting business, as a result of the excessive and constant use of intoxicating liquors at the time of making and entering into the arrangement with McColgan, which is alleged to have been "on or about the 1st day of February, A. D. 1893," and hence that Willey was in pari delicto in making the agreement with McColgan. The language of the answer is that "the said C. Walter Willey, in the month of February, A. D. 1893, and for a long time prior thereto, was improvident and addicted to the constant use of intoxicating liquors, and was thereby incapable of transacting business." It would be a somewhat technical construction to hold that "for a long time prior to the month of February and in the month of February" does not mean during the month of February, and include the date referred to as to the making of the contract. Particularly would this be so where the demurrer is general, and no suggestion therein as to uncertainty. However, we do not deem it essential that we should pass on the question, for the reason that the defendants' testator was not in pari delicto. The rule that a party to a fraudulent transaction is not entitled to any relief applies only when the parties are in pari delicto. In the transaction detailed in the answer it does not appear that Willey intended to wrong any one. He wanted the land back that he had conveyed to Boericke, and hence desired to destroy the trust that he had created for his own benefit. His only object in giving McColgan the status of a creditor was so that he might be in a position to attack the conveyance to Boericke. It does not appear that he had any creditors. McColgan certainly was not a creditor, although Willey had agreed to let him sue upon the note and get judgment so as to assume the status of a creditor. It does not appear that there was any intent to defraud any one, and if any one was to be defrauded it was Willey himself. The purpose was similar to that of a fine or common recovery at common law. The object of Willey in allowing the judgment to be taken failed. Now the plaintiffs contend, by the demurrer, that they, having obtained said judgment with the avowed purpose of assisting a weakling, without consideration, can make it the basis of a claim against the estate. McColgan proposed to Willey that he allow him to obtain the judgment, and that he could thus attack and set aside the trust deed. He promised Willey that the judgment "should not otherwise be made use of." The courts will see, if the alleged facts are true, that plaintiffs do not use it in order to take the funds of the estate, without consideration, and thus take advantage of their own wrong. "The rule that a debtor is not entitled to any relief against a fraudulent conveyance only applies when the parties are in pari delicto. It is founded on principles of public policy for purposes of justice and can never be made the means of sustaining an injustice. If the debtor, therefore, acts under circumstances of oppression, imposition, or undue influence, so that it appears that his guilt is subordinate to that of the grantee, equity will grant relief, not on account of any right in the debtor, but for the purpose of preventing a greater fraud by the grantee. The parties although in delicto are not in pari delicto, and a remedy is given on the ground of mala fides in the grantee and the necessity of preventing imposition." Bump on Fraudulent Conveyances (3d Ed.) § 436, and cases cited. The rule was applied in Donnelly v. Rees, 141 Cal. 58, 74 Pac. 433, where the deed was made with the avowed purpose of defrauding creditors, but by a man who had been for many years addicted to the excessive use of intoxicating liquors, and was persuaded and unduly influenced by greater force of character to make the conveyance without consideration. In support of the rule, see further, Vitoreno v. Corea, 92 Cal. 69, 28 Pac. 95; 1 Story's Eq. § 300; Prewett v. Coopwood, 30 Miss. 369; Beale v. Hall, 22 Ga. 431; 14 Am. & Eng. Ency. of Law (2d Ed.) p. 279, and cases cited.

This brings us to the second question as to whether or not the defense is barred by subdivision 4, § 338, Code Civ. Proc., which provides that an action for relief on the ground of fraud is barred within three years. The note was given and the judgment thereon entered more than three years before the commencement of this action, and hence, if the provision of the section applies to a defense, the demurrer was properly sustained. If the defense in such case is barred in three years we would have the peculiar condition of the law that a judgment obtained by fraud and without consideration may be successfully defended for a period of three years, but for the two years thereafter no such defense could be made. We are of opinion that the statute does not apply to fraud relied upon purely as a defense where no affirmative relief is sought by the defendant. If the judgment was procured by fraud and without consideration a court of equity will grant relief. It will grant relief by allowing the facts which will vitiate the judgment to be alleged and proven as a defense to it, and this as long as the judgment is the foundation for the suit. So long as the plaintiff is allowed to come into court, seeking to enforce such judgment, the defendant may allege and prove the fraud as a defense. The defendants' affirmative action for relief on the ground of fraud is barred, but the judgment does not become, by age alone, immune from the infirmities under which it originated. In Hart v. Church, 126 Cal. 479, 58 Pac. 913, 77 Am. St. Rep. 195, the court said: "It is also true that where a party seeks relief upon the ground of fraud or mistake, the action must be commenced within three years after the discovery of the facts constituting the fraud or mistake; but a different case is presented when the party who has procured the fraudulent contract, or who seeks to take advantage of it, asks to have it declared valid or to enforce its executory terms, and is thus himself asking affirmative relief. The three-years statute of limitations does not bar the defendant in such a case from objecting to the validity or to the enforcement of the contract upon the ground of fraud. It is not incumbent upon one who has thus been defrauded to go into court and ask relief, but he may abide his time, and when enforcement is sought against him excuse himself from performance by proof of the fraud." Hart v. Church was quoted with approval in Evans v. Duke, 140 Cal. 28, 73 Pac. 734, where it is said: "Fraud vitiates all things, and if by reason of fraud in this case there has been a total or partial failure of consideration, the defendant who, by his conduct, has elected to stand by his contract, would be entitled to be relieved from payment to the extent of his damage by the fraud; that is to say, to the extent of the failure of the consideration." The same rule has been followed in South Carolina (Amaker v. New, 33 S. C. 28, 11 S. E. 386, 8 L. R. A. 687; Jackson v. Plyler, 38 S. C. 497, 17 S. E. 255, 37 Am. St. Rep. 782) and in Indiana (Wilhite et al. v. Hamrick, 92 Ind. 594; Robinson et al. v. Glass, 94 Ind. 211).

Plaintiffs rely upon Carpentier v. Oakland, 30 Cal. 444, and Swasey v. Adair, 88 Cal. 179, 25 Pac. 1119, as holding to the contrary. Language is used in Carpentier v. Oakland to the effect that where it appears that the fraud set up as a defense was actually committed more than three years before the filing of an answer, the answer will be had on demurrer; but the question was not before the court, as no equitable defense was pleaded as in this case. It is said in the opinion: "In this case the plaintiff filed no demurrer to the defense of fraud, doubtless for the reason that counsel for the defendant claimed that the fraud alleged by him was a legal and not an equitable defense, and therefore unaffected by the statute of limitations. * * * Counsel for the defendant does not claim that he has an equitable defense, but on the contrary contends that it is a legal defense, and that the court erred in not allowing him to prove it as such. We accept the theory of counsel, and shall therefore confine ourselves to the simple question as to whether, at common law, in an action of debt upon a judgment of a court of general jurisdiction, the defendant could show fraud, or a want of jurisdiction aliunde." In the case at bar no such simple question is before us. Relief is asked as an equitable defense against a judgment which was obtained by fraud and without consideration, although the court had jurisdiction. In Swasey v. Adair the question was as to whether or not the defendant was entitled to a jury trial. The court below had denied a jury upon the ground that the defense set up was an equitable defense. The language of the court to the effect that in pleading an equitable right of action as a defense it must be of such a character as may be ripened into a decree in defendant's favor, was said by way of argument for the purpose of showing that the answer did not contain an equitable defense. The court, in the language used, evidently had in mind such an equitable defense as would entitle defendant to affirmative relief, and when applied to such a case the statements in the opinion are correct. The question of the statute of limitations was not raised nor discussed in the case.

It follows that the court erred in sustaining the demurrer. The judgment is reversed.

We concur: HARRISON, P. J.; HALL, J.

1 Cal. App. 733

HOOPER v. McDADE et al.

(Court of Appeal, First District, California. Oct. 13, 1905.)

1. PROCESS—RETURN—DEFINITION.

A sheriff's return to a writ is an official statement by him of his acts under the writ in obedience to its directions and in conformity with law, and must show compliance with such directions and requirements, or a sufficient reason for any noncompliance in whole or in part.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Process, § 164.]

2. MORTGAGES—FORECLOSURE SALE—RETURN OF SHERIFF.

Pol. Code, § 4176, requires a sheriff to serve all process as provided by law and to certify the manner of service, etc.; section 4175 declares that "process" includes all writs, summons, and orders of courts of justice; and Code Civ. Proc. § 684, provides that when the judgment requires the sale of property it may be enforced by the proper officer by making a sale and applying the proceeds in conformity therewith. *Held*, that where a foreclosure decree directed a sale of the mortgaged premises, and that out of the proceeds a sum specified should be paid to the plaintiff in the foreclosure, and from the surplus should be paid to H. a specified sum, but, if there was not a sufficient surplus, the clerk should docket a judgment in favor of H. for the deficiency, the sheriff, on making a sale for an amount only sufficient to pay the foreclosure plaintiff and the costs, was not bound to include in his return a statement that the proceeds of the sale were insufficient to make the payment to H. and the amount of the deficiency.

3. SAME—DEFICIENCY JUDGMENT.

Where a mortgage foreclosure decree provided for a sale of the mortgaged premises and a payment of the amount found due to the foreclosure plaintiff from the proceeds, and $659.88 to H. out of any surplus, with the right to H. to docket a judgment against the other defendants for any deficiency, the sheriff's failure to state in his report of the sale that the proceeds were insufficient to pay H. any portion of the amount decreed in his favor, and to specify the amount of such deficiency, did not preclude H. from having such deficiency docketed against his judgment debtors.

4. SAME—ENTRY OF DEFICIENCY JUDGMENT—DUTY OF CLERK.

Code Civ. Proc. § 726, providing that, if it appear from a sheriff's return that the proceeds of a mortgage foreclosure sale are insufficient to pay the judgment, judgment can then be docketed against the defendant for the balance, which will become a lien as in other cases, does not make it the duty of the clerk to docket a deficiency judgment, on a sheriff's report showing such deficiency, without any request so to do from the parties in interest.

5. SAME—RIGHT TO JUDGMENT.

A mortgage foreclosure decree directed a sale and an application of the proceeds to pay a specified amount to the plaintiff in foreclosure, and $659.88 surplus, if any, to H., and, if there was an insufficiency of surplus, that H. should have judgment for the deficiency against the other defendants. The sheriff sold the property, and returned that the sale had been for an amount sufficient, after deducting fees and expenses, to pay "to the plaintiff the amount directed to be paid to it," and that he had applied the same in full satisfaction of the decree of foreclosure, according to the receipt of plaintiff's attorney indorsed thereon, which was "in full satisfaction of the within." *Held*, that the return, in connection with the judgment and order of sale, showed a deficiency in favor of H. on its face, which entitled H., at any time after the return was filed, to have a judgment docketed therefor.

Appeal from Superior Court; City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by George W. Hooper against John J. McDade and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Rehearing denied November 13, 1905.

Sullivan & Sullivan, for appellants. W. F. Sawyer, for respondent.

HARRISON, P. J. The plaintiff seeks by this action to recover damages alleged to have been sustained by reason of the failure on the part of the defendant McDade to perform certain acts as sheriff of the city and county of San Francisco. The other defendants are sureties upon the official bond of McDade. In an action in the superior court for the city and county of San Francisco for the foreclosure of a mortgage, in which the Western Loan Association was plaintiff and Flavien Vanderveken and others (including George W. Hooper, the plaintiff herein) were defendants, judgment was rendered that the mortgaged premises be sold by the sheriff, and that out of the proceeds of the sale he pay to the plaintiff the amount found due to it (specifying said amount), and that out of the surplus after making such payment, if any there should be, he should pay to the defendant Hooper the sum of $659.88, or so much thereof as the balance of said surplus would pay; and that if the said balance should be insufficient to pay said amount to Hooper the sheriff should specify the amount of such deficiency in his return of said sale, and that the clerk docket a judgment for such deficiency against the other defendants in the action, and that Hooper have execution therefor. An order of sale directed to the sheriff of said city and county of San Francisco, was delivered to the defendant McDade as such sheriff, attached to a copy of said judgment, in which he was directed to sell the said lands and apply the proceeds of the said sale "as in said judgment directed," and to make and file his report of said sale within 60 days after his receipt thereof, and to do all things according to the terms and requirements of said judgment and the provisions of the statute in such case made and provided. After executing this order of sale the sheriff returned the same to the clerk of the court with a report of his doings indorsed thereon, in which he stated that he had sold the lands for an amount of money sufficient, after deducting his fees and the expenses of sale, to pay to the plaintiff the amount directed to be paid to it, and that he had applied the same "in full satisfaction of the annexed order of sale and decree of foreclosure as will more fully appear by the receipt of the plaintiff's attorney indorsed thereon." Indorsed upon the order of sale was the receipt of the plaintiff's attorney of this amount of money "in full satisfaction of the within"; and also a certificate of the sheriff in the following words, viz.: "I hereby certify that I have this 17th day of September, 1894, returned the within order of sale and decree, etc., fully satisfied at the city and county of San Francisco." The plaintiff claims that the sheriff, in the report of his sale of the land, falsely and in violation of his duty as sheriff, certified that he had returned the order of sale fully satisfied; and that his failure to certify in said return that the proceeds of the sale were insufficient to satisfy the judgment in favor of Hooper, and his failure to specify the amount of such deficiency, were in violation of his duty as such sheriff, and that by reason thereof no judgment for any deficiency was docketed against the other defendants; that in January, 1896, one of said defendants became the owner of certain real property in San Francisco, and that a deed to her therefor was recorded on February 14, 1896, and that a few days thereafter the property was sold and conveyed by said defendant; that had the sheriff made a truthful and proper return upon such order of sale, and specified the amount of the deficiency of the proceeds for the payment of the judgment in favor of Hooper, the latter would have had the judgment for such deficiency docketed against said defendants, and would have been able to satisfy the same out of the property subsequently conveyed to one of them as aforesaid; that the said defendants are insolvent; that by reason of the aforesaid violation of his duties as sheriff in making a false return of said order of sale and in failing to specify the amount of the deficiency judgment, the plaintiff herein has sustained damages to the extent of said judgment. Upon the trial of the case the court held in accordance with the aforesaid claim of the plaintiff, and rendered judgment in his favor for the sum of $350—the value of the land conveyed to and sold by the other defendant in February, 1896. From this judgment the defendant has appealed.

Although this action is styled by counsel an action against the sheriff for a false return the gravamen of the plaintiff's cause of action is to recover damages sustained by him by reason of the failure or neglect of the sheriff to perform an official duty. See Raker v. Bucher, 110 Cal. 214, 34 Pac. 654, 849. The return of a sheriff to a writ is an official statement by him of the acts done by him under the writ in obedience to its directions and in conformity with the requirements of law, and must show a compliance with such directions and requirements, or a sufficient reason for any noncompliance either in whole or in part. Freeman on Executions, § 355. His statement or silence with reference to any fact which his official duties do not require him to make, or his opinion as to the legal effect of his acts, whether correct or erroneous, does not form any part of his return, and will not affect the rights of any party to the action; and if incorrect or erroneous will not constitute a false return. The false return for which a sheriff is liable is one that is false in fact as distinguished from a correct return of the acts actually done by him, though in violation of his duty. See Lemit v. Mooring, 30 N. C. 312. The neglect with which the sheriff is charged in this action is his failure to specify in his return of sale the amount of the deficiency of the proceeds thereof to satisfy the judgment of the plaintiff herein. If the act which he has thus neglected or omitted to perform was a part of his official duty, and the plaintiff has sustained damage by reason of such omission, he and his sureties are liable therefor. If, on the other hand, he was under no obligation to perform the act the plaintiff has no right of recovery. Whether he is liable by reason of his certificate indorsed upon the order of sale that he returned the same fully satisfied, or the statement in his report that by reason of his acts the order of sale and decree of foreclosure were fully satisfied, depends upon whether he was authorized to make such certificate or determination of that question.

The duties of a sheriff are defined in section 4176 of the Political Code to be to "* * * (8) serve all process and notices in the manner provided by law; (9) certify under his hand upon process or notices the manner and time of service, or, if he fails to make service, the reasons of his failure, and return the same without delay." By section 4175 "process" includes all writs, summonses, and orders of courts of justice. Section 684, Code Civ. Proc., provides: "When the judgment requires the sale of property the same may be enforced by a writ reciting such judgment or the material parts thereof, and directing the proper officer to execute the judgment by making the sale and applying the proceeds in conformity thereof." The directions statutory to a sheriff for the execution of an order for the sale of property in satisfaction of a lien thereon and his corresponding authority and duty are not the same as those prescribed for the execution of a money judgment. In the latter case the writ of execution "must require the sheriff to satisfy the judgment" out of the property of the judgment debtor, and under this direction he has authority to take any property of the debtor within his bailiwick; and by virtue of this fact and his authority to "satisfy" the judgment it is held that upon his return that he had "satisfied" it he is estopped from disputing the receipt by him of the money called for in the judgment. Under an order of sale like the one in the present case the authority of the sheriff extends only to making a sale of the property therein described, and the payment of the proceeds of said sale "as in said judgment directed," and reporting the manner and time of making such sale and payment. Whether by such payment the judgment in favor of those to whom the payment was to be made would be satisfied is to be determined by rules of law applicable thereto, and not by the opinion or statement of the sheriff. It must be held, therefore, that, as he was not clothed with any authority to determine this question, his statement in his report of sale in reference to the satisfaction of the judgment, as well as his similar indorsement on the order of sale, was extraofficial, and did not constitute a violation or breach of his official duty, or have any effect on the rights of the parties to the action. It may be added that the statement in his report that he had applied the proceeds of the sale in full satisfaction of the decree of foreclosure "as will more fully appear by the receipt of the plaintiff's attorney indorsed thereon" shows by this reference that he did not intend to include the judgment in favor of Hooper, since the plaintiff's attorney had no authority to acknowledge satisfaction of the judgment in his favor. There is no statutory provision requiring the sheriff to state in his report whether the proceeds of the sale were insufficient to make the payments therein directed, and, if so, the amount of such deficiency; and in the absence of such provision his failure to make such statement cannot be regarded as a breach of his official duty. Such fact cannot be ascertained until after he has executed the writ by a sale of the property and made the application of the proceeds thereof, and forms no part of his report of the facts touching the time and manner of its execution. The ascertainment whether there is a deficiency, as well as its amount, is a mere matter of clerical computation to be made after the sheriff has returned the writ, and in the absence of statutory authority cannot be imposed upon him as a part of his ministerial duties in executing the writ.

The failure of the sheriff to state in his report that the proceeds of the sale were insufficient to pay to Hooper any portion of the judgment in his favor, and to specify the amount of such deficiency, did not preclude Hooper from having such deficiency docketed against his judgment debtor. The right of a judgment creditor to have a judgment docketed for a deficiency is not concluded by the sheriff's failure to state that there is a deficiency if its appears from the facts set forth in his report that such deficiency exists. Nor is the party entitled to a judgment for a deficiency bound by the amount which the sheriff may specify in his return. Even if it be the fact, as stated by the plaintiff in his complaint, that if McDade had specified the deficiency in his return he would have had a judgment therefor docketed against his judgment debtor, it does not follow that it was a part of the sheriff's official duty to specify such deficiency. The plaintiff does not state that such docketing would have been made without his application therefor; and as he knew that he had received none of the proceeds of the sale he was thus informed that there was a deficiency for which he was entitled to have a judgment docketed. There is no provision of law which makes it the duty of the clerk, when the sheriff files the report of his sale showing a deficiency of proceeds, to docket a judgment for such deficiency without any request so to do from the party interested. Section 726, Code Civ. Proc., as it read at the time of these transactions, declared: "If it appear from the sheriff's return or from the commissioner's report that the proceeds are insufficient and a balance still remains due judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien on the real estate of such judgment debtor as in other cases, on which execution may be issued." The same provision was contained in section 246 of the old practice act, and in Leviston v. Swan, 33 Cal. 480, the court said: "Of what the judgment in a foreclosure case shall consist is declared in the 246th section of the practice act. All that it needs or should contain is a statement of the amount due the plaintiff, the designation of the defendants who are personally liable for the payment of the debt, and a direction that the mortgaged premises, or so much thereof as may be necessary, be sold according to law, and the proceeds applied to the payment of the expenses of the sale, the costs of the action and the debt. Nothing further is required. All else is ministerial, and is expressly regulated by the statute, which is not made clearer or more binding by being copied into the judgment. * * * If it appears from his report that the amount due the plaintiff has not been fully paid by the sale the clerk then dockets the judgment for the balance due against those defendants named in the judgment as being personally liable for the payment of the debt without any order from the court." The judgment creditor may at any time present to the clerk or to the court the sheriff's report, showing that it appears therefrom that the judgment has not been fully satisfied, and procure from that officer an entry docketing a judgment for the deficiency. That a deficiency in the present case did exist in favor of Hooper appears upon the face of the sheriff's return when read in connection with the order of sale and the judgment to which it is attached, and it was in the power of the plaintiff at any time after the return was filed to have a judgment therefor docketed. Instead of making an application therefor, it appears by his complaint that he did not ascertain the character of the return until nearly 18 months after it had been filed with the clerk.

The judgment is reversed.

We concur: COOPER, J.; HALL, J.

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2 Cal. App. 1

NOLAN v. FIDELITY & DEPOSIT CO.

(Court of Appeal, First District, California. Oct. 17, 1905.)

1. JUSTICES OF THE PEACE—EXECUTION—STAY BOND—ACTIONS—COMPLAINT.

Code Civ. Proc. § 974, authorizes any party dissatisfied with the judgment "rendered" in a civil action in a justice court to appeal therefrom within 30 days after the "rendition" of the judgment, and section 975 declares that, when a party appeals to the superior court on questions of law alone, he must, within 10 days after the "rendition of the judgment," prepare a statement of the case, etc. *Held* that, where the complaint in an action on a stay bond given on appeal from a justice's judgment alleged that the judgment was "rendered," etc., the complaint was not objectionable for failure to allege that judgment was "duly made and given," etc.

2. PLEADING—DEFECTIVE COMPLAINT—AIDER BY ANSWER.

Where defendant did not demur to a complaint on a bond given to stay a justice's judgment, but answered, alleging the bringing of the action, and that thereafter such proceedings were had that on a date specified the justice court "gave, made, and entered its judgment," etc., the answer cured an alleged defect in the complaint in alleging that "judgment was rendered," etc., instead of that "judgment was duly made and given," etc.

3. JUSTICES OF THE PEACE—APPEAL BOND—DELIVERY.

Where a bond sued on, given to perfect an appeal from a justice of the peace, was produced at the trial by the justice's deputy clerk, and was found among the papers of the proper action in the custody of the clerk of the justice court, and the justice's docket entries disclosed that the bond had been filed, such facts justified a finding that the bond had been delivered.

4. SAME—EVIDENCE—DISMISSAL OF APPEAL.

In an action on a bond given on appeal from a justice of the peace, the order of the superior court dismissing the appeal was properly admitted in evidence.

5. SAME—EVIDENCE.

In an action on a bond given on an appeal from a justice of the peace, the admission in evidence of the order of the superior court dismissing the appeal was proper.

6. SAME.

In an action on a bond given on appeal from a justice of the peace, a judgment roll in another action, in which the time for appeal had not expired, was properly excluded.

7. SAME—DEFENSES—PLEADING.

Where, in an action on a bond given on appeal from a justice of the peace, no estoppel on the ground that plaintiff had procured the issuance of a writ of execution on the judgment after the giving of the bond was pleaded in the answer, nor any facts alleged suggesting an estoppel on such ground, defendant was not entitled to rely thereon as a defense.

8. SAME—DEFENSES—MOTION TO DISMISS APPEAL.

Where a motion to dismiss an appeal from a justice's judgment was made on the ground that the notice of appeal and undertaking were not filed within 30 days after rendition of the judgment, and because of appellant's failure to prosecute its appeal, and it did not appear that any objection was ever made that either the notice or the bond were never filed, such motion constituted no defense to an action on the bond.

9. SAME—BREACH OF BOND.

Where one of the conditions of a bond given on appeal from a justice's judgment was that, if the appeal should be dismissed, the sureties would pay the judgment and costs, the sureties assumed the risk that the appeal might be erroneously dismissed.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by L. Nolan against the Fidelity & Deposit Company. From a judgment in favor of plaintiff on an undertaking given to stay execution of a judgment of a justice's court, defendant appeals. Affirmed.

Rehearing denied by Supreme Court, December 15, 1905.

W. C. Cavitt, C. A. Elliott, and D. E. Alexander, for appellant. Louis S. Beedy and John T. Pidwell, for respondent.

HALL, J. This is an appeal from a judgment in favor of plaintiff in action on an undertaking given to stay execution of a judgment of the justices' court rendered in an action in which respondent was plaintiff. The record before us consists of the judgment roll and a bill of exceptions.

The first point made in the brief of appellant is that the complaint does not state a cause of action, for the reason that the judgment of the justices' court is not sufficiently alleged, in that it is simply alleged that "judgment was rendered," etc., instead of "judgment was duly made and given," etc. There is no merit in this point. This is not an action on the judgment, where the judgment must be pleaded as the foundation of the plaintiff's cause of action, but it is an action on a stay bond given on an appeal from a judgment, and the rendition of the judgment is pleaded only by way of inducement to the giving of the bond. The section of the Code (Code Civ. Proc. 974) which authorizes the appeal contains these words: "Any party dissatisfied with a judgment rendered in a civil action in a police or justices' court may appeal therefrom to the superior court of the county at any time within thirty days after the rendition of the judgment." And the next section provides that "When a party appeals to the superior court on questions of law alone, he must, within ten days from the rendition of the judgment prepare a statement of the case," etc. It is the rendition of the judgment which authorizes the appeal, and not the fact that the judgment has been "duly made and given." Indeed, an appeal is often taken for the very reason that it is claimed by the appealing party that the judgment was not duly made and given. It not infrequently happens that the point raised on the appeal is that the justices' court had no jurisdiction either of the parties or of the cause of action, but, no matter what the point raised on appeal, the condition of the stay bond is that the appellant will pay the amount of the judgment appealed from and all costs, if the appeal be withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against him in the action in the superior court. Code Civ. Proc. § 978. Furthermore, defendant did not demur to the complaint, but answered thereto, and by its answer set forth the bringing of the action by plaintiff in the justices' court against the defendant for money had and received in the sum of $299, and "that thereafter such proceedings were had therein that on the ——— day of March, 1902, the said justices' court gave, made, and entered its judgment," etc., and thus remedied the defect, if any there be, in the complaint. "When the plaintiff has failed to state material facts so that no cause of action is set forth, but these very facts are supplied by the averments of the answer, the omission is immaterial and the defect cured." Shively v. Semi-Tropic Co., 99 Cal. 259, 33 Pac. 848. The court did not err in finding "that on the 10th day of March, 1902, judgment was duly given, and made and rendered by the justices' court," etc., as this finding is supported by allegations of the complaint not denied, supplemented by affirmative allegations of the answer. Riverside Land, etc., Co. v. Jensen, 73 Cal. 550, 15 Pac. 131.

Appellant contends that finding 3, that the Pacific Debenture Company appealed to the superior court of the city and county of San Francisco, state of California, from the said judgment, is not sustained by the evidence, and attacks the sufficiency of the docket entries of the action, but, in addition to the docket entries, there were produced from the custody of the clerk of the justices' court, and introduced in evidence, the notice of appeal and the undertaking on appeal, which amply support the finding.

It is insisted that the evidence does not show that the undertaking sued on was ever delivered to the clerk of the justices' court, but the record shows that the undertaking was produced at the trial by the deputy clerk of the justices' court and was found among the papers of the action of L. Nolan v. Pacific Debenture Company in the custody of the clerk of the justices' court, and the docket entries showed that a notice of appeal and bond had been filed. This was sufficient to prove the delivery of the bond.

Appellant attacks several other findings and rulings of the court, for the reason that it is not sufficiently alleged that an action was ever commenced, or a judgment given or made, in the justices' court, but what we have said in the first part of this opinion relative to the affirmative allegations of the answer meets these objections. The order of the superior court dismissing the appeal was properly admitted in evidence, and, if it were not, the defendant was not injured thereby, for it fully pleaded the dismissal thus proved in its answer. It was not error to refuse to admit in evidence the judgment roll in McComb v. Frederick, for the reason, among others, that the time for appeal had not expired. People v. Beevers, 99 Cal. 286, 33 Pac. 844; In re Blythe, 99 Cal. 472, 34 Pac. 108; Naftzger v. Gregg, 99 Cal. 83, 33 Pac. 757, 37 Am. St. Rep. 23.

Appellant claims that plaintiff is estopped from enforcing all rights under the bond sued on, for the reason that the evidence shows a writ of execution was issued on the judgment appealed from after the giving of the bond, and that plaintiff secured the dismissal of the appeal upon the ground that no appeal bond had ever been filed. First, as to the estoppel on the ground that a writ of execution was issued on the judgment, it is sufficient to say that no such estoppel is pleaded in the answer, nor any facts alleged that suggest an estoppel on that ground. McKeen v. Naughton, 88 Cal. 462, 26 Pac. 354; Clarke v. Huber, 25 Cal. 594; Davis v. Davis, 26 Cal. 39, 85 Am. Dec. 157; Flandreau v. Downey, 23 Cal. 354; Newhall v. Hatch, 134 Cal. 269, 66 Pac. 266, 55 L. R. A. 673. As to the claim that plaintiff procured a dismissal on the appeal on the ground "that no undertaking on appeal had ever been filed in the justices' court," the record discloses that the motion to dismiss the appeal was upon the ground that the notice of appeal and undertaking were not filed within 30 days after rendition of judgment, and because of the failure of appellant to prosecute its appeal. Notice of this motion was filed June 7, 1902, and the order granting the same was entered July 15, 1902, and was general in form. It does not appear that it was contended that either the notice of appeal or the bond was never filed, but that they were not filed within 30 days after the rendition of the judgment. This would be a good ground for dismissing the appeal, and a dismissal on such ground would not defeat a recovery on a stay bond given at any time before the dismissal of the appeal.

From the whole record in this case it seems that the contention about the regularity of the appeal from the judgment of the justices' court arose from diverse views as to whether the notice of appeal and appeal bond were, in point of law, filed on the 8th of April, 1902, when they were delivered to one Fredericks, who seems to have then been in possession of the office and acting as justices' clerk, or, on the 4th day of June, 1902, when they were delivered to McComb, who is now conceded to be the justices' clerk. Whether the court committed an error in dismissing the appeal does not affect the case. One of the conditions of a stay bond is that, if the appeal be dismissed, the judgment and costs will be paid, and sureties on such bonds take the risk that appeals may be erroneously dismissed.

We find no errors in the record prejudicial to appellant, and the judgment is affirmed.

We concur: HARRISON, P. J.; COOPER, J.

2 Cal. App. 13

McNEILL v. STITT.

(Court of Appeal, Third District, California. Oct. 17, 1905.)

1. Appeal—Review of Facts.

An appellate court cannot interfere with findings of the trial court based on conflicting evidence.

2. Evidence — Weight and Sufficiency — Preponderance.

Under Code Civ. Proc. § 2061, providing that the jury is not bound to decide in conformity with the declaration of any number of witnesses against a less number or against a presumption of other evidence, a preponderance of evidence does not necessarily depend upon a numerical preponderance of witnesses, but the trial court may, in an action tried by it, accept the testimony of a single witness as against that of another witness.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2450.]

3. Frauds, Statute of—Collateral Promise.

One S. was under agreement to pay plaintiff a certain price for timber cut by S. from plaintiff's land. S. delivered the lumber to defendant, between whom and himself it was understood that defendant held it for plaintiff. Defendant also promised plaintiff's agent and plaintiff herself that he would pay her for the lumber. *Held*, that defendant's agreement with plaintiff was not within Code Civ. Proc. § 1973, requiring special promises to answer for the debt or default of another to be in writing.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Anna McNeill against James Stitt. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Weldon & Held, for appellant. T. L. Carothers, for respondent.

CHIPMAN, P. J. Action to recover $358.14 for certain lumber, shakes, and posts alleged to have been sold by plaintiff to defendant. The court found the facts for plaintiff as alleged in the complaint and gave judgment accordingly. Defendant appeals from the judgment and from the order denying his motion for a new trial.

The trees from which the lumber, shakes, and posts were produced grew upon land which formerly belonged to one Hagans, between whom and one Sartain there was an agreement that the latter might cut from the land the timber growing thereon, the stumpage to be paid for as follows: Lumber, $1 per 1,000 feet; posts, $2.50 per 1,000 feet; shakes, $1 per 1,000 shakes; and some other products not involved. Hagans sold the land to plaintiff and assigned to her the above agreement, and she was recognized as succeeding to Hagans' rights thereunder. There is evidence that a certain quantity of lumber, posts, and shakes cut from the growing timber on this land, amounting to the sum claimed in the complaint at the rates fixed in the agreement, was delivered to defendant by Sartain and that defendant agreed to pay plaintiff for the same. The evidence was quite sufficient to support the findings. Defendant testified that he gave Sartain credit on his books for the merchandise, and that Sartain was then and still is indebted to him over and above the amount claimed by plaintiff, and that he never agreed to pay plaintiff anything on account of the stumpage and had nothing to do with her in the transaction. His testimony is in sharp conflict with that of plaintiff's witnesses, but it cannot be regarded as going further than to produce a conflict, in which case the appellate court cannot interfere with the findings. Defendant claims that plaintiff's case rests upon the testimony of a single witness; and, as he was disputed by the testimony of defendant, the plaintiff has failed to establish her case by a preponderance of evidence. We do not think defendant is sustained in this claim. The evidence before the court in support of plaintiff's claim did not come from the testimony of a single witness. But, if it did, the trial court still had the right to reject the testimony of defendant's witness and receive that of the plaintiff's witness. Preponderance of the evidence does not necessarily depend upon the numerical preponderance of the witnesses. Code Civ. Proc. § 2061.

Appellant contends with much apparent confidence that this is a case coming under the statute of frauds (Code Civ. Proc. § 1973); i. e., that it is an action upon an agreement to answer for the debt or default of another, and must have been in writing. We cannot see that the evidence brings the case within the rule relied on. There was evidence that defendant had received the lumber and other articles from Sartain, and that it was understood between defendant and Sartain that he held it for plaintiff, and that he promised her agent, as well as herself, that he would pay the stumpage charges to plaintiff. There was evidence that he endeavored to induce plaintiff to take her pay in lumber, as money was scarce, but she was not willing to do this and left the lumber with him. The court accepted this evidence, and with its discretion in doing so we cannot interfere. No errors of law are assigned as having been committed at the trial.

The judgment and order are affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

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2 Cal. App. 24

MENDOCINO COUNTY v. PETERS et al.

(Court of Appeal, Third District, California. Oct. 17, 1905.)

1. EMINENT DOMAIN—PUBLIC USE—HIGHWAYS.

The taking of land by a county for the widening of a public highway is the taking of land for a public use, within Code Civ. Proc. § 1238, subds. 3, 4, Pol. Code, § 2681, and County Government Act, § 25, subd. 4 (Gen. Laws 1903, p. 121), relating to the establishment and alteration of highways.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 56.]

2. SAME—PROCEEDINGS TO TAKE PROPERTY—COMPLAINT—SUFFICIENCY.

A complaint, in a proceeding by a county to condemn land for a highway, which shows that a hearing was had after notice, that the owner of the land was represented, that the report of the viewers was approved and the damages awarded, that the county treasurer was ordered to set apart the amount awarded and the auditor to draw his warrant in favor of the owner, that the amount was set apart and the warrant drawn, and that the owner for 10 days thereafter refused to accept the amount, is sufficient, within Pol. Code, §§ 2688, 2689, and Code Civ. Proc. § 1963, subds. 15–20, prescribing the proceedings for the laying out of highways, and declaring that presumptions favor the regularity of acts of officers.

3. APPEAL—RECORD—BILL OF EXCEPTIONS—CONCLUSIVENESS.

A bill of exceptions reciting that the notice of intention to move for a new trial was seasonably served and filed prevails over the notice of intention found in the record, which shows that it was served and filed after the expiration of the time fixed by law; the notice of intention being no part of the record.

4. SAME—AUTHORITY OF APPELLATE COURT TO CHANGE RECORD.

A record authenticated by the trial court cannot be changed by the appellate court.

5. SAME—NEW TRIAL—PROCEEDINGS TO PROCURE—NOTICE OF INTENTION—WAIVER.

Where a bill of exceptions recites that the notice of intent to move for new trial was presented in due time, and a stipulation thereto attached states that it be settled as a "correct bill of exceptions," the objection that the notice of intention was not seasonably served and filed is waived.

6. SAME—RECORD—SUFFICIENCY.

A record on appeal from an order refusing a new trial, which contains the judgment roll, bill of exceptions used at the hearing, and a copy of the order refusing a new trial, is sufficient, within Code Civ. Proc. § 661, providing that the judgment roll and bill of exceptions, with a copy of the order made, shall constitute the record on appeal from an order refusing a new trial.

7. SAME—TRANSCRIPT—AUTHENTICATION.

A certificate attached to the transcript reciting that a true and correct copy of the order refusing a new trial is therein contained is sufficiently authenticated, within Code Civ. Proc. §§ 661, 952, 953, relating to record on appeal.

8. PLEADING—ANSWER—INFORMATION AND BELIEF.

In proceedings by a county to condemn land for the widening of a highway, a denial, based on want of information or belief, touching the report of the viewers, the notice of hearing, and the various orders of the board of supervisors, is insufficient, because defendant has the means of ascertaining the truth of the matters.

9. APPEAL—REVIEW—HARMLESS ERROR—ERRORS IN ADMISSION OF EVIDENCE—REVIEW.

Where the averments in a complaint stand admitted, assignment of errors based on rulings pertaining to evidence in behalf of the averments will not be considered.

10. EVIDENCE—PRIMARY EVIDENCE—HIGHWAY PROCEEDINGS.

In proceedings by a county to condemn land for widening a highway, the original petition to the board of supervisors praying the alteration of the highway, and the report thereon, are admissible as primary evidence, within Code Civ. Proc. § 1829, defining primary evidence as that evidence which affords the greatest certainty of the fact in question.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 536.]

11. EMINENT DOMAIN—EVIDENCE.

In proceedings by a county to condemn land for widening a highway, the auditor's warrant in favor of the owner of the land for the damages awarded was admissible, under Code Civ. Proc. § 1870, subd. 1, providing that evidence may be admitted on the precise fact in issue.

12. TRIAL—RIGHT TO OPEN AND CLOSE.

Where, in proceedings by a county to condemn land for the widening of a highway, the ownership of the land was not in issue, but was expressly admitted, defendant had no right to open and close the argument.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 57–60.]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Proceedings by the county of Mendocino against William Peters and another to condemn land for a highway. From a judgment condemning the land, defendant William Peters appeals. Affirmed.

Weldon & Held, for appellant. U. S. Webb, Atty. Gen., and Robert Duncan, Dist. Atty., for respondent.

McLAUGHLIN, J. This is an action to condemn a strip of land for the alteration of a public road by widening the same. The action was dismissed as to H. N. Peters, and judgment condemning the land for the purpose mentioned was entered. Defendant William Peters appeals from such judgment and from the order denying his motion for a new trial.

The demurrer to the complaint was properly overruled. We cannot concur in the view that widening a public highway is not a public use. Code Civ. Proc. § 1238, subds. 3, 4; Pol. Code, § 2681; County Government Act, § 25, subd. 4 (Gen. Laws 1903, p. 121). The nature of the alteration, the location, general route, and termini, the description of land sought to be taken, and its relation to the larger parcel of which it was a part, are fully set forth in the complaint, and in the map attached to and made a part thereof by express reference, as well as by the law. Code Civ. Proc. § 1238; S. F., etc., R. R. Co. v. Gould, 122 Cal. 603, 55 Pac. 411. There is no force in the contention that the facts pleaded do not show that sections 2688 and 2689 of the Political Code were complied with. It appears from the complaint that a hearing was had after due notice, and that appellant was represented at such hearing by his attorney; that the report of the viewers was there and then approved, and the damages ascertained and by order declared and awarded to defendants; that the county treasurer was at the same time and place ordered to set apart the amount so awarded and declared; and that the auditor was directed to draw his warrant on the treasurer in favor of defendants for said amount. It further appears that the amount was set apart and the warrant drawn pursuant to the order of the board, and that the defendants for 10 days thereafter refused, and at the time of filing the complaint still refused to accept such amount. This is all that the law requires. Pol. Code, §§ 2688, 2689; Code Civ. Proc. § 1963, subds. 15–20; County of Sonoma v. Crozier, 118 Cal. 682, 50 Pac. 845; Siskiyou County v. Gamlich, 110 Cal. 94, 42 Pac. 468; Glenn County v. Johnson, 129 Cal. 406, 62 Pac. 66; County of Sutter v. Tisdale, 136 Cal. 476, 69 Pac. 141. In fact, the complaint shows a strict compliance with section 2681 et seq. of the Political Code in every essential particular.

Respondent takes the position that the record on appeal from the order refusing a new trial is insufficient, and that the bill of exceptions used at the hearing of such motion cannot be considered on an appeal from the judgment, for the same reasons that render the appeal from the order ineffectual. It is first objected that the notice of intention to move for a new trial was not served or filed within the time allowed by law. The bill of exceptions recites that such notice was seasonably served and filed, but the notice of intention found in the record shows that it was filed one day after the time had expired. The notice of intention is no part of the record, and the recital in the bill of exceptions must therefore prevail. Nye v. Marysville, 97 Cal. 462, 32 Pac. 530; Downing v. Le Du, 82 Cal. 472, 23 Pac. 202; Monterey County v. Cushing, 83 Cal. 509, 23 Pac. 700. It is suggested, by way of diminution of the record, that the bill of exceptions be amended in this particular, but it is well settled that a record authenticated by the trial court cannot be changed by the appellate court. Satterlee v. Bliss, 36 Cal. 521; Boyd v. Burrel, 60 Cal. 284; Bonds v. Hickman, 29 Cal. 465; Boston v. Haynes, 31 Cal. 107; Warran v. Hopkins, 110 Cal. 509, 42 Pac. 986; In re Lamb, 95 Cal. 408, 30 Pac. 568. Moreover, it does not appear that any such objection was urged at the time the notice was served, or when the bill of exceptions was settled, and under the authorities it must be considered as waived. Hobbs v. Duff, 43 Cal. 491; Schieffery v. Tapia, 68 Cal. 185, 8 Pac. 878; Simpson v. Budd, 91 Cal. 491, 27 Pac. 758; Hibernia v. Moore, 68 Cal. 156, 8 Pac. 824. The bill of exceptions recites that it was presented in due time, and attached thereto is a stipulation that it be settled as a "correct bill of exceptions." Respondent cannot here urge an objection thus waived. The record on appeal from the order refusing a new trial contains the judgment roll, the bill of exceptions used at the hearing, and a copy of the order refusing a new trial. This is all the law requires. Code Civ. Proc. § 661. The order last mentioned having been made after the bill of exceptions was settled and authenticated, it is obvious that it need not, and could not, be included in such bill. The certificate attached to the transcript recites that a true and correct copy of such order is therein contained, and no further authentication is necessary. Code Civ. Proc. §§ 661, 952, 953; Power v. Fairbanks (Cal.) 80 Pac. 1075. The bill of exceptions may be considered on an appeal from the judgment. Code Civ. Proc. §§ 950, 670; Wall v. Mines, 128 Cal. 140, 60 Pac. 682.

The denials touching the report of the viewers, the notice of hearing, and the various orders and proceedings of the board of supervisors, found in the answer, are based on want of information or belief. Such denials are wholly insufficient. Whether or not a notice has been published in a designated newspaper can be readily ascertained, and the report and proceedings and orders of the board of supervisors must, under the law, be duly recorded in public records. "A defendant is not at liberty to answer an allegation in this form when he may be presumed to know, or when he is aware before answering, that he has the means of ascertaining whether or not such allegation is true." Mulcahy v. Buckley, 100 Cal. 487, 35 Pac. 144; Mullally v. Townsend, 119 Cal. 53, 50 Pac. 1066; Brown v. Scott, 25 Cal. 196; Weill v. Crittenden, 139 Cal. 490, 73 Pac. 238. This being the case, the averments of the complaint relating to such matters stand admitted, and hence assignments of error based on rulings pertaining to evidence in this behalf need not be considered. In re Spencer, 96 Cal. 450, 31 Pac. 453; Levitzky v. Canning, 33 Cal. 305; People v. Clark, 106 Cal. 40, 39 Pac. 53; Hudson v. Hudson, 129 Cal. 143, 61 Pac. 773; People v. Wynn, 133 Cal. 73, 65 Pac. 126, 85 Am. St. Rep. 225. The orders passed by the board of supervisors, adopting the report of the viewers, and directing the district attorney to bring this action, foreclose inquiry touching many of the assaults made on the sufficiency of the petition and report. County of Sutter v. Tisdale, 136 Cal. 477, 69 Pac. 141; County of Siskiyou v. Gamlich, 110 Cal. 98, 42 Pac. 468; County of San Mateo v. Coburn, 130 Cal. 635, 63 Pac. 78, 621; County of Madera v. Raymond G. Co., 139 Cal. 130, 72 Pac. 915; Pol. Code, § 2690. The original petition and report were properly admitted in evidence. Code Civ. Proc. § 1829. The report shows that the viewers were unable to ascertain the damages claimed by appellant. If they found it impossible to ascertain such fact, they certainly could not report it. "The law never requires impossibilities." Civ. Code, § 3531. This was at most an irregularity, and was cured by the orders above referred to. There was no error in the admission of the auditor's warrant. Code Civ. Proc. § 1870, subd. 1. The court admitted in evidence the record in a proceeding for a writ of certiorari, instituted by appellant, in which the writ was dismissed. If it be conceded that such ruling was erroneous, it must be held harmless. In re Spencer, 96 Cal. 450, 31 Pac. 453; Chapea Company v. Chapman, 144 Cal. 373, 77 Pac. 990. The ownership of the land was not in issue. Such ownership is admitted in paragraph 12 of the answer. The appellant had no right to open and close the argument. Code Civ. Proc. § 607. The evidence fully supports the findings and the findings support the judgment. County of Siskiyou v. Gamlich, 110 Cal. 99, 42 Pac. 468; County of Sonoma v. Crozier, 118 Cal. 682, 50 Pac. 845.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

2 Cal. App. 34

MENDOCINO COUNTY v. PETERS et al.

(Court of Appeal, Third District, California. Oct. 18, 1905.)

APPEAL—DECISIONS REVIEWABLE.

Where a judgment condemning land for a public highway has been affirmed on appeal, an appeal from an order, made after the entry of the judgment, authorizing plaintiff to use the property until the conclusion of the litigation, will be dismissed; for reversal cannot benefit appellant nor affirmance injure him.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Proceedings by the county of Mendocino against H. N. Peters and another to condemn land for a highway. From an order decreeing that plaintiff take possession of the land pending the litigation, defendants appeal. Dismissed.

Weldon & Held, for appellants. U. S. Webb, Atty. Gen., and Robert Duncan, Dist. Atty., for respondent.

McLAUGHLIN, J. In this action an appeal was taken from the judgment condemning lands therein described, and from an order denying defendants' motion for a new trial. The judgment and order so appealed from were affirmed. See county of Mendocino v. Peters, 82 Pac. 1122. The present appeal is from an order, made after such judgment was entered, decreeing "that said plaintiff take possession of and use the property described therein during the pendency of and until the final conclusion of the litigation herein." The judgment having been affirmed, no judgment which could be rendered on this appeal would afford appellants any relief. Reversal could not benefit nor affirmance injure him. The order cannot add to nor subtract from the judgment this day affirmed, for the effect of such judgment is to pass title and right of possession to plaintiff. The affirmance, therefore, renders the order functus officio, and the questions presented become entirely moot. "It thus appears that the parties to the litigation have no rights which can be affected by a reversal of the order, and that the correctness of the order has become merely an abstract question. The demands of actual practical litigation are too pressing to permit the examination or discussion of academic questions such as this case in its present situation presents." Foster v. Smith, 115 Cal. 612, 47 Pac. 591, 592; Weaver v. Reddy, 135 Cal. 430, 67 Pac. 683; Bradley v. Voorsanger, 143 Cal. 214, 76 Pac. 1031; San Diego v. Supervisors, 97 Cal. 438, 32 Pac. 517.

For the foregoing reasons, the appeal is dismissed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

2 Cal. App. 13

WICKERSHAM BANKING CO. v. NICHOLAS et al.

(Court of Appeal, Third District, California. Oct. 17, 1905.)

1. CORPORATIONS — CONTRACTS—INDORSEMENT OF INSTRUMENTS—AUTHORITY OF AGENT.

Where one who indorsed certain instruments in the name of a corporation had no authority to so use the corporation's name, and the corporation was ignorant of the existence of the instruments and of the indorsement when the money realized by the indorsement was paid to it, and was not estopped to deny the authority of the person making the indorsement, and did not ratify the same, it could not be bound as indorser, whether the instruments were negotiable promissory notes or not.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 1640-1646.]

2. ESTOPPEL — NATURE AND ESSENTIALS — KNOWLEDGE OF FACTS.

A corporation which never discounted notes, and which had not authorized its agents to discount its paper, and which had no knowledge, until notes indorsed in its name by its agents were presented to it for payment, of the making and discounting of such notes, but believed that the money realized by the discounting of the notes was the proceeds of a cash sale made by the agents, was not estopped to deny the agent's authority to make the indorsement.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 1700–1706, 1720–1723.]

3. PRINCIPAL AND AGENT — UNAUTHORIZED ACTS OF AGENT—RATIFICATION BY PRINCIPAL.

A corporation which had no knowledge, until the presentment of a note for payment, of the unauthorized act of its agent in indorsing the note in its name, could not be held to have ratified the agent's act in making the indorsement.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 1716–1719.]

4. APPEAL — REVIEW — CONCLUSIVENESS OF FINDING.

The Supreme Court cannot interfere with the finding of the trial court in accepting the testimony of one witness as against that of another.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3901–3905½.]

5. BILLS AND NOTES—INDORSEMENT—DUTY OF INDORSEE.

One who accepts the indorsement of a stranger to a note is bound to see that the indorsement is authorized.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 476, 625, 947; vol. 12, Cent. Dig. Corporations, § 1720.]

6. CORPORATIONS — NOTICE — IMPUTING KNOWLEDGE OF AGENT.

The fact that an agent of a corporation, who unauthorizedly indorsed the corporation's name on a note when he discounted the note, took a draft for part of the money so realized in the name of the corporation, and that the corporation collected the draft, does not necessarily imply full knowledge on the part of the corporation of the transaction.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 1714–1719.]

7. BILLS AND NOTES—ACTIONS—JUDGMENT—CONFORMITY TO FINDINGS.

In an action against the maker and indorser of a note, the court found that the maker executed the note, that plaintiff was the owner and holder thereof, and that the same had not been paid. *Held*, that judgment should have been rendered against the maker, though it was also found that the indorser was not liable.

Appeal from Superior Court, Sonoma County; A. G. Burnett, Judge.

Action by the Wickersham Banking Company against Charles Nicholas and others. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Affirmed in part.

Lippitt & Lippitt, for appellant. R. M. Swain, for respondent Nicholas. Curtis Hillyer, for respondent piano company. A. Barnard, for respondent Eigholz.

CHIPMAN, P. J. This is an action upon two certain written instruments, one for $150 and one for $125, and, except as to the amount and date of maturity, both were in the form following:

"$150.00. Petaluma, June 20th, 1901.

"For value received, thirteen months after date I promise to pay to the order of P. H. Eigholz one hunderd and fifty dollars in United States gold coin, with interest in like gold coin at the rate of 6 per cent. per annum. The consideration of this and other notes is a Heine piano, No. 11,334, which I have received of said P. H. Eigholz. Nevertheless, it is understood and agreed by and between me and said P. H. Eigholz or his assignees, that the title to the abovementioned property does not pass to me, and that until all said notes are paid, the title to the aforesaid property shall remain in the said P. H. Eigholz, who shall have the right, in case of nonpayment at maturity of either of said notes, without process of law, to enter and retake, and may enter and retake immediate possession of said property, wherever it may be, and remove the same. I further agree not to remove said piano from Petaluma without the consent of P. H. Eigholz or the party to whom this note may be assigned by indorsement. Payable at Petaluma. Due July 20th, 1902. [Signed] Mrs. Chas. Nicholas."

Indorsed: "Heine Piano Co., per P. H. Eigholz."

The action was dismissed as to the defendant Chas. Nicholas. Mrs. Nicholas had purchased the piano above referred to from the defendant piano company at the agreed price of $350, payable in installments, of which $50 was paid on delivery of the piano; the contract being the common form by which the title to the piano was to remain in the company until all the installments were paid. Appended to the agreement of sale was a provision that the price would be reduced to $325, "if paid by July 20th, 1902, in accordance with two collateral notes of $125.00 and $150.00 granted by Mrs. Nicholas of even date herewith," and was signed "Heine Piano Co., J. A. Swan, Mgr." The notes in question were given pursuant to this provision. The court found that Mrs. Nicholas executed the notes "in consideration of the reduction stated in said contract and agreed to by the said Heine Piano Company," and delivered the notes to Eigholz; that Eigholz "wrote upon the back of each of said instruments the words 'Heine Piano Company, per P. H. Eigholz,' and delivered the same to the plaintiff for a valuable consideration"; that the instruments, at maturity, were presented to the maker and payment demanded and notice of protest given against the defendants Heine Piano Company and Eigholz; that the money paid by plaintiff for said notes was paid to Eigholz and by him paid to the piano company with plaintiff's knowledge, but that the piano company had no knowledge, at the time Eigholz paid the money to it, of the existence of the said notes or of their transfer to plaintiff by Eigholz, or of the indorsement of the name of the piano company thereon; and that the company is not estopped to deny the agency of Eigholz to make the said indorsement. It was further found that Eigholz had no authority to indorse said instruments or any instruments on behalf of the piano company, or to execute and deliver or indorse any commercial paper on behalf of said company; that he "was a salesman in the employ of said defendant [the company], and that his powers as agent were only those powers which were implied from his employment by the defendant Heine Piano Company as a traveling salesman"; that the instruments sued upon "are not negotiable promissory notes, or promissory notes at all." Defendant had judgment, from which and from the order denying its motion for a new trial plaintiff appeals on statement of the case.

Appellant relies on its specifications to the insufficiency of the evidence to justify the findings, as follows: (a) That at the time of the payment to the piano company of the money received on the notes, it had no knowledge of their existence or of the transfer by Eigholz to plaintiff or of the indorsement thereon in the company's name by Eigholz; (b) that Eigholz had no authority to indorse said instruments or any instruments on behalf of the company, or to execute or deliver or indorse any commercial paper on its behalf; (c) that said instruments are not negotiable instruments or promissory notes. Counsel for appellant have devoted much intelligent attention to the proposition that the instruments in question were negotiable promissory notes; their brief leaves nothing to be desired by way of authority or in point of reason from their view point. The conclusion we have reached, however, makes it unnecessary to decide the question. If Eigholz, as the court found, had no authority to use the Heine Piano Company's name as indorser of the instruments sued upon, and the company was ignorant of their existence and of the indorsement of them in its name when the money was paid to the company, and was not estopped to deny Eigholz's agency to make the indorsement and did not ratify the same, we do not see how the company can be held, whatever view may be taken as to the character of the instruments.

There was evidence that Eigholz and one Swan (not a party) were salesmen of the piano company and were compensated by a weekly salary and a commission of 10 per cent., where pianos were sold on the installment plan, and 15 per cent. on cash sales; that neither of them was authorized to sign the company's name to commercial paper, and that the only person connected with the company who had such authority was the president of the company, Mr. Heine, who in fact was the company; that Eigholz and Swan came into possession of the instruments in question in making a sale to Mrs. Nicholas, Swan prepared the papers, Eigholz made the indorsement, and Swan drew the money from the bank, took a draft in favor of the piano company for the amount less the discount and commissions, and sent the draft to the piano company, as had been done in other instances, turning it in as a cash sale. Eigholz testified that he explained the whole transaction to Mr. Heine, who ratified it. But this was flatly denied by Heine, and he testified that the first knowledge he or the company had that these notes were in existence was when they were presented for payment. He testified to the authority given Eigholz and Swan which did not empower them to discount the company's paper; that the company never discounted notes and had no knowledge of this transaction until the notes were presented for payment; and that Eigholz never explained the transaction to him, but that it was reported as a cash sale and the commission paid on that basis. He further testified that when he received the money it closed the deal with Mrs. Nicholas. There was no evidence from which the court would have been justified in finding that an ostensible agency existed, and in accepting defendant's evidence the court could not have found otherwise than it did as to the estoppel, nor could it have found otherwise as to ratification. Daniel on Negotiable Instruments (5th Ed.) § 316, is cited to the effect that when the principal, with full knowledge of all the circumstances, deliberately ratifies the lawful act, doings, or omissions of another, assuming to act as his agent, he will be bound thereby as fully as if they had been done originally by his authority. This statement of the rule may not be disputed. The difficulty here is that the court found, on sufficient evidence, that the principal (Heine Piano Company) had no such, or equivalent, knowledge, and hence there could have been no ratification.

Appellant argues with some force that, inasmuch as Heine knew of the contract and of the appended provision relating to the notes, he must have known when the money was sent in that it came from the discounted notes, especially so, as he testified that the receipt of the money closed the entire transaction with Mrs. Nicholas. Against the inference of Heine's full knowledge arising from these facts, which appellant contends is irresistible, is Heine's positive testimony that he knew nothing concerning the discounting of the notes, but that the money was reported as coming from a cash sale. The trial court accepted the testimony of Heine as against the inference which it might otherwise have drawn from the testimony and other circumstances in the case. Under the familiar and well-settled rule of this court, we cannot interfere. It does not appear that plaintiff discounted the notes upon any representations even of Eigholz or Swan that either of them had authority to discount the note or sign the name of the company. The instruments were payable to Eigholz alone and not in any representative capacity, and the record is silent as to any inquiry by plaintiff of Eigholz's authority when he assumed to use the name of the piano company as indorser; plaintiff seems to have taken it for granted that Eigholz had the authority which he exercised, and if he made any representations in this regard they do not appear. It is true that the instruments mentioned the consideration to be "a Heine Piano No. 11,334," but Eigholz may have owned the piano and sold it on his own account, so far as plaintiff knew, when it discounted the paper. Indeed, the instruments recite that title to the piano is to remain in Eigholz until they were paid. In accepting the indorsement of a stranger to the paper (the piano company), it was plaintiff's duty to know that the indorsement was authorized. Nor did the fact that Eigholz took a draft for part of the money in the name of the company, and that the company collected the draft, necessarily imply that the company had full knowledge of the transaction.

There is no brief on file for respondents other than the piano company. The judgment is that plaintiff take nothing by the action. The specifications are directed exclusively to the question of the piano company's liability. But it is claimed that the maker of the notes should be held liable as well as the piano company. The court found that Mrs. Nicholas executed the instruments, that the plaintiff is the owner and holder thereof, "and that the same have not been paid nor any part thereof." We cannot see upon what theory the defendant, Mrs. Nicholas, escapes liability, nor why judgment should not have been given against her. As to defendant Eigholz, plaintiff claims nothing, and we suggest nothing as to his liability. But certainly, as between the owner and holder of the evidence of indebtedness and the maker who has received full consideration, there is a clear and unmistakable liability. Mrs. Nicholas, in her answer, admitted the execution of the instruments, but averred that there was an agreement between her and Eigholz that no interest was to be charged, and that if the notes provide for the payment of interest it was without her knowledge or consent. She submitted no evidence in support of this issue. The court found that she executed and delivered the instruments to Eigholz, which is a finding on the issue sufficient to support a judgment in connection with the other findings.

The judgment in so far as it affects the defendants Heine Piano Company and Eigholz is affirmed, and as to defendant Mrs. Charles Nicholas it is reversed, with directions to enter judgment against her as prayed for in the complaint. The order denying the motion for a new trial is affirmed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

2 Cal. App. 15

HANSE v. PHILLIPS.

(Court of Appeal, Third District, California. Oct. 17, 1905.)

1. Appeal—Review of Facts—Conclusiveness of Findings.

Where there is a substantial conflict in the evidence, the judgment will not be disturbed on appeal.

2. Contracts — Modification — Written Contracts — Executed Verbal Agreements.

Under Civ. Code, § 1698, providing that a written contract may be altered by an executed oral agreement, a verbal agreement between a landlord and tenant that cattle belonging to the latter should be pastured free, which has been fully executed by pasturing cattle thereunder until the end of the term, without any demand or claim being made by the landlord for pasturage, will modify a written stipulation of the lease, whereby the landlord reserved the pasture to himself.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 1123; vol. 32, Cent. Dig. Landlord and Tenant, § 95.]

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by Sarah Hanse against Perry C. Phillips. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

L. N. Crowell and E. C. Cosper, for appellant. R. J. Hudson, for respondent.

BUCKLES, J. This is an action in claim and delivery to recover the possession of two mares and two yearling colts, which defendant claims to hold for a pasturage bill for them and other animals. Judgment was for plaintiff, and defendant moved for a new trial, which was denied. The appeal is from the judgment and from the order denying a motion for a new trial.

On October 18, 1901, the defendant and one T. C. Hodgsen, then the husband of plaintiff, entered into a written lease for certain lands, which lease was for one year from and after November 1, 1901. This lease contained the following provision in relation to pasturage: "The party of the first part reserves for himself the use and benefit of the pasturage now on said tracts of land, including the acorns upon and under the oak trees thereon, and also the right to gather and remove from said lands the crop of corn now growing thereon and also the pasturage left after the removal of said crop of corn."

Hodgsen died in June, 1902. In October, 1902, and about a month before the lease would expire according to its terms, defendant agreed orally with the plaintiff, widow of T. C. Hodgsen, that she should have the land another year on the same terms contained in the written lease, and she remained in possession for another year. Another oral agreement was made between the parties that plaintiff should milk and feed and care for three cows then on the place, and said cows were to be pastured by defendant free, and plaintiff was to take the milk to the creamery, and was to have half of the proceeds and also one-half of the calves. The testimony is in the bill of exceptions, and it appears by the testimony for plaintiff from at least two witnesses, that the horses of Hodgsen, and of plaintiff, when she took the lease after Hodgsen's death were to be turned out on the pasture of the leased land free of charge, to which defendant agreed. This is denied by defendant. A question arose at the settlement for the first year as to the ownership of the stubble pasturage and the defendant and plaintiff agreed to divide it, and the stubble was sold, and they did divide the money received for it between them. Defendant's claim at the settlement was that as he gave the plaintiff the horse pasture he should have all the stubble, and then said to her and the witness Johnson, and in the presence of plaintiff's daughter, that he wanted all the stubble the next year, and as she had her horses there he would not charge her anything for them.

I think it clearly appears from the evidence in the case that defendant was to furnish pasturage free for plaintiff's horses and the three cows. At any rate there is a sharp conflict in the evidence upon that point, and under the well-settled rule where there is a substantial conflict in the evidence the judgment will not be disturbed, we must sustain the judgment. While the lease contains a written agreement that defendant reserved to himself all the pasture, the verbal agreement that the horses and cows should be pastured free, had been fully executed; that is, the horses and cows had been pastured under the terms of the oral agreement, to the end of the term before any demand or claim was made by defendant for pasturage, and would therefore be considered an executed contract, and to that extent would modify the written contract in the lease concerning pasturage. Civ. Code, § 1698. Defendant took three mares and colts away from plaintiff October 29, 1903, the last night plaintiff was on the premises. There is no charge of $4.93 made in the bill defendant presented to plaintiff for pasturage from November 1, 1903, to December 7, 1903, and no testimony was given upon that. In the claim there is an item of $54 for hay in September, 1903, but there was no testimony as to that item, but this does not appear to be a part of defendant's cross-complaint further than it may appear in the sum demanded; the account served on plaintiff being for $214, and the demand in the cross-complaint being for $225.93. As the judgment must be affirmed upon the ground either that the plaintiff was not indebted to defendant in any sum, or that there is a substantial conflict in the testimony, and as she is therefore entitled to her property sued for, the defendant could have no lien thereon. The evidence warrants the findings and the findings support the judgment.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

2 Cal. App. 59

PEOPLE v. ZUELL.

(Court of Appeal, First District, California. Oct. 24, 1905.)

ASSAULT—INDECENT ASSAULT—VICTIM—SEX.

A statute provided that any person who shall unlawfully and feloniously commit any lewd and lascivious act, other than those constituting other crimes, on or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing the passions or sexual desires of such child, shall be guilty of a felony. *Held*, that the words "lewd and lascivious," as so used, did not limit the application of the section to an act attempted or committed between persons of opposite sexes.

Appeal from Superior Court, City and County of San Francisco; W. P. Lawlor, Judge.

Harry B. Zuell was informed against for lewd and lascivious conduct upon and with the body of a child under 14 years of age. From a judgment and order sustaining a demurrer to the information, the people appeal. Reversed.

Rehearing denied by Supreme Court, December 22, 1905.

U. S. Webb, Atty. Gen., and Lewis F. Byington, Dist. Atty., for the People. John C. Keegan and Daniel O'Connell, for respondent.

COOPER, J. The information charges that defendant did unlawfully and feloniously "commit a certain lewd and lascivious act upon and with the body of a child under the age of 14 years, to wit, George B. Fincher, of the age of 13 years, with the intent then and there to arouse, appeal to, and gratify the lust, passions, and sexual desires of the said Harry B. Zuell and the said George B. Fincher." Then follows a statement of the acts of the said defendant. The defendant demurred to the information upon the ground that it does not state facts sufficient to constitute a crime, in that the act charged is alleged to have been committed between two male persons. The court sustained the demurrer and held "that the words 'lewd and lascivious,' as used in the statute, had reference only to an act attempted or committed between persons of the opposite sex." The people prosecute this appeal from the judgment and order sustaining the demurrer. An information similar to the one here was held by this court to state facts sufficient to constitute a public offense in People v. Curtis (May 22, 1905) 81 Pac. 674. Upon the authority of that case, the judgment and order are reversed.

We concur: HARRISON, P. J.; HALL, J.

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7 Cal. Unrep. 244

UNION COLLECTION CO. v. NATIONAL FERTILIZER CO.

(Court of Appeal, First District, California. Oct. 24, 1905.)

ASSIGNMENT—ACTION BY ASSIGNEE—PLEADING.

Where a complaint alleged that defendant was indebted to plaintiff's assignor for services rendered at defendant's special instance and request between certain dates; that the services were reasonably worth $1,050, which had not been paid, except the sum of $46; that the claim was assigned to plaintiff on a certain day, two days before the services were fully performed; and that the plaintiff ever since has been, and now is, the owner and holder thereof—stated a cause of action; it being immaterial when the assignment was made.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by the Union Collection Company against the National Fertilizer Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Kinley & Kinley, for appellant. P. A. Bergerot, for respondent.

COOPER, J. This appeal is from the judgment, on the judgment roll alone. The complaint states facts sufficient to constitute a cause of action. It alleges that the defendant became indebted to plaintiff's assignor for services rendered at defendant's special instance and request between the 1st day of June, 1901, and the 31st day of July, 1902; that such services were of the reasonable value of $1,050, and the same has not been paid, except the sum of $46. The assignment to plaintiff is alleged to have been made on the 29th day of July, 1902, two days before the services were fully performed. The complaint states that by reason of the assignment the plaintiff "ever since has been, and now is, the owner and holder thereof." It does not concern the defendant as to when the indebtedness was assigned to plaintiff. The findings follow the complaint and are sufficient.

There is no merit in this appeal, and the judgment is affirmed, with $100 damages to respondent.

We concur: HARRISON, P. J.; HALL, J.

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2 Cal. App. 52

DAKAN v. SUPERIOR COURT OF SANTA CRUZ COUNTY.

(Court of Appeal, First District, California. Oct. 21, 1905.)

1. VENUE—CHANGE—PROCEEDINGS—APPLICATION OF STATUTE.

Code Civ. Proc. § 396, authorizing the trial of an action in the county in which it is commenced, although it is not the proper county, unless defendant "at the time he appears and answers or demurs files an affidavit of merits and demands" a trial in the proper county, is inapplicable to a motion for a change of the place of trial, under section 397, on the ground of disqualification of the judge.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Venue, §§ 94–97.]

2. PROHIBITION—WHEN GRANTED—EXCESS OF JURISDICTION.

The writ of prohibition is granted only when the proceedings of the inferior tribunal are without, or are in excess of, its jurisdiction.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Prohibition, § 1.]

3. JUDGES — DISQUALIFICATION TO ACT — EFFECT ON JURISDICTION.

Under Code Civ. Proc. § 397, authorizing a change of the place of trial where the judge is disqualified from acting, the disqualification of the judge of the superior court of a county deprives him of authority to render judgment, but does not deprive the court of jurisdiction of a cause properly brought in that county.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Judges, §§ 235–245.]

4. SAME—BURDEN OF PROOF.

There is no presumption that a judge is disqualified, and the party seeking a change of the place of trial on the ground of his disqualification, in accordance with Code Civ. Proc. § 397, has the burden of presenting facts showing such disqualification.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Judges, § 229.]

5. PROHIBITION — PETITION — STATEMENT OF FACTS.

A petition for a writ of prohibition, based on the ground of the disqualification of a judge of the superior court, must show facts which will establish such disqualification.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Prohibition, § 69.]

6. VENUE — MOTIONS FOR CHANGE—AFFIDAVITS AND STATEMENTS.

On a motion for change of the place of trial on the ground of disqualification of the judge, under Code Civ. Proc. § 397, only the facts set forth in affidavits filed in support of the motion can be considered; and statements in the notice of motion as to the grounds upon which it will be made are not open to consideration.

7. JUDGES—DISQUALIFICATION—AFFIDAVITS—SUFFICIENCY.

Affidavits in support of a motion for change of venue, under Code Civ. Proc. § 397, on the ground of disqualification of the judge, stating that plaintiff's attorney bears great animosity towards defendant and is a close friend and adviser of the judge, who knows of such animosity, and on account thereof shows great partiality and favoritism to the attorney in opposition to the interests of defendant, are insufficient to disqualify the judge.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Venue, §§ 71, 74; vol. 29, Cent. Dig. Judges, § 187.]

8. VENUE—CHANGE—NOTICE OF MOTION—EFFECT.

The giving of notice of motion for a change of venue, under Code Civ. Proc. § 397, for disqualification of the judge, does not deprive the court of jurisdiction to proceed with the trial of the action.

Application by Thomas B. Dakan for a writ of prohibition against the superior court of the county of Santa Cruz. Denied.

Charles B. Younger, Jr., for petitioner.

HARRISON, P. J. Application for a writ of prohibition. The petitioner is the respondent in an action pending before the superior court in Santa Cruz county. Issues in the action were joined June 26, 1905, by his filing an answer to the complaint. The case appears to have been set down for trial for October 19th, and on that day, before the trial of the action, the defendant (petitioner herein) filed and served upon the plaintiff's attorney a notice that he would make a motion before said court on October 27th for a change of the place of trial, upon the ground that the judge of said superior court is disqualified from acting therein, and that he cannot have a fair and impartial trial in said superior court, by reason of the bias and prejudice of the said judge. Annexed to said notice of motion were two affidavits, which he stated would be read in support thereof—one by Charles B. Younger, Jr., to the effect that certain property claimed by him had been attached in the action and would be sold by the sheriff in case the plaintiff should recover judgment; and the other by the defendant, in which he stated that the attorney for the plaintiff is a close friend and adviser of the judge of the court, and bears great animosity towards the defendant, which fact is well known to the judge, and that the judge, on account of his close friendship with said attorney and his knowledge of said animosity, shows and has shown great partiality and favoritism to said attorney in all actions in said court where said attorney opposes the interests of the defendant. The defendant's attorney informed the judge at 2 o'clock p. m. of October 19th, in open court, that said notice of motion with the affidavits annexed thereto had been filed and served, and also of their contents. After being so informed the judge announced that he would proceed with the trial of the cause, notwithstanding the filing of said notice of motion, whereupon the attorney for the defendant objected to the action of the court, on the ground that it had no jurisdiction to proceed with the trial of the action until said motion was heard and determined. The judge, however, commenced the trial of the cause, and the defendant alleges that he will proceed therewith, unless restrained by this court. Wherefore he makes this application for a writ of prohibition.

As the defendant did not ask the court "to secure the services of some other judge," and did not file or serve affidavits "at least one day before the day set for the trial," his proceedings were not taken under section 170, Code Civ. Proc., but are to be taken as being brought under section 397, Code Civ. Proc. The motion is not based upon the ground that the action was not commenced in the proper county for the trial thereof, and the requisites of section 396 are, therefore, not applicable.

The writ of prohibition is granted only when the proceedings of the inferior tribunal are without or in excess of its jurisdiction. Although the disqualification of the judge of the superior court of a county will deprive him of authority to render judgment in any action in that court, it does not take from the court jurisdiction of a cause properly brought in that county. There is no presumption that a judge is disqualified; and, if a party would seek a change of the place of trial of the action upon that ground, the burden is upon him to present facts showing such disqualification. Whether it exists is a judicial question, to be determined by the tribunal before which it is presented, and an application for a writ of prohibition based upon this ground must present to the court facts which will establish the disqualification of the judge.

Neither in the petition herein, nor in the affidavits which were attached to the notice of motion, is there set forth the existence of any bias or prejudice on the part of the judge, or any fact showing his disqualification to hear and determine the action before him. The statement in the notice of motion of the grounds upon which the motion would be made are not to be considered in determining whether such disqualification exists. Only the facts set forth in the affidavits in support of the motion can be considered for that purpose, and these are insufficient to show any disqualification of the judge, or that the defendant could not have a fair and impartial trial before him.

By giving the notice of motion the defendant did not take from the court jurisdiction to proceed with the trial of the action. If the motion should be granted, and the judge be held to be disqualified, its previous action would be set at naught; but, if the motion should be denied, its action would not be affected thereby.

The application for the writ is denied.

We concur: COOPER, J.; HALL, J.

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(148 Cal. 306)

YOUNG v. NEW STANDARD CONCENTRATOR CO. et al. (L. A. 1,435.)

(Supreme Court of California. Dec. 9, 1905.)

CORPORATION—REFUSAL TO TRANSFER STOCK—REMEDY—CONVERSION—DEFENSES.

In an action against a corporation for the conversion of stock by refusal to register and transfer it to plaintiff's vendee, defendant offered to show that, though plaintiff had purchased the stock at an assessment sale, it had previously been held by him as security for a note, and that he had purchased it for much less than its value because of lack of competition on the sale, owing to his statement that he intended to hold the stock as security, and that he had agreed with the corporation so to do. *Held*, that it was error not to admit the evidence.

Department 1. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by J. B. Young against the New Standard Concentrator Company and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Jones & Weller, for appellants. W. H. & C. L. Shinn and J. B. Young, for respondent.

VAN DYKE, J. This is an appeal from a judgment in favor of the plaintiff, and also from an order denying defendants' motion for a new trial. During the progress of the trial the action was dismissed as to defendants McCabe and Doane, and judgment went against the corporation only.

The action is brought to recover damages for an alleged conversion on the part of the defendant corporation, and its refusal to register and transfer certain stock which the plaintiff claimed to own and had agreed to sell to another party. The stock involved in the controversy was transferred to the plaintiff as collateral security for the payment of two promissory notes made by E. W. Doane and James R. Townsend. An assessment of two cents per share was levied on the said stock; and becoming delinquent the stock was advertised for sale. At the assessment sale plaintiff bid in the stock, paying the assessment on the stock held by him, as well as that held by his brother, as security, and certificates were issued to both of them in their own name for the number of shares so bought. Thereafter the plaintiff claimed to have sold the stock so bid in to one Davis, and demanded a transfer on the books to him, which was refused, and by the refusal of the corporation to make the transfer, it is alleged in the complaint, the defendant thereby converted the stock to its own use.

The evidence at the trial showed that at the time of such sale upon the delinquent assessment there was some sort of an agreement made between the plaintiff and his brother with some of the officers of the corporation in regard to the disposition of the stock, in the event that they were allowed to purchase it in. The plaintiff on cross-examination stated that the stock originally pledged to him as collateral he acquired title to under and by virtue of a sale for delinquent assessment; that is, 13,900 shares of the stock. "That represented stock that I held before as collateral security for the notes. Every certificate of stock introduced in evidence as being issued to me represented stock that had been, prior to that time, held by me as collateral security for loans. The stock that was issued on the 15th of March to J. C. Young represented stock that had been pledged to J. C. Young, my brother, by E. W. Doane and James R. Townsend, and bought by him at the assessment sale. I knew this at the time the stock was indorsed in blank by J. C. Young and delivered to me, and I also knew it at the time I served the written notice on the defendant, asking a transfer to Davis. I knew it at the time the stock was pledged to my brother, and have known of the transaction in connection with the stock ever since, up to the present time. I attended the sale for delinquent assessment at the office of the company. At the time of the assessment sale at the office of the company the question in regard to the ownership of any of this stock was not discussed with Doane or Townsend or any of the officers of the company that I recollect of; not talked over at all at the assessment sale with reference to the stock I bought at that sale; but it was talked over in reference to the 900 shares that was not sold on assessment, but was left in my hands as collateral security. I don't recollect saying at the time of the sale that I would have to buy the stock in order to protect my security, but I might have said so." Thereupon the defendant offered to prove that, in order to prevent competition in the bidding of said stock at said sale, the plaintiff stated that this was his only security for his notes, and requested to be allowed to purchase the same, and agreed to still hold it as collateral, as before, and that upon such representations others who were present at said sale ceased bidding, and the plaintiff was allowed to purchase said stock at a little over two cents a share. Upon the objection of the plaintiff the court refused to allow this evidence to be given, and the defendant took an exception to the ruling. The president of the corporation, P. B. McCabe, was asked, on behalf of the defendant, what, if any, agreement was made after the sale with Mr. Young in regard to his sale of certificates of shares issued to him, and under what circumstances they were to be transferred, the answer to which, upon objection of the plaintiff, was refused to be admitted. He was also asked, while acting as president of the company, in the office of the company, what, if any, understanding he had with Mr. Young about his holding or disposing of those shares of stock, the answer to which was also refused upon objection of the plaintiff. Defendant further offered to prove by the president of the company, McCabe, and by others, that after the sale the plaintiff requested the transfer of the stock to him, and stated to and agreed with Mr. McCabe that, in the event of the issuing of the stock to him in his own name, he would still hold it as collateral security, and in the event of the sale he would apply sufficient of the proceeds of the purchase price on his note and collateral agreement to pay the note, and, if there was any surplus left, he would leave it with Doane and Townsend, the makers of the note, and that he would not ask a transfer of the stock unless these payments were made, and at the same time he left with McCabe, the president of the company, a copy of the agreement and note. To these offers the plaintiff objected, and the court sustained the objection, and defendant excepted. Mr. Doane, one of the pledgors of the stock, testified that he told the plaintiff if the proceeds of this sale were applied on the note he would be perfectly willing to have the stock transferred. He asked the plaintiff if he intended to keep the difference between the price of the stock and the amount due on his note, and he said he did (and thereupon the pledgors notified the company not to make the transfer). Defendant further offered to show an agreement between the plaintiff and the president of the company and Doane and Townsend similar to that already stated, an objection to which offer by the plaintiff was sustained by the court. The delinquent sale referred to took place on March 15, 1902, and on June 9, 1902, the testimony shows said stock to have been worth 50 cents per share, and there is nothing to show that the stock was not worth 50 cents per share on March 15th, at the time of the alleged understanding between the plaintiff and the officers of the corporation in reference to bidding in the stock. In fact, plaintiff testifies: "It was worth 50 cents a share then, and it is worth that now." Defendant also offered to prove that, contemporaneously with the issuance of the certificates of stock to the plaintiff, he agreed with the corporation and its board of directors that he would hold the stock as collateral security for the indebtedness of Doane and Townsend to him, and that the company was not to permit any transfer of the stock, except as a credit on the notes of the purchase price. The court also sustained an objection of the plaintiff to this offer, and the defendant excepted.

It was stipulated that the notes and collateral agreement were to be deposited with the president of the company, and the plaintiff in his notice mentions the fact that the notes were on file with the company. It would seem that this was done in pursuance of the agreement made by the plaintiff, when bidding on the stock, to prevent competition. If this understanding and agreement which defendant offered to show were had between the plaintiff and the corporation and its officers, the defendant was thereby constituted a sort of trustee, for the purpose of seeing that the proceeds of the sale of the stock were properly applied, and its refusal to transfer the stock at the request of the plaintiff, who at the time claimed to own it in his own right, and had effected the sale thereof to one Davis, as already stated, was not a conversion of the stock as alleged in the complaint and found by the court, and the defendant clearly had the right to show this, for it was one of the main issues in the case, whether the action of the defendant in the premises amounted to conversion. It is alleged in the complaint that the defendant, in its refusal to transfer the stock, converted the same to its own use, and this, which is the material allegation in the complaint, is denied by the answer. Therefore evidence was admissible to show any circumstances that would justify or excuse the refusal to transfer the stock on demand of the plaintiff, and the exclusion of the offered evidence that plaintiff agreed to continue holding the stock as pledgee after the assessment sale, and that it was agreed that the stock should not be transferred unless provision was made for the payment of the notes of Doane and Townsend out of the proceeds of the sale, was clearly error. The authorities cited by respondent do not militate against this. In Morawetz on Corporations, § 208, cited by respondent, it is said: "If the company refuses to recognize the real owner, or refuses to deliver him a new certificate, he may sue the company for the value of the shares." But in Cook on Corporations the true rule is laid down as follows: "Where a corporation has notice that a stockholder holds his stock as trustee for another, it is bound to refuse a register of the trustee's transfer until it is satisfied the trustee has power to make the transfer. If the corporation allows the transfer, and the trustee had no power to make it, the corporation is liable to the cestui que trust." Volume 1 (4th Ed.) § 327.

For the refusal to admit the evidence offered on the part of the defendant, under the circumstances of the case, the judgment and order denying a new trial should be reversed; and it is so ordered.

We concur: SHAW, J.; ANGELLOTTI, J.

148 Cal. 274

LEISHMAN v. UNION IRON WORKS.

(S. F. 3,441.)

(Supreme Court of California. Dec. 2, 1905.)

1. MASTER AND SERVANT—INJURIES TO SERVANT — DEFECTIVE APPLIANCES — FELLOW SERVANTS.

Where defendant had furnished to the molding department of its foundry in which plaintiff was employed proper materials from which to construct all parts of the flasks in which castings were molded, and provided competent employés to construct and assemble them, the assembling of the parts being left entirely to the employés in such department, defendant was not liable for any defects in the construction or adjustment of such flasks negligently selected or assembled by plaintiff's fellow servants.

2. SAME—NATURE OF COMMON SERVICE.

Where defendant's carpenter shop was strictly a part of its molding department, in which plaintiff was employed, and the foreman of the carpenter shop was under control and direction of the foreman of the molding department, and it was essential that the molding flasks should be put together by the carpenter in the molding department for use by the iron molders, who were required to prepare the molds, the foreman of the carpenter shop was a fellow servant of a molder.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 486–489.]

3. SAME—STATUTES.

Under Civ. Code, § 1970, providing that an employer is not liable to an employé for losses suffered by the latter in consequence of the negligence of another employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employé, or unless the employer has neglected to use ordinary care in the selection of the culpable employé, a master is not liable for injuries to a servant caused by the negligence of a fellow servant, regardless of the grades of the employment or the fact that they are employed in different departments of service.

4. SAME—INSPECTION.

Where a master, having furnished proper materials and competent workmen to construct molding appliances, had delegated the duty of assembling the parts to employés, and was therefore not liable for failure to furnish suitable finished flasks, it owed no duty to its employés to inspect the flasks before they were used.

Department 2. Appeal from Superior Court, City and County of San Francisco; William R. Daingerfield, Judge.

Action by John Leishman against the Union Iron Works. From a judgment in favor of defendant, and from an order denying plaintiff's motion for a new trial, he appeals. Affirmed.

Charles F. Hanlon, for appellant. Van Ness & Redman, for respondent.

LORIGAN, J. Plaintiff was a journeyman molder in the service of defendant. While assisting in casting an iron piston ring, he was seriously injured by the explosion of the mold in which the ring was being cast, and brought this action to recover damages for the injuries sustained. The case was tried before a jury, and at the close of the evidence the trial court granted a motion made by the defendant for a nonsuit. Judgment was entered accordingly in favor of defendant, and this appeal is taken from the judgment and from an order denying plaintiff's motion for a new trial. The only question involved on the appeal is the validity of the judgment of nonsuit.

The material facts, as disclosed by the pleadings and evidence, stated as briefly as possible, are as follows: That plaintiff was injured at the time and place mentioned in the complaint, and there was evidence tending to prove that his said injuries were of a serious character. That at the time he was injured he was an employé of the defendant, working in the iron molders' department of defendant. That he was injured while assisting in casting a piston ring. That for the purpose of casting such piston rings the employés of defendant were furnished with lumber, iron, and other material, out of which to construct the molds, in which such piston rings were cast, and out of such material so furnished said employés did, from time to time, as needed, construct such molds. That the molds aforesaid, in which such piston rings were cast, consisted of three parts, commonly called the "drag," "cheek," and "cope," fitting the one upon the other. To the bottom of the cheek was attached and bolted an iron ring or disc, known as the "plate." In the preparation of the flask it was customary to attach to the bottom of the cheek either this iron ring or disc, or a wooden substitute, called a "chuck." Each of these parts was filled with sand, rammed and tamped. In this sand, so rammed and tamped in the cheek, a pattern of the casting to be made is sunk and withdrawn, and the molten iron poured into the space made by the removal of the pattern, which iron, when cooled, makes the casting. For the purpose of making a casting, a pattern is furnished the iron molders' department, which pattern is made in, and furnished by, the pattern department of defendant, a department separate from and independent of the molders' department. For the purpose of casting a piston ring, such as was being cast at the time of plaintiff's injury, the flat iron ring or disc, commonly known as the "plate," is attached to the cheek, and these iron plates are molded and cast in the iron molders' department, from time to time, as needed, and are kept on hand for use from time to time as required. The wooden framework of the drag, cheek, and cope were made out of lumber furnished by the defendant for that purpose by carpenters, who are under the orders and subject to the control of the foreman of the iron molders' department; the carpenter shop, in which said carpenters work, being separate from and independent of the general carpenter shop of the defendant and a part of the iron molders' department of defendant. There was evidence tending to prove that the explosion of the mold, by which explosion plaintiff was injured, might have been caused by the use of a plate of improper size attached to the cheek, by reason of an unusual amount of rust upon said plate used, or by reason of improper tamping of the sand, which may have permitted the molten metal in the mold to find its way through the sand to the wooden bars of the cope. That in the making of castings in the foundry of defendant the pattern maker would prepare a pattern for each of said castings, and the foreman of the molding department would distribute daily these patterns to the molders in said department, and it would be, and was, the duty of each molder receiving a pattern to obtain from the foreman of the molding department the necessary drag, cheek, and cope with which to make the casting, and thereupon to proceed with said drag, cheek, and cope to his place of work in the molding department, and with sand on hand in the molding department to prepare the mold in which to make the casting, and, upon the completion of the mold, together with other employés of the defendant in the molding department, to proceed with and finish said casting. That it was the business of the molder receiving the pattern to secure from the foreman of the molding department the necessary drag, cheek, and cope, and, if any part thereof, or the plate upon the cheek, were not in proper order for the purpose for which intended, and for the work to be done, to call the attention of the foreman to any existing defect therein, whereupon it was the duty of said foreman to have such defect remedied. That the drag, cheek, and cope in use at the time of the accident were constructed in the carpenter shop of defendant, a part of the molding department, upon the order of the foreman of the molding department, out of materials furnished by defendant to and for the molding department, and the plate attached to the cheek was attached by the carpenter. At the time of the accident there were on hand in the molding department, and for use in said department, for work such as was being done at the time of the accident to plaintiff, and by reason of which plaintiff was injured, drags, cheeks with plates, and copes other than the drag, cheek with plate, and cope in use at the time plaintiff was injured, which could have been used in place of the drag, cheek with plate, and cope actually used, and it was the duty of the foreman to have selected from such drags, cheeks, and copes for the job upon which plaintiff was injured such as were in order, with the proper plate, and proper for that job. The defendant did not, other than as herein above stated, furnish to plaintiff, or its other employés in the molding department, finished drag, cheek, plate, or cope with which to make the castings, but furnished to and for said department the necessary material from which to construct said appliances, and they were constructed as aforesaid. From time to time the drags, cheeks, plates, and copes in use in said department would become worn and inefficient for one kind of work, while remaining efficient for some other or different kind of work, and it was the duty of the foreman and workmen to see to it that for each particular job a proper and efficient drag, cheek, and cope was selected out of the supply on hand and used. That each molder was understood to be capable of determining the sufficiency and safety for use on the job given him of the drag, cheek, and cope furnished him, and, if in his judgment there was any defect in the drag, cheek, or cope furnished, it was his privilege and duty to call the attention of the foreman to such defect, and to procure another drag, cheek, or cope which was not defective. That the nature of the work in the molding department of defendant, in the use of drags, cheeks, and copes, was such that rust would always accumulate upon the plates attached to such cheeks, and whether or not the amount of rust upon any particular plate was such as to render the use of the cheek unsafe was a fact to be determined immediately prior to its use, and the molder using the cheek was as competent as any other employé of defendant to determine such fact; and if, in fact, the amount of rust upon any particular plate was such as to render the cheek to which it was attached dangerous, then, and in that case, it was the duty of the molder, through the foreman, to procure another cheek which was in all respects proper to use, or to remove the rust from the plate attached, with oil, of which there was always plenty at hand in the department for that purpose.

Upon the day when plaintiff was injured one Drury, a fellow molder of plaintiff, was given a piston ring to cast, and, having secured the three parts of his flask, proceeded to his place of work and prepared the mold as above described. While plaintiff was assisting him in pouring the molten metal into the mold, it exploded; plaintiff receiving the injuries of which he complains. As stated, it is not clearly apparent from the testimony in the case to what cause the explosion of the mold was attributable. It might have been caused by the use of an iron plate of improper size attached to the cheek, or by the use of one which was in an improper and dangerous condition to be used on account of the accumulation of rust upon it, or by reason of improper tamping of the sand, which may have permitted the molten metal in the mold to find its way to the bars of the cope, and so cause the explosion without the metal having ever reached the plate at all.

With the particular cause of the accident, however, we have no present concern. The only point to be determined on this appeal is whether, upon a consideration of the entire evidence, the lower court was warranted in taking the case from the jury and deciding as a matter of law that upon no theory of the case did the evidence, considered most favorably in behalf of the plaintiff, show any liability upon the part of defendant, and would not have warranted a verdict in his favor. The theory of plaintiff on the evidence was that the accident was occasioned through the use of a defective plate attached to the cheek, and that the plate was too small for the particular casting in question, was composed of four pieces, when it should have properly consisted of but one, and, besides this, was coated with rust to such an extent that, when the molten metal reached it, the explosion occurred. His legal contention, based on this theory of the evidence, is that it was the imperative duty of the defendant to furnish the molders with appliances reasonably safe to do the work of casting, and that, in failing to have a plate of proper size and in good condition attached to the cheek of the mold at which plaintiff was working when his injuries were received, the defendant failed to discharge its legal obligation, and is liable. The lower court, in granting the nonsuit, evidently held, notwithstanding the general rule as contended for by plaintiff, that when the defendant furnished to the molding department proper materials from which to construct all parts of the appliances—the flasks—with which the casting was to be done therein, and provided competent employés to construct and attach them, the defendant had discharged all the duty it owed to the employés in such department, and was not liable for any defects in the construction or adjustment of such appliances occasioned by the employés themselves, and that, proper materials having been furnished to the employés in the molding department by the defendant for the proper construction of such appliances to be used in such department, any defects, either in construction or adjustment thereof, must be deemed to have proceeded from the negligence of fellow servants of the plaintiff, for which, under the familiar rule of law, the defendant could not be held liable. We are satisfied that, under the evidence, the trial court applied to it the proper rule of law, and correctly granted the motion for nonsuit.

There can be no doubt but that the settled rule is that an employer must provide his employés with safe appliances with which to do the work for which they are engaged, that he must keep such appliances in reasonably safe condition, and that this is a personal obligation which cannot be delegated so as to relieve the employer from liability in not having done so. But there is no positive duty incumbent upon an employer to furnish such appliances to do the work as completed instruments. He may supply sufficient and suitable materials to the employés themselves out of which the appliances with which they are to work are to be constructed and adjusted by them, in which case the general rule that safe appliances shall be furnished by the employer—that is, that efficient and complete appliances shall be furnished by him—has no application. His obligation to his employés as far as furnishing such appliances is concerned, is satisfied when he furnishes suitable materials with which to construct them, and, under the terms of the contract of employment, either express or implied, the employés themselves are to do the constructing. In that event, the employer is not liable for an injury through a defect in the construction or adjustment of such appliances. Upon this subject it is said, in Callan v. Bull, 113 Cal. 603, 45 Pac. 1020: "The rule which requires the master to provide a safe place and safe appliances for the servant is applied when the place in which the work is to be done is furnished or prepared by the master, as in the case of a ship or a mill or a factory, or when the machinery or other appliances with which the servant is employed to work are furnished by the master; but it has no application when the place at which the work is to be done, or the appliances for doing the same, are to be prepared by the servant himself. If the appliance is furnished by the master for the purpose of enabling the servants to perform the work in which they are to be engaged, he is required to see that it shall be reasonably safe for that purpose; but, if the preparation of that appliance is a part of the work which the servant is required to perform, the master is not liable for any defect in its preparation. 'The rule does not apply to a case where several persons are employed to do certain work, and by the contract of employment, either express or implied, the employés are to adjust the appliances by which the work is to be done.' Burns v. Sennett, 99 Cal. 363, 33 Pac. 916." In Kerrigan v. Market Street Ry. Co., 138 Cal. 511, 71 Pac. 622, it is said: "Where certain persons are employed to do certain work, and by the contract of employment, either express or implied, such employés are to construct and adjust the appliances by which the work is to be done, the employer to furnish proper material and the employés to construct and adjust such appliances as in their judgment are necessary, the employer is not liable to such employés for any defect in the construction or adjustment of such appliances."

Now, it appears clearly from the evidence that the flasks necessary for making castings were not furnished as complete appliances by defendant. It did not assume to do so, and it is obvious that under its contract of employment with the employés, in the molding department of its business, it was not required that they should be so furnished, but, on the contrary, that they should be constructed by the employés of that department themselves. To that end it furnished good and sufficient material—lumber and iron. It is not questioned but that the employés whose duty it was to construct the flasks were competent workmen. No complaint is made that the carpenters in the molding department did not properly put together the woodwork of which the flask consisted, but only that the plate adjusted by them, and which was cast by the iron molders themselves, whose duty it was to cast it, was not a proper one to be used in making a particular casting. As, however, the defendant furnished not only the lumber and competent carpenters, but the pig iron for the making of these plates, and competent iron molders, as the plaintiff himself was, to cast them for use on the flasks, it is evident that, under the rule stated above, the defendant failed in no duty it owed the plaintiff, and that assuming the injury to plaintiff was occasioned as claimed by him, still it proceeded from the neglect of fellow employés to properly construct and adjust the flask from materials furnished the molders' department for that purpose.

It is claimed, however, by plaintiff that the carpenter shop was a separate and distinct shop or department from that portion of the molding department in which plaintiff was engaged, and that the foreman of the carpenter shop was not a fellow servant with plaintiff in the construction and adjustment of the flask in question. But it appears from the evidence in the case that this is not true in point of fact. The foreman of the carpenter shop, or, as under the evidence he might more properly be designated, the "boss carpenter," was not in the control of an independent department. The carpenter shop was strictly a part of the molding department, and its foreman was under the control and direction of O'Neill, the foreman of that department. O'Neill had control and supervision of the entire molding department, including therein, as a part thereof, the carpenter shop. It was as essential, in efficiently performing the work of casting, in which the molding department was exclusively engaged, that the flasks should be put together by the carpenter in that department for use by the iron molders therein, as it was that the latter should prepare the molds in them and do the casting. The only work that was done in the carpenter shop was for the benefit and in aid of the molding department, particularly in the construction and adjusting of these flasks. And the making of these flasks was as much a part of the work of the molding department as was the making of the castings. But, were this not so, the department rule, relative to which counsel for appellant cites numerous decisions from other jurisdictions, does not obtain in this state. Our Civil Code (section 1970) lays down this general rule: "An employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employé, or unless the employer has neglected to use ordinary care in the selection of the culpable employé." In construing this section it was early said by this court that: "The law of this state respecting this subject, as set forth in the Code referred to, recognizes no distinction growing out of the grades of employment of the respective employés, nor does it give any effect to the circumstance that the fellow servant, through whose negligence the injury came, was the superior of the plaintiff in the general service in which they were in common engaged, and the alleged distinction in this respect insisted upon by the appellant's counsel, founded, as he claims, on the general principles of law and the adjudged cases, requires no examination at our hands." McLean v. Blue Point Gravel M. Co., 51 Cal. 258. To the same effect are Congrave v. Southern Pacific R. R. Co., 88 Cal. 361, 26 Pac. 175; Davis v. Southern Pacific R. R. Co., 98 Cal. 13, 32 Pac. 646; Noyes v. Wood, 102 Cal. 392, 36 Pac. 766; Livingston v. Kodiak Packing Co., 103 Cal. 264, 37 Pac. 149; and Donovan v. Ferris, 128 Cal. 53, 60 Pac. 519, 79 Am. St. Rep. 25. Within this rule, as declared by the Code, and construed by the authorities, the foreman of the carpenter shop was a fellow servant of the plaintiff. They were both in the employment of defendant in the molding department, both under the control of the general foreman of that department, O'Neill, and both engaged, not only in the general business of defendant, but in the particular business in which the molding department was exclusively engaged—casting. And the same rule applies to the foreman O'Neill, in as far as it is claimed that the defendant should be held responsible for his asserted negligence in failing to inspect the flask, the explosion of which occasioned the injury. If the positive duty rested upon defendant to supply completed and finished flasks to the molding department, and inspect them as necessity for doing so arose, and the foreman O'Neill represented the defendant, as its vice principal, to discharge these duties of supply and inspection, his neglect would be no doubt that of the defendant. But, as we have seen, no such positive duty of furnishing the flasks in the completed state devolved upon the defendant. It furnished, as it had a right to do under the rule above stated, only the materials for such purpose, the task of constructing the flasks to be performed by its employés. Having furnished such materials, and competent workmen to construct the flasks, defendant fully discharged its duty to its employés. As it was not bound to furnish finished appliances, but discharged its duty by furnishing adequate materials for that purpose, it logically follows that it was not required to inspect the appliances after construction. The construction and inspection of such flasks were simply details in the proper execution of such work after ample provision made for its being safely done, and as to such details the foreman and the workmen in the department were fellow servants. Noyes v. Wood, 102 Cal. 389, 36 Pac. 766. The other cases cited immediately preceding bear also directly upon this point and illustrate the application of the rule.

We do not think any further discussion of this matter is necessary, nor to particularly consider additional points urged by respondent in support of the judgment of nonsuit, namely, that the evidence shows that there were on hand in the molding department, at the time the flask in question was selected, other flasks, which, taken in their entirety, were in good condition, and that, if any improper selection was made by the foreman or other employés, the defendant was not liable for such error in judgment; further, that the molder Drury was capable of determining, and should have inspected to ascertain, whether the flask in question was sufficient and safe, and that his failure to do so and to call the attention of the foreman of the department to the defective plate, or substitute a chuck therefor, or remove the rust from it with the oil at hand for that purpose, was negligence of a fellow employé of plaintiff, for which defendant was not responsible.

Whatever merit there may be in these points, we do not discuss, because under the settled rule of law which we have mainly considered, and which was the principal question discussed by counsel, defendant having furnished the materials out of which the appliances for use in the molding department were to be constructed, and the employés in that department being required to construct them from the materials so furnished, the safety appliance rule urged by appellant has no application, and the defendant was not liable for any injury resulting to plaintiff in such department from a defect in the construction and adjustment of such appliances by his fellow employés.

Under this rule of law, applied to the evidence in the case, the lower court properly granted the motion for a nonsuit, and the judgment and order appealed from are therefore affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

148 Cal. 284

MENNER v. SLATER et al. (L. A. 1,549.)

(Supreme Court of California. Dec. 5, 1905.)

CONSPIRACY — WHAT CONSTITUTES — DOING LAWFUL ACT.

Where an attachment was dismissed before judgment for insufficiency of the affidavit, the attachment defendant had a right to sell, and the deputy sheriff who levied the attachment and the keeper of the property pending the attachment had a right to buy and sell to others, the attached property, and their act in joining in so doing before the rendition of judgment for plaintiff was not an actionable conspiracy for which plaintiff could recover damages resulting from her consequent inability to collect her judgment out of the property.

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Ednah J. Menner against John R. Slater and others. From a judgment for defendants, plaintiff appeals. Affirmed.

G. A. Gibbs, for appellant. J. C. Willett and Lee, Scott, Bailey & Chase, for respondents.

McFARLAND, J. A general demurrer to the complaint was sustained and judgment rendered for defendants, and from this judgment plaintiff appeals.

The purpose of the action is to recover of defendants the sum of $4,165 damages for an alleged conspiracy entered into by them to prevent plaintiff from collecting a certain judgment against defendant Horton for the above-mentioned amount of money. The main averments of the complaint are as follows: It is averred that plaintiff commenced an action against defendant Horton to recover of him damages for violation of certain contracts existing between him and plaintiff; that during the pendency of said action she had an attachment issued and levied upon certain personal property formerly belonging to the Putnam Furniture Company, a corporation, but alleged to belong at the time of the attachment to Horton; that said attachment was afterwards, and before judgment in said action, on motion "dismissed, upon the ground of insufficiency of the affidavit"; that after the discharge of the attachment, Horton sold the property for $2,000 to the defendants Slater and Crossman, who afterwards, and before judgment in said action, sold it to one Goodspeed. It is averred that the property was of the value of $6,000, and that afterwards plaintiff recovered judgment in said action against Horton for $4,000. There is also something in the nature of an averment that Horton has no other property, which respondents claim to be insufficient as an averment of that fact; but for the purposes of this appeal we will consider it as sufficient. It is also averred generally that the above acts constituted a fraudulent conspiracy to prevent plaintiff from having her judgment against Horton satisfied on execution out of said property. It is also averred that the writ of attachment above mentioned was placed in the hands of defendant Slater "as deputy sheriff," and was levied by him on the property, and that defendant Crossman was appointed by Slater as keeper of the property. The foregoing—leaving out of view certain general phrases which add nothing to the facts alleged—is a sufficient statement of the contents of the complaint for the purposes of this opinion. Respondents contend that many things claimed to be averred are not averred, and, particularly, that, under any view, there is no averment of any damage that is not too uncertain and conjectural to be considered; but, under our view, it is not necessary to discuss these contentions.

It is obvious that appellant had no lien of any kind on the property in question at the time it is alleged to have been sold by Horton to the other defendants. The attachment had been discharged. There was no judgment, and, of course, no execution lien. The appellant was merely a general creditor of Horton. She was in no position to claim any priority of right to the property. She had no lien to lose. Horton was, therefore, free to sell, and the other defendants free to buy, the property, for a valuable consideration; and a lawful act done by one person does not become unlawful because participated in by another person. An actionable conspiracy exists only where there is an unwarrantable combination of two or more persons to do an unlawful thing. We see nothing in the point made on the attempted averment that Slater was, in fact, a deputy sheriff. After the discharge of the attachment his functions as the officer who levied the attachment, if he was such officer, were ended. And so it is with respect to the keeper. It must be remembered that the purpose of this action is merely to recover damages for an alleged wrongful act. For these reasons the demurrer was, in our opinion, properly sustained.

The judgment appealed from is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

148 Cal. 287

CLYNE v. EASTON, ELDRIDGE & CO. (S. F. 3,120.)

(Supreme Court of California. Dec. 5, 1905.)

1. Attachment—Debts—Notice.

A notice of attachment of "credits and effects" belonging to the defendant in the attachment suit creates no liability of the garnishee for a debt due to the defendant.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Garnishment, § 230.]

2. Same—Evidence of Attachment of Indebtedness—Conclusiveness.

A pencil entry by the garnishee's bookkeeper on the margin of the account of the attachment defendant, and the statement of its president that the debt was attached as an excuse for refusing further payments, was evidence that the debt had been attached, but not conclusive evidence.

3. Same—Efficacy of Notice—Estoppel.

The refusal by a garnishee of further payments to the defendants in the attachment suit on the ground that the debt had been attached, and thereby securing an advantage to itself, cannot avail plaintiff as an estoppel to deny the efficacy of the notice, especially when the garnishee denies any indebtedness to the defendants in attachment, and an action by them is barred by limitations.

4. Same—Objections to Sheriff's Return—Relevancy.

A garnishee is not required to appear in the attachment suit, and has nothing to do with the sheriff's return, unless it should be false in some particular which would subject him to liability beyond that warranted by the facts; and in a suit to recover an alleged indebtedness to the attachment defendants at the date of the attachment, where the garnishee relies on the sheriff's return as containing a true statement that he attached credits and effects, and not debts, he may properly object to the sheriff's return when offered in evidence as irrelevant.

5. Same—Service of Attachment—Limitations.

Under Code Civ. Proc. § 544, providing that all persons having in their possession credits or other personal property belonging to defendant at the time of service of an attachment, unless such property be delivered up or transferred, or such debts be paid to the sheriff, shall be liable to the plaintiff for the amount of the credits, property, or debts until the attachment is discharged or any judgment recovered against him is satisfied, the running of the statutes of limitations in favor of a debtor is not interrupted by making him a garnishee, as such section applies only where the garnishee admits his indebtedness to the defendant in attachment or his possession of specific property of defendant.

6. Principal and Agent—Agreement—Construction.

Where a subsequent agreement for the sale of land superseded a former agreement under which defendant had incurred all items of expense charged in the account to that date, and provided that all excess received over a named sum and all crop returns now in hand, or due on account of crops growing on the land for the year 1893, shall belong to defendant as compensation, no expenses incurred by defendant, nor any payment to or on account of the vendors prior to the second agreement, can be charged as a credit against its indebtedness arising on the subsequent sale of the land.

7. Same—Performance.

Where, under an agreement for the sale of land, defendant was to liquidate incumbrances, pay a named sum to the vendors, and retain the excess, by procuring a conveyance to its clerk, it became bound by an implied agreement to pay off the incumbrances, with interest, and pay the vendors the stipulated sum, unless there was a subsequent modification of the agreement.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by James Clyne against Easton, Eldridge & Co. Judgment for plaintiff, and plaintiff appealed from a part of an order directing a new trial of the issues as to which findings were vacated, and defendant from the part which denied a new trial of the remaining issues. Affirmed as to so much of the order appealed from as granted a new trial, and reversed as to so much of the order as denied a new trial of the other issues.

Rehearing denied January 4, 1906.

R. E. Houghton and Houghton & Houghton, for plaintiff. Jesse W. Lilienthal and Frohman & Jacobs, for defendant.

BEATTY, C. J. The trial of this cause in the superior court resulted in a judgment for the plaintiff. Defendant moved for a new trial, and its motion was granted as to some of the issues, but denied as to the others. Both parties appeal—plaintiff from that part of the order which directs a new trial of the issues as to which the findings are vacated, and defendant from the part which denies a new trial of the remaining issues. The record is, of course, the same on both appeals, and they have been submitted together.

The salient facts of the case are that the defendant, a California corporation, prior to the 7th day of June, 1893, had written authority from Linnie W. Goodyear and her husband, H. C. Goodyear, to sell on commission 1,244.31 acres of land belonging to Mrs. Goodyear. The land was heavily incumbered by a first mortgage to the German Bank and by a second mortgage to one Kahn. The authority to sell provided for a sale of the land in separate tracts at a fixed minimum of price, and defendant was to receive a commission of 2½ per cent. of the price so fixed, and also one-half of any excess received from sales of the property over and above the fixed price plus the expenses of surveying, platting, and advertising, which expenses it is clear from the whole tenor of the writing were to be borne by the defendant as a part of its undertaking to make the sales. The effort to dispose of the land upon the terms of this authorization having failed, it was superseded on the 7th of June, 1893, by a new one in the following terms:

"Whereas, on the 25th day of January, 1893, the undersigned entered into a contract with Easton, Eldridge & Company for the sale of certain real estate in the county of Solano, state of California; and, whereas, owing to the condition of the mortgages, it is absolutely necessary to sell the land as a whole: Now, therefore, it is agreed, and Easton, Eldridge & Company are hereby authorized to sell the land, viz.: 1,244 and $^{31}/_{100}$ acres, more or less, for such sum as shall liquidate the present mortgage indebtedness, and in addition pay us the sum of twelve thousand dollars, and all excess received over and above that, as also all crop returns now in hand or due on account of crops growing on the land for the year 1893, shall belong to the said Easton, Eldridge & Company, and shall be held by them as a part of their compensation under this agreement of sale. Witness our hands this 7th day of June, A. D. 1893. [Signed] Mrs. H. C. Goodyear. H. C. Goodyear. Witness: [Signed] Geo. Easton."

Acting under this authority and some alleged oral modifications thereof, the defendant during the year 1893 sold the entire tract in two parcels, and out of the proceeds satisfied and discharged all the incumbrances thereon, including the mortgages above mentioned, and some other liens. The $12,000 claimed by the Goodyears, however, had not been paid in full, and there was a dispute between them and the defendant as to the balance remaining due upon the account, when, on the 10th day of August, 1894, the plaintiff in this action commenced an attachment suit in Solano county against Mr. and Mrs. Goodyear to recover, with interest, the sum of $6,805 due upon their promissory notes. Summons and attachment were duly issued in said suit, and on August 11th the attachment was placed in the hands of the sheriff of San Francisco for service. No return was made thereon until March 29, 1897—at which date the following paper was filed in the office of the county clerk of Solano county:

"Office of the Sheriff of the City and County of San Francisco. By virtue of the annexed writ, I duly attach all moneys, credits, and effects belonging to the defendants named in said writ, or to either of them, by serving upon each of the hereinafter named parties, personally, in the City and County of San Francisco, at the times set opposite their respective names, a copy of said writ, with a notice in writing notifying each of said parties, respectively, that such moneys, credits, and effects of said defendants, or either of them, was attached, and not to pay over or transfer the same to any one but myself. Statement demanded. The answers were as set opposite their respective names. Names of the parties served as aforesaid: Easton & Eldridge & Co., through G. Easton (Sec.); time of service, Aug. 11th, 1894, at 11:00 o'clock a. m.; answers, 'No funds.' Henry B. Shaw, Aug. 11th, 1894, at 11:15 a. m.; no answer. [Signed] John J. McDade, Sheriff, by J. J. McTieman, Deputy Sheriff."

After said writ of attachment was so served upon the defendant herein, on the 11th day of August, 1894, an entry was made in the margin of the ledger account, kept by said Easton, Eldridge & Co., in connection with the transactions under the contracts above mentioned, as follows: "Attached August 11, 1894." And thereafter said Easton, Eldridge & Co. refused to make further payments on account of such transactions to H. C. Goodyear, or Linnie W. Goodyear, giving as the reason for such refusal, that it had been enjoined by the courts from paying over any more money. In the meantime Clyne had recovered a judgment in his attachment suit against the Goodyears for $7,532, with accruing interest. The date of said judgment was December 13, 1895, but execution thereon was not issued until June 28, 1897. This writ was served on the defendant herein on July 15, 1897. In response to the accompanying notice and demand, defendant denied any indebtedness to the Goodyears, and, subsequently, upon supplementary proceedings duly taken, appeared by its president before a referee appointed by the superior court of Solano county, where it again denied all indebtedness to the Goodyears exceeding $50, denied possession of any of their property, and also pleaded the statute of limitations (section 339, subd. 1) as a separate defense to any claim in their behalf. Upon the coming in of the referee's report to that effect, the court made an order in the case of Clyne v. Goodyear authorizing the institution of this action for the recovery of the alleged indebtedness of defendant to the Goodyears at the date of the attachment in said suit. In pursuance of this order, the original complaint was filed on the following day, July 30, 1897, but the case was not tried until the year 1899, and the pleadings as finally amended were filed after the trial. In his second amended complaint the plaintiff alleges, among other things, that on the 11th day of August, 1894, when his writ of attachment in the action of Clyne v. Goodyear was served on the defendant corporation, it was indebted to the Goodyears in the sum of $6,910.28, and that said debt was attached by the service of said writ. The defendant by its answer to said second amended complaint denied that the sheriff attached any debt due to the Goodyears. It also denied the existence of any debt at the date of the attachment, and along with other separate defenses (account stated and laches) pleaded the statute of limitations (sections 312, 325, and subdivision 1 of section 339, Code Civ. Proc.) in bar of the action. Upon these and other material issues the findings were adverse to the defendant.

In disposing of the plaintiff's appeal, we have to consider only the particular issues to which the order granting a new trial was limited, and which relate exclusively to the question whether the debt of the defendant to Mrs. Goodyear was really attached in August, 1894, as alleged by plaintiff and denied by defendant. These issues vitally affect the plea of the statute of limitations. For whatever may have been the amount of defendant's indebtedness to Mrs. Goodyear, resulting from the sale of her lands, it is certain that it accrued prior to the alleged garnishment on August 11, 1894, and it is conceded that an action for its recovery by her would have been barred by subdivision 1 of section 339, Code Civ. Proc., within two years from that date. It is also conceded that there could have been no liability of the defendant to any creditor of the Goodyears by virtue of an attachment or execution levied after the debt had become barred as to them. The appeal of the plaintiff therefore must fail unless the evidence in the case shows without substantial conflict that the debt was attached as alleged. The appellant to sustain his contention upon this point relies upon two items of evidence: First. The return of the sheriff above quoted; and, second, an admission of the fact by the defendant under circumstances estopping them now to deny it. As to the first item, it will be observed that the notice served with copy of the writ made no mention of debt or indebtedness specifically, and had no application to the indebtedness of the defendant unless it was included in the more general term "effects." The contention of the plaintiff is that the statute, being remedial, should be liberally construed for the advancement of the remedy, and that a notice of attachment of credits and effects should be held a sufficient garnishment of a debt. The defendant cites in opposition to this view, the cases in which it has been held by this court that proceedings by attachment being special and statutory, the provisions of the statute must be strictly followed in order to acquire any rights thereunder. Gow v. Marshall, 90 Cal. 567, 27 Pac. 422, and cases there cited; Rudolph v. Saunders, 111 Cal. 233, 43 Pac. 619; Beltaire v. Rosenberg, 129 Cal. 164, 61 Pac. 916. In view of these authorities, it cannot be doubted that the established rule in this state is to exact a strict compliance with the law, and that rule was applied in Gow v. Marshall to a case almost exactly the counterpart of this. There the notice of attachment mentioned only credits, and it was held upon a critical examination of the various sections of the Code relating to this matter, and upon very satisfactory reasoning, that the attachment created no liability on the part of the garnishee for a debt due to the defendant in the attachment suit. The only difference between that case and this is that while that notice of attachment mentioned credits only, the notice in this case also contained the word "effects." But this difference would seem to be immaterial for both Rood (on Garnishment) and Shinn (on Attachment) agree that the attachment and garnishment laws make a fundamental difference between custodians of the debtor's property, which includes his effects, and his debtors. Rood on Garnishment, § 50; Shinn on Attachment, § 600. In the section last cited it is said: "The liability of a person to be charged as garnishee on the ground that he has property, money, or chattels, credits, and effects in his hands or under his control, is distinct from his liability on the ground of indebtedness to the principal defendant, and when process is issued on an affidavit specifying one of these grounds only the garnishee cannot be charged with liability on the other ground." Of course, these writers were referring more particularly to the proceedings under the laws of other states, regulating what is there variously denominated garnishment process or trustee process, but those proceedings, though differing in detail from our proceeding by attachment, are so far analogous as to make the distinction there recognized between the liability of a debtor and of a custodian of goods or effects, a safe precedent here. We think that upon this view of the matter, it must be held that the sheriff's return, so far from proving an attachment of the debt of defendant to Mrs. Goodyear, must, upon the presumption that it stated the truth, be regarded as evidence, and very persuasive evidence, that the debt was not attached.

As to the admission of the defendant, consisting of a pencil entry by one of its bookkeepers on the margin of the Goodyear account in defendant's ledger, and of the statement of its president that the debt was attached as an excuse for refusing further payments, that certainly was evidence that the debt had been attached; but it was not conclusive evidence. It may have been nothing more than the expression of an erroneous opinion as to the effect of the service of the notice which the sheriff says he served. As to the argument that the defendant, by refusing further payments to the Goodyears, upon the ground that the debt had been attached, and thereby securing an advantage to itself at their expense, is now estopped to deny the efficacy of the notice, it may be said that in a conceivable case these facts might work an estoppel in favor of the Goodyears; but it is not apparent how such estoppel can avail this plaintiff in view of the facts appearing in this record. A great deal of the argument of appellant on this branch of the case is devoted to the proposition that the defendant has no concern in disputing the validity of an attachment, the regularity of which has at all times been conceded by the Goodyears. This argument ignores the fact that the defendant denies any indebtedness to the Goodyears, and that an action by them is barred by the statute of limitations. The right to interpose this plea is a valuable right of which the defendant cannot be deprived by the admission of a third party, and especially of a party whose interest is adverse. If the debt was not attached, the plea of the statute is a perfect defense to the action, and for the purpose of that defense the defendant is interested and deeply concerned in contesting the issue. The Goodyears, on the other hand, are interested in having it established that the debt was attached; for if so, and if, as contended, the service of the writ stopped the running of the statute in favor of the plaintiff, he may now recover the debt, and what he recovers will satisfy pro tanto his judgment as against the Goodyears to their manifest advantage.

The plaintiff urges still another objection to the right of defendant to question the attachment of the debt. It is said that no objection to the sheriff's return was ever made prior to the motion for a new trial, and cases are cited in which it has been held that a garnishee waives all objections to the sheriff's return which he does not make when he appears and other cases which deny his right to interpose technical objections to the mode of service of the writ. These cases are not in point, because they arose under the laws regulating trustee process, and garnishee process in other jurisdictions where the garnishee is required by the process to appear in the action and answer to the court. Under our attachment law, a garnishee is not required, and has no right to appear in the action. The only answer he makes is to the sheriff at the time of the service of the writ, and that relates only to the property actually attached which he has in his possession or under his control. He has nothing to do with the return of the writ, unless it should be false in some particular which would subject him to a liability beyond that warranted by the facts. In this case, the defendant does not object to the return. On the contrary, it relies on the return as containing a true statement of what the sheriff did, i. e., that he attached credits and effects, but did not attach the debts. Defendant's real objection was made in the only manner and at the earliest time it could be made. Its answer to the original complaint is not in the transcript, but by the amended pleadings the issue as to the attachment of the debt is distinctly raised by allegation on one side and denial on the other. And at the trial when the sheriff's return of the writ was offered in evidence defendant objected that it was irrelevant. It is said that this was not the proper objection; that the real objection to the return, if any, was that it was incompetent. But this is not so. Conceding that the evidence may have been incompetent, that was an objection which the defendant could waive, as it did by failing to make it, but this waiver made the objection of irrelevancy all the more pointed, made it mean, in other words, that, waiving all other objections, this return has no tendency to prove an attachment of the debt. The present position of the defendant as to this matter is therefore the same position it has maintained from the beginning, and it follows from what has been said, that the part of the order of the superior court, from which the plaintiff has appealed, must be affirmed.

This conclusion, however, does not dispose of all the questions arising upon the plaintiff's appeal, for the defendant contends (and in view of the further proceedings involved in the order for a new trial, the question cannot be left open) that whether the debt of defendant to the Goodyears was or was not attached in August, 1894—that even conceding the efficacy of the attachment in that respect—the order granting a new trial should still be affirmed, upon the more radical ground that this plaintiff's cause of action was barred by the same lapse of time that barred an action by the Goodyears themselves; or, in other words, that the running of the statute of limitations in favor of a debtor is not interrupted by making him a garnishee. This is really the most important, as it is the most difficult, question in the case; for its determination, in favor of respondents, would seem to put an end to the present controversy, and however it may be determined, our conclusion will remain a precedent of vital importance for future cases. The plaintiff claims that this question (if, since the adoption of the civil practice act, it has ever been a question) was set at rest by the decision of department two of this court in Carter v. Los Angeles National Bank, 116 Cal. 374, 48 Pac. 332. The Code provision relied on is contained in section 544 of the Code of Civil Procedure, which reads as follows: "All persons having in their possession or under their control any credits or other personal property belonging to the defendant, or owing any debts to the defendant, at the time of service upon them of a copy of the writ and notice, as provided in the last two sections, shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, liable to the plaintiff for the amount of such credits, property, or debts, until the attachment be discharged, or any judgment recovered by him be satisfied." The construction which the plaintiff contends this section requires, and which he says this court has adopted, is that the liability of a garnishee to the defendant in an attachment suit—such as it is when the writ is served—is never barred as to the plaintiff in the attachment. If this be so, it must be conceded that it puts a garnishee at a great disadvantage as compared with other alleged debtors, and this without any fault or complicity on his part. Though the alleged claim of the defendant in the attachment may be barred the day after the garnishment, he nevertheless remains liable to an action by the garnisher on the same claim as long as he holds an unsatisfied judgment against the defendant in the attachment. This is the conclusion to which a literal reading of the statute inevitably leads, and it admits of no qualification or compromise.

A conclusion so fraught with injustice to innocent parties may well induce a doubt whether the language of the statute is to be taken literally; and, in considering whether it will bear a more liberal and equitable construction, we find nothing in Judge Temple's opinion in Carter v. Los Angeles National Bank, supra, to sustain the opposite view. All that he says touching this matter is contained in a single paragraph at the close of the opinion: "As to the statute of limitations, if the garnishee is entitled to the plea as against the defendant in the attachment suit, he can plead it. The liability created by the garnishment is never barred. Of course, the garnishee can plead any defense he would have against his creditor, and also that the attaching creditor's debt has been satisfied, or that he failed to recover judgment, or that it had been reversed or has been barred. These last defenses might also have been made by the intervener. But the liability which arises from the attachment, as something entirely distinct from these, is not barred." This language was used in deciding a case in which the claim of the attachment debtor against the garnishee was not barred at the commencement of the action, and was an answer to the contention of an intervening claimant of the fund in the hands of the garnishee that the liability created by the garnishment was barred. This being the case, it was quite natural for the court to say that the liability created by the garnishment, as something distinct from the original liability of the garnishee, is never barred.

But in making this entirely correct statement, in response to the claim there asserted by the intervener (and not by the garnishee against whom an action by his creditor was not barred), it will be seen that the court took pains to add the qualification that, of course, the garnishee could plead any defense against the garnisher that could be pleaded against his creditor. So far from sustaining the position of plaintiff, this decision is distinctly adverse. The cases cited by plaintiff from other jurisdictions afford us no aid in construing our statute. Generally they sustain the statement in Drake on Attachment (section 672) to the effect that in his action against the garnishee the garnisher can claim nothing which the original creditor could not claim if suing in his own behalf; and upon this principle it would seem to follow that the plea of the statute might be interposed against the garnisher whenever it could be interposed against the original creditor. In none of the cases to which we have been cited do we find anything in conflict with this view. Of course, in those jurisdictions where service of trustee or garnishee process has the effect of making the trustee or garnishee a party to the action the statute ceases to run in his favor after service, because the claim against him is then in suit. In this dearth of authority upon the particular point in controversy we have left for consideration only the language of the statute (section 544, Code Civ. Proc.) as affected by cognate provisions of the Codes. We think, in view of the general provisions of the statute of limitations (Code Civ. Proc. § 312 et seq.), and of its conceded policy, the Legislature could not have intended to exclude from its equal benefit every person who happens to be made a garnishee in an action between other parties, and that the section in question was intended to apply to those cases only in which the garnishee admits his indebtedness to the defendant in the attachment or admits his possession or control of specific property of the defendant. In such case he can discharge his admitted obligation by paying the debt to the sheriff or delivering possession of the defendant's property. This it is not only his privilege but his duty to do, but if he chooses to retain possession of the defendant's property, or to withhold payment of a sum admitted to be due, he thereby makes himself by his own act the trustee of a fund or of specific property in custodia legis, and in that character liable to account to the party entitled whenever called upon. The language of the section, no less than the reason for making the distinction, lends support to this view; for, according to its terms, the continued liability of the garnishee is made a consequence of his failure to pay his debt or deliver the defendant's property. But the alternative of accepting such liability or delivering property or making payment is not open to a garnishee who denies any indebtedness or disputes the defendant's title to any property in his possession or control, and when he takes that position in response to the writ and notice—as the defendant in this action did—his right to invoke the protection of the limitations act would seem to stand on the same plane with that of any other alleged debtor, and such is our opinion. As an alternative position to the claim that the liability of the garnishee is never barred, the plaintiff argues that by the garnishment a new statutory liability is created, upon which an action may be commenced at any time within three years after it accrues. Code Civ. Proc. § 338. But this position cannot be sustained. A contract liability is not changed or converted by garnishment into another sort of liability. Its sole effect is to work a contingent transfer of the alleged indebtedness from the creditor to the garnisher without any change in the nature of the liability.

Our conclusion upon the whole matter is that whether or not the writ and notice served on defendant in the suit of Clune v. Goodyear effected a garnishment of its indebtedness to them, or either of them, the statute which had begun to run in their favor continued to run, and that the right to maintain this action was barred before the original complaint was filed. The only inconvenience that could result from this construction of the statute is this: It might happen, and in many cases no doubt would happen, that a judgment in favor of an attaching creditor could not be obtained until after the statute had barred an action against the garnishee; and if the right of the attaching creditor to sue the garnishee does not accrue until he gets a judgment against the defendant in the attachment suit he would be deprived of all benefit of the statutory remedy unless the latter chose to commence an action for his benefit. The point does not call for decision in this case, but in answer to this argument against our construction of section 544, it may be said that there appears to be no very weighty reason for holding that the garnisher might not commence an action against the garnishee for the protection of his contingent interest in the debt or property attached, before he obtains a judgment. It is certain that after garnishment the claim of the original creditor against the garnishee itself becomes contingent, and yet we have held that his right of action is not suspended. Glugermovich v. Zicovich, 113 Cal. 64, 45 Pac. 174. If his creditor may sue upon a contingent liability we see no reason for holding that the garnishee could object to a suit by the garnisher upon the same sort of liability upon the same obligation. The right being the same the remedy should be the same; and the right being admitted, the general provisions of the Code should be sufficient to provide a remedy. In any action by the garnisher against the garnishee before judgment in the attachment suit the creditor would, of course, be a necessary party, and the judgment would afford the garnishee complete protection. Glugermovich v. Zicovich, supra. Upon this view of the law the statutory remedy is fully preserved without any impairment of the right of garnishees, and a view which gives full effect to the remedy at the same time that it preserves the rights of all parties should commend itself to the favorable consideration of the courts. But, notwithstanding our conclusion, that upon any view of the facts as disclosed by the record before us the action was barred, we cannot on this appeal, or on the defendant's appeal, remand the cause with directions to the superior court to enter a judgment for the defendant. All we can deal with is the order granting in part and denying in part, the motion for a new trial.

It seems unnecessary, however, in view of the points decided, to enter upon any detailed discussion of the questions presented by the defendant's appeal. This involves a construction of the original and substituted authorizations to defendant to sell the land, and the amount and character of its indebtedness or liability to the Goodyears upon the completion of the sale, and the credits to which it was entitled for payments to and on account of Mrs. Goodyear. The second agreement, dated June 7, 1893, by its express terms, supersedes the former agreement under which the defendant had incurred all the items of expense charged in its accounts up to that date, and we construe the words "all crop returns now in hand" to mean the balance of rents theretofore collected by defendant over and above its expenditures to that date. This balance and any further collections, for the year 1893, were to belong to defendant as part of any surplus of proceeds of sale of the land over and above the sum necessary to pay off the existing incumbrances on the land (including the interest necessarily accruing during the reasonable time required for effecting the sale, which the parties must have taken into consideration in making their agreement), and the $12,000 to be paid to Mrs. Goodyear. Upon this construction no expense incurred by defendant, nor any payment to or on account of Mrs. Goodyear prior to the second agreement, can be charged as a credit against its indebtedness arising upon the subsequent sale of the land. We hold, further, that when, in pursuance of the authorization of June 7th, defendant procured a conveyance of the land from Mrs. Goodyear to its own clerk it became bound by an implied agreement to pay off the incumbrances with accrued interest, and to pay Mrs. Goodyear $12,000, unless by valid subsequent agreement she had consented to make her claim for that sum dependent upon the amount actually collected by defendant upon the securities accepted by it in part payment of the purchase price. There is no finding, and we think no sufficient allegation in the answer, that she consented to any such modification of the written authorization. What has been said covers every substantial point made by defendant in support of its appeal, except the claim that, according to the evidence, it should have received credit for one or two payments on account of Mrs. Goodyear which the court disallowed. We think that on the uncontradicted evidence the court should have allowed an item of $220 paid Montgomery and $171.14 taxes. There are, perhaps, some other small items which should have been allowed, and for this error, affecting as it does the amount of the judgment, we think that part of the order denying a new trial should be reversed.

It is ordered that so much of the order appealed from as grants a new trial be affirmed, and so much thereof as denies a new trial of other issues be reversed.

We concur: McFARLAND, J; HENSHAW, J.; LORIGAN, J.

SHAW, J. I concur in the judgment, and in all of the opinion of the Chief Justice, except the part thereof to the effect that where a garnishee, in his answer to the sheriff, admits that he is indebted to the defendant, the service of the garnishee process in such cases interrupts the running of the statute of limitations on the debt, and, in fact, prevents its again running until the attachment is discharged or the plaintiffs' debt paid. The provision of section 544, Code Civ. Proc., which is said to have this effect, applies alike to cases where the garnishee owes a debt to the defendant and to those where he has in his possession personal property belonging to the defendant. Where the garnishee has property which he admits he holds as custodian of the defendant, the statute of limitations does not run, and cannot begin to run, so long as he admits that he holds as such custodian, nor until, in some manner, he asserts a claim thereto adverse to the defendant. The admission in the answer to the sheriff in such cases, therefore, would of itself be evidence that the statute had not begun to run. But where a matured debt exists at the time of the service of the garnishee process, the statute of limitations has already begun to run against it, and an admission that the debt still exists does not, ordinarily, stop, or interrupt, the running of the statute. There are strong grounds for holding that section 544 was not intended to give any greater effect in this respect to an admission contained in an answer to the sheriff on garnishee process, than in ordinary cases, and that the full meaning of that section, so far as this point is concerned, is that, after the service of garnishee process upon a third person, the garnishee, if he keeps the property, or does not pay the debt to the sheriff, shall thereafter be liable to the attachment plaintiff, in the same manner, and to the same extent that he was theretofore liable to the defendant, but no farther, and that this transfer of liability continues, subject to its original limitations and qualifications, until the attachment is discharged or any judgment in the main action in favor of the plaintiff satisfied, in which case the liability to the attachment plaintiff ceases, and the liability to the defendant continues, if not then barred.

As this question is not involved in the case, I do not think any opinion should be expressed concerning it.

We concur in the foregoing: VAN DYKE, J.; ANGELLOTTI, J.

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148 Cal. 303

PEOPLE v. SALMON. (Cr. No. 1,220.)

(Supreme Court of California. Dec. 6, 1905.)

LEWDNESS — ADULTERY—NOTORIOUS COHABITATION.

Where defendant, a married man, lived in adultery with his brother's wife, but under such circumstances that the community in which he lived believed that they were married and their adulterous relation was kept secret, he was not guilty of living in open and notorious adultery, in violation of St. 1871–72, p. 381, c. 276, § 2, providing that, if two persons, each being married to another, live together in a state of open and notorious cohabitation and adultery, each is guilty of a felony.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Lewdness, § 3.]

In Bank. Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

A. B. C. Salmon was convicted of living in a state of notorious cohabitation and adultery with one Daisy I. Salmon, and he appeals. Reversed.

W. R. Leeds and Davis, Rush & Willis, for appellant. U. S. Webb, Atty. Gen., and L. B. Wilson, for the People.

HENSHAW, J. The information jointly charged A. B. C. Salmon and Daisy I. Salmon with the crime of living together "in a state of open and notorious cohabitation and adultery," each at the time being married to a designated person other than the codefendant. The defendant was convicted, and appeals from the judgment and from the order denying his motion for a new trial. The evidence may be taken as establishing that the defendant Salmon was, as charged, a married man, and that Daisy I. Salmon was not his wife, but was the wife of another man; that the defendants came from New Jersey to the city of Los Angeles, where they were not known, and rented a room in a lodging house on South Olive street in that city, where they lived together as husband and wife under the name of Salmon. The conduct of the Salmons while there is told in the evidence of Mrs. Hall, who conducted the lodging house. She says: "I never knew that there was anything wrong between the defendant, A. B. C. Salmon, and Mrs. Daisy I. Salmon while they were at my place. They never lived at my place in open and notorious adultery, not that I knew anything about. They never lived in my place in a notorious state of any kind. They were very quiet. They were quiet, peaceable, gentlemanly and ladylike. Nobody was shocked by their being at my place that I know of. Nobody took any exception to their being there. If I or my sister had known there was any such thing as an adultery charge against them, or that they were guilty of living in an adulterous relation, we would not have permitted them to have stayed there."

The question thus presented is whether the charge in the information, which embodied the offense of the law, is established by this testimony. The statute upon the subject is entitled "An act to punish adultery," and provides, in section 2, that: "If two persons, each being married to another, live together in a state of open and notorious cohabitation and adultery, each is guilty of a felony." St. 1871–72, p. 381, c. 276. It will be noted that this statute does not punish secret adultery, which, from the moral aspect alone, is as grave an offense as known adultery. The object of the law, as pointed out by the decisions of all of the states where like statutes are found, is to prohibit the public scandal and disgrace of the living together of persons of opposite sexes notoriously in illicit intimacy, which outrages public decency, and has a demoralizing and debasing influence upon society. It is designed, as the Supreme Court of Iowa phrases it, "To prevent evil and indecent examples, tending to corrupt the public morals." State v. Marvin, 12 Iowa, 499; Searls v. People, 13 Ill. 597; State v. Crowner, 56 Mo. 147. In this state the distinction is drawn in People v. Gates, 46 Cal. 53, where the conviction was for the same offense, and this court reversed the case, saying that, while the evidence tended to show that the defendant committed adultery with the woman named in the indictment, there was not the slightest proof of a living with her in a state of notorious adultery. "The offense consists in living in a state of open and notorious cohabitation and adultery. The notoriety is as material in making out the offense as is the fact of adultery committed." So it is the publicity of the offense, the demoralizing and debasing influence of the example that the law designs to prevent. State v. Marvin, 12 Iowa, 506; State v. Johnson, 69 Ind. 87. Adultery is, as is well understood, sexual intercourse of one spouse with any one other than the other spouse. In this case the evidence may be taken as establishing that the defendant committed adultery, since it was shown that in all respects he occupied to Daisy Salmon the relationship of husband. But during all the time that they so lived in the house of Mrs. Hall, no one in the community ever even suspected that defendant's intercourse was adulterous. Notoriety is the state or character of being well known, usually (and always when applied to crime) in an unfavorable sense. It is often found with words of similar import, such as "open" and "flagrant." Can it be said that a person, whose adulterous relationship is not only not known, but not even suspected, is guilty of the open and notorious adultery made punishable by our law? It certainly cannot. Having regard to the very design of the law, which is to prevent an affront to society by such notorious practice, having regard to the uniform decisions of the law, that where the adulterous relationship is kept secret, even if it be continuous, the crime is not made out, it must be answered that the evidence fails to establish the essential of notoriety, without which this particular offense is not proved. The two kinds of cases most commonly found in charges of this kind are when John Doe and Jane Roe, known in the community not to be husband and wife, maintain an open, flagrant, and notorious sexual relationship without pretense of marriage or do the same thing under pretense of marriage, where the community knows the facts, and knows therefore that the pretense is false. In both of these cases there is the same affront to social decency and to the marital relation which is the basis of it. In this case, however, no such affront was put upon society. The couple were by all supposed to be married, and comported themselves with all the respect due to the marriage relation and to society. The moral delinquency may have been the same, but their conduct did not constitute a violation of the penal laws of the state.

The judgment and order appealed from are reversed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; VAN DYKE, J.; McFARLAND, J.; LORIGAN, J.

(148 Cal. 334)

PEOPLE v. COOK. (Cr. 1,227.)

(Supreme Court of California, Dec. 14, 1905. On Rehearing, Jan. 12, 1906.)

1. Criminal Law—Conduct of Trial—Evidence in Chief—Proof of Motive.

The fact that the prosecution has established a prima facie case of murder does not preclude it from going on to prove motive in its case in chief.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1609–1614.]

2. Same—Evidence—Distinct Crimes.

While the prosecution may not introduce evidence of distinct offenses for the purpose of showing defendant's bad character, yet evidence which is relevant to any material fact cannot be excluded because it may prejudice defendant by proving him guilty of distinct crimes; but, in order to render such evidence admissible, it must have a direct tendency to prove the motive or intent or some other material fact.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 830–834; vol. 26, Cent. Dig. Homicide, §§ 372, 373.]

3. Same—Question for Court.

Whether evidence of a distinct crime is relevant to any issue in a criminal case is a question for the court.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1701.]

4. Homicide—Evidence.

In homicide, evidence of criminal relations between defendant and his daughter was admissible, when connected with proof that defendant was extremely jealous of attentions paid by any one to his daughter, and that deceased had been paying such attentions.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 830–832; vol. 26, Cent. Dig. Homicide, §§ 326–328.]

5. Criminal Law—Reception of Evidence—Motions to Strike.

Where an offer of evidence of distinct crimes is connected with an offer of other proof which makes the distinct crimes relevant, the failure to make good the offer of connected proof does not render the ruling admitting the evidence erroneous, in the absence of a motion to strike.

6. Witnesses — Impeachment — Contradictory Statements.

Under Code Civ. Proc. §§ 2049, 2052, providing that a party producing a witness may contradict him, and may show that he has made inconsistent statements, the prosecution may question a witness called by it who denies the very fact which he is called to prove as to previous contradictory statements made by the witness.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1267–1273.]

7. HOMICIDE—EVIDENCE—ARMS OF DECEASED.

In homicide, where there is evidence that deceased had threatened to kill defendant, testimony that deceased, on the day of the homicide and only a few hours before the killing, was armed with a large knife, in addition to a rifle, was admissible to support the issue of self-defense.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 416.]

8. SAME—LETTERS OF DEFENDANT.

In homicide, where the existence of illicit relations between defendant and his daughter, to whom deceased was paying attention, was sought to be established as a motive for the crime, letters indicating the existence of such illicit relations, directed to defendant's daughter and delivered by defendant while in jail to messengers and intercepted by the sheriff, were admissible, regardless of the sufficiency of the evidence of handwriting.

9. SAME—INSTRUCTIONS—EXTRINSIC CRIMES.

In homicide, where the prosecution introduced evidence showing the existence of illicit relations between defendant and his daughter, to whom deceased was paying attention, in order to show a motive for the crime, a requested charge that, although such relations existed between defendant and his daughter, defendant would not thereby be deprived of the right of self-defense, nor the right of indulgence the law allows for a killing in sudden quarrel or in the heat of passion, and that whether or not defendant had at some previous time committed another crime different from that for which he was being tried could not be considered as a reason for convicting him of the crime charged, should have been given, notwithstanding the giving of a brief general charge on the same subject.

10. CRIMINAL LAW—TRIAL—REQUESTS FOR INSTRUCTIONS.

A rule of court requiring requested instructions in civil cases to be presented before the conclusion of the argument does not justify a refusal to consider requested instructions presented in a criminal case after argument and after other instructions had been read.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2008.]

11. SAME—ARGUMENTS OF COUNSEL—DEPARTURE FROM FACTS.

In homicide, the theory of the prosecution was that deceased was paying attentions to a daughter of defendant with whom defendant was carrying on incestuous intercourse, and that defendant killed deceased from motives of jealousy. Defendant's counsel stated in support of defendant's character that he had prosecuted a certain man for raping a certain girl, whereas there was no evidence on which to base his argument. The district attorney in reply argued to the jury that the man whom defendant had prosecuted was engaged to be married to defendant's daughter, and that defendant possibly wanted to get him out of the way, and therefore instituted the prosecution. This argument was also not based on any evidence in the case. *Held*, that the argument of the district attorney was improper, and was not excused by the remarks of defendant's counsel which brought it forth.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1681.]

McFarland, J., dissenting in part. Shaw and ngellotti, JJ., dissenting.

On Rehearing.

12. SAME—INSTRUCTIONS—REFUSAL OF REQUESTS—SUFFICIENCY OF GIVEN INSTRUCTIONS.

It is not error to refuse instructions requested by accused, where the points to which they are directed are fully covered by other instructions given at his request.

In Bank. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

L. B. Cook was convicted of murder, and appeals. Reversed.

Charles F. Craig and J. W. Preston, for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Deputy Atty. Gen., for the People.

BEATTY, C. J. The defendant was convicted of murder of the first degree and sentenced to be hanged. He appeals from the judgment and from an order denying his motion for a new trial. The Attorney General objects to any consideration of the appeal from the order, upon the ground that it does not appear from the bill of exceptions that a motion for a new trial was made, or that it was denied, or that the order, if made, was excepted to. This is all true, but it is also true that the clerk's minutes of the proceedings upon the arraignment of the defendant for judgment show that he then moved for a new trial, that his motion was overruled, and that he reserved an exception to the order. The minutes of the court do not show the particular grounds of the motion, but in other respects the case is the same as in People v. Ward, 145 Cal. 736, 79 Pac. 435, where this point was somewhat considered, though not decided. It is unnecessary, however, to dwell upon this feature of the case, for the appeal from the judgment presents every question that could have been raised on an appeal from the order, except that of the sufficiency of the evidence to sustain the verdict; and it would avail the defendant nothing if he could urge that question, because it is clear that the evidence (the whole of which is shown to be included in the bill of exceptions) was sufficient to establish prima facie a case of murder of the first degree.

For the purpose of disposing of the questions presented by the appeal from the judgment, it will be convenient to state some of the leading features of the case as disclosed by the evidence. For some time prior to the 15th of July, 1904, the defendant and a number of other men, including the deceased, had been employed by one Albers in peeling tan bark at a place known as "The Outlet," in Mendocino county. Of the localities mentioned in the evidence, it seems that the camp of Albers, where the work of peeling bark was conducted, was up in the canon. Descending the canon, the trail passed the house of Pomalek—one of the workmen, and a witness for the people—and at a distance of from 150 to 300 yards further down reached the house of one Rafaelo, where the defendant, with his 15 year old daughter, Ida, was temporarily residing. The deceased, Max Krieger, and the defendant, had been working together for a short time, and down to the day of the homicide were, outwardly at least, on not unfriendly terms. On July 15, 1904, defendant and Pomalek were working together at the camp; but Krieger, who had been celebrating his birthday, was drinking and partially intoxicated. During the morning, he, in company with two companions, appeared at the Rafaelo cabin, where Ida Cook was alone and engaged in preparing her father's midday meal. She testifies that Krieger entered the kitchen, took gross liberties with her person, and made most indecent proposals to her. Whatever may be the truth as to the conduct of Krieger at that time, it appears to be unquestioned that it was disagreeable and offensive to the girl. Mrs. Pomalek, who happened to come to the place while he was there, heard from the outside enough of the conversation in the back room to induce her to expostulate with Krieger, whose demeanor and language convinced her that it was not a fit place for the girl, so that finally she persuaded her to go over to her house on pretense of going for eggs. As the girl did not return, Krieger followed after her, but was informed by Mrs. Pomalek that she was up at the camp with her father, whereupon he left. When, shortly after noon, defendant and Pomalek came down for their dinner, the girl met her father at Pomalek's and told him in Pomalek's presence how Krieger had been acting. She testifies that, when Krieger was soliciting her to have sexual intercourse with him and taking indecent liberties with her person, she threatened to inform her father, upon which he said: "I am not afraid of the old son of a bitch. I will kill him." Of course, there is no direct corroboration of her testimony as to the worst of Krieger's alleged misconduct when they were alone; but she is corroborated to a certain extent by Mrs. Pomalek and by circumstances. Mr. Pomalek was called as a witness for the people to prove threats by the defendant. He testified on his direct examination that defendant had no pistol in the morning, but brought one with him in the afternoon, and was so mad he could hardly work; that he said that Krieger had been down to the house bothering his little girl; that he felt like going down to the camp and shooting him down before the men and the children; and that he repeated this two or three times. He further testified that he advised defendant not to shoot anybody, and that he cooled off and towards evening seemed to forget all about it. At the time defendant was saying these things, Pomalek says he stated in that connection that he had been told by his daughter that Krieger was going to fix him, and that was the reason he had got the pistol—that "if the overgrown brute came around he would give him all he wanted." On his cross-examination Pomalek testified that during the four or five days he had worked with defendant he had manifested no ill feeling towards Krieger until the afternoon of the shooting, and that he had himself heard the girl tell her father about Krieger's misconduct and his threats to fix him (defendant). When they were returning to camp after dinner, defendant had Rafaelo's pistol and said: "He's going to fix me, and I am going to be ready for the overgrown brute."

That same afternoon, shortly before 6 o'clock, Krieger again made his appearance at Rafaelo's house. He had been drinking, but the testimony of two witnesses (Sowers and Whitcomb), who happened to be there when he arrived and went away with him, is conflicting as to the degree of his intoxication. According to the former he was staggering drunk, needing assistance to enable him to go up the trail towards Pomalek's. According to the latter he was quite able to take care of himself, and this is corroborated by Rafaelo. Ida Cook was at the house when Krieger arrived, and Rafaelo and Mrs. Pomalek came a few minutes later. It does no appear that he interfered with her at that time, except to express his displeasure on account of her telling Rafaelo that he had been there drinking his wine. But when Mrs. Pomalek went away—as she did in a few minutes—the girl again went with her to her house, and remained there until her father came down on his way home, when she joined him and they passed down the trail together. They were talking, but no one overheard what was said. She testified that all she told her father at this time was that Krieger had been at the house again. Almost immediately after starting down the trail from Pomalek's, defendant and his daughter met Krieger, Sowers, and Whitcomb coming up the trail from Rafaelo's. The evidence of Sowers, Whitcomb, and Ida Cook is conflicting as to what then happened; but in some important points it agrees. Sowers, Whitcomb, and Krieger each had a rifle. Cook accused Krieger of being down at his house where his girl was, and Krieger denied it. Cook drew his pistol, and Krieger made some motion that induced Sowers to seize his rifle and disarm him. Krieger then advanced upon defendant, and defendant shot him, inflicting a wound which caused his death in a few minutes. Sowers says that, when the parties met, Krieger was drunk and he was assisting him along; that defendant had his hat off and was "white in the face"; that when he took Krieger's rifle from him he made a drunken stagger towards defendant; that he caught him and drew him back, and at the same moment defendant fired. Whitcomb says Krieger was not drunk; that he needed no assistance; that he advanced upon defendant (who was commanding him to stand back) in a determined manner, with his hands up as if he meant business; that Sowers did not pull him back. On the question of Krieger's intoxication, Whitcomb was corroborated by Rafaelo and Ida Cook, and by the latter as to the defendant's repeated command to Krieger to stand back before he shot. There was, it will thus appear, evidence in the actual circumstances surrounding and immediately preceding the shooting from which the jury would have been warranted in finding either murder in the second degree or manslaughter, if not self-defense, and this state of the evidence has a material bearing upon most of the points to be considered.

There remains to be stated, however, the peculiar and most important feature of the case. The district attorney offered to prove, and was by the court permitted, over the objection of the defendant, to introduce evidence tending to prove, the existence for some months previous to the homicide of an incestuous relation between the defendant and his daughter. The theory upon which this evidence of an independent crime was offered and admitted was that it pointed to a motive on the part of the defendant to murder Krieger. It was suggested that defendant may have feared that Krieger either knew, or, if he should succeed in winning the favor of the girl, would discover, the criminal intercourse of father and daughter, and would expose their guilt. It was more strongly argued that defendant's jealousy of any one who sought to ingratiate himself with the girl, whether by honorable or other advances, would prompt him to seek his rival's life.

The exception to the admission of this evidence gives rise to the first question to be considered. The defendant contends that the evidence was wholly inadmissible, and even if admissible was no part of the people's case in chief. The position he takes is that when, by direct evidence of an unlawful killing, the prosecution has made out a prima facie case of murder, the people have no right to add proof of a motive on the part of the defendant to seek his victim's life, unless in rebuttal of some affirmative defense. If this were a sound proposition, it would be difficult to show how this defendant was or could have been injured by admitting at the beginning of the trial evidence which must have come in at the close. But the proposition is clearly untenable. The prosecution in a criminal case is not obliged to rest upon evidence which merely establishes the guilt of the defendant prima facie—upon evidence, that is to say, which is merely sufficient in law to sustain a verdict of guilty. The guilt of the defendant must be proved beyond a reasonable doubt in order to secure such a verdict, and the district attorney not only may, but ought to, introduce all proper evidence at his command tending to establish the guilt of the defendant, in order to overcome any doubts or scruples of the jurors. And this is especially true of a trial for murder, where proof of an unlawful killing, in the absence of evidence indicating express malice (deliberate purpose to kill), would only establish a case of murder in the second degree.

Regarding the other ground of objection, the rule that a defendant in a criminal cause can be tried for no other offense than that charged in the indictment or information is universally recognized, and it is equally well established that in order to convict the defendant of the particular offense charged the prosecution is not allowed to introduce evidence of other offenses for the mere purpose of showing that he is a bad man, and therefore more likely to have committed the offense than if he had borne a good character. The prosecution is not even allowed under our law to attack his character by evidence of general repute, except in rebuttal of evidence on that point first introduced by him. But when some distinct offense is so connected with the crime charged in the indictment that proof of the former, in connection with other evidence, would sustain a probable inference of guilt as to the latter, such distinct offense may be proved, as, for instance, to show a motive on the part of defendant to commit the crime charged, or the intent with which an equivocal act has been done, such as passing a counterfeit bill, or receiving stolen goods. The general rule and its exceptions are very elaborately discussed in the opinion of Justice Werner in the celebrated case of People v. Molineux, 168 N. Y. 290, 61 N. E. 286, 62 L. R. A. 193, where many of the principal authorities are cited. The result of the discussion, I think, may be summed up in the proposition that evidence which is relevant to any material fact in issue in a criminal case cannot be excluded because it may prejudice the defendant by proving him guilty of other crimes than that for which he is on trial. People v. Walters, 98 Cal. 141, 32 Pac. 864. The rule as thus stated has been applied in a number of cases decided in this court, of which the following are examples: People v. Lane, 101 Cal. 513, 36 Pac. 16; People v. Wilson, 117 Cal. 688, 49 Pac. 1054; People v. Valliere, 123 Cal. 576, 56 Pac. 433; People v. Brown, 130 Cal. 594, 62 Pac. 1072. These were all cases in which the prosecution was allowed to prove distinct offenses for the purpose of showing a motive on the part of the defendant to commit the crime charged in the information. But, in order to render evidence of this character admissible, it must have a direct tendency, in view of the surrounding circumstances, to prove the motive or intent or other material fact, and whether it is relevant or not is a question for the court; and in several instances this court has reversed convictions for the admission of evidence of distinct offenses, upon the ground that such evidence had no tendency to prove the charge laid in the information. People v. Lane, 100 Cal. 379, 34 Pac. 856; People v. Wright, 144 Cal. 165, 77 Pac. 877. In People v. Lane it was held that evidence of a distinct substantive offense cannot be received unless there is some clear connection between the two offenses, by which it may be logically inferred that, if guilty of one, he is also guilty of the other.

These cases, and the decisions everywhere, clearly sustain the position of the Attorney General that if the fact of incestuous relations between the defendant and his daughter, in view of the other facts in evidence, did furnish the ground for a logical inference that he desired to put Krieger out of the way, and was willing to murder him in order to bring about that result, then proof of such relations was admissible. On the other hand, the same authorities show with equal unanimity that, if the alleged relation between defendant and his daughter had no tendency to establish a motive on the part of defendant to put Krieger out of the way, and therefore avail himself of some pretext for provoking an affray in which he might kill him, the evidence in question was irrelevant, as it was necessarily prejudicial in the highest degree. It becomes necessary, therefore, to examine the grounds upon which it is contended that a motive on the part of defendant to murder Krieger may be inferred from the assumed fact of the incestuous relation with his daughter.

The first of the two grounds suggested by the district attorney, upon which he argued the relevancy of the testimony, viz., the possible fear of the defendant that Krieger might know or might find out, and as a rival for the girl's favors, might expose, defendant's criminal intercourse with his daughter, seems to have been abandoned on the appeal. No reference is made to it in the Attorney General's brief, and there is nothing in the evidence to indicate that Krieger had any knowledge of the supposed criminal intercourse, or that he had any opportunity of discovering it. But it is insisted there is evidence that the defendant was jealous of Krieger. All of this evidence is cited in the brief of the Attorney General, and I shall quote it in full. A letter written by the defendant to his daughter from the jail and intercepted by the sheriff was read in evidence. It contains a number of expressions which, in connection with other evidence introduced at the trial, go very far to prove the charge of incest; but there is nothing bearing upon the point of jealousy of Krieger, unless it is found in the closing sentences: "Remember poor papa. Kiss Tom and Jerry. Don't have anything to do with any man. Be true to me. By by." These words follow almost immediately that part of the letter in which he urges his daughter to marry one "George" immediately in order that she may have a protector, and in order to induce George to stick to him. The only other evidence on the point is that of Pomalek, who testified that, Krieger having mentioned to him his liking for defendant's daughter, he spoke to defendant on the subject four or five days before the killing: "I says to Mr. Cook that Krieger was a pretty good-looking man, and good worker, and it would be pretty good if his daughter married him and they would be for themselves. Mr. Cook says—well, he says: 'She wouldn't go with nobody,' he says. He says: 'My child will stay with me as long as I live.' He says: 'If she marries anybody she's going to let him understand on the start that she never going to leave her papa; that she stay with her papa as long as he lives or as long as she lives.' * * * I says: It would be all right if they marry. Mr. Cook says, if he do marry, he got to live with them." The same witness, Pomalek, testified in another connection that, prior to the afternoon of the day Krieger was killed, defendant and he had appeared to be on good terms; but that evening, after hearing his daughter's report of Krieger's misconduct, defendant was violently angry and made the threats above detailed. In other words, it appears, by the evidence of this main witness for the state, that the defendant for several days before the killing, having reason to believe that Krieger was seeking his daughter in marriage, remained friendly, but became violently enraged when he heard that in his absence Krieger had pursued her with improper solicitations and indecent familiarity. To my mind this evidence, so far from sustaining the inference that the jealousy of the defendant had been aroused by any proper attentions of Krieger to his daughter (thereby causing him to seek an opportunity or pretext for killing him) has an opposite tendency—a tendency to rebut whatever inference it may be claimed is to be drawn from the mere fact of the criminal connection of defendant and his daughter. The question to be decided, therefore, seems to resolve itself into this: Where the immediate circumstances surrounding a homicide leave it doubtful whether the killing was of deliberate malice, may the prosecution always prove that the slayer was on terms of criminal intimacy with a woman to whom the slain was paying his addresses, even though there is no direct evidence of actual jealously? Upon this precise question we are referred to no authority directly in point.

In People v. Gress, 107 Cal. 463, 40 Pac. 752, it was held to be error to admit evidence that the defendant had been trying to induce the wife of the deceased to leave him. But that decision is not in point here, although what was said by the court in regard to one of several alleged errors does sustain appellant's contention upon a point that we have here overruled. It was conceded in that case that if the defendant's agency in the killing had not been admitted and had depended on circumstantial evidence, his efforts to seduce the wife of deceased would have been relevant to the question of motive, and the error in admitting it was held to consist in its admission where it was not necessary. We think this was said without due consideration of the fact that, in cases of homicide, the presence or absence of motive to kill is always material, whether the killing is admitted or denied, not only in determining the degree of the murder, if murder, but also upon the question of malice where the plea is self-defense, as in this case, or provocation and sudden passion. What was decided on this point in People v. Gress, we think, was erroneously decided; but what was conceded seems to sustain the proposition that any existing cause for jealousy on the part of the slayer is relevant in cases of homicide, although it may not appear that jealousy has actually resulted. Aside from this case, there is in the briefs of counsel a dearth of authority on the precise question above stated, and no very convincing argument. We shall therefore go no further than necessary to decide the precise point presented by the record, which is narrower and more technical than the matter we have been discussing. When the district attorney offered the evidence of defendant's criminal relations with his daughter, he offered to connect it with proof that he was extremely jealous of the attentions of any one to her, and that Krieger had been paying her attentions. This offer made the ruling of the court in admitting the evidence correct, and though, in my opinion, the offer was not made good, in the absence of any motion by defendant to strike out the evidence, it cannot be said that there was, as to this matter, any error in the rulings of the court.

Nor can it be said that the court erred in permitting the district attorney to cross-examine Ida Cook as to previous contradictory statements regarding her relations with her father. He had called her as a witness to prove the sexual intercourse, and she, in response to direct inquiry, had denied that there had ever been any sexual intercourse. He then asked her if she had not made a contrary statement to him within 24 hours, and she answered, without objection, that she had, and had made the same statement to others at different times and places. Cross-examined by defendant's counsel, she gave it as an excuse for her statement to the district attorney that he had threatened, if she did not admit the intercourse, to "send her to some home." She made similar excuses for her statements to others. On direct examination on the following day, the district attorney asked her in regard to other statements as to sexual intercourse with defendant, made at other times and places, and in the presence of other persons. Here, for the first time, defendant's counsel interposed an objection, on the grounds, among others, that the evidence was incompetent, and that the examination had gone far enough, which objections were overruled, and the witness answered that she had made one of the statements, but denied others. This ruling of the court could scarcely be regarded as injurious to the defendant, even if erroneous; for it only added one hearsay statement to a number of others of the same character that had come in without objection, and by which the witness was as completely discredited as she could have been by the addition of one more. But the ruling was not erroneous. The case is not affected by the qualification which this court has from the beginning imposed upon the general language of sections 2049 and 2052 of the Code of Civil Procedure. The witness in this case did not simply fail to give favorable testimony for the state. Upon the point at issue her testimony was positive against the state. This court has in a number of cases held, and I have no doubt correctly held, that the mere failure of a witness to give favorable testimony for the party producing him does not entitle such party to prove that he has made contrary statements elsewhere. People v. Creeks, 141 Cal. 532, 75 Pac. 101, and cases cited. But it has gone no further in qualifying the language of the statute. The rule on this subject, its origin, its policy, and its limitations, are very fully discussed in the recent work of Professor Wigmore (Wigmore on Evidence, § 902 et seq.), and his conclusion is that under statutes similar to ours the rule is subject to no more stringent qualification than the decisions above referred to have imposed.

Defendant's counsel on cross-examination of Ida Cook asked her this question: "Do you know whether he had, in addition to a rifle, a large knife on his person?" This question referred to Krieger and to the time—about noon of the day of the homicide—when, according to the subsequent testimony of the witness, he had threatened to kill the defendant. The question was objected to on the grounds of incompetency, irrelevancy, and immateriality, and the objection was sustained, notwithstanding the offer of counsel to show that the fact was communicated to defendant. If the objection had been that it was not proper cross-examination, it would have been right to sustain it upon that ground and at that stage of the proceedings; but it was a mistake to hold that if, at the very time he was threatening to kill the defendant, and only a few hours before the fatal encounter, deceased was armed, not only with a rifle, but with a large knife, the fact was irrelevant, or that the testimony of Ida Cook was incompetent evidence of such fact. And it may be that the ruling upon the objection as made prevented the defendant's counsel from offering proof of the same fact as part of his own case, when it would clearly have been admissible as a circumstance to be weighed by the jury in considering the action of defendant in firing upon Krieger after his rifle had been taken away, but when, according to all the testimony, he was advancing upon defendant at close quarters, and, according to some of the testimony, in a threatening manner and in disregard of repeated commands from defendant, to stand back. If this evidence had been offered at the proper time as part of defendant's case in support of his plea of self-defense, and excluded by the court on the objection as made, it would have been a serious error.

The court did not err in admitting the intercepted letters. That defendant was the author of the letters was proved by direct evidence that he had delivered them to the messengers, who conveyed them out of the jail, and the evidence of the handwriting, if insufficient of itself, was superfluous.

The defendant, at the close of the trial, requested the court to give, among others, the following instruction: "Evidence has been introduced by the prosecution in this case tending to show that defendant, prior to the shooting, had had illicit intercourse with his daughter. I charge you that, although it should appear to you from the evidence that such a state of affairs existed, nevertheless the defendant would not for that reason be deprived of the right of self-defense, either in protection of his life or the prevention of great bodily injury, nor would he be deprived thereby of the right to the indulgence the law allows for a killing upon a sudden quarrel or in the heat of passion. Whether or not the defendant had at some previous time committed another crime different from that for which he is being tried cannot be taken into consideration by you as a reason for convicting him of the crime with which he is charged." This request to instruct seems to us to have been wholly unobjectionable in point of law and strictly pertinent to the facts in evidence. It was of the highest importance to the defendant in this case, as it always is to any defendant in any case in which evidence of a distinct offense has been admitted for the purpose of showing motive to commit the crime charged, that the jury should be cautioned not to consider such evidence for any but the limited purpose for which it has been admitted, and we cannot see that the instruction as presented contained a single word beyond what the defendant had a right to request. The court, however, refused the instruction, and its refusal is justified on the ground that another instruction framed by the judge on the same point was given. It is true that the instruction given stated the law correctly; but it was brief, general, and colorless in comparison with the instruction asked, and had the effect of minimizing the importance of a consideration which could not have been stated with too much emphasis. The instruction as asked should have been given.

The defendant's requests to instruct, numbered 7 and 8, related to a part of the law of self-defense strictly pertinent to the evidence of his witnesses. The wording of the seventh request is perhaps faulty, but the eighth stated the proposition of law in an entirely unobjectionable form, and the refusal of the court to give it is not justified by the instructions given of its own motion. Those instructions, while entirely correct and proper, were confined to a statement of what is not self-defense, and contained only an implication of the proposition which the defendant had a right to have stated to the jury in direct terms.

The refusal of the court to allow defendant's requests to charge numbered 17 and 18 was placed partly upon the ground that they were presented too late, in view of a rule of court requiring requested instructions to be presented before the conclusion of the argument. What the terms of the rule are does not appear from the bill of exceptions; but if, as asserted by counsel for appellant, it applies only in civil cases, it did not justify a refusal to consider the requests, though presented after the argument and after the other instructions had been read. Nor was the refusal of the eighteenth request justified by reason of the instructions given. It related to the law of self-defense, and what has been said of the eighth request applies equally to it.

There remains but one other matter to be noticed: During his closing argument to the jury the district attorney allowed his zeal to betray him into the statement of a matter not in evidence, which was necessarily injurious to the defendant; and the court, upon objection to the statement and argument based upon it, justified the course of the district attorney upon the ground that counsel for defendant had referred in his argument to matters not in evidence. The following are the remarks of the district attorney, the objection of defendant, and the ruling of the court: "I say to you, gentlemen of the jury, that there is not in the history of the world, I believe, a case parallel with this case here, if you gentlemen of the jury knew the history of this Cook family in all its ramifications. Mr. Craig went outside of the record here to bolster up the character of this defendant, and told you how energetic he had been in defense of the honor of his daughters. He told you how he had caused a man by the name of Ferguson to be arrested and sent to Folsom because of raping or having sexual intercourse with this little girl Belle, who testified on the stand here. But he neglected to tell you, gentlemen of the jury, that that same man Ferguson was at that time engaged to be married to his daughter Ida when he sent him to Folsom. He did not say anything about that to you as a possible motive why this defendant wanted to get Ferguson out of the way. It was not necessary to mention that. He did not go into all those facts because, gentlemen of the jury, he did not want to treat you fairly upon that subject. That should never have been mentioned in the case. Mr. Preston (interrupting): We desire to object to the remarks made by the district attorney relative to the question of the engagement to be married and the motive for the prosecution of Ferguson, and move that it be stricken out and the jury instructed to disregard it. The Court: I think Mr. Craig opened the way for those remarks. Mr. Preston: We except to the remarks of the court. The Court: He referred to the action of the defendant with reference to Mr. Ferguson, when there was no evidence of it, and let the door open. Mr. Preston: We object to it, and make an exception to the ruling."

It was misconduct, calling for rebuke from the court, for the district attorney to state a fact not in evidence in order to found upon it an argument that defendant had sent one man to the penitentiary from the motive of jealousy, and therefore was capable of killing another upon the same incitement. And it was no excuse for the misconduct that the counsel for defendant had referred in his argument to the Ferguson trial. In the case of People v. Kramer, 117 Cal. 650, 49 Pac. 842, this court said in response to this excuse for similar misconduct: "Assuming that the comments of the district attorney were not warranted by the evidence, his act would not be justified by the fact that defendant's counsel had already committed a like impropriety. The proper way to correct such an abuse of privilege on the part of either counsel is for his adversary to call it to the attention of the court and have it stopped." We cannot too strongly insist upon the observance of this admonition, as the only mode of confining criminal trials within proper limits, or conducting them with proper decorum, or—which is vastly more important—preserving the right of the defendant to be convicted only upon legal evidence addressed to the charge upon which he is being tried. Considering the nature of the collateral offense imputed to the defendant in this case, it is apparent that the evidence concerning it must have had a tendency to bias the jurors against him, and it was incumbent upon court and counsel to confine their attention to the evidence and to the only legitimate purpose of that evidence. That the statement to the jury of an incriminating fact not in evidence as the basis of an argument against the defendant by the district attorney is grave misconduct has been decided by this court in People v. Valliere, 127 Cal. 66, 59 Pac. 295, and in People v. Sing Lee, 145 Cal. 191, 78 Pac. 636. It is true that in those cases evidence of the facts used in argument by the district attorney had been ruled out by the court, and this certainly made the offense more flagrant; but that circumstance was not the ground of the decision, though it was, perhaps, the occasion for the severe terms of reprobation by which the conduct of the district attorney was characterized in the opinion of Judge Temple in the Case of Valliere, the closing words of which we quote. "The court promptly rebuked the attorney, but that did not cure the injury. Rebukes do not seem to have any effect upon prosecuting officers, and probably as little upon juries. The only way to secure fair trials is to set verdicts so procured aside."

The judgment and order of the superior court are reversed, and the cause remanded.

I concur: VAN DYKE, J.

HENSHAW, J. I concur in the opinion of the Chief Justice and in the judgment. That opinion, however, treats only of the case as it is presented upon this appeal, while, in contemplation of the new trial which must necessarily result, it seems to me obligatory upon us to direct the trial court upon the new phases of the question which are certain to arise. Of these, the first is as to the admissibility under any circumstances of this highly injurious testimony tending to show motive. It has been said by this court: "In every criminal case proof of the moving cause is permissible, and oftentimes is valuable." People v. Durrant, 116 Cal. 179, 48 Pac. 75. As stated in the opinion of the Chief Justice, the admissibility or nonadmissibility of such offered evidence presents a legal question, to be determined in the first instance by the trial court, and evidence, even though injurious, is not, therefore, inadmissible if it pertinently and logically tends to show motive for the crime, and thus to solve any doubt which may exist in the case, either as to the identity of the slayer, the degree of the offense, the insanity of the defendant, or to the justification or excusability of his act. It will not, of course, be said that such evidence is admissible merely as the "foundation of an argument." It will not do even to say that such evidence should be admitted when the jury from it might draw an inference of motive. To be admissible it should be of such character as to show a logical, causal connection with the crime, moving the minds of unprejudiced jurors to the belief that it tends to establish the true motive. That evidence of the incestuous relations between defendant and his daughter was admissible in this case to show motive, as well as to throw light upon any doubtful circumstance attending the actual homicide, I am well convinced. Precisely what may be the mental process of one so degenerate it may not be easy to declare; but it is at least understandable, from the evidence in the case, that while he might not have objected to the marriage of his daughter, since she was to have lived with him, and thus have enabled him to continue the relationship, he might well have become incensed at the dishonorable solicitation of another man who was endeavoring to have sexual intercourse with her. His letters to his daughter show that he regarded himself more as her lover than as her father, and herself more as his mistress than his daughter. And his objection might have been the same objection that has excited many another man to crime when his love affair has been interfered with; or, again, he may have feared that his daughter would have yielded, and that, in the confidences which might follow, his own bestial conduct would be disclosed. That one, or another, or both, of these considerations, were the moving impulses of his mind, seems to me beyond doubt, since no one can credit that, having debauched the girl himself, he could, in any honorable and paternal sense, be careful of her chastity or resentful of improper advances made to her by another. And if either of these views, or both, were entertained by the defendant, the fact of his relationship became proper for the jury.

Upon the assumption that the district attorney believed the statements which the girl had made to him, and, so believing, expected her to testify to them under oath, her impeachment was, as pointed out by the Chief Justice, legitimate evidence. But the situation presented upon a new trial will, in this regard, be entirely different. The district attorney cannot again be taken by surprise, and it would be highly improper, prejudicial, and erroneous to adopt upon a new trial a method which the peculiar circumstances of the first trial alone justified. It is never permissible for an attorney to offer a witness in the expectation, or with the knowledge, that that witness will testify to a given fact, merely for the purpose of establishing the contrary, by purely hearsay testimony. This would be subversive of the fundamental principles of evidence. Therefore, I think it should be pointed out that, while legitimate evidence of the incestuous relationship is admissible upon a new trial, such evidence cannot be presented to the jury by the method which the circumstances of the first trial alone made permissible.

I concur: LORIGAN, J.

McFARLAND, J. (concurring). I concur in the judgment of reversal. I concur also in the reasons given in the opinion of the Chief Justice for the reversal; but I do not concur in some other parts of that opinion. I do not think that evidence of the unlawful relation between the defendant and his daughter was admissible at all. In the first place, I do not think that it tended to show motive for the killing; and, in the second place, evidence of motive is admissible, in my opinion, only where the fact of the homicide is denied and is in doubt, and not where, as in the case at bar, it is admitted. People v. Gress, 107 Cal. 461, 40 Pac. 752. Moreover, in my opinion it was error to allow the district attorney to ask Ida Cook, when on the stand as his own witness, if she had not made declarations contrary to the testimony which she then gave. Her declarations were purely hearsay and inadmissible. A party can show contradictory statements of his own witness only where it reasonably appears that he was taken by surprise by the testimony given by his witness, and then the contradictory statements can be given only for the purpose of setting the surprised party right before the jury, not as general evidence in the case. Suppose at another trial the district attorney, well knowing what Ida would swear to as to the incest, should again put her on the stand and ask her if she had ever had incestuous relations with defendant, and, upon her denying it, should ask her if she had not stated the contrary to other persons; is it possible that such questions should be allowed, or would it be allowable for him to prove her declarations by others? It would be intolerable to allow the manufacture of evidence in this way. He might just as well prove her declarations in the first instance, without putting her on the stand at all.

SHAW, J. I dissent. I do not think the propriety of the admission of the evidence tending to prove the existence of incestuous relations between the defendant and his daughter should, under the circumstances of this case, have been left in doubt. That such evidence would tend to show motive on the part of the father to kill a man whom he knew to be paying attentions to her of an amatory character, whether honorable or dishonorable, seems to me too clear to admit of doubt, or justify elaborate discussion. The instruction quoted in the main opinion on the subject of the purpose for which the evidence of incest should be considered by the jury, and which was refused by the court, was, in my opinion, clearly objectionable. It purported to give a positive direction to the jury, in effect, that the evidence of incest by the defendant and his daughter could not be considered as a reason for convicting him of murder. The rule is, and it is supported by the main opinion, that if they should believe from the evidence of such incest and the other evidence in the case that the motive for the killing was to prevent exposure of the incest, or was rage or jealousy growing out of the incestuous relations, then the fact of the existence of such incestuous relations must constitute one of the reasons (using the word in a sense very common) which would impel the jury to convict him of murder.

With respect to the instructions asked after the argument, and after the giving of all the other instructions, the rule of the court referred to by defendant's counsel applies to criminal cases as well as civil, but leaves the court at liberty to give the instruction or not in criminal cases. The matter treated of in these instructions—self-defense—was fully treated in other instructions given by the court, and, hence, they do not come within the rule that in criminal cases an instruction which, under the rules of the trial court, is requested too late, should nevertheless be given, if it is upon a point material to the defense and not covered by other instructions.

As to the alleged improper remarks of the district attorney in his argument to the jury, it is clear they were provoked, if not justified, by the misconduct of the defendant's attorney, who, in his argument, stated to the jury facts not in the record, relating to the same subject, and did so manifestly for the purpose of prejudicing the case of the people in the minds of the jury. I am unable to approve the view which seems to have been adopted in the main opinion, with respect to such misconduct. The commonwealth must necessarily, in its efforts to prevent and punish the commission of crime, avail itself of the agency of mere human beings, who are subject to the common weaknesses incident to humanity, and are influenced and controlled by like passions and impulses as the rest of mankind. The trial courts and the prosecuting officers, when engaged in the trial of a criminal case, must proceed with some celerity. In the argument, particularly, the district attorney is liable to be moved by sudden and ill-advised impulses, and to say things on the spur of the moment and under the provocation frequently so freely given by the opposing attorneys, which, if taken seriously and considered by the jury as part of the evidence, would be prejudicial to the rights of the defendant. And the court itself, under the pressure of the occasion, is likely to manifest some human impatience with the untimely interruption of an argument, and to overrule objections which, upon maturer reflection, it would sustain. In view of these difficulties naturally existing in the prosecution of every case, and of the further fact that such improper action is not infrequently deliberately provoked by shrewd attorneys for the defense, for the very purpose of causing a subsequent new trial or reversal, and that such motive cannot usually be exposed, it should not be the policy of this court, sitting in chambers, with ample opportunity for grave deliberation, to be swift to criticise, or declare injurious error, the action of the trial court or of the district attorneys in such matters. Under our system of criminal jurisprudence it is taken as a certainty that a properly impaneled trial jury is a fit tribunal for the determination of the question of the guilt or innocence of the defendant. This necessarily implies that these triors are capable of discerning the radical difference between the evidence and the argument, and to know the different manner in which each is to be considered by them. If not, they would be utterly unfit for the performance of their office. The rule of practice in regard to such alleged misconduct should require the counsel for the defendant, not only to object at the time to the improper argument complained of, but also to make a formal request to the court to instruct the jury that they must disregard such argument and decide the case solely on the law and the evidence. If the court does so instruct the jury, that should be deemed the end of the matter, unless the trial court, in its discretion, believes the injury from the misconduct to be so serious as to require a new trial.

In the present case the court did not, at the time of the objection and request for an instruction concerning this particular part of the argument, either deny or grant the request. Afterwards, however, during the same argument, objection was made to another portion thereof, and a like request made for an instruction to the jury, and thereupon the court instructed the jury not to consider the remarks as influencing their verdict, and "not to be influenced by any remark of any attorney, but to decide it on the law and the evidence." This instruction was clearly intended to apply to all the previous remarks of the district attorney, and it must be presumed to have been so understood. The other instructions also repeatedly directed the jury that the several facts involved in the guilt of the defendant must be determined from the evidence, and proved beyond reasonable doubt. They were also sworn to "a true verdict render, according to the evidence." If the jury were fit to try the case at all, as they are conclusively presumed to be, they must have obeyed these clear instructions and their own solemn oath.

I desire to say, in addition, that I concur in the remarks of Justice Henshaw in his concurring opinion. I think the judgment should be affirmed.

ANGELLOTTI, J. I dissent from the judgment of reversal, and concur generally in the views expressed by Justice SHAW in his dissenting opinion. In regard to the charge of misconduct on the part of the district attorney in argument, I have no doubt that the remark complained of as to an existing engagement of marriage between Ferguson and the daughter Ida was improper; but I do not think that, under the circumstances of this case, we have the right to assume that the jury may have been at all influenced thereby, in view of the explicit instruction of the court to the jury, given during the argument, that they must not consider or be influenced by any remark of the district attorney, but must decide the case on the law and the evidence.

I concur in the views expressed by Justice HENSHAW upon the question as to the admissibility of the evidence tending to show the relations existing between defendant and his daughter, Ida, and also in what is said by him as to the questions asked the witness Ida by the district attorney in relation to her previous statements to him and to others, and in what is said by him as to the only basis upon which such questions can properly be allowed.

On Petition for Rehearing.

BEATTY, C. J. A rehearing of this cause is denied, but it is proper to say that the petition of counsel for the people points out a mistake in my opinion which requires correction. The superior court did not err in refusing defendant's requested instruction 18. It was rendered erroneous by the insertion of the word "misdemeanor." This fault in the instruction was not adverted to in the argument upon which the cause was submitted, and escaped the attention of the court, as it seems to have done in People v. Glover, 141 Cal. 237, 238, 74 Pac. 745, where a similar instruction was said clearly to express the law. In that case, as in this, however, the attention of the court was directed exclusively to other questions affecting the ruling complained of, and this particular fault in the wording of the instruction overlooked. The law on the point is correctly stated in People v. Hecker, 109 Cal. 461, 42 Pac. 307, 30 L. R. A. 403. It is proper, also, to state that for another reason there was no error in refusing to give either the eighth or eighteenth instruction requested by defendant. The points to which they were directed were fully covered by instructions 9, 10, and 11, given at request of the defendant. This fact was pointed out in the brief of the Attorney General, but by some inadvertence in preparing the opinion my attention was confined to the instructions given at the request of the people, which, as stated, merely pointed out the limitations of the right of self-defense.

As to the question of the right of the people to prove the incest without evidence aliunde of actual jealousy, the point, though not decided in my opinion, seems to be clearly decided by a majority of the court in favor of the people.

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148 Cal. 311

HAUGHAWOUT v. RAYMOND et al.

(L. A. 1,460.)

(Supreme Court of California. Dec. 11, 1905.)

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—RESOLUTION OF INTENTION.

A resolution of intention for a public improvement may be aided by reference to the plans and specifications.

2. SAME—ANNEXATION OF SPECIFICATIONS—NECESSITY.

A resolution of intention for a public improvement referring to the specifications and plans is not insufficient because the plans and specifications are not physically annexed to it.

3. SAME—CREATION OF SPECIFICATIONS—ORDINANCE.

It is not necessary that the specifications for a public improvement should be created by ordinance, instead of by resolution.

4. SAME—BOUNDARIES OF ASSESSMENT DISTRICT—OBJECTIONS.

The failure of a property owner to object to the boundaries of an assessment district at the time that he is given a right to object by statute amounts to a waiver, and he is concluded by the decision of the council.

5. SAME—ENGINEER'S ESTIMATE—FAILURE TO FURNISH.

Since the statute merely requires that the city engineer shall furnish an estimate of a public improvement if required by the council, his failure to furnish it does not invalidate an assessment, in the absence of any showing that the estimate was required.

Department 2. Appeal from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Action by W. J. Haughawout against William Raymond and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

S. O. Houghton, Leslie R. Hewitt, and Lee, Scott, Bailey & Chase, for appellants. Goodrich & McCutchen and H. J. Stevens, for respondent.

HENSHAW, J. This is an action to foreclose an assessment for the construction of a public sewer in the city of Los Angeles. Plaintiff recovered judgments, and defendants appeal upon the usual technical grounds.

Some of the questions have already been disposed of by this court in Haughawout v. Hubbard, 131 Cal. 675, 63 Pac. 1078. Upon this appeal the principal attack is made upon the sufficiency of the resolution of intention, which it is declared does not sufficiently describe the work. Our statute prescribes merely that it shall "describe" the work. We need not be at pains to follow the elaborate objections which appellants urge. The resolution of intention by specific reference makes the plans, profiles, and specifications a part of itself, and these, taken with the resolution of intention, are certainly sufficient to carry all knowledge and notice to the property owner which a fair construction of the street law requires. That the resolution of intention may be aided by reference to the plans and specifications is well settled. Williams v. Bergin, 116 Cal. 57, 47 Pac. 877; Cohen v. Alameda, 124 Cal. 507, 57 Pac. 377; Grant v. Barber, 135 Cal. 188, 67 Pac. 127. As a typical illustration of the refinement of the technical objections which are invoked against these proceedings, it may be pointed out that it is contended that the plans, profiles, and specifications cannot be used to aid the resolution of intention, because they were not physically "annexed" to it. Reliance is here placed upon Grant v. Barber, supra, where the word "annexed" was employed. A casual inspection of the opinion in Grant v. Barber will disclose that the annexation there meant was an annexation by reference, which was the only annexation in that case, as well as in the case at bar. Notwithstanding that the proceedings for street work and sewer work, like proceedings in taxation, are in invitum, and that therefore a fairly strict and accurate compliance with all the statutory requirements is necessary, this is the limit to which any court should be expected to go in disposing of the questions which are involved. The contractor who has honestly and substantially complied with his contract, of which the property owners have received and will continue to receive the benefit, is quite as much entitled to the protection of the law as are the property owners themselves, and, upon the other hand, an endeavor—even a successful endeavor—upon the part of the property owners to defeat the just claims of such a contractor, by a resort to the extreme technicalities of the law, can, upon the whole, operate only to the disadvantage of the property owners themselves, since it necessarily tends to increase the price at which any and all future contractors will be willing to engage in work, payment for which, after having been duly performed, is met by harassment and vexatious delay, with the prospect at the end of utter failure of recovery.

The objection that the specifications should have been created by ordinance and not by resolution is answered by Santa Cruz Rock Paving Co. v. Heaton, 105 Cal. 162, 38 Pac. 693. The contention that benefited property was omitted from the assessment, and the whole assessment is therefore invalidated, is disposed of by the case of Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661. So, also, and upon the same authority, is the further objection that the so-called assessment district embraced only lots fronting on the sewers, upon which proposition citation may also be made to Savings & Loan Society v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067. Nor does the fact that the engineer did not furnish an estimate invalidate the assessment; the statute requiring merely that the engineer shall furnish an estimate to the city council, if required by it, and the record disclosing that the estimate was never required.

No other of the objections presented by appellants seems to merit special notice, and for the foregoing reasons the judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

HAUGHAWOUT v. BONYNGE et al.

(L. A. 955.)

(Supreme Court of California. Dec. 11, 1905.)

Department 2. Appeal from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Action by W. J. Haughawout against W. A. Bonynge and others. From a judgment in favor of plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

S. O. Houghton, Leslie R. Hewitt, and Lee, Scott, Bailey & Chase, for appellants. Goodrich & McCutchen and H. J. Stevens, for respondent.

PER CURIAM. The points urged by the appellants in this case are identical with those heretofore considered and disposed of in Haughawout v. Raymond (L. A. 1,460, filed this day) 83 Pac. 53; and, for the reasons in that case given, the judgment and order here appealed from are affirmed.

148 Cal. 313

STOCKTON GAS & ELECTRIC CO. v. SAN JOAQUIN COUNTY (two cases).

(Sac. 1,065, 1,070.)

(Supreme Court of California. Dec. 14, 1905.)

TAXATION—PLACE OF TAXATION—FRANCHISE TO USE STREETS.

The franchise extended by Const. art. 11, § 19, to lay pipes and conduits or erect poles, and supply the inhabitants of a city with artificial light, is an incorporeal hereditament, or real estate in the nature of an easement, pertaining to the streets of a city wherein it is exercised, and is therefore assessable for taxation only in the county in which such city is located, under Const. art 13, § 10, providing that all property (save property of railroads operated in more than one county) "shall be assessed in the county * * * or district in which it is situated."

McFarland, J., dissenting.

In Bank. Appeal from Superior Court, San Joaquin County; Joseph H. Budd, Judge.

Actions by the Stockton Gas & Electric Company, a corporation, against the county of San Joaquin. Judgment for defendant in both cases, and plaintiff appeals. Judgment in both cases affirmed.

Nicol, Orr & Nutter, for appellant. A. H. Ashley, for respondent. Page, McCutchen & Knight and William B. Bosley, amici curiæ.

LORIGAN, J. These are appeals in two cases, which, as they involve the same main legal proposition, will be disposed of together. They are actions to recover taxes paid to the tax collector of San Joaquin county by plaintiff under protest; one to recover such taxes paid in the year 1898, the other for taxes, paid in the year 1899, upon the assessment of a franchise hereinafter to be mentioned. Plaintiff is a corporation organized under the laws of this state for many purposes, among others to manufacture, use, transmit, purchase, and sell gas for illuminating, heating, and other purposes; to purchase, generate, transmit, use, purchase, and sell electricity; to produce, conduct, use, purchase, and sell steam and steam power; and, generally, to engage in the business of producing, transmitting, and selling light, heat, and power. The place where the principal business of the corporation is to be transacted is set forth in its articles of incorporation as required by section 290 of the Civil Code, and is declared to be the city and county of San Francisco. At the time when the assessments in question on this appeal were made the plaintiff corporation was actually engaged in the business of supplying the inhabitants of the city of Stockton with gas and electric light, using the streets of the city for that purpose, its pipes and conduits being laid therein for the distribution of gas, and its poles strung with wires erected thereon for the transmission of electricity. These assessments, made by the assessor of San Joaquin county, were of what was denominated the "franchise" of the appellant exercised in the city of Stockton, and which is described in the findings in each case as "the right and privilege of using the public streets and thoroughfares of said city of Stockton for laying down pipes and conduits therein and connections therewith, and for erecting poles therein and of running electric wires over, across, and about the same, and of making connections therewith so far as was necessary for supplying said city of Stockton and its inhabitants with gaslight and electric light, and in connection therewith to collect rates and charges for said light furnished said city and its inhabitants." In addition to the assessment upon its franchise as so described, the plaintiff was assessed each year in question upon other property in the city of Stockton, including its pipes, poles, and wires in use in, under, and upon the streets thereof. It paid all the other taxes levied without protest, but, as to the taxes levied upon said franchise, paid them each year under protest, and these actions are brought to recover back the amounts so paid. Judgments were entered in favor of defendant, and from them plaintiff appeals.

It is provided, by section 19, art. 11, of the Constitution that, "in any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual or any company duly incorporated for such purposes under and by authority of the laws of this state * * * shall have the privilege of using the public streets and thoroughfares thereof and of laying down pipes and conduits therein and connections therewith so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes * * * upon the condition that the municipal government shall have the right to regulate the charges thereof." Section 3628 of the Political Code provides that "the franchise, roadway, roadbed, rails and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization as hereinafter provided for. Other franchises, granted by the authorities of a county, city, or city and county, must be assessed in the county, city, or city and county within which they were granted. If granted by any other authority, they must be assessed in the county in which the corporations, firms or persons owning or holding them have their principal place of business." No question is raised that a franchise is property under the terms of the Constitution and revenue laws of the state, and that it is taxable as such. The sole question relative thereto is, was the franchise assessed against the plaintiff properly assessable in the county of San Joaquin?

It is insisted by appellant that, as to a corporation organized under the laws of this state, and authorized to supply gas and electricity to cities for illuminating purposes, its corporate franchise included as a necessary part thereof, and as indispensable to the enjoyment of that franchise, the privileges extended by the constitutional provision of using the public streets and thoroughfares of cities for laying down pipes and conduits, and placing thereon electric poles and stringing wires across and over the same, and, as an incident to such privilege, the right to collect from the cities and the inhabitants thereof for gas and electricity distributed and sold therein; that the right to exercise these privileges, extended by the constitutional provision to all corporations created like the plaintiff for one of the purposes specified therein, constituted part of its formative charter; that its corporate franchise embraced and included these privileges as a grant to it of them by the sovereign authority, and that such franchise, considered as an entirety, was assessable only in the city and county of San Francisco, where its principal place of business, fixed by its articles of incorporation, was; and that the act of the assessor of San Joaquin county in assessing its franchise in that county was unauthorized and void. While we have directed attention to the contention of plaintiff, we have done so simply to state his position, and do not deem it necessary, in the view we take of the case, to particularly discuss it, though some reference may be made to it in a general way as we proceed. Nor do we feel called upon to determine other points, raised on the appeal by respondents, as to the proper construction to be placed on the phrase "principal place of business," as used in section 3628 of the Political Code—whether it means the actual place of the transaction of franchise business or the office of the corporation where business of a strictly corporate nature is transacted—nor to pass, as invited to do, upon the constitutionality of this section of the Political Code itself.

While all these propositions have been learnedly discussed by counsel, a consideration of them is unnecessary, because we are satisfied that the validity of the assessment of this franchise by the assessor of San Joaquin county must be sustained, under section 10 of article 13 of the Constitution. That section provides that "all property * * * shall be assessed in the county, city, city and county, town, township, or district in which it is situated." As this constitutional provision declares that all property (save property of railroads operated in more than one county, which it provides shall be assessed by the state board of equalization) must be assessed in the locality where it is situated, it follows, as a franchise is property subject to taxation, that if the franchise which was assessed against plaintiff in the county of San Joaquin had a local situation in the city of Stockton, in that county, it was properly assessed there under the constitutional mandate, and could be assessed nowhere else. And if it be determined from a consideration of the authorities that a franchise, or right exercised by the plaintiff in the streets of the city of Stockton, is of a local character, it is an immaterial matter for consideration as the source from which the right or franchise sprung. It can be of no moment that the franchise is granted by the Constitution—by the state in its sovereignty. It is not the source from which it was derived that shall determine the place where it shall be assessed and taxed, but the place where it is situated. For the purpose of taxation under the constitutional provision it is not the lòcus of the grantor that is to be considered, but the situs of the franchise. This provision of the Constitution is but the recognition of one of the fundamental principles of taxation that property, situated in a city and county, should be taxed there for the purpose of revenue; that the property which has had the protection and benefit of municipal government shall pay its share of the expenses required to insure these advantages, apportioned on the basis of the actual value of that property. San Francisco, etc., Ry. v. Scott, 142 Cal. 229, 75 Pac. 575. It applies to all property. And where a franchise, or the right acquired by an exercise of it, is of a local character, it requires that it shall be assessed in the locality which is burdened with its exercise, and upon which is cast the duty of protecting the property embraced in such exercise. While the right is accorded by the Constitution to the plaintiff in common with all kindred corporations and with individuals to use the streets of a city for the purpose of furnishing illuminants to it and its inhabitants, it cannot be said that any one individual or corporation possesses this right merely by virtue of the constitutional provision. The Constitution extends a potential right to those enumerated in its provisions to avail themselves of the benefit of the franchise. But this general extension of the privilege does not invest individuals or corporations with the franchise in the streets of any particular city. It is only acquired when the constitutional grant is actually accepted; when the pipes and conduits for gas or the electric poles are laid in or erected on the streets of the city. It is then owned by any individual or corporation doing so, as an accepted franchise under the general constitutional grant, exercised in the particular city where these appliances are laid or erected. By the provisions of the Constitution all persons and all corporations organized for the purpose of supplying these necessities are given the capacity to take the franchise extended thereunder, but they do not acquire it until they have accepted it by proceeding to its actual exercise.

While considering this constitutional grant of the right to use the streets of cities throughout the state by individuals or corporations for supplying either water or artificial light (when the city owns no public works for such purpose), it is well to remember the purpose which was sought to be attained under the provision. It was to prevent the abuses which the framers of the Constitution believed were therefore indulged in by municipal officers, who, by imposing onerous burdens and conditions upon persons desiring to compete with existing companies in such municipalities, in supplying such necessities, precluded them from doing so, and hence created a monopoly in favor of existing corporations. By providing for unrestricted competition in the supplying of these necessities, it prevented such abuses. But while this was the purpose in view, and the facility was afforded to use the streets of a city for that purpose, without the necessity of obtaining a franchise therefor from the municipal authorities, it was not intended thereby that in the exercise of such privilege whatever rights of a valuable property nature were acquired should not be subject to taxation in the locality where, through the exercise of the franchise, the corporation became invested with them. Now, is the franchise exercised by the plaintiff in the city of Stockton, or, more accurately speaking, the right or interest which plaintiff acquired in the streets of that city by virtue of its exercise, property of a local character, property—to use the term in the constitutional provision—"situated" in the city of Stockton? We think the authorities support the contention of respondent that it is; that the franchise extended by the constitutional provision to lay pipes and conduits, or erect poles and supply the inhabitants of a city with artificial light, is an incorporeal hereditament—is real estate in the nature of an easement pertaining to the streets of the city in which it is exercisable; that it is inseparably annexed to the soil out of which the profit arises, and has a local situation in the place, and that place only, where the right is actually exercised.

The principle that franchises of the character here involved are treated as incorporeal hereditaments finds ready support in the authorities. In Bowman et al. v. Watham et al., Fed. Cas. No. 1,740, p. 1082, it is said: "And the only inquiry now is whether the ferry right reserved is of the same nature, in this respect, as a part of the land. In what does it differ? It is appurtenant to the soil, and constitutes no inconsiderable part of its value. As has been shown, it is susceptible of a different ownership from the soil. It is still a right growing out of the soil, and subjects it to the servitude in whosoever's hands it may come. Although an incorporeal hereditament, in contemplation of law, it is property, real property. It passes by deed—is assets in the hands of heirs, and in all respects is subject to the laws which regulate real estate. * * * There would seem to be no doubt that the ferry franchise, with all that belongs to it, may be taken by descent or by conveyance the same as other interests which pertain to realty." In Dundy v. Chambers et al., 23 Ill. 312, it is also said: "Chancellor Kent, in his Commentaries (volume 3, p. 458), in treating of franchises in roads and ferries, says: 'An estate in such a franchise, and an estate in land, rest upon the same principle, being equally grants of a right or privilege for an adequate consideration.' And he calls such franchises incorporeal hereditaments. Hilliard, in his treatise on Real Property (volume 1, p. 1), classes a ferry franchise amongst hereditaments." And in Gue v. Tidewater Canal Company, 24 How. (U. S.) 263, 16 L. Ed. 635, it is said: "The property seized by the marshal is of itself of scarcely any value, apart from the franchise of taking toll, with which it is connected in the hands of the company, and, if sold under this fieri facias without the franchise, would bring scarcely anything; but would yet, as it is essential to the working of the canal, render the property of the company in the franchise, now so valuable and productive, utterly worthless. Now it is very clear that the franchise or right to take toll on boats going through the canal would not pass to the purchaser under this execution. The franchise being an incorporeal hereditament, cannot, upon the settled principles of the common law, be seized under a fieri facias." In People v. O'Brien, 111 N. Y. 46, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684, the court said: "In speaking of the franchises of a corporation we shall assume that none are assignable, except by the special authority of the Legislature. We must also be understood as referring only to such franchises as are usually authorized to be transferred by statute, viz., those requiring for their enjoyment the use of corporeal property, such as railroad, canal, telegraph, gas, water, bridge, and similar companies, and not to those which are in their nature purely incorporeal and inalienable, such as the right of corporate life, the exercise of banking, trading, and insurance powers, and similar privileges. The franchises last referred to, being personal in character and dependent upon the continued existence of the donor for their lawful exercise, necessarily expire with the extinction of corporate life, unless special provision is otherwise made. * * * In the former class it has been held that at common law real estate acquired for the use of a canal company could not be sold on execution against the corporation separate from its franchise, so as to destroy or impair the value of such franchise. * * * And by parity of reasoning it must follow that the tracks of a railroad company, and the franchise of maintaining and operating its road in a public street, are equally inseparable, in the absence of express legislative authority providing for their severance." In City of Chicago v. Baer, 41 Ill. 306, the court says: "Certain it is that this railway company has a franchise appurtenant to this street; that, through this franchise, it has a right of occupancy in a portion of the street, peculiar to itself, and, so far as may be necessary to run its cars, exclusive; that this right of occupancy is secured for a long term of years; that this franchise and this right of occupancy together constitute a property fixed and immovable in its character like realty, and recognized and protected by the law as fully as a fee simple in land."

From these authorities it would appear then that the franchise extended by the Constitution is of such a character that it is indissolubly annexed to the street of a city in and upon which it is exercised, and that, while an incorporeal hereditament, it is, in contemplation of law, real property, an easement appurtenant to such streets. This being so, it necessarily, as real property, has a situs in the city where it is exercised, and, under the constitutional provision with reference to the assessment of property, must be assessed there. It will be observed from these authorities which we have cited that the right to use the streets, and the right to take tolls by reason of their use, are inseparable parts of the franchise. The latter is a right arising out of the soil, a right to take a profit out of the easement acquired in the streets of the city, and the easement and the right to take a profit therefrom can be valuable only when exercised together. That these rights conjointly constitute the franchise is also the view taken by this court in Spring Valley Water Company v. Barber, 99 Cal. 38, 33 Pac. 735, 21 L. R. A. 416.

But, independent of the general principle announced in these authorities with reference to the nature of the right plaintiff acquired by exercise of the franchise in the streets of the municipality, it is clear from the decision in the appeal of N. B. & N. R. R. Co., 32 Cal. 512, where the matter is fully considered and discussed, that the franchise exercised by plaintiff invested it with an easement therein, real property, the situs of of which was necessarily local. And this is equally apparent when we examine the Civil Code. Section 801 thereof declares the servitudes which may attach to other lands, and which, when so attached, shall constitute easements, and, among others, are included, by subdivisions 4 and 6, respectively, "the right of way" and "the right of transacting business upon land." Under section 802 of the same Code, "the right of way" is designated as among the land burdens which may be granted or held, although not attached to land. This right of way, an easement, is real property, and is distinctly and necessarily local in character, and situated in and upon land. It is clear, too, that the right to use the pipes, conduits, and poles for the transmission of illuminants to the city and its inhabitants is a right which is exercised and can be exercised only in connection with and at the situs of the right of way and location of the appliances. It is a right exercised by means of these appliances in connection with a right of way, so that a profit, which the company is authorized to take, may be made upon the sale of the illuminants which they serve to transmit. This right to so use them for this purpose is as local to the city of Stockton as are the gas pipes and the electric poles under or upon its streets, and, within the meaning of subdivision 6, above referred to, is a "right to transact business upon land," acquired in addition to the easement by virtue of the exercise of the constitutional franchise.

From all these considerations we are of the opinion that the plaintiff, in the exercise of its, franchise, acquired rights of property in and over the streets of the city of Stockton of a character distinctively local to that city, and that, under section 10, art. 13 of the Constitution, above quoted, they were properly assessed by the assessor of San Joaquin county in that county.

The appeal from the judgment in each of these cases is accompanied by a bill of exceptions. It is urged therein that the trial court erred in its rulings relative to the admission of evidence. Under the pleadings and the issues raised, we think the rulings were correct.

The judgments appealed from in both cases are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.; COOPER, J.

BEATTY, C. J. I concur in the judgments of affirmance, and upon all essential points in the views of Justice LORIGAN, with the sole exception that, in my opinion, his conclusion requires that the following clause of section 3628 of the Political Code must be held unconstitutional, so far as it applies in terms to franchises which have a local situs: "If granted by any other authority they must be assessed in the county in which the corporations, firms, or persons, owning or holding them have their principal place of business." The framers of our Constitution did not leave it to the Legislature to determine where property having a local situs should be assessed. That was a matter which they settled themselves by the provision of section 10 of article 13: "All property, except as hereinafter in this section provided [i. e., railroad property] shall be assessed in the county, city, city and county, town, township or district in which it is situated, in the manner prescribed by law." If, then, the privilege of using the streets of a city for the purpose of laying and maintaining pipes for the distribution of gas is a franchise having a situs in that city, the fact that it has been granted by "another authority" (the people of the state) gives no warrant to the Legislature to say that it shall be assessed and taxed in the city or county where the holder of the franchise happens to have his principal place of business, or where he resides. The whole question to be decided, therefore, is the question whether this particular franchise has a local situs, for, if it has, it is idle to refer to the above-quoted clause of section 3628 of the Political Code as determinative of the controversy.

Upon this question of situs or no situs of the franchise in question it can scarcely be necessary to add anything to what has been said by Justice LORIGAN, but I am tempted to put the same view in a form which to me has always seemed unanswerable. Land always has a situs. The ownership of land consists in the right to use it for all lawful purposes, and that right of use constitutes its whole value. If the owner of land grants to another the right of way over it, or the right to lay and maintain pipes through it, the totality of ownership is divided into two separate interests: The original owner retains the right to use the land for every lawful purpose not inconsistent with the exercise of the privilege granted, and his grantee acquires the right to use it for the special purpose named in the grant. It is easy to suppose a case in which the value of the granted privilege or easement exceeds the value of the interest remaining in the grantor—indeed, such instances are of frequent occurrence; but, whether of greater or less value, it is still an interest in that particular piece of land, and no more of an ideal abstraction than the remaining right of the owner to cultivate the soil. The aggregate value of the two rights constitutes the aggregate value of the land, and each is assessable where the land is situated. If this is true of an easement granted in land held in private ownership, it must be equally true of a franchise to use public lands for similar purposes. The privilege is essentially the same, and the only reason for calling one a franchise while the other is denominated an easement is that the former is held by direct grant from the sovereign, while the other is the grant of a private person. The conclusion is that the right to use land within the municipal boundaries of the city of Stockton is assessable only in Stockton for city purposes, and in the county of San Joaquin for state and county purposes. The difficulty and confusion which it is apprehended (according to the dissenting opinion of Justice McFARLAND) may be caused by our decision in these cases is, I think, purely imaginary, and the apprehension groundless.

There is, of course, a franchise—the franchise to have perpetual succession, etc., common to all corporations for whatever purpose organized—which is always assessable where the corporation has its principal place of business. This franchise is a pure abstraction, and, like the right to collect a promissory note or other chose in action, it has no fixed situs, but follows the person of its owner, and is assessable where the owner lives, and that, in the case of a California corporation, is the place designated in its articles of incorporation as its principal place of business. The only difficulty to be apprehended is in placing a valuation upon this, the strictly corporate franchise. But that difficulty is not new, and will neither be enhanced nor diminished by the present decision. The method of ascertaining the value of the corporate franchise, sanctioned by this court in some of its decisions, and nowhere disapproved as far as I am aware, is to take the difference between the market value of its shares and the value of its tangible property as the basis of assessment. Whatever difficulty this method involves remains, but remains without addition by reason of anything here decided. For, take the supposed case of a corporation having its principal place of business in San Francisco, and operating gasworks in several other cities. We will suppose that the market value of its shares is $1,000,000; that its plant, consisting of furnaces, retorts, tanks, pipes, etc., is now assessed in Sacramento at $100,000, in Stockton at $120,000, and in San Jose at $150,000. (For the purposes of illustration three places are as good as a dozen.) The assessor of San Francisco, even on the doctrine of the dissenting opinion, must deduct the aggregate of these sums, $370,000, from the value of the shares, to arrive at a basis for assessing the corporate franchise. If, hereafter, in consequence of the decision of these cases the assessor of Sacramento values the local franchise at, say $10,000, of Stockton at $12,000, and at San Jose at $15,000, all the additional labor imposed on the assessor of San Francisco will be to add $37,000 to $370,000, in order to determine the aggregate amount to be deducted from the market value of the shares. The labor will be inappreciable, and the difficulty nil.

If it be said that confusion will arise out of differences of opinion between the assessor of San Francisco and the assessors of Sacramento, San Joaquin, and Santa Clara as to the true value of the local franchises, I freely admit that such differences of opinion are quite likely to arise, but this is a difficulty which inheres in the matter under any view of the question to be decided. If the different assessors are liable to differ as to the value of a particular interest in land, so are they liable to differ as to the value of the plant of a gas company. The difference between the two cases, if any, is a difference of degree, and not of kind, and furnishes no reason for holding that property is assessable in San Francisco when the Constitution requires it to be assessed in San Joaquin.

McFARLAND, J. (dissenting). I dissent, and think that the judgments should be reversed. Assuming, as held in Bank of California v. San Francisco, 142 Cal. 276, 75 Pac. 832, 64 L. R. A. 918, 100 Am. St. Rep. 135—against my views—that a franchise is assessable property, that the franchises of a corporation may be legally assessed under the general word "franchise" or "franchises" without any other description, and that their value may be ascertained as declared in that case, still a franchise exists only in legal and mental contemplation, has no local situs, is indivisible, and, as said in Spring Valley W. W. v. Schottler, 62 Cal. 111, is "quite distinct and separate from the property which, by the use of such franchise, the respondent may acquire." The whole of the franchises involved in this case were granted by the state. The right of the municipality to regulate the laying of the pipes, etc., is a mere power of the municipality, not a franchise of the corporation appellant. Those franchises granted by the state being mere intangible ideal things, the state has a perfect right to determine where and how they should be assessed. The state has determined that, when they belong to a corporation, they shall be assessed at its principal place of business, and, in my opinion, that clearly means the place designated as its principal place of business in the charter of the corporation. Any other rule leads to an interminable division of the franchises, which would not only cause confusion and manifest injustice, but is not warranted by any provision in the law. And if the franchise, for purposes of assessment, is to be distributed through numerous municipalities, I cannot see how the method of ascertaining its value declared in the Bank of California Case can possibly be applied. Of course, all tangible property which the corporation may have in any county or city is assessable there. It makes no material difference whether a franchise be considered as real or personal property. I think that for purposes of taxation it is clearly personal property, under section 3617 of the Political Code. But, whether real or personal, the franchise or "privilege to use the streets" of the city is admittedly granted by the state, and not by the city or county. Now, the provision of section 3628 is that franchises "granted by the authorities of a county," etc., must be assessed in the county or city in which they were granted, but "if granted by any other authority they must be assessed in the county in which the corporations * * * holding them have their principal place of business." And, as the franchises here involved were granted by "other authority" than that of the city and county, they must be assessed in the county where the principal place of business of the corporation is; so that the question, from whatever direction we approach it, always is, where is the principal place of business? And this question is in no way affected by a consideration of the different places where the franchise is being exercised, or the fact that it is not being exercised at all.

The following opinion was prepared some time ago, though not by myself, and I adopt it as clearly and forcibly expressing my views on the questions here involved:

"These are actions to recover for taxes paid to the tax collector of San Joaquin county by plaintiff under protest. The taxes were levied and assessed against plaintiff upon its "franchise.' No question is raised that a franchise is property, within the meaning of the Constitution and revenue laws of the state, and that, as property, it is taxable. The sole question is, where shall the franchise of a domestic corporation be assessed under the laws of this state? Section 19, art. 11, of the Constitution, prescribes as follows: "'In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual or any company, duly incorporated for such purpose under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages, and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants, either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof.' The purpose of this constitutional provision, which was not found in our earlier Constitution, is well known and appears plainly from the constitutional debates. Formerly, when the granting of such franchises was left to the municipalities, it was thought that the municipalities themselves abused their powers, and by imposing most onerous conditions and restrictions upon applicants for new franchises effectively created monopolies in favor of existing companies. To remedy this the Constitution deliberately took away from these municipalities the power to bestow these franchises, and by direct grant conferred upon corporations organized for the indicated purposes not only the franchise to be, but the franchise to do, within the corporate limits of cities which did not own their own works. That this was a direct constitutional grant does not admit of doubt, and in fact has been expressly declared by this court in People v. Stevens, 62 Cal. 209, and in Re Johnston, 137 Cal. 115, 69 Pac. 973, in which last case it is said that the sole power which a municipality now has in this regard is the power of general regulation which is expressly conferred by terms in the Constitution, and that the municipality cannot impose any additional burdens or terms as a condition to the exercise of the franchise so granted.

"Appellant in this case is a corporation organized under the laws of the state of California for many purposes specifically set forth in its articles of incorporation. To manufacture, use, transmit, purchase, and sell gas for illuminating, heating, and other purposes; to manufacture or otherwise dispose of the residual products therefrom; to sink and construct natural gas wells, and to deal in the products thereof; to produce, generate, transmit, use, purchase, and sell electricity; to purchase, use, and sell water and water rights, and wells, flumes, ditches, pipes, and conduits in connection therewith; to produce, conduct, use, purchase, and sell steam and steam power, and generally to engage in the business of producing, transmitting, and selling light, heat, and power; to purchase and sell patents and patent rights relating to the purposes above mentioned. The place where the principal business of the corporation is to be transacted is set forth, as required by section 290 of the Civil Code, as the city and county of San Francisco, state of California. We have thus a corporation organized for sundry legitimate purposes, which has declared—as the law compels it to do—the place where the principal business of the corporation is to be transacted. This place of business is declared to be the city and county of San Francisco, and this corporation derives its franchise for the supplying of artificial light to the city of Stockton, and to any or all other cities of the state, by direct grant from the Constitution. Where is this franchise to be assessed? This question would seem to find a ready answer in the language of section 3628 of the Political Code, which provides as follows: 'The franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization as hereinafter provided for. Other franchises, if granted by the authorities of a county, city, or city and county, must be assessed in the county, city, or city and county within which they were granted; if granted by any other authority they must be assessed in the county in which the corporations, firms, or persons owning or holding them have their principal place of business.' When the Civil Code prescribes that the articles of incorporation must set forth the place where the principal business of the corporation is to be transacted, and when the Political Code declares that the franchise, if granted by any other authority than that of a county, city, or city and county, 'must be assessed in the county in which the corporation, firms, or persons owning or holding them have their principal place of business,' there is the foundation of an argument, persuasive, though not, of course, conclusive, that by the uses of this phrase, 'the principal place of business,' the Legislature meant one and the same thing. The principal place of business of a corporation means, of course, the principal place for the transaction of the corporation's business, the place where directors' and stockholders' meetings are held, where the offices of the corporation are situated, for the purpose of the transfer of stock, the levying of assessments, the declaration of dividends, and for the performance of all other business strictly corporate in its character. Such, of course, is the well-settled meaning of the phrase.

But respondent contends that as this corporation is actually engaged in the business of supplying the inhabitants of the city of Stockton with light, and is using the streets of the city for that purpose, and is in Stockton collecting its revenues, for the purposes of taxation of its franchise, this should be considered its principal place of business, within the meaning of section 3628, Pol. Code; and it argues further, in support of this view, the injustice that results to a municipality when a corporation so exercising the privilege of using its streets pays to that municipality nothing for that intangible, but valuable, property called its franchise. But to this it may be answered that the revenue laws of the state, at best, are imperfect, and are frequently unjust, inequitable, and even oppressive. No scheme has yet been devised by man for an absolutely economical, just, and uniform mode of taxation. Primarily, the sovereign power is interested in seeing that all property bears its just proportion of taxation. It is to the state a minor matter whether the tax itself is collected by one or another of its agents and mandatories. We have seen that the power to grant or to refuse such franchises was, for the abuses which had crept in, absolutely taken away from municipal corporations by the Constitution itself; and it may well have been that it was this circumstance which prompted the Legislature to make provision, as it has done, for the assessment of such franchises at the principal place of business of the corporation. If municipalities had the power to grant such franchises, then, of course, the question would be a simple one, and would be solved by the very language of section 3628; but when the people saw fit to make these franchises a matter of constitutional grant, the Legislature was at once confronted with the problem of fixing a locus for the assessment of these franchises. One corporation might be organized—as was this —for the purpose of supplying any number of cities with artificial light. Its franchise is distinctively one franchise, notwithstanding the fact that its operations might be extended to many municipalities. An obvious and important distinction, and one never to be lost sight of, exists between the franchise itself and the exercise of the franchise. The franchise is the privilege granted by the Constitution to a corporation, or to a private person, to do certain things—not as to one, but as to any number of municipalities. The franchise may be exercised in one or in many municipalities. If a corporation should be exercising its franchise in several municipalities, how, under respondent's contention, and under the present system of fixing a valuation upon such franchise, could it be assessed? Would it be divisible in the different cities? Would it be assessed in the one where the larger business was done, or where the larger profits were received? If the company sustained a loss in one municipality, and made a profit in another, in the assessment of the franchise would it be worth less than nothing in one municipality, or would its loss in that city be set off against the valuation in the city where it made a profit? These, and many more like questions, leading to inextricable entanglement and confusion, are eliminated only by giving the obvious and common-sense meaning to section 3628 of the Political Code. Assessing the franchise, not in the many cities or counties where it may be exercised, but assessing it, as the Code directs, where the corporation has its principal place of business, affords a simple, plain, and understandable solution of the whole matter; and such, we think, was the clear meaning of the Legislature."

HENSHAW, J., being disqualified, Justice COOPER, one of the Justices of the District Court of Appeal for the First Appellate District, participates herein pro tempore, pursuant to section 4, art. 6, of the supplement to the Constitution.

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148 Cal. 331

CITY AND COUNTY OF SAN FRANCISCO v. OAKLAND WATER CO.

(S. F. 4,034, 4,044.)

SAME v. CONTRA COSTA WATER CO.

(Supreme Court of California. Dec. 14, 1905.)

1. TAXATION—CORPORATIONS—FRANCHISES—WHERE ASSESSABLE.

Under Pol. Code, § 3628, providing that franchises (other than railroad franchises) granted by the authorities of a county, city, etc., must be assessed in the county, city, etc., within which they were granted, and that, if granted by any other authority, they must be assessed in the county wherein the corporations, firms, or persons owning or holding them have their principal place of business, the assessor of a city and county wherein the corporation has its principal place of business, as designated in its articles, is authorized to assess its corporate franchise only; their business and waterworks being situated elsewhere.

2. Same—Water Companies.

The franchise actually exercised by a corporation, under Const. art. 11, § 19, of using the streets and thoroughfares of a city in laying down pipes and conduits therein, and supplying such city and its inhabitants with water, and charging rates therefor, can be assessed only where it is locally situated.

McFarland, J., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Actions by the city and county of San Francisco against the Oakland Water Company and against the Contra Costa Water Company. Judgment in each case for plaintiff, and defendants appeal. Judgment in each case reversed.

Rehearing denied January 12, 1906.

Page, McCutchen & Knight and C. Irving Wright, for appellants. Frank P. Haynes (S. C. Denson and Bert Schlesinger, of counsel), for respondent.

LORIGAN, J. These appeals from judgments in favor of the plaintiff, accompanied by bills of exceptions, as they involve precisely the same question, will be considered and disposed of together. The actions were brought by the city and county of San Francisco to recover taxes upon franchises assessed against the defendants; the Contra Costa Water Company being assessed for "franchises $750,000," and the Oakland Water Company for "franchises $500,000." The principal place of business of both corporations, established by their articles of incorporation, is, and at all times has been, the city and county of San Francisco, and they have transacted their corporate business and functions there. The actual business of these corporations, from which their revenues are derived, is carried on in the county of Alameda, where they are engaged in supplying water to the city of Oakland and other places in that county. Their waterworks are located there, and their mains, conduits and other means for distributing water in said city of Oakland are laid in the public streets thereof, and water rates collected from persons therein using the water so distributed. Neither of these corporations has ever owned any reservoirs, mains, conduits, or other means of distributing water within the municipal limits of the city and county of San Francisco, and they have never distributed or sold any water there. These facts appear from the findings.

Various questions are presented for disposal on this appeal, which, in the view we take of the matter, do not need any discussion. While the assessments are generally described upon the assessment roll as "franchises," the assessor of the city and county of San Francisco was authorized to assess against these defendants, under section 3628 of the Political Code, their corporate franchises only; their franchises to be corporations with all the powers and privileges exercised and to be exercised by the corporate bodies. His right to do this proceeded from the fact that the principal place of business of each of these corporations was designated in its articles of incorporation as the city and county of San Francisco.

When we examine the complaint and findings in each of these cases, it is clearly apparent that this was not the character of franchise that the assessor assessed. The franchise which he did assess was the franchise actually exercised by each of the defendants, under section 19, art. 11, of the Constitution, of using the streets and thoroughfares of the city of Oakland in Alameda county, in laying down pipes and conduits therein, and supplying such city and its inhabitants with water, and charging rates therefor. We have this day decided, in the case of Stockton Gas & Electric Company v. County of San Joaquin, 83 Pac. 54, that such a franchise can be assessed only where it is locally situated. Under the authority of that case the assessor of the city and county of San Francisco had no right or authority to assess these defendants on franchises exercised in the city of Oakland. Such assessments were void.

The judgment of the lower court in each case is reversed.

We concur: BEATTY, C. J.; VAN DYKE, J.; COOPER, J.; ANGELLOTTI, J.; SHAW, J.

McFARLAND, J. (dissenting). I dissent, and think that the judgments should be affirmed. My views on the subject are fully expressed in my dissenting opinion in the Stockton Case, and under those views the franchises involved in these cases were properly assessable at the principal place of business of the corporations, which is the city and county of San Francisco.

HENSHAW, J., being disqualified, Justice COOPER, one of the Justices of the District Court of Appeal for the First Appellate District, participates herein pro tempore, pursuant to section 4 of article 6 of the supplement of the Constitution.

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2 Cal. App. 122

TURNER v. FIDELITY LOAN CONCERN (JAMES, Intervener).

(Court of Appeal, Second District, California. Oct. 31, 1905.)

1. Corporations—Stock Subscriptions—Liability of Stockholders—Set-Off.

Where, in a creditors' suit against stockholders of a corporation to recover alleged unpaid subscriptions, facts showing an indebtedness by the corporation to one of the defendant stockholders for services were set up by plea containing all the elements of a quantum meruit, the court should have found the value of such services and set off the same against the stockholders' liability.

2. SAME—RESOLUTIONS—ENACTMENT.

Where the record of a directors' meeting of a corporation recited that the directors were notified, and the contrary did not appear, proof of the notice of the meeting was not necessary to sustain the validity of a resolution adopted there.

3. SAME—ISSUANCE OF STOCK—RESOLUTION—INCORPORATORS' AGREEMENT—EVIDENCE.

Where, in a creditors' suit against stockholders of a corporation to recover alleged unpaid subscriptions, it appeared that the corporators' agreement to subscribe for stock was adopted by the corporation, such agreement was admissible in evidence as bearing on the construction and validity of resolutions of its board of directors under which the stock was directed to be issued to the subscribers.

4. SAME—PAID-UP STOCK.

A resolution adopted by a corporation's board of directors directed that the secretary and president issue to the stockholders the shares of stock subscribed by them respectively, and later another resolution was passed that, in consideration of the assignment to the corporation of certain property, 240 shares of stock should be issued to R., 239 shares to B., and in consideration of $1 and their good will and services other shares should be issued to certain others. *Held*, that under Const. art. 12, § 11, and Civ. Code, §§ 323, 359, prohibiting the issuance of certificates not paid up, the stock issued under such resolutions should be considered as paid-up stock.

5. SAME—INCORPORATORS' AGREEMENT—ADOPTION BY CORPORATION.

Where an incorporators' agreement providing for the issuance of stock in payment for a business and for the good will and services of certain incorporators was adopted by the corporation, it became binding on it.

6. SAME—AUTHORITY OF DIRECTORS.

A resolution of directors of a corporation providing for the issuance of stock cannot be attacked because of the interest of the directors voting therefor, where they were the sole beneficiaries.

7. SAME—CONSIDERATION OF STOCK—PROPERTY—FRAUD—PRESUMPTIONS.

The issuance of corporate stock in consideration of property or services will be presumed to have been free from fraud, unless the contrary clearly appears.

8. SAME—CREDITORS' SUIT—VARIANCE.

A creditors' suit against a stockholder of a corporation, based on an alleged unpaid subscription, is not supported by findings and evidence showing that the subscription contract was executed.

9. SAME—CREDITORS' RIGHT TO SUE—STATUTES.

Civ. Code, § 322, provides that each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation, and for a like proportion only of each debt or claim against the corporation, and that any creditor may institute joint or several actions against any of its stockholders for the proportion of his claim payable by each, in which the court must ascertain the proportion of the debt for which each defendant is liable and render a several judgment, etc.; section 331 provides for the levy of assessments of subscribed capital stock; section 332 declares that no assessment shall exceed 10 per cent. of the capital stock, except an assessment for the full amount unpaid or such percentage as may be necessary to satisfy creditors; and section 349 authorizes the board of directors to proceed by action to recover the amount of the assessment. *Held*, that creditors of a corporation could not maintain an action directly against stockholders on a subscription contract, but could only enforce such liability through an assessment levied by the corporation or the court in a suit to which the stockholders are parties.

Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by Stephen L. Turner against Fidelity Loan Concern and others. W. S. James intervened. From a judgment against defendants H. M. Lord and O. P. Widaman, and from an order denying their motion for a new trial, they appeal. Reversed.

S. J. Parsons, for appellants. Walter Bordwell, for respondents. Lawler & Allen, for defendant Rowan. Camp & Lissner, for intervener.

SMITH, J. Appeal from a judgment against the defendants Lord and Widaman, and from an order denying their motion for a new trial. The plaintiff and intervener are creditors of the defendant corporation, on judgments of date June 4, 1901, or later, and the suit was brought to subject to the payment of plaintiff's claim the alleged subscription liability of the appellant defendants. The causes of action on which the judgments were rendered arose in the year 1901; but with regard to plaintiff's cause of action, it appears from evidence introduced by him that part thereof was in renewal of a note of the corporation to him, of date October 4, 1900, for the sum of $500, given in lieu of a personal note of O'Bryan, who was president of the corporation. The certificate of incorporation was filed August 18, 1900. The capital stock of the corporation consists of 500 shares of the par value of $100 each; of which the defendant Widaman and Bingham, the assignor of the defendant Lord, are named as having subscribed for 10 shares each. One Rowan, who is named as a subscriber for one share, was originally a defendant in the case; but the suit as to him has been dismissed. The other subscribers named are Raymund and O'Bryan—the former for 240 shares, the latter for 239 shares. These subscriptions together make up the full amount of the capital stock, and the subscribers are named in the certificate as directors of the corporation. The certificates of stock to Bingham and Widaman are dated in August, 1900, and were issued to them in the month of November of that year, under two resolutions of the board of directors, of date August 25, and September 4, 1900; which are as follows: "On motion, duly seconded, it was resolved that the secretary and president be and they are hereby authorized to issue to the stockholders of this corporation the certain shares of stock subscribed by the respective incorporators, namely, to R. C. O'Bryan a certificate calling for 239 shares, to H. A. Bingham a certificate calling for 10 shares, to Robert A. Rowan a certificate calling for 1 share, to W. B. Raymund a certificate calling for 240 shares, and to O. P. Widaman a certificate calling for 10 shares. And upon the motion of O. P. Widaman it was resolved that in consideration of the assignment, sale and delivery to this corporation of all the fixtures, safe, property and effects now used in the office of this company, that there shall be issued to W. B. Raymund 240 shares of the capital stock of this corporation, and to R. C. O'Bryan 239 shares, and in consideration of the payment to this company by O. P. Widaman, Robert A. Rowan and H. A. Bingham of the sum of $1.00 (one dollar) each, and the further consideration of their good will, interest and services in and about the management, formation and directorship of said corporation, that there shall be issued to the said O. P. Widaman 10 shares of the capital stock of this corporation, to Robert A. Rowan 1 share of the capital stock of this corporation, and to H. A. Bingham 10 shares of the capital stock of this corporation, and the president and secretary, respectively, are hereby authorized and directed to issue such capital stock as aforesaid under the name and seal of this corporation."

The complaint alleges: That Widaman and Rowan "were subscribers to the capital stock of said defendant corporation at the time of its organization"; that they have not "paid the full amount of their subscription * * * or any portion thereof"; and "that each of said defendants is indebted to said defendant corporation on account of his subscription," Widaman in the sum of $1,000, Rowan in the sum of $100; that since the organization of the corporation the defendant Lord "has become and is now the owner of 10 shares of stock" therein; that "there is due, owing and unpaid on account of said 10 shares of stock to the said corporaion the sum of $1,000, no part of which has ever been paid by the defendant Lord, or by his predecessors in interest of the said 10 shares of stock." The prayer of the complaint is, in effect, that the court ascertain the amount of indebtedness from each of the defendants Lord, Widaman, and Rowan to the corporation on account of their subscription, and that plaintiff have judgment against each of them for the amount due to the plaintiff on his judgment against the defendant corporation, not to exceed the amount due from each of said defendants to the defendant corporation. The allegations and prayer of the complaint in intervention are substantially similar, except that it is alleged in the latter that the defendants are the only stockholders liable for unpaid subscriptions; but this allegation is negatived by the findings. There was a demurrer to the complaint, which was overruled.

The answers of the defendants deny the alleged indebtedness, and plead specially, in effect, that the stock was issued as paid-up stock, to the defendant Widaman and to Bingham, the predecessor of the defendant Lord, in consideration of services rendered and to be rendered. But on the answers of the two defendants—as on the allegations of the complaint, and on the evidence and facts found—their cases differ in detail. As to the defendant Widaman, the cause of action is on his alleged subscription to the capital stock, as evidenced by the certificate of incorporation; and in his answer, besides denying "that he ever subscribed and agreed to pay any sum whatever for 10 shares * * * of the capital stock of the" corporation, he alleges in effect: That there was an agreement between the incorporators of the company, that there should be issued to him for certain legal services to be rendered by him the 10 shares of stock for which in the certificate he is named as subscriber; that this agreement was confirmed and adopted by the company; that the services were rendered and the stock issued to him accordingly; and that the services rendered were in excess of the nominal or par value of the stock. As to the defendant Lord, the cause of action is based on his acceptance of the stock as assignee of Bingham; and in his answer, besides denials, it is alleged that the stock was fully paid for by Bingham, and was issued to him as paid-up stock—which is in effect equivalent to the defense more specifically pleaded by Widaman; and it is further alleged that he was induced to take the stock by representations made to him by the corporation, through its proper officers, that it had been fully paid for, as to which allegation, it may be observed that it appears from his testimony that he was invited by O'Bryan, the president of the corporation, "to take the Bingham stock and act as director," and that, accepting the proposition, he took the stock supposing it to be paid for.

On the issues made by Widaman, the findings are, in effect, that he has paid no part of the sum for which he subscribed to the capital stock of the company, and there is due on account of his said subscription the sum of $1,000; that a certificate of 10 shares of stock was issued to him "on account of said subscription." As to other matters pleaded by this defendant it is found: "(10) * * * *That the defendant Widaman did do work as an attorney at law for the defendant corporation for which the president and secretary of said corporation issued to said defendant Widaman his certificate for said shares of its capital stock; that said defendant Widaman did perform work and labor or render services to said corporation in excess of the value of said 10 shares of stock;* that no contract between the defendant Widaman and the promoters of said defendant corporation, whereby said promoters were to pay the said defendant Widaman for services rendered or to be rendered by him in the organization of said corporation, was ever recognized by resolution of the board of directors of said corporation, or otherwise; that no such resolution was ever passed after the organization of said corporation; that said 10 shares of stock issued by said defendant corporation to the defendant Widaman were never by any authority of said corporation so issued to him as fully paid stock in consideration of the services rendered by said defendant Widaman to the promoters of said corporation; that the said defendant Widaman had not fully paid for said 10 shares of stock issued to him by said corporation at the time of the delivery thereof or at any other time; that there was due from the defendant Widaman at the time of the issuance of said stock to him the sum of $1,000 to said defendant corporation." There is no finding as to the allegation of the answer of this defendant that the value of the services rendered by him was in excess of the par value of the stock, though there was evidence that the services were worth more than twice the par value. As to the defendant Lord, it is found that the stock held by him was not paid for, in whole or in part. Upon these findings judgment was entered in favor of the plaintiff and the intervener against each of the defendants for the sum of $1,000, the par value of the stock.

The following are the points urged by the appellant for reversal: First. The court erred in refusing to allow the defendants to show the contract between the corporators as to how the stock was to be issued, and for what consideration. Second. It was also error to exclude the question to Raymund: "What was the market value of that stock at the time it was transferred to Mr. Widaman?" Third. The evidence was insufficient to support the findings in various particulars. But the only specifications that need be considered are those referring to the alleged indebtedness of the defendants, and the nonpayment thereof, and to the parts of finding 10 unitalicized. Fourth. (a) The resolution of September 4, 1900, was valid and effectual to authorize the issuance of the stock to the stockholders for the consideration agreed upon; (b) it was duly passed: (c) nor can it be attacked on account of the interest of the directors, except by the corporation or a stockholder. (d) The evidence offered and excluded was admissible to explain it. Fifth. In the case of the defendant Widaman there is a material variance between the case alleged and found and the proofs.

The points principally discussed by the respondent's counsel relate to the due passage, the construction, and the validity of the resolution of September 4, 1900. It is claimed also, that these are the only questions involved; but this proposition is, we think, clearly untenable for several reasons. First. Widaman testifies that the corporation was indebted to him, at the time of the trial, for money loaned; and this seems to be confirmed by the ledger of the company, put in evidence by the plaintiff, which, as we understand it, shows two credits of $250 each, of dates February 21, and 28, 1901; as to one of which, at least, we can find no debit. Besides, it is found by the court that the value of the services rendered by Widaman was in excess of the value of the stock received by him; and from the only evidence in the case on the point, it appears that his services "were worth twice the face value of the stock." It is, indeed, claimed by the respondents that no "offset" or "quantum meruit" is pleaded by this defendant. But as to the first item, the evidence of Widaman was admitted without objection, and the amount of the indebtedness was brought to the attention of the court by the plaintiff, himself; and we are not prepared to say that in an equitable proceeding of this character, it was not the duty of the court to render equity in this particular to the defendant. Code Civ. Proc. § 440. But, however this may be, the facts showing the indebtedness of the corporation to Widaman for his services are pleaded; and we are of the opinion of the appellants' counsel that (if the theory of the court be assumed) the actual plea "includes all the elements of a plea of the quantum meruit and more." We are of the opinion, therefore, that, on this account, as well as on account of the bearing of the fact on the other issues, the court should have found the value of the services of Widaman, and given the fact due effect. But we are of opinion, also, that the objections of the respondent to the due enactment of the resolution of September 4, 1900, as well as of the previous resolution of August 25th, are untenable. On this point it is unnecessary to dwell on the fact that the resolution was ratified by Rowan and Bingham (who, with the others, were the only stockholders) by their acceptance of the stock; nor need we enter at length upon the question as to proof of notice of the meeting of the former date. The record of the meeting recites that the directors were notified, and it is sufficient that the contrary does not appear. Granger v. Original Empire M. & M. Co., 59 Cal. 679; Stockton C. H. & A. Works v. Houser, 109 Cal. 9–11, 41 Pac. 809. It is also to be observed that, were the point well taken, the result would seem to follow that the certificates were issued without authority and were void; and consequently the grounds for plaintiff's action, at least as against Lord, would seem to be lacking. We have to consider, therefore, only the questions of the construction and of the validity of the resolutions of the board; and on both these questions we think the evidence as to the agreement of the incorporators should have been admitted. For not only would the excluded evidence have an important bearing upon the question of construction, but it is clear from the evidence (whatever construction we may put upon the resolutions) that the agreement between the corporators (whatever it may have been) was adopted by the corporation; and, indeed, otherwise the plaintiff's suit against Widaman would be without foundation to rest on.

As to the construction of the resolution, reading it in connection with the previous resolution of August 25th, and the evidence introduced and offered, we think there can be no doubt it must be construed as claimed by the appellants, and that the stock was issued as paid-up stock; and, it may be added, this construction is confirmed by the consideration that otherwise the issue of the certificates would have been illegal (Const. art. 12, § 11; Civ. Code, §§ 323, 359; Kellerman v. Maier, 116 Cal. 424, 48 Pac. 377; Ewing v. O. Mining Co., 56 Cal. 652), which is not to be presumed.

As to the validity of the transaction, the question is to be considered from two points of view, namely, with regard to the corporation, and with regard to subsequent creditors. As to the corporation no serious question can arise. By the adoption of the incorporators' agreement, that agreement became the agreement of the corporation. San Joaquin L. & W. Co. v. Beecher, 101 Cal. 70, 35 Pac. 349; Scadden Flat Co. v. Scadden, 121 Cal. 33, 53 Pac. 440, and cases cited infra. Nor can any objection be urged to the resolution on the score of the interest of the directors. For here the directors, though trustees, were the sole beneficiaries, and in this double capacity were fully empowered to act. Chater v. S. F. Refining Co., 19 Cal. 246; Shorb v. Beaudry, 56 Cal. 450; Cornell v. Corbin, 64 Cal. 200, 30 Pac. 629; Kohl v. Lilienthal, 81 Cal. 397, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520; Behlow v. Fischer, 102 Cal. 214, 215, 36 Pac. 509; Kellerman v. Maier, 116 Cal. 416, 48 Pac. 377; Hunt v. Davis, 135 Cal. 34, 66 Pac. 957; Civ. Code, §§ 323, 324. As to the creditors of the corporation, the principles by which their rights are to be determined are sufficiently simple, though, it must be confessed, they are somewhat obscured by the immense multiplicity and varying character of the authorities. The relation of the judgment debtor to the creditors of a corporation is simply a particular case of the general case of a creditor seeking to collect his debt from the debtor of his debtor by attachment or other proceeding authorized by law. In no case is there any privity between the creditor and the debtor's debtor (Matteson, etc., Mfg. Co. v. Conley, 144 Cal. 483, 77 Pac. 1042); but whatever rights the former may have come to him through the intermediate debtor, and the general principle is that they cannot be other or greater than his. In this the case differs from that of the statutory liability of the stockholder, where the direct relation of debtor and creditor is established between the stockholder and the creditor by the statute. Civ. Code, § 322. There are exceptions, or apparent exceptions, to the general rule in cases of fraud, actual or constructive, as to creditors, and there are cases where the stockholder may be estopped from showing the real nature of the contract or agreement between him and the corporation; and, it may be admitted, the latter principle and that of constructive fraud have been extended in their application with extreme liberality in favor of creditors, and, perhaps, with some disregard of the rights of innocent individuals. Hence, it may be said of "unpaid subscriptions to stock" that "these may sometimes be collected by creditors when the corporation itself has released them, or in some way deprived itself of that right." Vermont Co. v. Declez Co., 135 Cal. 583, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143. But we see nothing in the agreement between the corporation and the defendants here to take the case from the application of the general rule, or to give to the creditors of the corporation any greater rights than the corporation itself had. Here, from the circumstances of the case, it may be inferred that the principal parties to the transaction were Raymund and O'Bryan, and the relation of the others to them merely that of employés. Nor do we see anything in the nature of fraud in the terms of their employment. As to Widaman, especially, it affirmatively appears that the consideration rendered by him was in excess of the value of his stock, and, upon the evidence, that it was even in excess of its par value. To such a transaction no possible objection can be made. As to Bingham, if this cannot be said, at least the contrary does not appear, and until the contrary is shown the presumption is that the transaction was fair. Code Civ. Proc. § 1963, subds. 1, 19, 20, 33, 39. Here also the general presumption was confirmed by the consideration that otherwise the issue of the certificate would have been in contravention of constitutional and statutory provisions (authorities, supra), and, in the absence of circumstances tending to inform him better, his assignee might justly rely on this presumption. The case, therefore—as to both defendants—comes within the application of what is said in Kellerman v. Maier, 116 Cal. 422, 423, 48 Pac. 377, which is to the effect that it is legitimate for the corporation to dispose of its stock for full value received in land or property, or, as in this case, in services. Nor is there anything in the decision in Vermont Co. v. Declez Co., supra, affecting this position. All that is there held is that the issue of stock for part of its nominal value, or, in other words, the sale of stock at less than par, is not permissible. But, assuming this to be the law, the case considered in Kellerman v. Maier in the passage quoted, and the present case, come within the distinction expressed on page 586 of 135 Cal., page 1059 of 67 Pac. (56 L. R. A. 728, 87 Am. St. Rep. 143), where it is said: "Had the case been the usual one where a road is constructed for a fixed sum of money and a definite amount of stock, it might, perhaps, have been held that the stock was fully paid; but the stock was given for a definite sum of money, and it was contended that it was the usual case of selling stock below par, and that no contract with the corporation could release the stockholder from his liability to creditors." The decision, therefore, does not affect the case of Widaman; nor, in the case of Bingham, does it appear "that the transaction was not fair, and that a reasonable equivalent was not given for the stock"; nor is there anything here to show or to lead us to suspect that there was a mere "simulated payment of such subscription," or that there was "any device short of an actual payment in good faith."

This disposes of the various points made by the appellants' counsel, except the last point of the appellant Widaman, which is that there is a material variance between the case alleged and found, and the proofs. This point—though perhaps by itself insufficient for reversal—is well taken. The action against Widaman is based upon the subscription, and from the findings and the evidence it appears that the contract of subscription (whatever may have been its terms) was executed. The judgment, therefore (if it could be otherwise supported), would have to rest simply, as in the case of Lord, upon the contract implied (as held in Vermont Co. v. Declez Co.) to pay the full par value of the stock.

For these reasons, the judgment and order appealed from must be reversed. But there are other questions involved, antecedent to those discussed by the counsel, which must be determined with a view to the further proceedings in the case. These are: (1) Can an action be maintained by a creditor of a corporation upon a stockholder's liability otherwise than through the medium of an assessment by the corporation, or by the court itself in the suit? (2) Assuming this question to be answered in the negative, will it be necessary in a creditors' bill against a corporation to make the stockholders parties? (3) Or, assuming the first question to be answered in the affirmative, can a suit be maintained by a creditor against a stockholder on his subscription liability without making all the stockholders parties, or excusing the absence of missing stockholders?

The first and second of these questions will be considered together: Under the Constitution and statutes of this state, it is settled that there are two methods of proceeding by creditors of a corporation to collect their debts, to wit: (1) "Each stockholder may be compelled to pay to the corporation assessments to the full amount of his subscription to the capital stock of the corporation for the payment of creditors;" and (2) he will "be individually liable to each creditor for such proportion of his claim as the amount of stock held by such stockholder bears to the whole of the capital stock." Sacramento Bank v. Pacific Bank, 124 Cal. 150, 56 Pac. 787, 45 L. R. A. 863, 71 Am. St. Rep. 36; Kimball v. Richardson-Kimball Co., 111 Cal. 395, 43 Pac. 1111. With regard to the latter remedy, it is expressly provided by section 322 of the Civil Code that the action can be maintained by a creditor against a stockholder for his proportion of the debt "only." This seems clearly to imply that no action can be maintained by a creditor against a stockholder on his subscription liability directly; and hence, the right of a creditor to maintain an action of the kind now before us would seem to be denied by the express provision of the statute cited. This conclusion, we think, would be right, and the first question might very well be thus disposed of; but there are grounds upon which it may be rested independent of the statute.

As to the equitable remedy, until recent times the principles governing it and the mode of procedure were equally well defined: A suit may be maintained by the creditor of a corporation on behalf of himself and other creditors against the corporation to subject its assets to the creditors' lien. Wood v. Dumner, 3 Mason, 308, Fed. Cas. No. 17,944; 2 Story's Eq. Jur. § 1252. Among these assets the unpaid subscriptions of stockholders are to be regarded as part, and with reference to these the court will either compel the corporation to assess the stock in the amount necessary for the payment of its liabilities, or it will itself make the assessment; and in this proceeding — unless a personal judgment against a stockholder be sought—it will be unnecessary to make all the stockholders parties, the assessment, whether by the corporation or by the court, being conclusive upon them. Salmon v. The Hamborough Co., 1 Cases in Chancery, 204, cited, Thompson on Liability of Stockholders, § 16; Glenn v. Saxton, 68 Cal. 353, 9 Pac. 420; Glenn v. Williams, 60 Md. 93. Stockholders, however, under the ordinary rules of equity procedure, may be made parties, and as to those who have been served, or who appear, several judgments may be entered against them for the amounts for which they are assessed. Code Civ. Proc. §§ 379, 382, 387, 389; Story's Eq. Jur. §§ 64k, 65; Harmon v. Page, 62 Cal. 448. The leading case on this subject was decided in the reign of Charles II, and it seems to be agreed that the doctrine has never been extended in England beyond the rule as above stated. Nor, until recent times, has it been extended in this country. There are, indeed, some cases in which it has been held that a suit may be maintained by a single creditor directly against one or several stockholders; but this is confessedly an innovation in equity practice, and seems to have grown out of a misapprehension of the resources of the existing practice, rather than from any necessity for the innovation. For the ordinary proceeding furnishes the most ample remedy to creditors that can be justly demanded; and at the same time—unlike the new practice—is free from being chargeable with a disregard of the rights of stockholders, and of the familiar principles upon which equity is commonly administered. This, I think, is a fair criticism of the cases alluded to, whose fault seems to be that they have left out of view the necessity of an assessment (required by every consideration of equity and common sense) to fix the liability of the stockholder; but it would be impracticable, with any due regard to brevity, to attempt to verify the criticism by a review of the cases. We will therefore confine our attention to the statutory provisions and authorities of this state, by which alone the case is to be determined.

By section 331 of the Civil Code, the directors of a corporation, after one-fourth of its capital stock has been subscribed, may levy and collect assessments upon the subscribed capital stock "in the manner and form and to the extent provided herein." By section 332 it is provided: "No one assessment must exceed ten per cent. of the amount of the capital stock," except in the cases mentioned in the section, of which one is that an assessment may be made "for the full amount unpaid upon the capital stock," or such percentage as may be necessary "to meet its liabilities, or to satisfy the claims of its creditors." And by section 349, upon delinquency in the payment of the assessment, the board may elect to waive further proceedings under the statute and "to proceed by action to recover the amount of the assessment," etc. These provisions of the code enter into and constitute the terms of the contract. Union Savings Bank v. Leiter, 145 Cal. 702, 79 Pac. 441. Hence, in the absence of an express agreement to the contrary, the promise of the stockholder is only to pay the amount of his subscription upon assessment, and until then no cause of action arises. Union Savings Bank v. Leiter, supra; Welch v. Sargent, 127 Cal. 81, 82, 59 Pac. 319; Shively v. Eureka Co., 129 Cal. 293, 61 Pac. 939; Ventura Ry. Co. v. Hartman, 116 Cal. 260, 48 Pac. 65; Glenn v. Saxton, 68 Cal. 357, 358, 9 Pac. 420; Harmon v. Page, 62 Cal. 463, 464; Cal. Sugar M. Co. v. Schafer, 57 Cal. 396. It would seem to follow, therefore, that until the levy of assessment, either by the directors of the corporation, or by the court in lieu of the directors, no cause of action can arise either in favor of the corporation or its creditors; and also that, except in the manner indicated—that is to say, by an assessment either by the directors, or in the creditors' suit—no suit can be maintained by a creditor on the subscription liability directly against one or several stockholders. Nor is this an immaterial limitation upon his liability. For not only is the stockholder entitled to the interposition of the directors of the corporation, who are trustees for him, as well as for creditors, and whose duty it is to see that unequal burdens are not imposed upon him (Union S. B. v. Leiter, supra), but he is also protected by the statutory provisions of the law, which forbid him to be assessed, without an assessment of the other stockholders. Nor is the case differenced where the court makes the assessment. For here the court simply performs the functions of the corporate officers, and becomes itself a trustee of the stockholders, as well as of the creditors. It would seem, therefore, even if the case be assumed to be otherwise for the plaintiff, that the judgment was nevertheless premature. There should have been an inquiry as to the amount necessary to be assessed, and an assessment against all the stockholders, whether present or absent.

On the other hand, there are some cases in this state in which it has apparently been held that a direct judgment in favor of creditors against several stockholders is admissible (Baines v. Babcock, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158; Potter v. Dear, 95 Cal. 578, 30 Pac. 777; Walter v. Merced Academy Ass'n, 126 Cal. 586, 59 Pac. 136; Welch v. Sargent, 127 Cal. 72, 59 Pac. 319; Tulare Savings Bank v. Talbot, 131 Cal. 45, 63 Pac. 172); and this, as we have seen, is correct provided there first be an assessment. But the actual decisions go further, and the judgments were affirmed, though there had been no assessment. But in none of these cases was the question as to the necessity of an assessment considered, nor was the attention of the court directed to the statutory provisions and the authorities above cited, nor was the question of their effect considered. In Baines v. Babcock, supra, indeed, the general question is discussed in the briefs, and, in the brief of counsel for the appellants Babcock and Collett, very elaborately and ably. But the question as to the proper mode of procedure and the necessity of an assessment was not considered by the court. Nor in the actual case was there any very pressing necessity that it should be. For, out of the 2,500 shares of the stock of the corporation, 2,317 were represented by the defendants, and it was alleged in the complaint that the remaining 183 shares were "mostly held in small amounts by nonresidents or insolvent persons." But, however this may be, the question actually considered by the court was whether the objection to the nonjoinder of the latter could be sustained, and it was held, in effect, that the nonjoinder was excused. Upon the question under consideration here, all that is said is: "It is well settled that a judgment creditor, who has exhausted his legal remedies against a corporation, may maintain an action against its stockholders to recover, for the benefit of all creditors who may desire to come in and be made parties, the amount due upon unpaid subscriptions for stock, when the corporation neglects or refuses to collect the same." And it is further said: "The contention of appellants that this equitable remedy is superseded in this state by section 322 of the Civil Code, and that the only personal liability of the stockholder is that fixed by that section, is not tenable, and was so held by this court in Harmon v. Page, 62 Cal. 448." But referring to the case cited, it appears that all that was held there was that the jurisdiction of equity to entertain a creditors' bill against the corporation and stockholders to subject the assets of the corporation to the lien of the creditors was not divested by the personal liability imposed upon the stockholder by statute, and that the question under consideration was not there in any way involved. Nor is the language of the court in the principal case to be considered as going beyond the authority cited.

The case of Hatch v. Dana, 101 U. S. 205, 25 L. Ed. 885, is also cited by the court, and, though not cited to the point now under consideration, it apparently goes beyond the point for which it was cited, and probably had some influence on the mind of the court. The case, however, was an Illinois case, where by statute it is expressly provided: "Each stockholder shall be liable for the debts of the corporation to the extent of the amount that may be unpaid upon the stock held by him, to be collected in the manner herein provided." And it is further provided: "Whenever any action is brought to recover any indebtedness against the corporation, it shall be competent to proceed against any one or more stockholders upon the stock owned by them respectively, whether called in or not, as in cases of garnishment." See Alling v. Ward (Ill.) 24 N. E. 551, where the statute is cited, though not fully. Accordingly, though the statute is not expressly referred to, the decision is placed upon the ground that: "A creditors' bill merely subrogates the creditors to the place of the debtor and garnishees the debt due to the defendant corporation. It does not change the character of the debt attached or garnished." This was precisely in accord with the Illinois law, and must be considered as having reference to that only. And it is the more requisite thus to construe the decision, because, if the proposition should be regarded as asserted generally, it would not be supported by any of the authorities cited—unless, perhaps, by the Georgia case cited from Wood's Reports, which does not seem to have been very carefully considered. Nor, however construed, can the decision be regarded as authority in this state, where there are express statutory provisions covering the whole subject of attachment, which it is said are to be regarded as "a substitute for a creditors' bill." Matteson, etc., Mfg. Co. v. Conley, 144 Cal. 485, 77 Pac. 1042.

For these reasons we are satisfied that in this state creditors of a corporation can maintain a suit directly against a stockholder for his statutory proportion of the corporation indebtedness, only; and that to enforce his subscription liability otherwise than by means of a suit against the corporation, and an assessment, would not only be an unnecessary, and therefore unwarranted innovation upon the established equity practice, but it would also be in direct contravention of the provisions of section 322 of the Civil Code, and of the decisions of the Supreme Court in Union Savings Bank v. Leiter, 145 Cal. 696, 79 Pac. 441, and the numerous other cases cited supra. This conclusion is also confirmed by the decision in Welch v. Sargent, 127 Cal. 73, 59 Pac. 319, where it is held that a stockholder cannot pay the debt of a corporation in discharge of his liability upon an unpaid subscription to the stock, which, it is said, "is an asset of the corporation" and "payable to the corporation and no one else." It can hardly be that a cause of action can exist against one which he is not at liberty to pay. And, as in this state, it seems, paid-up stock may be assessed by the corporation (Santa Cruz Ry. Co. v. Spreckles, 65 Cal. 193, 3 Pac. 661, 802; Vermont Co. v. Declez Co., supra), it is difficult to preceive, if such an action can be maintained, why it should be limited to the unpaid subscription.

On the other hand, reverting to the third question, if we could assume that a suit could be maintained by a creditor against a stockholder without the intervention of an assessment by the corporation, or by the court, then it would be clear that all the stockholders should be parties, "at least so far as they can be ascertained," or, as practicable (Hatch v. Dana, 101 U. S. 205, 25 L. Ed. 885, cited; Baines v. Babcock, 95 Cal. 590, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158, supra); and that none could be omitted "unless some valid excuse is shown for not bringing them in" (Thompson on Liability of Stockholders, §§ 353 et seq.; Code Civ. Proc. §§ 379, 389). But assuming that the obvious necessity (in the absence of an assessment) of bringing in all the stockholders before judgment can be rendered against one (Code Civ. Proc. §§ 379, 382, 389) may be thus qualified, the rule can have no application to the present case. For here, though it appears that one of the stockholders (O'Bryan) absconded some four or five years ago, it does not appear that he cannot now be found; and it affirmatively appears that the other stockholders (Rowan and Raymund) were present. No reason appears, therefore, why they should not be joined, and under the provisions of the Code cited they should be. By joining Raymund only, the trust fund subject to the claims of the plaintiff and intervener would be increased by more than $24,000, or, in other words, would be multiplied 13 times, and a very small assessment upon each share would be sufficient to satisfy the claims sued on. And even should the judgment be against them jointly for the amount due, and the smaller stockholders have to pay the judgment, they would be assured of their right to contribution from the others. Under these circumstances, to impose the whole debt on two small stockholders, to the exclusion of the principal debtors, would not be justified by any principle of equity with which we are acquainted. In this connection, it will be proper to say we are not satisfied of the correctness of the proposition of the court, in Hatch v. Dana, supra, that "the liability of a stockholder for the capital stock of the company is several, and not joint"—at least, as applicable to this state. After the assessment it is "several." But before that the liability is only contingent, and can hardly be said to be either joint or several; though in its characteristics it more nearly resembles obligations of the former kind.

For the reasons given, the judgment and order appealed from must be reversed, and further proceedings had in accordance with the views expressed in this opinion.

I concur: ALLEN, J.

GRAY, P. J. I concur specially in the reversal of the judgment and order. I do not think there is any analogy, however, between this case and the case of a creditor seeking to collect his debt from the debtor of his debtor by attachment. I am strongly of the opinion that the creditors may sue the stockholders of a bankrupt corporation directly and without any effort to compel an assessment by the corporation, and believe that the liability of the stockholders to such creditors is several as well as joint, and that it is not necessary to join all the stockholders in such a suit. Walter v. Merced Academy Association, 126 Cal. 582, 59 Pac. 136.

2 Cal. App. 122

TURNER v. FIDELITY LOAN CONCERN et al. (JAMES, Intervener). (L. A. 1,433.)

(Supreme Court of California. Dec. 29, 1905.)

APPEAL—DIVIDED COURT—LAW OF THE CASE.

The decision of certain questions by a District Court of Appeal, with a view to further proceedings in the case, only concurred in by two of the justices of such court, does not constitute "the law of the case" for further proceedings.

In Bank. Action by Stephen L. Turner and another against the Fidelity Loan Concern and others. A judgment against H. P. Lord and O. P. Widaman was affirmed in a District Court of Appeal (83 Pac. 62), and they apply for a transfer of the cause to the court in bank. Petition denied.

S. J. Parsons, for appellants. Walter Bordwell, for respondents. Lawler & Allen, for defendant Rowan. Camp & Lissner, for intervener, James.

PER CURIAM. The petition for a transfer of the above-entitled cause to this court, after decision in the District Court of Appeal of the Second Appellate District, is denied. In denying such petition, it is proper to say that such portions of the opinion of said Court of Appeal as are devoted to the discussion of such questions as, it is said in the opinion, "must be determined with a view to the further proceedings in the case," are concurred in by only two of the justices of said Court of Appeal, and, consequently, do not constitute "the law of the case" for further proceedings.

2 Cal. App. 47

FRUTIG v. TRAFTON.

(Court of Appeal, First District, California. Oct. 20, 1905.)

1. APPEAL — FINDINGS — CONFLICTING EVIDENCE.

Findings of the trial court, based on conflicting evidence, will not be interfered with on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3983-3989.]

2. PAYMENT—APPLICATION—STATUTES.

Under the express provisions of Civ. Code, § 1479, a debtor has the absolute right to direct at the time of payment the obligations to which he desires the same applied.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Payment, § 99.]

3. SAME—EVIDENCE—PAYMENT ON ACCOUNT.

Where defendant's merchandise account with plaintiff included not only an original indebtedness for goods sold, which was partially secured by mortgage, but also charges representing subsequent sales, remittances made by plaintiff "for credit," or "to apply on account," did not constitute a direction that the remittances should be applied in payment of the subsequent charges, as distinguished from the items secured.

4. APPEAL—NEW TRIAL—DENIAL—CONFLICTING EVIDENCE.

Where the evidence was substantially conflicting on an issue of the application of payments, the trial court's denial of a motion for a new trial on the ground that the findings were contrary to the evidence will not be interfered with on appeal.

5. MORTGAGES—SATISFACTION—JUDGMENT.

Where a mortgage was past due at the time suit was brought to compel satisfaction thereof on payment of an alleged balance, and the court found that the amount of the balance was as claimed by plaintiff, it was improper to render judgment requiring satisfaction on payment of the amount so found into court, without fixing a reasonable time for such payment.

Appeal from Superior Court, Santa Clara County; W. G. Lorigan, Judge.

Action by Harry Frutig against J. P. Trafton. He having died after judgment, Dola P. Trafton, his executrix, was substituted as defendant. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, she appeals. Modified and affirmed.

Rehearing denied November 16, 1905.

Valentine & Newby and S. F. Leib, for appellant. H. W. McComas and Charles L. Witten, for respondent.

HALL, J. This is an action to compel the satisfaction of a note and mortgage given for

$1,000, upon the payment of the balance of $260 alleged to be unpaid. Plaintiff had judgment as prayed for. The appeal is from the judgment and order denying defendant's motion for a new trial. The original defendant, J. P. Trafton, died subsequently to the rendition of the judgment, and the executrix of his will has been substituted as defendant. Plaintiff was a retail dealer in jewelry, and bought a bill of goods amounting to $1,070.41, of defendant, a wholesale dealer, and with his wife gave a note and mortgage to defendant to secure the payment of $1,000 thereof. The note bore date November 4, 1896, and by its terms was payable on or before November 4, 1901, without interest. During the next 12 months plaintiff, from time to time, purchased additional goods of defendant to the amount of $638.10, and during the same time made payments of $735. The court found the payments to be $740, but no point seems to be made of this difference; for other payments were made by plaintiff of taxes on the mortgage which brought the total payments to a sum in excess of $740, and the court found the balance to be paid on the mortgage to be $260.

The controversy concerns the application of these payments. If credited to the note and mortgage, the findings of the court were right; but, if credited to the balance on the first bill, $70.41 and the succeeding purchases, the findings of the court are not sustained by the evidence. Testimony was given by plaintiff and by H. W. McComas to the effect that at the time of the execution of the note and mortgage it was distinctly agreed by defendant and plaintiff and his wife that the first moneys that should be paid by plaintiff to defendant should be credited on account of the note and mortgage, although it was contemplated at that time that defendant should continue to supply plaintiff with such goods as he might need from time to time. Much stress seems to have been put upon this question at the trial, and counsel have discussed the question at length in their briefs. It is sufficient for us to say that on this question there is an absolute conflict of testimony, and therefore, so far as the findings of the court depend upon this question, we cannot interfere with the action of the trial court. We do not think the question last discussed, however, very important, for every debtor has a right to direct at the time of payment the application of such payments as he makes to such obligations as he pleases (Civ. Code, § 1479). It is contended by appellant that the evidence shows without conflict that plaintiff directed the application of the payments to current or running account, and that the payments were so applied by defendant with the knowledge and acquiescence of plaintiff. This presents the real point upon which the determination of this case hinges.

We shall first consider the evidence as to the direction by plaintiff for the application of the payments. Plaintiff carried on his business at Gilroy, Santa Clara county, while defendant carried on business at Los Angeles, and all the payments were by check sent through the mail. There were 25 payments, varying in amount from $20 to $100, and each was inclosed in a letter containing a direction in substantially the following form: "Inclosed please find check for $25 [or whatever the amount] to apply on account," save the last payment, where the direction was: "Inclosed please find check for $25, for which give me credit." It is contended by appellant that the words "to apply on account" meant that the payment should be applied on the debt represented by the current account, as distinguished from the debt evidenced by the note and mortgage. But "the word 'account' has no inflexible technical meaning, being defined by Webster to mean a registry of pecuniary transactions, a written or printed statement of business dealings of debits and credits, and also of other things subjected to a reckoning or review." Preston Nat. Bank v. Purifier Co., 102 Mich. 462, 60 N. W. 981. "An account is a list or statement of monetary transactions, such as payments, losses, sales, debits, credits, etc., in most cases showing a balance or result of comparison between items of an opposite nature, e. g., receipts and payments." Purvis v. Kroner, 18 Or. 414, 23 Pac. 260. See, also, 1 Words and Phrases Judicially Defined, under subject "Accounts." As we shall see further on in this opinion, the very first item in the "account" kept in the books of defendant as to the monetary transactions between defendant and plaintiff was a debit item for $1,070.41, which included the $1,000 evidenced by the note and mortgage, and the same item appears in the statement of account furnished plaintiff by defendant before the beginning of this litigation. We think the import of the words "to apply on account," when referring to a remittance of a named sum, and not qualified by more definite terms, is simply that the payment made is a payment in part of a debt exceeding the amount then paid. The most that can be fairly claimed by defendant in regard to the direction contained in the words "to apply on account" is that plaintiff at the time of the payments gave no direction as to which obligation the payments should be applied to.

This brings us to a consideration of the evidence in the record as to the application in point of fact by defendant of the payments as they were made. On this point we find a substantial conflict in the evidence. It is true that defendant testified that, "when these payments were made, I applied them on the goods he was buying on open account." As evidence of a mental process this testimony is not conclusive against other evidence showing what was in fact done.

Upon this point a written statement was furnished plaintiff by defendant prior to the beginning of this litigation. It is dated November 14, 1901, and the first debit item is under date of November 2, 1896, and is "Bill rendered $1,070.41," which includes the $1,000 represented by the note and mortgage. This item is followed by 18 debit items aggregating $649.16, which with the first item make a total debit of $1,719.57. The credit side of the statement begins thus: "Dec. 10, 1896, By cash, $30," followed by 24 like items, making a total of credits in the sum of $735, and shows a general balance of $984.57, which is the difference between the debit items of the account and the credit items thereof. This written statement furnished by defendant to plaintiff before the litigation was begun, tended to show that the payments therein set forth were by the defendant applied to the $1,000 represented by the note and mortgage.

Further, defendant testified in relation to this statement as follows: "This statement that has been introduced in evidence was furnished Mr. Frutig at his request. He wanted a statement that would show him how he stood. I made out the statement so as to *show him everything.*" (The italics are ours.) It in fact showed that the payments had been credited to the bill of goods for which the note was given. True, the books of the defendant were put in evidence, and the books correspond with the statement with the exception that the first item on the credit side reads, under the head of November 4, "Note and mortgage, $1,000," but the relative weight to be attached to the "statement" and the books of defendant were for the trial court, especially as the defendant himself testified that this credit of $1,000 for the note and mortgage was not entered until after the recordation of the mortgage, which was March 29, 1897, 4 months and 25 days after the execution thereof. In the meantime, six cash payments had been made and credited to the account, the first debit item of which was the bill of $1,070.41. An inspection of defendant's ledger at any time prior to March 29, 1897, would have shown all payments then made credited to the item represented by the note and mortgage. The statement and the books of defendant were before the court and subject to its inspection. If there was anything suspicious or irregular in the appearance of this $1,000 credit entry, or the contrary, it was for the trial court to pass upon it, not the appellate court.

In our examination of this case we have not overlooked the evidence tending to sustain the theory of defendant, but in our discussion of the matter we have simply called attention to the evidence tending to sustain the findings of the court. There being a substantial conflict in the evidence, we cannot interfere with the action of the lower court on the motion for a new trial. Gilbert v. Penfield, 124 Cal. 234, 56 Pac. 1107; Brison v. Brison, 90 Cal. 334, 27 Pac. 186; Moore v. Douglas, 132 Cal. 399, 64 Pac. 705; Bell v. Staacke, 141 Cal. 186, 74 Pac. 774. It is insisted that the judgment is erroneous for the reason that it provides for the satisfaction of the note and mortgage upon the payment into court of the sum found unpaid, without limiting any time within which such payment should be made. The mortgage was past due at the beginning of this action. We think the judgment should have fixed a reasonable time within which the money found due should be paid.

For the foregoing reasons, the order denying the motion for a new trial is affirmed, and the trial court is directed to modify the judgment by fixing a reasonable time within which the money found to be due must be paid, and as so modified, the judgment is affirmed; appellant to recover costs of the appeal.

We concur: HARRISON, P. J.; COOPER, J.

2 Cal. App. 42

SAN FRANCISCO PAVING CO. v. DUBOIS et al.

(Court of Appeal, First District, California. Oct. 19, 1905.)

1. MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS—ASSESSMENTS—LEVY.

St. 1891, p. 204, c. 147, § 7, subd. 11, authorizes exception from a resolution of intent of any work already done upon the street to be improved; subdivision 8 declares that when any work is done on either or both sides of the center line of any street for a block or less, and further work of the same class is ordered to complete the unimproved portion of the street, the assessment to cover the total expense of the work shall be made only on the lands fronting the portions of work so ordered; and subdivision 7 provides that, when a subdivision street terminates in another street, the expense of the work done on one-half of the width of the subdivision street opposite the termination shall be assessed on the lands fronting on such subdivision street so terminating. *Held* that, where two streets terminated at the southerly line of a street to be improved, the assessment for work done on the southerly one-half of such street opposite the streets so terminating was properly made against the lands fronting on those streets, respectively.

2. SAME—SINGLE ASSESSMENT.

An assessment for street improvement does not cease to be a single assessment for the work done under the contract because a portion of the cost of the work done on the street improvement was required to be assessed on a district embracing lands which did not front on the street by St. 1891, p. 204, c. 147, § 7.

3. SAME—ENGINEER'S CERTIFICATE.

Where a city engineer's certificate of the completion of a street improvement gave the measurements of the special work, for the cost of which an assessment was to be made on lands liable therefor, and stated that the engineer found the work to the official line and grade, it was not defective for failure to contain an estimate of the cost and expense of the work.

4. SAME—ACTIONS—EVIDENCE—PRIVATE CONTRACTS.

In an action to recover an assessment for street improvement, certain private contracts between plaintiff and defendants, which included additional work never performed, were inadmissible.

Appeal from Superior Court of City and County of San Francisco; John Hunt, Judge.

Action by the San Francisco Paving Company against William E. Dubois and others. From an order denying defendants' motion for a new trial, they appeal. Affirmed.

Rehearing denied by Supreme Court December 18, 1905.

Charles F. Hanlon and Tobin & Tobin, for appellants. J. C. Bates, for respondent.

HARRISON, P. J. Action upon a street assessment in San Francisco. Judgment was rendered in favor of the plaintiff, and the defendants have appealed from an order denying a motion for a new trial.

The supervisors passed a resolution of intention "that granite curbs be laid on Sixteenth street, between Sanchez and Market streets, where not already laid, and that the roadway thereof be paved with bituminous rock where not already so paved," and the work for which the assessment was made was done under a contract entered into pursuant to said resolution. The improvement of Sixteenth street under this resolution for which the assessment is made is 310 feet in extent, and the assessment therefor is made upon lands of that frontage on the southerly side of Sixteenth street and upon a frontage of 80 feet on the northerly side of the street. Opening out of Sixteenth street between Market and Sanchez streets, and extending in a southerly direction to the next main street bounding the block, are Pond street and Prosper street, each being 31¼ feet in width, and the assessment for the work done on Sixteenth street opposite to these streets is assessed upon lots fronting upon them. The lot involved in this action fronts upon the northerly side of Sixteenth street, and the appellants contend that the assessment is void, for the reason that it appears upon its face that it is not made against all the land which the statute requires to be assessed for the improvement. Subdivision 11 of section 7 of the street improvement act (St. 1891, p. 204, c. 147) authorizes the city council to except from its resolution of intention "any of said work already done upon the street to the official grade." See, also, Williams v. Bergin, 116 Cal. 56, 47 Pac. 877. Subdivision 8 of the section declares that when any work is done upon either or both sides of the center line of any street for one block or less, and further work of the same class already done is ordered to be done to complete the unimproved portion of said street, the assessment to cover the total expenses of said work so ordered shall be made only upon the lands fronting the portions of the work so ordered. Subdivision 7 of the same section declares: "Where a subdivision street terminates in another street the expense of the work done on one half of the width of the subdivision street opposite the termination shall be assessed upon the lands fronting on such subdivision street so terminating." Under these provisions the assessment for the work done upon the southerly half of Sixteenth street opposite to Pond street and Prosper street was properly made against the lands fronting on those streets, respectively.

Whether any portion of the work authorized under the resolution of intention had been "already done," as well as the extent to which it had been done, was a question of fact, to be determined by the superintendent of streets, subject to the right of appeal to the city council on the part of any one aggrieved by his determination. His act in making the assessment against only a portion of the frontage on each side of Sixteenth street was a declaration by him that the contract had been fully performed to his satisfaction, and is not open to controversy in any other tribunal. The mere omission from the assessment of one or more lots fronting upon the street does not of itself render the assessment void upon its face. Buckman v. Landers, 111 Cal. 347, 43 Pac. 1125. As Pond street and Prosper street terminate at the southerly line of Sixteenth street, the directions in section 7 of the street improvement act for assessments for work done upon the "crossings" of streets are inapplicable.

The assessment does not cease to be a single assessment for the work done under the contract, notwithstanding these provisions of the act which require the superintendent to assess a portion of the cost of the work done upon Sixteenth street upon a district embracing lands which do not front upon that street. The amount which, but for the intersecting streets, would be assessed upon that frontage of Sixteenth street is distributed over a larger area, but does not affect or enlarge the amount to be assessed against the lot described in the complaint or any of the lots fronting upon Sixteenth street.

The objection that the demand made upon the lot was for a greater sum than the defendants' share of the assessment for the work on Sixteenth street, or that it was increased by including therein a demand for work done at the intersections of Pond street and Prosper street, is not sustained by the record.

The appellants further object to the sufficiency of the engineer's certificate, on the ground that it does not state that the engineer or any one measured or surveyed the work, or had estimated the cost and expenses of the work, or that the work had been done according to the contract, plan, and specifications, or that it had been completed. The statute does not specify the character of the certificate which the engineer is to make (Gray v. Lucas, 115 Cal. 430, 47 Pac. 354), but it makes it the duty of the superintendent of streets to determine whether the contractor has fulfilled his contract. The city council may require the engineer to make an estimate of the cost and expenses of the work before passing any resolution for an improvement, but the engineer is not required to state these items in the certificate which he gives after the work is completed. The cost of the work to be included in the assessment is determined by the superintendent from the terms of the contract, aided, when necessary, by the certificate of the engineer. The certificate which was offered in evidence gives the measurements of the several species of work for whose cost an assessment is to be made upon the lands liable therefor, and states that the engineer found the work to the official line and grade. No objection was offered to the sufficiency of the certificate when it was offered in evidence, and on its face it complies with all the requirements of the statute.

The court did not err in excluding from evidence certain private contracts which the defendants had entered into with the plaintiff in May, 1897. The defendants could not oust the city council of jurisdiction to order the improvement of the street by entering into contracts of this nature, or prevent the contractor to whom a contract might be awarded by the council from enforcing an assessment for work done under such contract. If the defendants herein have sustained damage by reason of any act or omission on the part of the parties with whom they entered into the contract, their remedy must be sought elsewhere. Such damage cannot be made a defense to an action for the enforcement of the assessment. It may be added, as another reason for the inadmissibility of the contracts, that they were not for the same work as the contract under which the assessment was made, but included additional work and had never been performed.

The order appealed from is affirmed.

We concur: COOPER, J.; HALL, J.

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2 Cal. App. 29

TOWLE et al. v. SWEENEY et al.

(Court of Appeal, First District, California. Oct. 18, 1905.)

1. Trial—Findings of Facts—Agreed Case.

Though findings of fact are not necessary to the validity of a judgment in a case submitted for decision on an agreed statement of facts, the court is not thereby precluded from making such findings.

2. Limitation of Actions—Pleading.

Limitations relied on must be specifically pleaded.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, § 678.]

3. Limitation of Actions—Determination of Issue.

Where limitations are pleaded, the court is bound to determine the issue so raised from the facts connected with the transaction out of which the right of action arose, whether such facts are presented in the form of an agreed statement or by evidence.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, § 733.]

4. Same.

A finding in favor of a defense of limitations does not cease to be a conclusion of law by reason of being found among the findings of fact, but will be regarded according to its character, notwithstanding its misplacement.

5. Mechanics' Liens—Building Contractor's Bond—Liability of Surety.

Where a building contractor's bond was conditioned that the contractors should fully pay to the person or persons performing labor or furnishing material the value of the labor or materials, and should be void if the contractors did so pay, etc., the bond was a collateral obligation, which was enforceable by materialmen only to the extent that their claim could have been enforced against the contractors.

6. Same—Contracts—Limitations.

Where materials were furnished to building contractors under an oral contract, the materialmen were barred by limitations from maintaining an action on the contractors' bond given to secure payment by them of claims for material, etc., after expiration of the time fixed for the maintenance of an action against the contractors on such oral contract.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by J. F. Towle and others against G. C. Sweeney and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Wickliffe Matthews, for appellants. W. H. Jordan, A. G. Eells, and Sheffield S. Sanborn, for respondents.

HARRISON, P. J. The firm of Gardner & Boyden, as contractors, entered into a contract with one Probert, as owner, for the erection of a dwelling house in San Francisco, and at the same time the defendants herein, as sureties, in connection with said contractors, as principals, executed a bond in the penal sum of $1,500 to any and all persons who should perform labor or furnish materials to the contractors, conditioned that, if the said contractors "shall fully pay to the said person or persons performing labor or furnishing materials" the value of such labor or materials, said obligation should be void; otherwise, to remain in full force and effect. The plaintiffs herein furnished the contractors certain materials, which were used in the construction of the said dwelling house, and, the contractors not having paid for the same, brought the present action against the sureties to recover from them the value of the materials so furnished. The construction of the dwelling house was completed November 26, 1895, and the present action was commenced April 8, 1898. The defendants set up the statute of limitations (Code Civ. Proc. § 339, subd. 1) in their answer as a defense to the action, and the court found in their favor upon this issue, and rendered judgment accordingly, from which the plaintiffs have appealed.

1. At the trial the parties submitted the cause upon an agreed statement of facts. Thereupon the court filed its written finding of facts and conclusions of law, and entered judgment accordingly. Its finding that the plaintiffs' cause of action is barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure is placed among the findings of fact, and it is urged by the appellants that, as the cause was submitted upon an agreed statements of facts, there should have been no finding of facts; and that, as the statute of limitations was not included in the agreed facts, the finding thereon must be disregarded, and was improperly considered by the court as a basis for its conclusions of law and judgment. While the findings of fact made by the court are not identical in form or language with the agreed statement upon which the case was submitted, it is not claimed by the appellants that there is any substantial variance in their effect, or that any fact found by the court, other than its finding upon the statute of limitations, is not supported by the facts stated in the agreed statement. Although findings of fact are not necessary to the validity of a judgment, where the case is submitted for decision upon an agreed statement of facts, yet the court is not thereby precluded from making such findings of fact. It may adopt the agreed statement as its own finding of facts, or it may make findings therefrom to correspond with the issues to be determined; and, as it is required to find only the ultimate facts in the case, it may find such ultimate facts from the probative facts set out in the agreed statement, as well as from evidence thereof. An agreed statement of facts is but a substitute for evidence of those facts, and in this respect differs from an "agreed case," which, under section 1138 of the Code of Civil Procedure, may be submitted for decision without any pleadings. Findings of fact must always have reference to the issues to be determined, and in considering their effect for determining the issues in a case the court may consider any provision or rule of law applicable to such determination. The statute of limitations is a provision of law rather than a fact; and, being a defense to the plaintiffs' right of action which must be specifically pleaded, it forms an issue which the court must determine from the facts connected with the transaction out of which the right of action arose, whether such facts are presented in the form of an agreed statement or by evidence. Whether a cause of action is barred by the statute of limitations is, like ownership, a mixed question of law and fact, and may be either, according to the manner in which it is presented. As a recital in the nature of a right or of a defense, it is a fact, while, as the determination of an issue in the cause pending before the court, it is a conclusion of law. Richter v. Henningsan, 110 Cal. 530, 42 Pac. 1077. It does not cease to be a conclusion of law by reason of being found among the findings of fact, and is to be regarded according to its character, notwithstanding its misplacement. Savings Bank & L. Soc. v. Burnett, 106 Cal. 514, 39 Pac. 922; Burton v. Burton, 79 Cal. 490, 21 Pac. 847; Hamilton v. Delhi M. Co., 118 Cal. 148, 50 Pac. 378. The court, therefore, did not err in making a finding upon the defense of the statute of limitations set up by the answer of defendants, and rendering judgment accordingly.

2. Upon the facts found by the court, as well as by the agreed statement of facts, plaintiffs' cause of action against Gardner & Boyden was barred by the statute of limitations. The materials for which the plaintiffs seek to recover were furnished prior to September 19, 1895, and the present action was not commenced until April 8, 1898. The contract under which they were furnished was verbal, and its character and incidents, as a verbal contract, were not varied by reason of the bond set forth in the complaint. The obligation of Gardner & Boyden to the plaintiffs was not created by that instrument, nor is there in it any direct agreement with them on the part of Gardner & Boyden. The plaintiffs are not parties to the instrument, and the instrument itself is only collateral to any obligation that might arise in their behalf for materials thereafter furnished by them. It does not constitute a direct and independent obligation on the part of Gardner & Boyden to discharge every liability that may be afterwards incurred by them for materials, nor does it purport to vary or enlarge such liability, but merely provides that whatever obligation they may enter into for furnishing materials shall be discharged according to its terms. The condition in the instrument that it shall be void, if Gardner & Boyden "shall duly pay" the value of the materials, shows that such payment is to be made according to the terms under which the materials may be furnished. The obligation of the defendants as sureties for the payment by Gardner & Boyden for any labor or materials that might be furnished to them in the construction of the dwelling house is accessory and collateral to the obligation of their principals, and can be enforced against them only to the extent that the same obligation could have been enforced against Gardner & Boyden. County of Sonoma v. Hall, 132 Cal. 589, 62 Pac. 257, 312, 65 Pac. 12, 459; Paige v. Carroll, 61 Cal. 211; Farmers' & M. Bank v. Kingsley, 2 Doug. (Mich.) 403. By virtue of the principles governing the relation between principal and surety, the liability of the sureties is measured by that of the principal, and, unless the claim of the creditor can be enforced against the principal, it cannot be enforced against the surety. As his obligation is accessory to that of the principal, if the prin-

cipal is not liable, he is not, for there can be no accessory if there is no principal; and the surety may avail himself of any defense to the claim that would have been available to the principal. There are certain well-recognized exceptions to this rule, but none of them exist in the present case. "It is of the essence of this contract that there should be some one liable as principal, and, accordingly, when one party agrees to become responsible for another, the former incurs no obligation as surety, if no valid claim whatever arises against the principal; whilst, on the other hand, the liability of the surety upon a claim that is good against the principal ceases so soon as such claim is extinguished." Chitty on Contracts (11th Am. Ed.) 738. In Farmers' & M. Bank v. Kingsley, supra, the Supreme Court of Michigan said: "It would be as difficult to conceive of a surety's liability continuing after the principal obligation was discharged as of a shadow's remaining after the substance was removed." See, also, Brandt on Suretyship, § 164 et seq.; De Colyar on Guaranties, 39; Pothier on Contracts, 229; Hazard v. Irwin, 18 Pick. 95; Eising v. Andrews, 66 Conn. 65, 33 Atl. 585, 50 Am. St. Rep. 75.

It follows from the foregoing that the defense of the statute of limitations which was available to Gardner & Boyden is also available to the defendants herein, and that the court properly rendered judgment in their favor. County of Sonoma v. Hall, 132 Cal. 589, 62 Pac. 257, 312, 65 Pac. 12, 459; Auchampaugh v. Schmidt, 70 Iowa, 642, 27 N. W. 805, 59 Am. St. Rep. 459; Bridges v. Blake, 106 Ind. 332, 6 N. E. 833. In Whiting v. Clark, 17 Cal. 407, and Sichel v. Carrillo, 42 Cal. 493, cited on behalf of appellants, the defendants, by the terms of their contract, became personally bound to the plaintiff, independent of the obligation of the principal debtor. In Sichel v. Carrillo, 42 Cal. 499, the court placed its decision upon the distinction between the statute of limitations, which takes from the plaintiff all remedy whatever against the principal debtor, and a statute which deprives him merely of a particular remedy—as in that case a remedy against the estate of a deceased person—leaving his right to other remedies unaffected thereby.

The judgment and order are affirmed.

We concur: COOPER, J.; HALL, J.

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2 Cal. App. 61

NEWELL v. BRILL.

(Court of Appeal, Second District, California. Oct. 24, 1905.)

1. Mechanic's Liens—Foreclosure—Actions—Variance.

Where a complaint to foreclose a mechanic's lien alleged that the contractors agreed to do all the work and furnish all the materials to complete the plumbing work, according to the plans, for $614, and the claim of lien recited that the work and materials necessary to do the "plumbing work" were to be furnished, according to the plans, for $614, a variance between the complaint and the contract, which required the contractors to do the "gas-fitting and plumbing in the building" for $614, was not fatal under Code Civ. Proc. § 1187, requiring the claim of lien to contain "a statement of the terms, time given and conditions of the contract," etc.

2. Same.

Where, in a suit to foreclose a mechanic's lien, nothing was allowed on account of extra materials, an alleged variance between the complaint and lien and the contract, relating solely to extra materials, was immaterial.

3. Same—Extra Work.

Where a mechanic's lien recited that during the progress of the work defendant ordered certain extra work and agreed to pay therefor the reasonable value of the materials furnished and labor performed, which was the sum of $21.84, such allegation sufficiently showed that the order and agreement for such extra work, etc., was that of the defendant.

4. Same—Pleading—Negative Pregnant—Proof.

Where, in a suit to foreclose a mechanic's lien on an assigned claim, defendant's denial of the assignment was pregnant with the admission thereof, it was not necessary for plaintiff to prove the assignment.

5. Same—Property—Description.

Where, in a suit to foreclose a mechanic's lien, the house subject to the lien was described, and the decree directed a sale only of the building and land on which it was situated, it was not material that the land necessary for the occupation of the building was not described.

6. Same.

Where, in a suit to foreclose a mechanic's lien, the complaint referred to the claim of lien for a description of the property, and the claim contained a sufficient description thereof, the complaint was not objectionable for failure to contain a sufficient description.

Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by W. D. Newell against William Brill. From a judgment in favor of plaintiff and from an order denying defendant's motion for a new trial, he appeals. Affirmed.

Rehearing denied by Court of Appeal, November 23, 1905; by Supreme Court, December 22, 1905.

W. C. Batcheller, for appellant. Jones & Weller, for respondent.

GRAY, P. J. The plaintiff had judgment herein foreclosing a mechanic's lien, and the defendant appeals from the same and from an order denying him a new trial.

1. The contract of plaintiff's assignors, Newell Bros., provided that the firm would do the gas-fitting and the plumbing in the building for $614. The complaint alleges that the Newell Bros. "agreed to do all of the work and furnish all materials necessary to complete the plumbing work in said building, according to the plans agreed upon between said parties," for an agreed price of $614. The claim of lien recited that the work and materials necessary to do the plumbing work were to be done and furnished, "according to the plans and specifications agreed upon between said claimants

and said William Brill," for $614. It is claimed that there was a material variance between the agreement above quoted on the one hand, and the claim of lien and the complaint on the other. We do not think this claim should be upheld. The mechanic's lien law is remedial, and should be liberally construed, with a "view to effect its objects and to promote justice." Code Civ. Proc. § 4. It may be true that the business of a gas-fitter is something separate and distinct from that of a plumber, and yet it must be admitted that there is a close kinship between the two occupations, so close, in fact, that in reading the complaint, and also the claim of lien, and noting that they both fix the price of the work and materials used in the plumbing at exactly the same figure that both the plumbing and the gas-fitting were to be done for under the terms of the contract, and that one firm was doing the whole of this work, it would be difficult to think otherwise than that the word "plumbing," as used in the lien and complaint, was intended to embrace all the work and materials mentioned in the contract. We do not think any person was, or could be, misled by the omission of the word "gas-fitting," and therefore are of opinion that this did not constitute a fatal variance, but that there was a substantial compliance with that part of section 1187, Code of Civil Procedure, which requires in the claim of lien "a statement of the terms, time given, and conditions of his contract."

2. Nor is there any material variance between the allegations of the complaint and lien, on the one hand, and the contract, on the other, in respect to the extra work and materials to be furnished. At the trial the complaint was amended by striking out the reference to "other materials." This was done, apparently, for the reason that there was no evidence of any "extra materials" having been furnished. As nothing was allowed in this connection on account of extra materials, and as the variance complained of related only to those extra materials, we can see no force in appellant's complaint in this regard.

3. The objection that the $21.84 item might have been furnished by some one other than Newell Bros. to some one other than Brill, so far as the allegations of the claim of lien show, is without merit. The allegations of the complaint, as well as the evidence and findings, are to the effect that this extra work was done on the building at the request of Brill by the Newell Bros., and that Brill agreed to pay for the same. Reading the whole claim of lien together, it is apparent from it, also, that this extra work was done for Brill by plaintiff's assignors, and that is all that is necessary. The case in this respect is unlike the case of Madera Flume Co. v. Kendall, 120 Cal. 182, 52 Pac. 304, 65 Am. St. Rep. 177. In that case the claim entirely failed to state the name of the person for whom the materials were furnished, and it was held that section 1187, Code of Civil Procedure, requiring such statement, was not complied with; but here the claim reads as follows: "That thereafter, * * * and during the progress of said work under said contracts, the said William Brill ordered certain extra work, and agreed to pay therefor the reasonable value of the materials furnished and labor performed: that the reasonable value of said labor and materials so done and furnished was and is the sum of $21.84." It is reasonably plain that the above expression "so done and furnished" means done and furnished in accordance with the order and agreement of William Brill previously referred to, and from this the "name of the party" for and to whom it was furnished appears.

4. The attempted denial, in the answer, of the assignment to and ownership of the claim in plaintiff, is pregnant with an admission of those facts, and it was unnecessary, therefore, to introduce any evidence on the subject of the assignment.

5. It is claimed that there is an uncertainty of description in the complaint as to the property sought to be charged with the lien, and that the property convenient for the use and occupation of the house is not designated. The house is certainly described, and the case should not be reversed because it does not appear how much land is necessary for its occupation. Sidlinger v. Kerkow, 82 Cal. 45, 22 Pac. 932. The decree directs the sale only of the building and the land on which it is situated. Sachse v. Auburn, 95 Cal. 651, 30 Pac. 800. Besides, the claim of lien contains an accurate description of the lot, "together with the building thereon," upon which the lien is claimed, and a reference to this may be had to obviate uncertainty in other directions. It is alleged in the complaint that the claim of lien contains a description of the property sufficient for identification, and this allegation is borne out by an inspection of the claim referred to. The complaint was therefore sufficient in the matter of description.

Some other objections are urged, but after examination we consider them of not sufficient importance to warrant a discussion.

The judgment and order appealed from are affirmed.

We concur: SMITH, J.; ALLEN, J.

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2 Cal. App. 55

REED v. SEHON.

(Court of Appeal. Second District, California. Oct. 23, 1905.)

OFFICERS—ELIGIBILITY—OTHER OFFICE—RETIRED ARMY OFFICER.

Rev. St. U. S. §§ 1245–1259 [U. S. Comp. St. 1901, pp. 885–889], provide for the retirement of army officers. Section 1259 authorizes the assignment of retired officers to duty at the

Soldiers' Home, and by subsequent enactments retired officers may be detailed for service with the militia of the several states or in colleges and military schools, and in time of war may be employed on active duty other than in command of troops. Act March 2, 1903, c. 975, 32 Stat. 927, 932 [U. S. Comp. St. Supp. 1905, p. 194]; Act April 23, 1904, c. 1485, 33 Stat. 259; Act Nov. 3, 1893, c. 13, 28 Stat. 7 [U. S. Comp. St. 1901, p. 863]; Act Aug. 6, 1894, c. 228, 28 Stat. 235 [U. S. Comp. St. 1901, p. 864]; Act April 21, 1904, c. 1403, 33 Stat. 225 [U. S. Comp. St. Supp. 1905, p. 190]. *Held*, that a retired army officer is not, by reason of such retirement, holding an office within State Const. art. 4, § 20, making any person holding any lucrative office under the United States ineligible to any civil office of profit under the state.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Army and Navy, § 27; vol. 37, Cent. Dig. Officers, § 43.]

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Contest by D. C. Reed against John L. Sehon over the office of mayor of the city of San Diego. From a judgment in favor of contestor, contestee appeals. Reversed.

Rehearing denied by Supreme Court December 22, 1905.

J. B. Mannix, H. S. Utley, Hunsaker & Britt, and E. W. Britt, for appellant. Stearns & Sweet and F. W. Stearns, for respondent.

SMITH, J. This is a contest of the election of defendant to the office of mayor of the city of San Diego, on the ground of ineligibility. Code Civ. Proc. § 1111, subd. 2. The special ground assigned is that at the time of the election "the defendant held and now holds an office in the army of the United States, to wit, the office of first lieutenant of infantry * * * retired with the rank of captain," etc. The principal question involved in the case is whether the position of the defendant as retired officer is a "lucrative office" within the meaning of section 20, art. 4, of the Constitution of this state; or, rather, whether it is an "office," for, if so, it is undoubtedly lucrative. The court held that the case came within the application of the constitutional provision, and judgment was entered annulling and setting aside the defendant's election. The appeal is from the judgment.

The provision of the Constitution referred to, and the provisions of the Revised Statutes of the United States [U. S. Comp. St. 1901, pp. 885–889] referring to retired officers, are as follows:

"Sec. 20. No person holding any lucrative office under the United States, or any other power, shall be eligible to any civil office of profit under this state: provided, that officers in the militia, who receive no annual salary, local officers, or postmasters whose compensation does not exceed five hundred dollars per annum, shall not be deemed to hold lucrative offices."

"Sec. 1245. When any officer has become incapable of performing the duties of his office, he shall be either retired from active service, or wholly retired from the service by the President, as hereinafter provided."

"Sec. 1251. When a retiring board finds that an officer is incapacitated for active service, and that his incapacity is the result of an incident of service, and such decision is approved by the President, said officer shall be retired from active service and placed on the list of retired officers.

"Sec. 1252. When the board finds that an officer is incapacitated for active service, and that his incapacity is not the result of any incident of the service, and its decision is approved by the President, the officer shall be retired from active service, or wholly retired from the service, as the President may determine. The names of officers wholly retired from the service shall be omitted from the Army Register."

"Sec. 1255. Officers retired from active service shall be withdrawn from command and from the line of promotion.

"Sec. 1256. Officers retired from active service shall be entitled to wear the uniform of the rank on which they may be retired. They shall continue to be borne on the Army Register, and shall be subject to the rules and articles of war, and to trial by general court-martial for any breach thereof.

"Sec. 1257. When any officer in the line of promotion is retired from active service, the next officer in rank shall be promoted to his place, according to the established rules of the service; and the same rule of promotion shall be applied, successively, to the vacancies consequent upon such retirement."

"Sec. 1259. Retired officers of the army may be assigned to duty at the Soldiers' Home upon a selection by the commissioners of that institution, approved by the Secretary of War; and a retired officer shall not be assigned to any other duty."

By subsequent statutory provisions, cited in respondent's brief, retired officers may be detailed also for service with the militia of the several states (Act March 2, 1903, c. 975, 32 Stat. 927, 932 [U. S. Comp. St. Supp. 1905, p. 194]; Act April 23, 1904, c. 1485, 33 Stat. 259), or in colleges, etc., and military schools (Act Nov. 3, 1893, c. 13, 28 Stat. 7 [U. S. Comp. St. 1901, p. 863]; Act Aug. 6, 1894, c. 228, 28 Stat. 235 [U. S. Comp. St. 1901, p. 864]; Act April 21, 1904, c. 1403, 33 Stat. 225 [U. S. Comp. St. Supp. 1905, p. 190]), and in time of war may "be employed on active duty, other than in command of troops."

The defendant, prior to his retirement was first lieutenant of the Twentieth United States Infantry, and there can be no doubt that by his retirement the office he had previously held was vacated. The question, then, is whether there is another office corresponding to his position as a retired officer; and this question we think must be answered in the negative. For, though the word "office" may be used in varying senses, the term in any proper sense implies, as indicated by its etymology, a duty or duties to be performed. Other elements, such as the public nature of the duty and its permanence, may be necessary to constitute a public office; but this element—that is, duty or service to be performed—is an essential part of the definition. Marshall, C. J., in U. S. v. Maurice, Fed. Cas. No. 15,747, cited, Saunders v. Haynes, 13 Cal. 155. The term "office" may, indeed, like other terms, be used in a sense other than the proper one, but the presumption is, unless the contrary appears, that the proper sense was intended, and here we see no reason to suppose that it was not.

It also seems clear to us that, under the provisions of the statute cited, the position of the defendant is a mere sinecure without any duties attached to it; and hence that it cannot properly be called an office. It is true that a retired officer may be detailed to perform the duties of the several offices or employments specified in the statutory provisions that have been cited, such as an officer at a soldiers' home, or as a professor, or in connection with the militia of the state, or in the military service in time of war; but these are mere offices or employments to which he may be appointed; and until they happen no service can be required of him. Nor can the mere fact that he is subject to the remote contingency of being thus employed be regarded as such a duty as is contemplated in the definition. All this is apparently implied in the expression "retired officer," which may be regarded as fairly synonymous with the words "ex-officer," or "ci-devant officer," and implies that he is no longer an officer in the proper sense of the term—just as when we speak of a brevet captain, we mean one who—unless specially assigned command by the President—is not a captain, but merely has the title. In the same way we speak of a transfer as an executed contract, meaning something which has been, but is no longer a contract as defined in the Code. Civ. Code, § 1549. We see no reason, therefore, in the language used, to attribute to the constitutional provision an intention of disfranchising a class of eminently deserving men and depriving the state of their services.

We are of the opinion, therefore, that the case does not come within the provision of the Constitution cited; and to what has been said may be added that this construction of the provision would seem to be required by the reason for its enactment, which would seem to be the obvious consideration that an officer of the state, who is presumably employed to devote himself exclusively to the duties of his office, should not be permitted to assume other duties incompatible with his own. This was the view taken of the case by the court of appeals of New York in People v. Duane, 121 N. Y. 367, 24 N. E. 845, and this view is also supported in some degree by the decision of the court of claims in Geddes v. U. S., 38 Ct. Cl. 428. In the case of State v. De Gress, 53 Tex. 387, the question involved here, and in People v. Duane, was decided differently, but without discussion. In other cases cited by the respondent, it was held that a retired officer was an "officer" within the sense of the several statutes involved (In re Tyler, 18 Ct. Cl. 25; In re Winthrop, 31 Ct. Cl. 35; Franklin v. U. S., 29 Ct. Cl. 6; U. S. v. Tyler, 105 U. S. 244, 26 L. Ed. 985; Wood v. U. S., 107 U. S. 414, 2 Sup. Ct. 551, 27 L. Ed. 542); and it is claimed, in effect, on the authority of these cases, that if there be an officer there must be an office. But the contention we think is untenable. The terms "officer" and "office" are, indeed, paronymous, and in their original and proper sense are to be regarded as strictly correlative. But both terms, like most other terms, are used in various senses; nor do the variations of the one always correspond with the other. Thus, it sometimes happens that the word "officer" is used without reference to the original and proper sense; and this we think was the case in the statutes involved in the cases cited, and is the case when the term is applied to retired officers.

The judgment appealed from is reversed, and the case remanded, with directions to the lower court to dismiss the proceeding.

We concur: GRAY, P. J.; ALLEN, J.

2 Cal. App. 36

WYMAN v. HOOKER.

(Court of Appeal, Second District, California. Oct. 18, 1905.)

1. CONTRACTS—PERFORMANCE—COMPLAINT.

Where, in an action on a completed contract, the complaint alleged that the contract was fully performed on the contractor's part, and contained a copy of the contract attached as an exhibit, the complaint, in the absence of a special demurrer, was not fatally defective for failure to allege that the work was done to the satisfaction of the architect or that the latter gave the required certificate for the last payment.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 1637.]

2. SAME—FINDINGS—EVIDENCE.

Where, in an action on a building contract, the written certificate for final payment, duly signed by the architect, was introduced in evidence, and it also appeared that the owner went into possession of the building, a finding that the work was accepted by the architect, and that defendant by his tenants took possession of the same and ever since occupied it, was justified.

3. TRIAL—SPECIAL FINDINGS—ISSUES.

Special finding *held* responsive to the issue of performance of the contract.

4. CONTRACT—AMOUNT DUE—LIENS—DEDUCTION.

Where, at the commencement of an action by a building contractor for a balance due, there remains a sum due from the contractor for materials which constituted a lien on the property, which was paid by defendant, the amount so paid, including attorney's fees and expenses, was properly allowed as a counterclaim against the amount otherwise due the contractor, as provided by Code Civ. Proc. § 1193.

5. SAME—ARCHITECT'S CERTIFICATE—FAILURE TO PROCURE.

Where a builder completed his contract, and the owner took possession after the acceptance certificate had been executed by the architect and the contractor had done everything necessary to entitle him to a certificate for the final payment, he was entitled to recover the balance due, notwithstanding the architect's wrongful withholding of such final certificate.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 1310.]

6. SAME—COMPLAINT.

Where an architect wrongfully withheld a contractor's final payment certificate after completion of the work, it was not necessary that the contractor, in the complaint to recover the balance due, should allege any excuse for failing to obtain such certificate, but he was entitled to allege and prove the full performance, and show that such certificate was wrongfully withheld.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 1637.]

7. SAME—EXTRA WORK—WRITTEN STIPULATION—ESTIMATES—WAIVER.

Where extra work on a building was performed with the knowledge and consent of the owner and his agent, and they waived a written stipulation and a separate written estimate provided for by the contract, by orally agreeing to continue the work without such estimates, the owner could not thereafter repudiate the work because the estimates were not furnished.

8. TRIAL—EVIDENCE—REBUTTAL.

Where, in an action on a building contract, the architect testified that a floor in the building was defective, the contractor was properly permitted to testify in rebuttal that he did not pay his subcontractor for the floor until the architect "passed on it, said it was all right, and accepted it."

Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by Elliott B. Wyman against John D. Hooker. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Affirmed.

Rehearing denied by Supreme Court, December 16, 1905.

J. W. McKinley, for appellant. Borden & Carhart, for respondent.

GRAY, P. J. This is an action to recover the sum of $2,445.66, alleged to be due upon a certain builder's contract, and to foreclose a mechanic's lien securing the same. The plaintiff had judgment for $1,665.57, and for costs, and a decree of foreclosure, from all of which, and from an order denying a new trial, the defendant appeals.

The builder's contract provides that the work shall be done under the direction and to the satisfaction of the architect. It further provides for payments as follows: "$2,000 when walls are up ready to receive the trusses; $2,000 when roof on, copings of wall cemented and rear corrugated iron finished; $2,127.50 when completed and accepted; the final payment of $2,042.50 shall be made 35 days after the completion and acceptance of the work." It was also provided: "That in each case of the said payments a certificate shall be obtained from and signed by said John Parkinson, architect, to the effect that he considers the payment properly due; but no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials."

1. Appellant contends that the complaint contains no allegation that the work was done to the satisfaction of the architect, or that the architect gave the certificate as to the last payment mentioned above. The complaint did state that the contract was fully performed on the part of the contractor, and contained a copy of the contract attached as an exhibit. The answer denied this averment of performance, and there was no special demurrer to the complaint for uncertainty. The allegations of the complaint in this respect were sufficient. Code Civ. Proc. § 457; Moritz v. Lavelle, 77 Cal. 12, 18 Pac. 803, 11 Am. St. Rep. 229. If the appellant did not regard the complaint as sufficient in this respect, he should have demurred specially for this reason, and the defect, if it was a defect, could have been remedied by amendment. He will not be heard on appeal as to an objection of this character, as such an objection is deemed to be waived when not taken by demurrer to the complaint in the court below. Code Civ. Proc. § 434.

2. The court finds: "That the said contract and the building therein agreed to be constructed including the said additional work, was fully completed and finished by the said contractor on the 17th day of May, 1902; and was on said day accepted by the said architect named in the said contract, and that said architect then and there issued his certificate for the completion payment in accordance with said contract. That on June 7, 1902, the defendant, Hooker, filed in the office of the county recorder of Los Angeles county, a notice of the completion of the said building in the words and figures set forth in paragraph 8 of the said answer; that the said defendant, Hooker, by his tenants took possession of the said building on May 19, 1902, and have ever since occupied same." We think there was evidence to support every part of this finding. The written certificate for the completion payment, duly signed by the architect, was placed in evidence. And this certainly was some substantial evidence that the architect was satisfied with the building, and followed as it was by the owner going into possession

of the building, it was evidence also of acceptance of the building on the part of the owner, as well as the architect. It is true that the architect made some oral declaration, both before and after the giving of this certificate, showing that he was not satisfied with the building, but these declarations could hardly be taken by the trial judge as impeaching the written document certifying that the completion payment was due, which document seems to have been executed with full knowledge of the exact condition of the building. Besides, it may well have been that the "wall out of plumb," and other defects complained of by the architect, were considered, if not by the architect himself, at least by the trial judge, as the direct fault of the plans and specifications drawn by the architect, and in no way the fault of the builder. The builder was there to follow the plans and specifications, and it would be unjust in the extreme to allow the architect to interpose an objection, based on his own fault, between the builder and compensation for his work. We also think that the quoted finding was responsive to the issue already referred to, as to the performance of the contract.

3. The contract also provided that: "The contractor shall, on or before 35 days after the acceptance of the work herein contracted for, cancel and release the said work, premises, or property from all claims that may have accrued against the same in carrying out the work herein contracted for." And it is shown that at the commencement of the action some $600 and upwards was yet due from the contractor, and constituted a lien on the property, for materials put into the building. But it was also shown that this lien was paid by defendant, and the whole thereof, including attorney's fees and all expenses connected with it, was allowed as a counterclaim, and deducted from the amount otherwise due the contractor. This was the proper disposition of the matter, as directed by section 1193 of the Code of Civil Procedure (see Adams v. Burbank, 103 Cal. 646, 37 Pac. 640), and is all that defendant has a right to demand. He has lost nothing on account of that lien, and as the matter has been disposed of as directed by the law, he cannot be heard to complain. It was not here agreed, as in Holmes v. Richet, 56 Cal. 316, 38 Am. Rep. 54, "that if any lien upon the property shall exist at the time when an installment will be otherwise due, the existence of such lien shall constitute a good and sufficient reason for the nonpayment thereof;" hence, that case is not inconsistent with the position here taken, nor is there anything inconsistent herewith to be found in the case of Loup v. California S. R. R. Co., 63 Cal. 101, or in any of the other cases cited by appellant.

4. To be sure, the last payment was to be made upon the obtaining of the certificate of the architect that the amount was due. But where it is shown, as here, that the builder had completed his contract, and the owner had gone into possession after the acceptance certificate had been executed, and the contractor had done everything necessary to entitle him to a certificate for the final payment, the defendant will not be allowed to defeat the contractor's right of recovery by a wrongful withholding of the final certificate on the part of the architect. It is not to be presumed that the parties intended that money righfully belonging to the contractor should be forfeited upon the arbitrary will or caprice of the architect in withholding the final certificate. Antonelle v. Lumber Co., 140 Cal. 315, 73 Pac. 966. Nor was it necessary that any excuse for obtaining this final certificate should be set out in the complaint. It was sufficient in that behalf to allege the performance of the contract on the part of the contractor, and thereafter to prove such performance. If he performed his contract he was entitled to the final certificate, and he could show, as he did, that it was wrongfully withheld without alleging it specifically. Moreover, it does not appear that any objection of this nature was urged at the trial, but, on the contrary, the evidence showing that obtaining the final certificate was excused by the arbitrary and inexcusable actions of the architect, came in without objection and as if it was all perfectly proper under the pleadings. The findings also support the judgment in this regard, because they show that the contractor did everything under the contract required to entitle him to the final certificate and payment of what was unpaid.

5. That the plaintiff was the assignee and owner of the claim sued on is plainly apparent from the evidence. The unaccepted order in favor of F. O. Wyman for this claim did not amount to an assignment of the same, nor did it in any way affect the subsequent assignment of the whole claim made to this plaintiff after the lien was filed. F. O. Wyman testified that there was no assignment to him, but a mere order, and as he is the chief party interested, and the only one that can be hurt by a holding that the order was not an assignment, we think his statement of the transaction and his view of what the parties intended ought to control.

6. The evidence showed that the extra work on the building was done with the knowledge and consent of defendant and his agent, and that they waived the written stipulation that a separate written estimate of extra work should be submitted, by orally agreeing to and countenancing the work without written estimates. Had it not been for defendant's consent thus given, the work would not have been thus done. He will not now be permitted to repudiate work done in the manner that he consented to, on any ground that it was not done in accordance with a previous written agreement.

7. There was no error in allowing the contractor to testify that he did not pay his subcontractor for the floor until the architect "passed on it, said it was all right and accepted it." This testimony was given in rebuttal, and tended to affect the weight of the architect's previous testimony, to the effect that the floor was defective, and was proper for this reason, if for no other. Some other objections are urged by appellant, but they are deemed not of sufficient importance to warrant special notice.

The judgment and order are affirmed.

We concur: SMITH, J.; ALLEN, J.

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2 Cal. App. 88

FAY v. STUBENRAUCH et al.

(Court of Appeal, Third District, California. Oct. 26, 1905.)

1. Mortgages—Foreclosure—Conveyance to Purchaser—Misdescription of Parties.

One "M. Q.," being a party to a suit to foreclose a mortgage, the decree misdescribed her as "A. M. Q."; but, pending appeal an order was made by the trial court reciting a clerical misprision in the decree in the insertion of the initial "A." in the name of such party, and directed that such initial be stricken out wherever it appeared therein. The decree was corrected, and thereafter affirmed, after which the property was sold by a commissioner who referred in his certificate of sale and deed to "A. M. Q." as one of the defendants. *Held*, that there was no judgment against A. M. Q., eo nomine, and the commissioner being directed to execute the corrected decree did not invalidate his acts in so doing by misdescribing one of the defendants in the title of the cause.

2. Judgment — Amendment—Clerical Misprision—Effect.

The amendment of a decree with reference to the name of a party to correct a clerical misprision therein, and make it conform to the name of the party who was in fact served with summons, did not constitute the judgment a new and different one from that originally rendered.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 632.]

3. Mortgages—Foreclosure—Return—Deed—Impeachment.

A commissioner appointed to enforce a mortgage foreclosure decree cannot impeach his return and deed on an application for a writ of assistance.

4. Same—Commissioner's Action—Collateral Attack.

The action of a commissioner appointed to enforce a foreclosure decree in making a return of the sale and deed pursuant thereto is not subject to collateral attack on an application of the purchaser for writ of assistance.

5. Assistance, Writ of—Scope.

A writ of assistance is a process issued by a court of equity to enforce its decree; the scope of the writ being coextensive with the court's jurisdiction to hear and determine the rights of the parties.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assistance, Writ of, § 1.]

6. Mortgages — Foreclosure — Writ of Assistance—Issues—Title to Property.

On an application for a writ of assistance by a purchaser at a mortgage foreclosure sale, the title to the property cannot be litigated.

7. Same—Rights of Parties.

Where, on an application for a writ of assistance by a purchaser of property under a foreclosure decree, it appeared that L. claimed title under a deed made by a party defendant to the foreclosure suit, after suit brought and the filing of a lis pendens, and that he purchased with knowledge of the pendency of the action, his tenant was estopped to plead such title to defeat the writ.

Appeal from Superior Court, Napa County; H. C. Gesford, Judge.

Action by Susan M. Fay against Henrietta Stubenrauch and others. From an order directing the issuance of a writ of assistance, M. R. Lunt appeals. Affirmed.

W. H. Barrows, for appellant. F. L. Coombs and Percy S. King, for respondent.

CHIPMAN, P. J. Writ of assistance. Bank of Napa is the holder of a commissioner's deed under a foreclosure sale in the above-entitled action. The foreclosure suit was commenced June 16, 1899, and lis pendens duly recorded on that day. One of the defendants named in the complaint as claiming some interest in the property, was Mrs. M. Quinn. The complaint alleged that since the month of December, 1898, Mrs. M. Quinn has been, and now is, in possession of the premises. Return of summons was made showing service on Mrs. M. Quinn. The decree of foreclosure was duly made and given on April 24, 1901, and recites that all the defendants made default, and that their default was duly and regularly entered. In the decree one of the defendants was described as Mrs. A. M. Quinn (the only one of the name of Quinn mentioned). Mrs. A. M. Quinn, on May 16, 1901, appealed the case to the Supreme Court. Thereafter, and pending the appeal, Mrs. A. M. Quinn conveyed the premises to one S. P. Lunt, who leased to appellant, M. R. Lunt. Thereafter Mrs. Quinn died, and S. P. Lunt, on application, was substituted in her place and stead. Fay v. Stubenrauch, 138 Cal. 656, 72 Pac. 156. While the appeal was pending in the Supreme Court, an order was made by the trial court, on motion of plaintiff's attorney, "reciting that a clerical misprision had been made in the decree of foreclosure in the insertion of the initial 'A.' before the initial 'M.' in the name of Mrs. M. Quinn, the defendant in said action, and directing that such initial 'A.' be stricken out wherever it appeared therein." The decree was affirmed January 12, 1904 (Fay v. Stubenrauch, 141 Cal. 573, 75 Pac. 174), and the commissioner made return dated April 26, 1904, that he duly sold the property on April 24, 1904, to Bank of Napa County, and on October 27, 1904, he executed his deed as such commissioner to the bank. It appears that in his certificate of sale, and his deed subsequently executed, he states the parties to the action and refers to Mrs. A. M. Quinn as one of the defendants. The affidavit of Edward S. Bell, used at the hearing of this petition, states that "Mrs. M. Quinn, one of the defendants in said cause, was also known as and called Mrs. Annie M. Quinn and A. M. Quinn, and is the same person named as grantor in, and who executed a deed dated May 20, 1901, to one S. P. Lunt, which said deed was recorded August 29, 1902, in Book 73 of Deeds, at page 111, of the records of Napa county." This is the deed under which said S. P. Lunt claims title. At the hearing it was shown by the affidavit of S. P. Lunt: "That at the time this action was commenced and for a long time prior thereto, one Annie M. Quinn was the owner of and in the actual possession of all of said lands (the lands in question) and then and there claimed the same in her own right and adversely to all the world and not under or in subordination to the title of any of the defendants in said action; that said Annie M. Quinn was not then or there the grantee, agent, tenant, or successor in interest of any of the said defendants, and has never at any time so been—all of which was well known to plaintiff at the time this action was commenced; that said Annie M. Quinn was not a party to said action and never appeared therein." Affiant then sets forth the fact of her having conveyed the property to him, his possession thereunder, his lease to appellant, and the latter's possession. Appellant, in a deposition used at the hearing, deposed that the land was in fact sold by said commissioner to E. S. Bell, one of the attorneys for plaintiff, and was not sold to said bank as recited in said commissioner's deed, but that said Bell was at the sale acting for plaintiff in the action, and not for said bank; that no certificate of sale was made, or return thereof until October 25, 1904, six months after the date of said sale (the certificate is dated April 26, 1904), and that said commissioner signed the return herein and executed said deed to said bank "solely at the dictation of said Bell" and without any knowledge that the bank "had any connection with the matter, save that which was then and there received by him verbally from said Bell." That "nothing whatever was then or there or ever thereafter paid to or received by said commissioner for the said property." Commissioner Gunn testified that he sold the property on April 26, 1904, at public auction, and that at said sale Edward S. Bell, an attorney at law, bid the sum of $7,855.73 for said property, and that he "then and there declared the said property sold to said bidder for the sum so bid." He further testified that said Bell did not, until October 26, 1904, inform witness that he made said bid for any person other than himself, and that witness made the return of sale, the certificate of sale, and deed under instructions from said Bell, and from him received the receipt for $7,813.48 (amount of judgment and interest, less costs), signed by plaintiff by her attorneys, Bell, York & Bell, but that no money passed through witness' hands in the transaction. The return of Commissioner Gunn showed that this sum had been credited on the judgment, and plaintiff so acknowledged in her receipt attached thereto. It also appeared that the commissioner's deed was exhibited to M. R. Lunt, and possession demanded, which was refused. Upon this state of facts, appellant makes several contentions.

1. It is claimed that the judgment originally entered against Mrs. A. M. Quinn was void, because she was not a party to the action (citing Houghton v. Tibbets, 126 Cal. 57, 58 Pac. 318), and that it was so decided on the appeal (141 Cal. 573, 75 Pac. 174, supra). It is therefore urged that the pretended sale under said judgment, and the deed issued by the commissioner were void. This contention cannot be maintained. The judgment was corrected as above shown, and was affirmed; there was, therefore, no judgment against Mrs. A. M. Quinn, eo nomine. The commissioner, by order of the court, was directed to execute the corrected judgment, and no other. In doing so he did not invalidate his acts by misdescribing one of the defendants. The giving of the title of the cause was simply to identify it as the one under which he was proceeding, and the identification was sufficient.

2. The claim that the amendment of the judgment "had the effect of making a new and different judgment" is equally untenable. The purpose of the amendment was to correct a clerical misprision, and in no material respect affected the judgment; its object was to make it conform to the fact that Mrs. M. Quinn was the party defendant who was served with summons. 141 Cal., 75 Pac., supra.

3. It is claimed that the neglect of the commissioner to make prompt return of sale, and his return as finally made and deed pursuant to the sale, being contrary to the fact as shown by his testimony, rendered the whole proceeding void. We do not think the commissioner should be permitted to impeach his return and his deed in an application for a writ of assistance. Nor can appellant be heard, in this proceeding, to question the regularity of the commissioner's action by way of collateral attack upon the validity of the deed.

4. The principal point made by appellant arises out of his contention that he holds possession under S. P. Lunt, the successor in interest of Mrs. A. M. Quinn; that neither of these persons was a party or privy to the judgment, and neither of them entered into possession under any of the defendants in the action, and, therefore, neither of them can be dispossessed by a writ issued under the judgment. At the hearing, the uncontradicted fact appeared, and we think, properly by affidavit, that Mrs. M. Quinn and Mrs. A. M. Quinn, sometimes called Annie M. Quinn, are one and the same person, and the

complaint in the action averred that Mrs. M. Quinn was then in possession. It is true that Lunt made affidavit that Mrs. A. M. Quinn was not a party to the action; and this he might aver because no defendant by that name was known to the complaint or judgment. But this is not a denial of the fact that Mrs. M. Quinn, who was a defendant and was duly served with summons, is the same person as Mrs. A. M. Quinn, and no claim is made in appellant's brief that they were not the same. If this is not the fact it would have been a very simple matter to have so shown at this hearing. When the case was on appeal before the Supreme Court, the points decided were that the lower court had the right to correct the clerical misprision above noted, and that when the correction was made, the judgment stood against Mrs. M. Quinn. Nothing then appeared of record, however, to show that Mrs. M. Quinn and Mrs. A. M. Quinn were the same person, nor did the court adjudge that there were two different persons of these respective names. No such question arose. Appellant disputes the relevancy of the evidence showing this identity, and, furthermore, claims that at most it but raises an issue of fact which the trial court could not try upon this motion. The relevancy of the evidence is quite apparent. If there was but one person, and that person was a party defendant duly served with summons, her grantee, under another name, with knowledge of the action, should not be permitted to defeat the writ. The inquiry as to this fact did not raise an issue involving title. The inquiry went only so far as to show that Lunt was claiming under a defendant by another name than that applied to her in the action, and thus attempting to defeat the writ. As it now appears that Lunt claims under a deed made by a party defendant after the action was commenced, and with knowledge of its pendency, is his tenant in a position to defeat the writ by an assertion of such title, or should he not be remitted to his action where title may be tried?

This writ is a process issued from a court of equity to enforce its decree, and its power to issue the writ results from the principle that jurisdiction to enforce a decree is coextensive with jurisdiction to hear and determine the rights of the parties—that the court may do complete justice by declaring the right and enforcing a remedy for its enjoyment. The writ has been in common use in the courts of this state, in foreclosure cases, since Montgomery v. Tutt, 11 Cal. 190. The proceeding to obtain possession through the operation of this writ is summary in its nature, and it has been frequently held that title cannot be litigated in this way, or the proceeding converted into a trial of title. Landregan v. Peppin, 94 Cal. 465, 29 Pac. 771. Against whom the writ will issue, it was said, in Burton v. Lies, 21 Cal. 88: "Such writ can only issue against the defendants in the suit, and parties holding under them who are bound by the decree." See, also, Harlan v. Rackerby, 24 Cal. 561; Steinbach v. Leese, 27 Cal. 295; Frisbie v. Fogarty, 34 Cal. 11; Tevis v. Hicks, 38 Cal. 234; Henderson v. Tucker, 45 Cal. 647. It was held in Enos v. Cook, 65 Cal. 175, 3 Pac. 632, that the legal or equitable rights of persons not parties to a foreclosure suit, cannot be adjudicated upon application for a writ of assistance. In Kirsch v. Kirsch, 113 Cal. 56, 45 Pac. 164, the court said: "The reason for the issuance of the writ is to give effect to rights awarded by the judgment. It should not and cannot operate to establish in the one party, or to destroy in the other, any rights to the property independent of those determined by the judgment." Hence, as has been held, the execution cannot exceed the decree, the writ can issue only against a party bound by the decree. Terrell v. Allison, 21 Wall. 289, 22 L. Ed. 634; Howard v. Railway Co., 101 U. S. 837, 25 L. Ed. 1081; Boyd v. U. S., 116 U. S. 625, 6 Sup. Ct. 524, 29 L. Ed. 746. See, also, extended note to Wilson v. Polk, 13 Smedes & M. 131, 51 Am. Dec. 151; 2 Ency. Pl. & Pr. p. 975. In Landregan v. Peppin, supra, it was held that the defendant could not defeat the writ of possession by showing that since the date of the judgment he had purchased an outstanding title. The court said: "Defendant now claims a right to the possession, acquired subsequently to this adjudication. It is sufficient to say, the court cannot determine the merits of defendant's claim upon this application. This is a proceeding upon affidavits, and no question of title can be litigated in this way. This is a hearing upon a motion, and a motion cannot be converted into a trial." Harlan v. Rackerby, supra, was a case where the mortgagor conveyed the premises during the pendency of the suit, and the writ was refused because the purchaser had no actual or constructive notice of the suit. Clearly the writ would have issued had the purchaser taken from a party defendant or privy with notice. Baker v. Pierson, 5 Mich. 456.

If Lunt has a title not adjudicated in the action, the courts are open to him and he may there establish such title. This proceeding does not determine title, nor are we to be understood as deciding the fact as to the identity of the person or persons known as Mrs. M. Quinn and Mrs. A. M. Quinn. What we hold is that at this hearing this identity was shown by uncontradicted evidence and that the writ was properly issued. Should the fact be otherwise, nothing herein determined may be regarded as estopping Lunt or his grantee from so showing in any action commenced wherein title may be tried.

The order is affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

2 Cal. App. 120

HOEY v. HECHTMAN.

(Court of Appeal, First District, California. Oct. 30, 1905.)

HUSBAND AND WIFE — NECESSARIES — HUSBAND'S LIABILITY—COMPLAINT.

Civ. Code, § 174, provides that, if a husband neglects to make adequate provision for his wife's support, any other person may in good faith supply her with articles necessary for her support and recover the reasonable value thereof from the husband. *Held*, that a complaint alleging that defendant was indebted for goods, wares, and merchandise furnished to his wife at her request, and that such merchandise was common necessaries of life and necessary for her support and maintenance, was insufficient for failure to allege that the articles furnished were "necessary for her support" and that defendant had neglected to make adequate provision therefor.

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by John A. Hoey against A. J. Hechtman. From a judgment in favor of defendant, plaintiff appeals. Reversed.

William M. Sims, for appellant. William B. Craig, for respondent.

HALL, J. This is an appeal from a judgment upon the judgment roll. The complaint is in seven counts identical in form; each being for goods sold and delivered. The second allegation in each count is that: "Defendant and Carrie C. Hechtman now are, and at all times herein mentioned have been, husband and wife." The third allegation of the first count is as follows: "That on or about the 22d day of November, 1902, defendant was indebted to R. G. Schroeder in the sum of $155.70 for goods, wares, and merchandise sold and delivered within two years last past, at the city and county of San Francisco, state of California, to said Carrie C. Hechtman, wife of this defendant, at the special instance and request of said Carrie C. Hechtman, wife of said defendant, and that said goods, wares, and merchandise were common necessaries of life and necessary for the support and maintenance of said Carrie C. Hechtman." The third allegation in each of the other counts varied from the above only in the name of the seller of the goods and the amount of the indebtedness. Defendant demurred to each count upon the ground that it did not state a cause of action. The demurrer was overruled, and upon failure of defendant to answer judgment was entered against him as prayed for.

The demurrer should have been sustained. The complaint does not allege a sale to defendant, and does not allege all the facts necessary under section 174, Civ. Code, to fix liability upon a husband for a sale to the wife. Simon, Jacobs & Co. v. Scott, 53 Cal. 76; Nissen v. Bendixsen, 69 Cal. 521, 11 Pac. 29. In Simon, Jacobs & Co. v. Scott the allegations were of a sale to the wife of the defendant, and were very similar in form to the allegations of the complaint in this case, being "that the said goods and merchandise were necessary for her and the family of defendant and the maintenance of the household of defendant." The court said: "Whether the defendant is liable for the goods furnished to the wife or not, it is certain that the plaintiffs cannot recover against him their value, in the absence of an averment that they were sold and delivered to him. If she was authorized, by reason of her relation to her husband, the nature and character of the goods, and the husband's circumstances, to purchase them, the goods were in law sold to defendant, and the averment should have been to that effect." In the case of Nissen v. Bendixsen, supra, the complaint fully and explicitly alleged all the facts necessary under section 174, Civ. Code, to fix liability on a husband for goods sold to his wife, and the court for that reason sustained the sufficiency of the complaint, but referring to Simon, Jacobs & Co. v. Scott, supra, said: "In the case of Jacobs v. Scott, 53 Cal. 74, the complaint did not allege the facts declared by section 174, Civ. Code, to give a cause of action against the husband, and hence that case was decided in accordance with the common-law rule."

Section 174, Civ. Code, provides: "If the husband neglects to make adequate provision for the support of his wife * * * any other person may, in good faith, supply her with articles necessary for her support, and recover the reasonable value thereof from the husband." In the complaint before us it is alleged that the goods were necessary for the support of the wife, but it is not alleged that the husband had neglected to make adequate provision for her support. Both are essential. The allegation that the goods were necessary for her support refers to the character of the goods as being suitable to her circumstances and condition in life, and such allegation does not import that the husband had neglected to make adequate provision for her support. Under the statute the articles must be necessary for her support and the husband must have neglected to make adequate provision for her support. See, also, St. Vincent's Institution, etc., v. Davis, 129 Cal. 17, 61 Pac. 476.

The judgment is reversed, with directions to sustain the demurrer, with leave to plaintiff to amend his complaint.

We concur: HARRISON, P. J.; COOPER, J.

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1 Cal. App. 740

In re SCOTT'S ESTATE.

(Court of Appeal, First District, California. Oct. 14, 1905.)

1. EXECUTORS — ACCOUNTING — REVIEW — PRESUMPTIONS.

In the absence of the evidence on which the court disallowed certain items in an executor's report, it will be presumed on appeal that the disallowance was proper.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 2248.]

2. WILLS — CONTEST—COSTS—ALLOWANCE BY SUPREME COURT—STATUTES.

Code Civ. Proc. § 1720, authorizing the Supreme Court to allow costs incurred during a will contest, refers only to costs incurred in such court or by reason of an appeal, and does not authorize the Supreme Court in its discretion to allow costs that the superior court had discretion to disallow.

3. EXECUTORS — IMPROPER PAYMENTS—INTEREST.

Where executors improperly withdrew money belonging to the estate and paid the same to a bookkeeper, they were properly chargeable with interest thereon at the legal rate from the time when the money was drawn until it was repaid to the estate.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 423, 425.]

4. SAME—SALE OF ASSETS.

Where executors sold certain cooperage belonging to the estate, without order of court, for a price in excess of the appraised value in the inventory, and reported that it had been sold at the latter figure, they were liable for its value, without proof that more money was received for the total cooperage sold than was stated in their accounts.

5. SAME—COMPENSATION OF ATTORNEYS—ORDER OF ALLOWANCE.

An executor being personally liable to his attorney for the reasonable value of the latter's services, regardless of the amount allowed by the probate court, an order making an allowance to executors for attorneys' services is not conclusive on the attorneys.

6. SAME—ORDER—INSTRUCTION.

Where executors represented by different attorneys filed their accounts jointly, in which they asked for an allowance of $7,500 as attorney's fees to the attorneys who represented two of the executors, and $2,000 as fees for the third executor's attorneys, an order finding that the two executors should be allowed $4,000 as a reasonable attorney's fee, and that the other executor was entitled to $1,000 for the same purpose, did not purport to fix the reasonable value of the services rendered by such attorneys, but was a mere exercise of the court's power to make allowances out of the estate for attorney's fees.

7. SAME—SEPARATE COUNSEL—EMPLOYMENT—STATUTES.

Code Civ. Proc. § 1355, providing that, where there are more than two executors, the act of a majority is valid, did not preclude one of three executors, who honestly differed from the others, from employing counsel of his own selection and being entitled to an allowance for attorney's fees.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 457.]

Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Accounting by the executors of the estate of Angelia R. Scott, deceased. From portions of the decree settling the account and disallowing certain items, the executors appeal. Affirmed.

See 77 Pac. 446.

Rehearing denied November 13, 1905.

A. E. Bolton, for appellants. Houghton & Houghton, for respondents Chamberlain and others. John B. Gartland, for respondent Tilton. Louis Seidenberg and R. P. Clement, for respondents Wormell and others.

COOPER, J. This is an appeal by the executors from portions of the decree settling their accounts and disallowing certain items therein.

1. The first item disallowed by the court is "Expenses of contest in the probate of will of Angelia R. Scott, deceased, $1,681.63." Under the heading "Disbursements by Executors" are set forth in the accounts several items, aggregating $1,686.13, claimed to have been incurred for expenses in establishing the validity of the will. Upon the hearing at the settlement of the accounts the court made the following finding of fact in reference to these items: "I find that the items on the credit side of the second annual account, amounting to the sum of $1,686.13, including $1,560 drawn from the bank to pay the expenses of defending the will upon the contest for its admission to probate, are an improper credit, and ought not to be allowed, excepting the item, 'January 15, 1899, by publication notice of the time and place for proof of the will, $4.50', which is allowed. Total amount disallowed on this item, $1,681.63. And as the executors did, on the 11th day of June, 1901, without any order of court, draw from the funds of the estate deposited in the Donohoe-Kelly Banking Company's Bank the sum of $1,560, which sum was used by said executors in part payment of the above disallowed items of costs, said executors must be charged with interest on said amount of $1,560 at the rate of 7 per cent. per annum from the 11th day of June, 1901, to the time of the payment of said money back into the estate, or until the same is deposited in the Donohoe-Kelly Banking Company's Bank to the credit of the executors of said estate." In the decree settling the said accounts the court disallowed the above items, and surcharged the accounts with their amount. The facts connected with the above item of $1,560 are as follows, viz.: In order to raise money to meet the expenses to be incurred in defending the will against the contest for its probate, certain devisees advanced that amount of money for such expenses, and, as shown by the finding, on the 11th of June, 1901, the executors withdrew this amount from the funds of the estate deposited in the bank, apparently for the purpose of reimbursing the said devisees, and credited themselves in their account with the payments of the items of expense. The mention of the transaction in the finding is relevant only for the purpose of fixing the amount which the executors are required to return to the estate, and the date from which interest thereon is to be paid by them. The executors have not specified any particulars in which the evidence before the court was insufficient to justify the above finding of fact, and it does not appear from the bill of exceptions that they took, or had entered of record, any exception to the order of the court in disallowing said

items. Neither is there any evidence in the bill of exceptions which in any way illustrates the character of those expenses; and the items which form by far the greater part of the amount disallowed by the court are not by their terms, as set forth in the account, prima facie of such a character as would require the court to allow them as a charge against the estate. Whether the executors properly incurred the items of expense set forth in their account in obtaining probate of the will was to be determined by the court upon the evidence before it in reference thereto. Error is not to be presumed, and, in the absence of the evidence before it, we cannot say that the superior court erred in refusing to allow them as a charge against the estate. Appellants contend that section 1720, Code Civ. Proc., authorizes this court to allow and order paid the costs incurred during the contest. The section as to this court refers to costs incurred here, or by reason of the appeal. It does not mean that this court has discretion to allow costs. That the lower court has discretion to disallow. The fact that some of the devisees and legatees refused to contribute to the expenses of the contest furnishes no legal reason for interfering with the order. It may be that the devisees who did contribute are the ones to whom most of the property is devised or bequeathed, and that those who refused to contribute would have received more if the will had been denied probate.

2. Appellants claim that the court erred in surcharging the executors with interest on sums amounting to $230 drawn out of the bank for the purpose of paying a bookkeeper for the estate. The court found that $230 had been drawn, without any order of court, from the funds of the estate in the Donohoe-Kelly Banking Company's Bank, and paid to McGowan as bookkeeper; and that "such amount was improperly paid is hereby disallowed, and the executors must be charged with interest on the several sums drawn out of said bank * * * at 7 per cent. per annum for the respective times said checks were drawn to the time of the payment of said money back into the estate." The finding of the court that the money was improperly paid is not questioned. The amount of interest charged is not computed nor stated; but conceding that the money, upon which the interest was charged, was improperly used by the executors, they are responsible for interest on it at the legal rate. The question as to whether or not the executors had the right to employ and pay the bookkeeper out of the funds of the estate is not before us.

3. The next contention is that the court erred in surcharging the accounts with $836.88, the excess in value of 235,043 gallons of redwood cooperage over the amount returned in the account. The finding of the court as to this item is as follows: "The number of gallons of redwood cooperage sold and accounted for in this account is 235,043. The redwood cooperage was appraised in the inventory filed by the executors on the 9th of May, 1900, at one-half cent per gallon. The executors sold the greater part of said cooperage at one-half cent per gallon, selling some in excess of that amount, and some at seven-eighths of a cent per gallon, in various lots from time to time, without having obtained any order of the court for that purpose, and said sales were made at private sale without any notice of sale being given, and no return of sales of redwood cooperage has ever been made to this court, and no order has heretofore been made confirming said sales. The value of such cooperage at the time of sales being seven-eighths of a cent per gallon, the executors are to be charged with this cooperage at that price, and credited with the total amount of sales accounted for in said accounts. The executors are therefore to be charged with $2,056.62, less $1,219.75, which is the amount of said cooperage accounted for as sold, leaving a balance of $836.88, with which the executors should be charged." After a careful examination we are of opinion that the evidence supports this finding. No order of sale was obtained before selling the cooperage. The sales were made without legal notice, and no returns of sales made, except in the accounts. The accounts do not give the names of all the various purchasers, and it was only by the diligence of the respondent's counsel that most of them were found. It was shown, contrary to the accounts, that many sales were made in excess of one-half cent per gallon as stated in the accounts. The witness Carpy testified that he had been engaged for 25 years in the wine business; that he had seen the cooperage, knew the value of that kind of cooperage, and had had a great deal of experience in buying and selling that kind of property; that in his opinion the cooperage would sell for three-fourths of a cent per gallon. The court found, and the evidence shows, that several sales were made at seven-eighths of a cent per gallon and one at two-thirds of a cent per gallon. The executors admitted that they had made sales in excess of one-half cent per gallon in the face of their verified accounts showing all sales at one-half cent. By selling the cooperage at private sale without an order of court, the executors became responsible to the estate for its value. In re Radovich, 74 Cal. 538, 16 Pac. 321, 5 Am. St. Rep. 466. If the sales had been made for the full value of the property, and the accounts had shown such sales correctly, giving the date of sale and the name of the purchaser in each separate case, the question would be different. We do not attach much importance to appellant's contention that it is not shown that more money was received for the total cooperage sold than stated in the accounts. It might have been very difficult for the parties contesting the accounts to make such proof; and, even conceding that the total amount of money received for cooper-

age is credited to the estate in the accounts, the executors, having sold without an order of court, are responsible for the value of the property sold.

4. Finally it is claimed that the court erred in making an order deducting from the item of $4.750, paid as attorney's fees to Galpin and Bolton, the sum of $750. The executors had drawn from the bank, by order of court, long before the account was settled the sum of $5,000 to be applied as attorney's fees. The court did not direct, and in fact had no right to direct, the manner in which the $5,000 should be apportioned between the attorneys. The two executors, however, who received the money, paid $4,750 of it to their own attorneys, Messrs. Galpin & Bolton, and $250 to the attorney of the other executor, before any order had been made allowing attorney's fees to either of the executors. The executors, although represented by different attorneys, filed their accounts jointly, in which they ask that the court allow them $7,500 as attorney's fees for Messrs. Galpin & Bolton, who represented two executors, Garcia and Gerrish, and $2,000 as attorney's fees for John B. Gartland, who represented and advised Tilton, the other executor. The court, in effect, found that the two executors who employed Messrs. Galpin & Bolton were entitled to be allowed $4,000 as the reasonable attorney's fees incurred by them, and that the executor who employed Mr. Gartland was entitled to $1,000 as the amount of reasonable attorney's fees incurred by him. The total amount allowed was $5,000; and it makes no difference to the executors, as representatives of the estate, as to whom it is paid. The rule is well settled that attorney's fees are not a claim by the attorney against the estate. The administrator or executor must be allowed reasonable attorney's fees paid or incurred in the necessary management of the estate, but such attorney's fees are allowed to the administrator or executor, and not to the attorney. McKee v. Soher, 138 Cal. 370, 71 Pac. 438, 649, and cases cited. The executor or administrator is personally liable to the attorney employed by him for the reasonable value of the services of such attorney, regardless of the amount allowed by the probate court; the probate court not having power to adjudicate between the attorney and the executor or administrator as to the amount of the fee. Briggs v. Breen, 123 Cal. 660, 56 Pac. 633, 886. Therefore the order made in this case does not conclude the attorneys as to the amount of their respective fees. The executors, in their official capacity, have no interest in settling the controversy between them. The effect of the appeal as to the executors represented by Galpin & Bolton is that the court did not allow a sufficient sum to cover the reasonable attorney's fees incurred by them. If they are liable in excess of the amount allowed them by the court, they may be unfortunate; but there is no contention here that the amount of fees allowed by the probate court was too small. While the court had no power to fix and apportion the attorney's fees, it did have the power to allow the executors represented by Messrs. Galpin & Bolton $4,000 incurred as attorney's fees, and the executor represented by Gartland $1,000 incurred as attorney's fees. Taking the accounts, the decree, and the findings together, we hold this to be the effect of the decree and order as to attorney's fees.

In Estate of Brignole, 133 Cal. 163, 65 Pac. 294, in the final settlement the court below allowed $750 on account of legal services rendered two of the executors, and the same amount to the third executor, who had not employed the same attorney. The order was affirmed. In Estate of Dudley, 123 Cal. 256, 55 Pac. 897, it was held that where two sisters were jointly administratrices of an estate, and unfriendly, each employing different attorneys, the trial court properly allowed to each a reasonable sum as attorney's fees. In Re Delaphine's Estate (Sur.) 3 N. Y. Supp. 202, it was held that, where two executors each employed an attorney, each was entitled to be reimbursed for his attorney's fees incurred in good faith. The court said: "The deceased person must be held to have contemplated, not only the possibility of differences of opinion among his executors, but the extreme probability that such differences would arise. In such an event it surely cannot be held that one shall submit to the other; that he shall subordinate to the other his own honest conception of a proper line of policy and official duty. There can be no doubt, either, but that it is the plain duty of the executors to honestly strain after harmony in all respects affecting the welfare of the estate. On such appearing to be the history of their official acts, there can be no difficulty in disposing of any question of the expense of their administration. * * * After qualification they would stand equal before the law, and in the precise attitude that the deceased wished and expected when he named them in the will; and, except for misconduct, they could not be removed, nor their powers, as set out in their letters of appointment—the will—be limited or restricted. * * * Both executors were entitled to the assistance of good lawyers. They employed them, and promised, under the obligations of a lawful contract, to pay them proper compensation, and such compensation has been ascertained, and they have been paid. The sums so paid in this case appear to have been fully earned, and whether really the services of either or both the attorneys for the respective executors were or were not beneficial to the estate does not signify on the question under consideration. * * * I have no difficulty in holding * * * that they are each entitled to be reimbursed out of this estate for the sums paid by them, respectively, to their respective attorneys."

If appellants' contention in this case be correct, then two of three, or three of five, executors could entirely ignore the minority, and not even allow such minority the assistance of counsel. If three executors should each honestly differ with the others, and each employ counsel of his own selection, which one would be entitled to his attorney's fees? It is true that in such cases the estate may be put to more expense for attorney's fees, but that was for the deceased to consider in making his will. Certainly a testator who appoints three friends, in whose judgment and integrity he confides, does not intend that one of them shall be ignored and denied costs which are allowed to the others. Counsel for appellants rely on section 1355, Code Civ. Proc., which provides that, "where there are more than two executors or administrators, the act of a majority is valid." The language quoted refers to the acts under the will, or in relation to the trust, as is shown by reading the entire section. It does not mean that the act of the majority can deprive one of the executors or administrators of the assistance and advice of counsel.

The order allowing the accounts is affirmed in all respects.

We concur: HARRISON, P. J.; HALL, J.

2 Cal. App. 95

GOFF v. HEALEY.

(Court of Appeal, First District, California. Oct. 27, 1905.)

COSTS—DAMAGES FOR FRIVOLOUS APPEAL.

Where, in an action on a note, defendant appealed from a judgment in plaintiff's favor, but confessed that the appeal was without merit, plaintiff having been deprived of the amount of his judgment for upwards of two years, and caused expense for costs, attorney's fees, and printing a brief, was entitled to an affirmance, with damages.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, § 983.]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Almon B. Goff, Jr., against Benjamin Healey, as executor, etc., substituted for William Tardif. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Affirmed.

John J. Roche, for appellant. Frank W. Sawyer, for respondent.

HALL, J. This is an appeal from a judgment in favor of plaintiff and the order denying defendant's motion for a new trial.

At the oral argument appellant conceded that the judgment and order should be affirmed, and only opposed the request made in respondent's brief for damages for a frivolous appeal. The action was on a promissory note, alleged to have been executed by defendant to plaintiff, which was set out in full in the complaint. In his answer defendant denied the execution of the note, and also alleged that it was without consideration. The court found in accordance with the allegations of the complaint, and that the allegations of the answer were untrue. The evidence was ample to support the findings of the court, and no claim to the contrary is made in appellant's brief, and no question is or can be reasonably raised that the complaint and findings do not support the judgment. No objections were made to the admission of evidence, and no errors of law were assigned in the statement of the case. By this appeal, which is confessedly without merit, plaintiff has been kept out of his money for upwards of two years, and been put to costs for attorney's fees and printing a brief. It is apparent that it was taken for delay.

The judgment and order are affirmed, with $100 damages to respondent.

We concur: HARRISON, P. J.; COOPER, J.

2 Cal. App. 70

In re CULP.

(Court of Appeal, Third District, California. Oct. 25, 1905.)

1. JUDGMENT—JUDGMENT OF OTHER STATE—CONCLUSIVENESS.

Code Civ. Proc. § 1915, provides that the judgment of a foreign country against a person is presumptive evidence as between the parties and their successors in interest, and can only be repelled by evidence of a want of jurisdiction; and section 1916 provides that any judicial record may be impeached by evidence of a want of jurisdiction. *Held*, that a personal judgment of another state may be collaterally attacked on the ground that the court was without jurisdiction for want of notice, though the judgment recites due notice; such procedure not being violative of state comity or of the federal Constitution (art. 4, § 1), declaring that each state shall give full faith and credit to the judicial proceedings of a sister state.

2. PROCESS—ESSENTIALS.

If a party does not submit himself voluntarily to the jurisdiction of a court, the process requiring such appearance must be issued and served in substantial compliance with the law.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Process, § 4.]

3. SAME—PLACE FOR SERVICE—PERSONS WITHOUT STATE.

The authority of a court to issue and serve process is restricted to the territory of the state where issued, and the court has no power to require persons not within such territory to appear.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Process, §§ 15, 69, 70.]

4. DIVORCE — DECREE — CUSTODY OF CHILD — MODIFICATION—NOTICE.

Where the judge, who had rendered a decree of divorce, subsequently stated to counsel who had represented the plaintiff that, if an application should be made ordering the plaintiff to bring her child back into the jurisdiction of the court from which she had taken it, the order would be granted, such statement did not amount to notice to the plaintiff, giving the court jurisdiction over the person of plaintiff to thereafter make such an order.

Appeal from Superior Court, Sacramento County.

Habeas corpus by C. H. Culp for a writ of habeas corpus against Fantasia F. Culp to secure the custody of Willa Norine Culp. Writ dismissed.

R. C. Ross and Eugene S. Wachhorst, for petitioner. Hall & Dunn, for respondent.

BUCKLES, J. Fantasia F. Culp, against whom the writ runs, and William H. Culp, were husband and wife, and the fruit of their marriage was one girl, now 5 years and 7 months old, named Willa Norine Culp. The petitioner is the grandfather of the child, and seeks to get the custody of her through this writ. The said spouses were residents of Shawnee county in the state of Kansas. The said Fantasia F. Culp was plaintiff in a divorce proceeding against her husband in the Shawnee county district court of the Third judicial district of the state of Kansas, which court granted her a divorce on the ground of habitual drunkenness of said William H. Culp, and also gave her the custody, education, nurture, control, and care of said minor child. This decree was made April 4, 1904, and became final, so far as the divorce was concerned, under the laws of Kansas, on the 4th day of October, 1904. Under and in pursuance of this decree the said Fantasia F. Culp received the possession of said child in the state of Kansas on April 9, 1904, and ever since that date has had said child with her. Said decree contained no restriction as to the residence of the child, or of its mother, and about October 9, 1904, said mother moved from the state of Kansas to this state, bringing the said minor child with her to Sacramento.

Upon some information, it is not stated what, but without petition therefor being filed, the judge of the said Kansas court made the following order: "Whereas, be it remembered, that on the 28th day of November, A. D. 1904, in the Shawnee county district court, Third judicial district, state of Kansas, before the Hon. Z. T. Hazen, presiding justice, it being at the September term, 1904, of said court, the following proceedings, among others, were had, to wit: Fantasia F. Culp, Plaintiff, vs. William H. Culp, Defendant. No. 22,240. Now, on this 28th day of November, A. D. 1904, this cause came on to be heard on the court being advised that the minor child, named in the petition as Willa Norine Culp, had been removed from Shawnee county and from the jurisdiction of this court, and the court, being fully advised in the premises, does hereby order that the plaintiff, Fantasia F. Culp, shall on or before the 1st day of January, 1905, bring said child, Willa Norine Culp, into Shawnee county and within the jurisdiction of this court, and said plaintiff is hereby notified that, unless this order is complied with, another order will be made changing the custody of said child, and directing other parties to take said child and bring it within the jurisdiction of this court. Z. T. Hazen, Judge."

On the 5th day of January, 1905, the judge of said Kansas court made the following order, to wit: "Whereas, be it remembered, that on the 5th day of January, A. D. 1905, in the Shawnee county district court, Third judicial district, state of Kansas, before the Hon. Z. T. Hazen, presiding judge, it being at the January term, 1905, of said court, the following proceedings, among others, were had, to wit: Fantasia F. Culp, Plaintiff, vs. William H. Culp, Defendant. Now, on this 5th day of January, 1905, upon due and proper notice to the attorney for plaintiff herein, came on to be heard the application of the defendant herein for a modification of the judgment heretofore rendered in this cause on the 4th day of April, 1904, and the court finds: That contrary to the order, decree, and judgment of this court heretofore rendered the plaintiff herein, Fantasia F. Culp, has removed her daughter Willa Norine Culp, whose custody was by said judgment committed to her, the said plaintiff, from and out of the jurisdiction of this court subsequent to the rendition of said judgment. That said Fantasia F. Culp so removed said child in absolute violation of the order of this court, and with the purpose and intent of hindering and obstructing this court in the proper care and custody of said child. That the conduct of said Fantasia F. Culp since the rendition of said judgment in this case has been such that she is no longer a fit person to be intrusted with the custody and care of said child. That the circumstances render it proper that the said order, committing the custody, control, education, and care of said child to the plaintiff herein, shall be modified and changed, and that C. H. Culp, the grandfather of said child, is a suitable person to be intrusted with her custody, control, care, and education. It is therefore ordered, adjudged, and decreed by the court that the said judgment heretofore rendered in this court on the 4th day of April, 1904, be, and the same is, hereby changed and modified in the following respects, to wit: That it be ordered, adjudged, and decreed that the custody, education, nurture, control, and care of the said Willa Norine Culp be, and the same is, hereby given to C. H. Culp, the grandfather of said child, Willa Norine Culp, and that the said plaintiff, Fantasia F. Culp, and the defendant herein, William H. Culp, either in person or by any agent, relative or representative, are, and each of them is, hereby enjoined from interfering with or disturbing said C. H. Culp in the custody, education, nurture, control, and care of said child until the further orders of this court. And the said C. H. Culp is hereby empowered and directed to take into his possession the said child, Willa Norine Culp, and provide for its maintenance, education, nurture, and control, and to keep the same within the jurisdiction of this court, unless otherwise ordered by this court. Z. T. Hazen, Judge."

Then on the 6th day of March, 1905, the court made another order in the same matter, reciting the fact of making the order modifying the decree of April 4, 1904, and directing that the order of January 5, 1905, be "forthwith carried into effect," and further ordered: "It is therefore hereby ordered, adjudged, and decreed that to the end that said modified order, aforesaid, may be forthwith carried into effect, the sheriff of Shawnee county, Kan., forthwith proceed to take the said child, Willa N. Culp, into his custody, and that he thereupon deliver the said child over to the custody and keeping of the said C. H. Culp, her lawful custodian, according to said modified order, and that said sheriff make immediate return hereof. A. W. Dana, Judge."

The petitioner claims the recital in the judgment of January 5, 1905, "upon due and proper notice to the attorney for plaintiff herein," is a declaration of the court making such degree that notice was given, and that it conclusively establishes the fact that said court had jurisdiction to make the decree. By an inspection of the judgment of April 4, 1904, by which Fantasia F. Culp was awarded the custody of the said minor, it is seen that nowhere therein is she commended to remain within the state of Kansas, and no other order or judgment of said court is presented showing any such direction to her, and we, therefore, conclude none was made. The order of November 28, 1904, shows that the judge making such order knew she had departed from the state of Kansas, and knew, of course, that no personal service could be had on her. And in the order of January 5, 1905, which pretends to modify the original decree and give the child to its grandfather, there is no pretense that any other notice was given than to the attorney of plaintiff in the divorce proceedings. Section 645 of the Code of Kansas provides that, "When a divorce is granted, the court shall make provision for guardianship, custody, support and education of the minor children of the marriage, and may modify or change any order in this respect whenever circumstances render such change proper." It was held in Kendall v. Kendall (Kan. App.) 48 Pac. 940, a Kansas case, which was an application to have modified the decree in a divorce case in relation to the support of the minor children, that "this section gives the court granting the divorce a continuing jurisdiction over the guardianship, custody, support, and education of the minor children of the parties to the divorce proceedings, and it may be invoked whenever circumstances render a change of a former order proper." There was a contention at the hearing in that case as to how service of notice should be made. The service was by service, on the father, of the notice of the motion which had been made. The court said: "There is some force in the argument of plaintiff in error that the proper proceeding is by petition and summons, and not by motion and notice. In this case however, the plaintiff in error was fully informed by the motion and notice of the order applied for. The motion was filed in the original cause, in the same court, the same judge presiding. The plaintiff in error had full opportunity to prepare his defense. He was not misled. The cause was tried on its merits." It is well to note in passing that this case was local—that is all the parties lived in Kansas and were within the jurisdiction of said court; and I apprehend that, when the court said the jurisdiction over the minor children was continuous, it could only mean continuous while they remained domiciled within the jurisdiction of the court. But it appears from this case, and the others cited therein, that the court of Kansas deems some notice necessary when it is sought to modify a decree, in order to give the court jurisdiction to render a personal judgment as would be an order modifying a decree changing the custody of a minor from one person to another.

Petitioner claims that as this is a collateral attack on the judgment of January 5, 1905, this court is not permitted to inquire into the question of the jurisdiction of the Kansas court to make it, or if such court had jurisdiction over the person of Fantasia F. Culp, for the reason that jurisdiction in that court must be presumed, and cites section 1, art. 4, of the federal Constitution, which provides that each state shall give full faith and credit to the judicial proceedings of a sister state. I do not question this authority, for even without this wholesome constitutional provision the comity of states of this union requires that each should give full faith and credit to the judicial proceedings of the other. But how can the courts of this state give such faith and credit to the judicial proceedings of courts in other states until it is known that such courts have acted within the legitimate scope of their authority? It is true that, when the jurisdiction is free from attack, then the presumption that jurisdiction was acquired and that such courts have acted within the powers granted them is allsufficient, and that the authorities all hold that way. If the state courts of Kansas, or of any other state, render an opinion or judgment they had no right or power to render, and it is attacked for want of jurisdiction, then neither the courts of that state nor of any other state are bound by it, and yet they give it all the credit and faith it is entitled to. And this rule is a reasonable one. Freeman on Judgments, § 565, lays down this rule: "Courts of record are presumed to act only in accordance with the authority vested in them by law. Their judgments will generally be treated as conclusive on the parties until the absence of jurisdiction is affirmatively shown.'

The petitioner here is asserting the validity and verity of the judgment of the court of

Shawnee county, Kan., made January 5, 1905, and claiming under it to have the right here in this state to take this little girl of tender years from its mother, who has it by natural right, and by whatever force there is in the decree of the Kansas court, made April 4, 1904, and deliver it over to the grandfather; and it seems to me that, whatever may be said of the powers of this court under the writ of habeas corpus in such cases, this is an effort to enforce a foreign judgment in this court. At least the effect sought is the same. The mother is here resisting such enforcement upon the ground that the court in Kansas had no jurisdiction to make such judgment, it being a proceeding to compel her personally to perform a certain act, to wit, to turn her child over to another person, when she had no notice of the pendency of the application for such purpose—that is, to make such a judgment against her—and did not have her day in court. To maintain her position she seeks to show that the court of Kansas did not have jurisdiction to make such order. After the judgment of divorce became final she never submitted voluntarily to the jurisdiction of the Shawnee county court, and it is admitted that she never was served with notice thereafter, and that she, in fact, removed from the state of Kansas before the proceedings were instituted which led up to the judgment she now assails. The general rule in such cases is that, if a party does not submit himself voluntarily, then, before the court can rightfully exercise jurisdiction over his person, it must be authorized to require him to appear before it and submit to its judgment in that action or proceeding, and the process requiring such appearance must be issued and served upon him in substantial compliance with the law, and the authority to serve is restricted to the territory of the state where issued, and the court has no power to require persons not within such territory to appear before it. In support of this doctrine I cite Freeman on Judgments (section 120a) as follows: "Therefore any personal judgment which a state court may render against one who did not voluntarily submit to its jurisdiction, and who is not a citizen of the state, nor served with process within its borders, no matter what the mode of service, is void, because the court had no jurisdiction over his person." A very strong case showing the right to assail a foreign judgment on the ground of the want of jurisdiction comes from the Supreme Court of the state of Kansas. Thorn v. Salmonson, 15 Pac. 588. There the plaintiff was married to one Karl Johan Thorn in the kingdom of Sweden in the year 1852. The couple lived together as husband and wife, and six children were the fruit of their marriage. In 1862 he separated from her, going to a distant part of the kingdom, where he procured a divorce from her, without giving her any notice, although the decree recited notice by publication for the period of one year before the judgment of divorce was rendered. In a subsequent proceeding, where both husband and wife were parties, the validity of the decree of divorce was questioned, and was determined by the highest court of the kingdom; both parties being residents there, and both being heard. At that time the man, husband, had married this defendant, Salmonson. Plaintiff here stated in that proceeding that she did not wish to disturb the marriage of her late husband to this defendant, and the Supreme Court of Sweden affirmed the judgment of divorce. The matter was then taken before his Royal Highness and was again affirmed. Thorn and his second wife then emigrated to America, and lived together as husband and wife in McPherson county, Kan., until about 1881, when he died. The plaintiff sued, asking to be adjudged the lawful widow of deceased Thorn, and entitled to his estate. The Kansas court held as follows: "While the judgment of divorce appears to have been granted by a competent tribunal, which had jurisdiction of the subject-matter as well as of the parties, and is therefore entitled to liberal presumptions, it is not so far conclusive as to preclude the plaintiff from showing that it was rendered without jurisdiction, or was fraudulently obtained. The reply specifically denies that the plaintiff was ever served with process or had her day in court. * * * If in truth there was no service, personal or otherwise, and she had never been given an opportunity to be heard, she cannot be bound nor affected by any of the orders or judgments made in these proceedings. A foreign judgment rendered without jurisdiction may be assailed in either a direct or collateral proceeding. Although the recital in the judgment that service was made raises a strong presumption in favor of the jurisdiction and of the truth of the recitals, yet the plaintiff may show by extrinsic evidence, if she can, that no service was made. Strong proof will be required to overthrow the presumption of jurisdiction raised by the recitals; but, if it is clearly shown that the plaintiff was not served with process, and did not voluntarily appear or submit to the jurisdiction of the court, the recitals are of no avail." A number of cases are cited in said decision sustaining this doctrine. It is the law of Kansas, therefore, that when a party is seeking the enforcement of a foreign judgment in that state, or seeking some benefit thereunder, the party resisting or defending may assail such judgment by showing want of service, and therefore a lack of jurisdiction to render such judgment.

Petitioner in his argument claims that, if extrinsic evidence can be received to contradict the recital of notice in the Shawnee county court's judgment, then it must appear, first, that notice is necessary under the Kansas law, and, second, that no notice sufficient in the Kansas practice was given. The necessity of notice is answered in a Kansas case decided November 8, 1902, and reported in the Pacific Reporter. Miles v. Miles (Kan. Sup.) 70 Pac. 631. This was an application, made two years after the decree of divorce, for a modification of the decree, so that the husband might be compelled to contribute to the support of his children, which had been awarded to the custody of the mother. In that case, quoting the section of the Code of Civil Procedure (645) heretofore referred to, the court said: "This section leaves the matter entirely in the hands of the court. He may at any time, upon proper notice, change any former order made in reference to these matters by adding to or taking from the burdens of either party relative to the same." Thus it will be seen that in Kansas, when an application is made to the court to modify a decree or judgment relative to the custody and care of minor children in a divorce case, there must be notice served.

As to the second contention, that no notice was given sufficient in the Kansas practice: The judgment says service was had on the attorney. The deposition of H. G. Larimer, who was the attorney of respondent in the divorce proceedings, was taken. He says: "The day before she left here she called upon me to bid me good-bye, and said in leaving, 'If any trouble comes up here in this case, I will want you to look after it for me.' To that extent I represent her still." He was asked as follows: "State whether any notice was ever given to you of said application to modify the judgment aforesaid, rendered on the 4th day of April, 1904, in said action?" To which he answered: "No notice of any such application was ever given to me, either verbally or in writing. The practice in our court is that the attorneys, who are making application or asking for orders, either, shall serve a notice upon the opposing attorney, when the same is published in the Legal News, a paper published in the city of Topeka. Through neither source did I ever have any notice of any such application." Mr. Larimer states further in his deposition that in a conversation with Judge Hazen, who made the modifying order, which conversation was held between the 1st and the 15th of October, 1904, Judge Hazen said: "If the Culps make any application ordering the child brought back here, I will grant it. I will turn the child over to them." Mr. Larimer never heard anything more of the application or the order, until the latter part of March, 1905, and declares again in his deposition that no notice of any kind was ever served on him, and that he was not in the courtroom when the order was made. The deposition of A. M. Harvey, who was the attorney for C. H. Culp, and who drew up the order of January 5, 1905, was taken, and he says he filed no application for the modification of the judgment of April 4, 1904, and that he has no personal knowledge of any notice having been given to the attorney, Larimer. Had there been any notice served upon Mr. Larimer, who would know better than Mr. Harvey, who was acting for petitioner? It appears that all the service of any kind in these proceedings was that the judge had said to him that, if the Culps applied for an order, he would make it; and in the light of Mr. Larimer's testimony, uncontradicted as it is, and supported by the testimony of Mr. Harvey, this must be the service the judge had in mind when he directed the recital in the judgment. This was no service at all, and no notice that any application had been filed or would be heard on January 5, 1905, or on any other day. It therefore follows, it seems to me, that the courts of Kansas have established the rule that, when a domestic or foreign judgment is assailed on the ground of want of jurisdiction, as this is here, the party assailing it may prove by extrinsic evidence the want of jurisdiction. Such courts have also established the doctrine that the application to modify a decree awarding the custody of minor children in a divorce proceeding must be noticed to the party to be bound. The fact appears in the case at bar that there was no service of notice, and no notice at all, given to any one of the application to modify, and that the judgment made thereunder has no binding effect on the said Fantasia F. Culp, assailed as it is, either in Kansas or here.

Neither the rule of comity, supposed to exist between sister states, nor provisions of the federal Constitution requiring each state to give full faith and credit to the judicial proceedings of a sister state, warrants this court in saying, under the attack and showing made as to jurisdiction, that, because the said judgment recites that notice was given, the jurisdiction of the Shawnee county district court is conclusively established and cannot be inquired into. But this whole question of whether or not the jurisdiction of a foreign judgment can be inquired into was determined by the United States Supreme Court in the case of Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897, where that court said, in substance, that the record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction, and, if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite they did exist. This has been followed in every case rendered by the United States Supreme Court since that time, when the question was involved, and is the leading authority on that point in the United States. Coming now to the decisions in our own state. There are a number holding that jurisdiction may be assailed, but the citation of the leading case I deem sufficient. This is In re James, 99 Cal. 375, 33 Pac. 1122, 37 Am. St. Rep. 60, and is cited by both parties. William E. James married the petitioner, Sarah M., in the state of New York in 1859, and they lived together in New York until 1871, when they separated. Some time after, he went to the state of Missouri, and in 1874 procured a divorce from Sarah M., who had remained in New York. She had no notice of the pendency of the action, though the service was by publication. James removed to and became a resident of this state, and in February, 1883, married Leonora A. King, of Santa Cruz, this state. He lived with this last wife until about the time of his death, which occurred in April, 1887. Letters of administration on his estate were issued to the said Leonora A. James. Sarah M. James, the New York wife, appealed from an order of the court refusing to revoke the letters issued to Leonora A., and also from an order refusing to grant letters to her. The petitioner contended that the court in Missouri had no jurisdiction to render the judgment of divorce, upon three several grounds, the second of which was that "the deceased, James, was not a resident of the state of Missouri for one year next before the commencement of the action resulting in the decree; such residence being necessary under the laws of that state in order to give the court jurisdiction in actions for divorce." This was a collateral attack upon the Missouri judgment, and our Supreme Court says, at the top of page 377 of 99 Cal., page 1123 of 33 Pac. (37 Am. St. Rep. 60): "In regard to the second ground of objection to the decree in James v. James, we agree with appellant that it is competent to collaterally impeach the record of a judgment rendered in another state by extrinsic evidence showing that the facts necessary to give the court pronouncing it jurisdiction to proceed did not exist; and this is true, although the record sought to be impeached may recite the existence of such jurisdictional facts"—citing Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897; Starbuck v. Murray, 5 Wend. 148, 21 Am. Dec. 172, Grover & Baker Machine Co. v. Radcliffe, 137 U. S. 287, 11 Sup. Ct. 92, 34 L. Ed. 670; and other cases. There was a substantial conflict in the evidence as to whether James was a citizen of Missouri or not, or a bona fide resident therein for one year, and upon that ground the court held the decree valid. This case has been followed in all the well-considered cases in this state involving the same question since the rendition of that opinion, and must be considered the leading case in this state. But, independent of this decision, the Code of Civil Procedure, as adopted in 1872, and now in force, provides as follows:

"Sec. 1915. The effect of the judgment of any other tribunal of a foreign country having jurisdiction to pronounce the judgment, is as follows: (1) In case of a judgment against a specific thing, the judgment is conclusive upon the title to the thing. (2) In case of a judgment against a person, the judgment is presumptive evidence of a right as between the parties and their successors in interest by a subsequent title, and can only be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact."

It will thus be seen that, when a foreign judgment is assailed, its recitals are but presumptions which may be overcome by extrinsic evidence showing such recitals of jurisdiction to be untrue. But, as if this was not enough, the Code further provides: "Sec. 1916. Any judicial record may be impeached by evidence of a want of jurisdiction in the court or judicial officer, of collusion between the parties, or of fraud in the party offering the record, in respect to the proceedings."

The further citation of authorities seems useless.

The writ is dismissed.

I concur: CHIPMAN, P. J.

McLAUGHLIN, J. I concur in the order dismissing the writ, and in the conclusions voiced in the main opinion touching jurisdiction and the right of this court to inquire into such jurisdiction. But I am unwilling, by silence, to lend implied consent to the proposition that the judgment relied upon as conclusive of petitioner's right to the custody of this child could, under any state of facts, be enforced in this state through the medium of a writ of habeas corpus. This is exactly what petitioner seeks to accomplish by this proceeding. He insists that this court has no alternative, but must execute said judgment by granting his petition, because the federal Constitution and laws require that full effect must be given to judgments rendered in a sister state. Granting his premise, the conclusion does not follow.

Judgments rendered in Kansas have no extraterritorial effect as judgments. Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538; Black on Judgments, § 682. Judgments rendered there will not be enforced here, unless a judgment thereon is recovered in this state. Am. & Eng. Ency. Law, vol. 13, p. 986; Cooley, Const. Lim. p. 43, note; Freeman on Judgments, §§ 559, 564, 575; Brown v. Campbell, 100 Cal. 646, 35 Pac. 433, 38 Am. St. Rep. 314; McElmoyle v. Cohen, 13 Pet. (U. S.) 312, 10 L. Ed. 177; Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; Code Civ. Proc. § 1913. Such judgments will, as a general rule, be accepted as conclusive proof of rights finally adjudicated by courts of a sister state having jurisdiction of the parties and subject-matter. Huntington v. Attrill, supra; Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535; Freeman on Judgments, § 559; Cooley, Const. Lim. p. 586; Am. & Eng. Ency. Law, vol. 13, p. 983. But, unfortunately for petitioner's contention, judgments relating to the custody of children fall within an exception to this general rule. Such judgments have never been accorded conclusive force, even as evidence, in another state. No person has an absolute right to such custody, for the welfare of the third party—the minor—is always an open and paramount question, and courts of another state may, and will, award the custody of minors, regardless of such judgments. Kentzler v. Kentzler (Wash.) 28 Pac. 370, 28 Am. St. Rep. 21; In re King, 66 Kan. 698, 72 Pac. 263, 67 L. R. A. 783, 97 Am. St. Rep. 399; Woodworth v. Spring, 86 Mass. 321; Kline v. Kline, 57 Iowa, 386, 10 N. W. 825, 42 Am. Rep. 47; Matter of Rice, 42 Mich. 530, 4 N. W. 284; Matter of Heather Children, 50 Mich. 261, 15 N. W. 487; In re Stockman, 71 Mich. 192, 38 N. W. 876; Kraft v. Wickey, 23 Am. Dec. 569; Williams v. Storrs, 10 Am. Dec. 343; Black on Judgments, § 861; Bishop on M. & D. (6th Ed.) vol. 2, p. 604; Am. & Eng. Ency. Law, vol. 13, pp. 965, 968, 960; Cooley, Const. Lim. pp. 497, 584. If the jurisdiction of the court and absolute verity of the modified judgment before us be granted, it could hardly have greater legal effect or confer greater powers than an order constituting the petitioner guardian of the person of this minor. If this be true, then our courts are not bound to recognize either his authority or the judgment on which it rests. Code Civ. Proc. § 1913; Hoyt v. Sprague, 103 U. S. 631, 26 L. Ed. 585; Morgan v. Potter, 157 U. S. 197, 15 Sup. Ct. 590, 39 L. Ed. 670; Curtis v. Smith, 6 Blatchf. 537, Fed. Cas. No. 3,505; Cooley, Const. Lim. p. 44; Am. & Eng. Ency. Law, vol. 13, p. 966, and notes; cases cited supra.

But, waiving this rule, which seems conclusive of the question before us, and giving this judgment all the effect claimed for it, by the most ultra authority supporting it, as evidence, in the courts of another state, we are forced to the conclusion that, even in a direct proceeding to obtain a judgment thereon, the courts of this state would be at liberty to disregard it. It cannot be claimed that it must be given greater effect here than in Kansas. It could be modified there whenever circumstances rendered such change proper. Dassler's Gen. St. Kan. 1901, § 5138. It is as inconclusive here as there. It would be open to inquiry and change in that state, and it is no more sacred in this. In re King, 66 Kan. 698–700, 72 Pac. 263, 67 L. R. A. 783, 97 Am. St. Rep. 399. In short, such judgments are universally held subordinate to the welfare of the child, and any court in this state might act as parens patriæ to this child and award its custody to the mother, or other proper person, notwithstanding this judgment. Black on Judgments, § 861; Code Civ. Proc. § 1913; Cooley, Const. Lim. pp. 496, 497, 584; Avery v. Avery, 33 Kan. 1, 5 Pac. 418, 52 Am. Rep. 523; In re Bort, 25 Kan. 308, 37 Am. Rep. 255; In re King, 66 Kan. 698, 72 Pac. 263, 67 L. R. A. 783, 97 Am. St. Rep. 399; People v. Allen, 40 Hun (N. Y.) 611; Dubois v. Johnson, 96 Ind. 6; De La Montanya v. De La Montanya, 112 Cal. 116, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165; Id., 112 Cal. 133, 44 Pac. 354. This being true of a direct proceeding, it seems to me that habeas corpus is not adapted to the hearing of equitable and interstate questions involved, and that it cannot be extended to such cases without inconsistency and incongruity. All authorities agree that habeas corpus will extend only to the point of freeing the minor from unauthorized restraint. But it is said by those supporting its use in cases involving the custody of children that, the office of the writ having been accomplished, the court will go beyond this, and exercise its equitable powers to protect and conserve the welfare of the minor whose custody is sought. This, confessedly, involves a supplemental inquiry and adjudication equitable in its nature, based on considerations entirely foreign to, and beyond the scope and purpose of, this writ. It is an admission that the writ is inadequate in such cases; and even the authorities sanctioning its use admit such inadequacy, and confess that habeas corpus "gives no jurisdiction to appoint guardians of infants." Church on Habeas Corpus, §§ 445, 446, 451, 452; Spelling on Extraordinary Relief, §§ 1236–1242; Hurd on Habeas Corpus, pp. 476–534. It seems more logical to adopt the course pursued by Southard, J., in State v. Cheesman, cited by the last-named author at pages 554 to 556 of his valuable treatise. See, also, Church on Habeas Corpus, § 452.

Habeas corpus has its legitimate and time-honored scope, and so peculiar is the purpose, nature, and dignity of this writ that it cannot be coupled with other remedies without creating confusion. Even an enlightened and commendable desire to abolish useless forms cannot be carried to the extent of making every writ an agency to right every wrong and vindicate every right without obliterating distinctions designed to prevent confusion and chaos. This is illustrated in the record and briefs before us. The petition and return both show that a similar application was heard and denied by the superior court of Sacramento county. It is argued by the attorneys for Mrs. Culp that the decision of Judge Shields is final, while the attorneys for the petitioner contend that it has no binding force whatever in this or any other court. The authorities generally seem to hold that such decisions are res adjudicata. Freeman on Judgments, § 324; Church on Habeas Corpus, § 387; Spelling on Extraordinary Relief, § 1152. But under our practice repeated applications for a writ of habeas corpus may be made, and it is at least doubtful whether an appeal from the decision of the learned judge of the superior court would lie. This is hardly reconcilable with the theory of finality, and points a reason why this proceeding is peculiarly inappropriate and inadequate to the determination of such questions under the practice in this state. If this remedy may be invoked, then the supplemental inquiry and adjudication is a necessary corollary under all the authorities sanctioning such practice. If the decision rendered on this supplemental hearing be not final, then the equitable powers of a court can be invoked, and its decision will count for nothing, even in the eyes of the person who sought and was denied its aid. Under our system the petitioner cannot be prevented from making repeated applications. He may, perchance, be dissatisfied with the decision of this court, and, if so, he may apply to another department of the superior court of Sacramento county, or to the Supreme Court, for relief denied him here. But, if this be the rule, how fares the other party to this proceeding? Compelled to submit to repeated inquiries involving her character and fitness to retain the custody of her child, the first adverse decision will send her out of the court without child, without appeal, and justly without confidence in the theory that all stand equal before the law. This is not fair or just. It cannot be the law. It might be said that she, in turn, could resort to repeated applications of the same nature; but, if this be admitted, it furnishes an unanswerable argument against such a practice. In my opinion the petitioner should be compelled to seek relief through ordinary legal channels, because the writ of habeas corpus is inappropriate and inadequate to the proper consideration and final adjustment of important questions and rights here involved.

I am also unwilling that the decision in which I concur shall, under any circumstances, be considered as implied authority sustaining the doctrine that the district court of Shawnee county, Kan., retains jurisdiction of this child during her minority, regardless of her presence within or absence from that state. There can be no question that during the time occupied by the proceedings leading to the modified judgment this minor and her mother were in California. The modified judgment shows on its face that the minor was not within the jurisdiction of the court. A decree of this kind can only be made, or continue operative, while the child "remains within the jurisdiction." Cooley, Const. Lim. p. 584; De La Montanya v. De La Montanya, 112 Cal. 133, 44 Pac. 354; Code Civ. Proc. § 1913. The mother, after her divorce, certainly had a right to fix her domicile wherever she pleased, and I can see no good reason, in law or logic, why she could not change the domicile of the child by taking her with her. I can find nothing in the judgment, the laws of Kansas, or the general current of authority to forbid such removal or change. Some courts have held that, where the other parent is permitted to see the child, the court may forbid removal from the jurisdiction, and one decision is to the effect that forbiddance is implied in such a case. Campbell v. Campbell, 37 Wis. 206; Hewitt v. Long, 76 Ill. 399; Miner v. Miner, 11 Ill. 43. This rule is founded on a substantial reason, and I entertain no doubt that, under such circumstances, comity alone would prompt the courts of this state to aid the courts of another state in conserving rights reserved to the other party to the litigation. But here the original decree absolutely debarred the husband and all his agents and kin from seeing, or in any way interfering with the custody of, this child, and I have found no case, and believe none can be found, which holds that, under these conditions, the minor may not be taken from the jurisdiction. Griffin v. Griffin (Utah) 55 Pac. 88; Adams v. Adams, 62 Ky. 169; Woodworth v. Spring, 86 Mass. 323–326; In re D'Anna, 117 N. C. 462, 23 S. E. 431. In the case of Stetson v. Stetson, 80 Me. 483, 15 Atl. 60, this right is expressly recognized, but the court also laid down the inconsistent and untenable proposition that, notwithstanding such right, the jurisdiction continues. There is nothing in Estate of Henning, 128 Cal. 214, 60 Pac. 762, 79 Am. St. Rep. 43, to support the opposite view. That decision rests upon the express prohibition found in section 248 of the Civil Code, and on the presumption that no change of domicile was effected by the permissive removal. Had Mrs. Culp fled from Kansas for the apparent purpose of evading a law or judgment of that state, a very different question would be presented. But I know of no rule of law or reason which prevents a person from doing that which no law or court has forbidden.

It may be said that this prohibition is implied from the power to modify the judgment. But, if implications are to be indulged, it is equally as reasonable to construe section 5138, Dassler's Gen. St. 1901, as permitting such modification at any time while the minor remained within the jurisdiction. We have seen that most of our courts, including those of Kansas, recognize the rule that other courts may consult the welfare of the child, regardless of judgments rendered in another jurisdiction. This rule is irreconcilably in conflict with the idea that the child may not be removed from the state, and that the jurisdiction is continuing and extraterritorial.

148 Cal. 374

FLOOD v. TEMPLETON et al. (Sac. 1,391.)

(Supreme Court of California. Dec. 18, 1905.)

1. PLEADING — AMENDMENT—EFFECT ON DEMURRER.

Where amendments of a complaint, made after the overruling of a demurrer interposed to the complaint, consist merely of minor interlineations, which in no way affect the grounds of demurrer, it is not necessary for defendant, in order to save the rights acquired by the demurrer, to demur to the complaint as amended.

2. SAME — WAIVER OF DEFECTS — FAILURE TO DEMUR.

Under Code Civ. Proc. § 434, providing that if no objection to a complaint is taken, either by demurrer or answer, defendant must be deemed to have waived the same, excepting the objection to the jurisdiction, and that the complaint does not state facts sufficient to constitute a cause of action, the failure of the complaint to state facts sufficient to constitute a cause of action may be raised at any time.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1366.]

3. SPECIFIC PERFORMANCE — CONTRACTS ENFORCEABLE — NECESSITY OF SHOWING EQUITY.

Under Civ. Code, § 3391, which precludes specific performance as against a party to a contract who has not received adequate consideration, or as to whom the contract is not just and reasonable, a contract to devise land to plaintiff in consideration of the latter's failure to interpose a set-off and plea of limitations, constituting a partial defense to an action by the promisor to foreclose a mortgage on the land in question, cannot be specifically enforced against the executor and devisees or heirs of the promisor, in the absence of a showing as to what the land was worth at the time of the contract, or of anything to show that plaintiff suffered any detriment or that the promisor gained any advantage by the contract.

4. SAME—ADEQUACY OF LEGAL REMEDY.

An agreement by a mortgagor not to assert a fixed monetary demand against the mortgagee's claim on foreclosure, and not to plead limitations as against another specific part of the mortgagee's claim, in consideration of an agreement by the mortgagee to devise the mortgaged property to the mortgagor, cannot be specifically enforced against the executors and heirs or devisees of the mortgagee, as the mortgagor's remedy at law by an action for damages is adequate and complete.

In Bank. Appeal from Superior Court, Glenn County; Oval Pirkey, Judge.

Action by Mary Flood against Charles Templeton, as executor of James Sullivan, deceased, and others. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

R. L. Clifton and McCoy & Gans, for appellants. Frank Freeman, for respondent.

HENSHAW, J. Plaintiff's action is to enforce an alleged agreement made between herself and James Sullivan in his lifetime, whereby Sullivan agreed by his last will and testament to devise to plaintiff real property described in the complaint. Defendants' demurrer to the complaint was overruled, and they answered by denial, and by cross-complaint sought to quiet title to the property which was then in possession of Mary Flood under lease. Trial was had, and the court gave judgment for plaintiff as prayed for, and from that judgment, and from the order denying their motion for a new trial, defendants appeal.

The complaint does not disclose any ground for equitable relief, and defendants' demurrer to it should have been sustained. Plaintiff alleges that she was the owner of a certain piece of property and was in possession of it; that on the 4th day of February, 1899, she owed Sullivan upon her promissory note, secured by mortgage upon this land, $9,696 principal and $5,226 interest; that upon the 1st day of January, 1899, Sullivan had become indebted to her in the sum of $5,875.50 for board, lodging, washing, nursing, etc., and for the pasturing of his stock upon plaintiff's land; that no balance had been struck in their accounts, and that their accounts were open, mutual, current, and undetermined; that Sullivan, in February, 1899, made demand upon plaintiff for the payment of her indebtedness; that the first installment of the promissory note, amounting to the sum of $969.67, was at that time barred by the statute of limitations. Thereupon plaintiff and deceased entered into the following agreement: "That the said Sullivan should proceed to foreclose the mortgage given to secure the note hereinbefore set out, which said note and mortgage are herein marked 'Exhibit A,' and obtain a judgment and deed, through foreclosure proceedings, to the said land and premises then owned by the said Mary Flood and hereinbefore described, and that the said Mary Flood should refrain from pleading the statutes of limitations as a bar to said first installment due on said note, and should refrain from setting up as a set-off to the said foreclosure proceedings the said amount of $5,875.50, which was then due from the said Sullivan to the said Mary Flood, and, in consideration of the said Mary Flood not so pleading the statutes of limitations or setting up said set-off in said foreclosure proceedings, the said Sullivan agreed that after he obtained title to said premises in said foreclosure proceedings he would rent to the said Mary Flood the said premises herein described, as long as she, the said Mary Flood, lived, for the sum of $400 a year, and that he would make and leave at his death a last will in favor of the said Mary Flood, devising and bequeathing to her, the said Mary Flood, all of the said land and premises hereinbefore described and described in said mortgage, so that the said Mary Flood, upon the death of the said Sullivan, should become the owner in fee of the whole of the said land and premises clear of incumbrance." The complaint then avers the foreclosure proceedings, the performance upon the part of plaintiff of the obligations imposed upon her by the agreement, the leasing of the property to her, and her occupation of it until the death of Sullivan, his failure to devise her the property, and the consequent injury. The original complaint set forth the agreement between the parties, as above quoted. To this the demurrer was interposed and overruled. Subsequently, during the course of the trial, plaintiff was permitted to amend, and did amend, in the following particulars: She was allowed to add an interest charge to the amount which she claimed, $5,875.50, so that the complaint read that there was due to her from Sullivan the amount of $5,875.50 "and interest thereon"; and, further, she was allowed to amend the allegation as to Sullivan's promise, so as to make it read that Sullivan would rent to Mary Flood the premises herein described "so long as she, the said Mary Flood, lived," instead of reading "so long as he, the said Sullivan, lived."

Respondent interposes a preliminary objection to the consideration of the demurrer, upon the ground that an amended complaint supersedes the original complaint, and that, as defendants did not demur to the amended complaint, they waived their demurrer by this omission. Some force might attach to this argument, if the amended complaint in any vital respect changed the issues or relieved the original complaint from the objections pressed by the original demurrer, but in this case there was no amended complaint. There were merely brief amendments by way of interlineations made to the original complaint, and those amendments in no way relieved from, nor even affected, the grounds of demurrer which had been urged against the pleading. In such cases it is well settled that, not only is a new demurrer unnecessary, but that it is not error for the court to refuse, upon application, to permit a new demurrer to be presented. 6 Ency. of Pl. & Pr. p. 381; Stanton v. Kenrick, 135 Ind. 382, 35 N. E. 19; Hawthorne v. Siegel, 88 Cal. 159, 25 Pac. 1114, 22 Am. St. Rep. 291. Moreover, and finally, it may be said upon this point that the demurrer is a general one, and charges a failure in the complaint to state facts constituting a cause of action; and this may be urged at any time without demurrer. Code Civ. Proc. § 434; Ryan v. Holliday, 110 Cal. 335, 42 Pac. 891.

It is a rule of equity, embodied in section 3391 of the Civil Code, that specific performance cannot be enforced against a party to a contract if he has not received adequate consideration for the contract, and if the contract is not as to him just and reasonable. In other words, the complaint must show that the party against whom enforcement is sought has received adequate consideration, and that the contract is just and reasonable. In the complaint at bar there is an absence of averment to show any of these things. It is made to appear that plaintiff was indebted to the defendant in the sum of $14,922, against which plaintiff claimed the set-off of $5,875 and an additional reduction in the sum of $969, as to which she could plead the statute of limitations. There is no averment that this $14,922 was not justly owing to Sullivan. Indeed, the averments of the complaint show that it was, and certainly no equity is disclosed by the intimation that plaintiff would have availed herself of the strictly legal defense of the statute of limitations to a money demand admitted honestly due the creditor. This, however, is a minor matter, and it is mentioned merely in passing. The consideration moving from the plaintiff, therefore, is found in her agreement to forbear to urge her set-off and to plead the statute of limitations against Sullivan's foreclosure. But there is no allegation as to the value of the land. It is not made to appear whether Sullivan gained much, or little, or anything at all, by the forbearance. For aught that is shown, even if plaintiff had successfully interposed this set-off and her plea of the statute of limitations, foreclosure would still have resulted, and it is not made to appear that plaintiff would have bought in the property at foreclosure, that the property was worth more than it would have been foreclosed for, or, in short, that plaintiff suffered any detriment or deceased gained any advantage thereby. As this court has said in Bruck v. Tucker, 42 Cal. 346: "The court is to be satisfied that the contract is founded upon, not merely a valuable, but an adequate, consideration. But how are we to be so satisfied here, where there is an absence of all averment upon that point." Windsor v. Miner, 124 Cal. 492, 57 Pac. 386; Stiles v. Cain, 134 Cal. 170, 66 Pac. 231.

But in another respect, even more fatal to its sufficiency, is the complaint radically defective. While it seeks the specific performance of a contract to devise real property by last will without allegation as to the value of the property at the time of the agreement, nor, indeed, at any other time, it bases the right to compel this performance upon plaintiff's forbearance merely in the matter of a money demand. Equity, it is true, does entertain contracts for specific performance to convey the whole or any portion of the promisor's property by will, but it decrees such performance, first, only upon clear proof of fairness, justness, and adequacy, and where the rights of innocent third parties are not imperiled, and, second, it does so only where the plaintiff cannot be compensated in money. These cases usually arise where the service is of some extraordinary nature which cannot be, and in the contemplation of the parties was never expected to be, paid for in money, as where home ties are broken, and minors go to live with an adult upon his promise that he will stand in loco parentis and will to them his property in return for their filial services during his lifetime. As was said by this court in Owens v. McNally, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369: "Specific performance is not to be decreed under strict rule and formula. Every consideration which may be properly urged upon the court is to be weighed and passed upon, and it will be decreed only when no other adequate relief is available to plaintiff, and even then it will be denied, if it operates by way of a hardship upon the innocent." The jurisdiction of a court of equity to decree specific performance does not, as was said in Senter v. Davis, 38 Cal. 450, depend at all upon the question whether the contract relates to real or personal property, but altogether upon the question whether the breach complained of cannot be adequately compensated in damages. If it can, the action has no place in a court of equity, and the plaintiff's remedy is strictly in law. Equity is designed only to supplement the deficiencies of the law. So it will be found that, in all of the cases in which specific performance of these agreements to leave property by will has been upheld by the courts, there has been the element of peculiar personal services, fully performed and incapable of compensation in money. Such was the case in Owens v. McNally, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369, and that, also, of McCabe v. Healy, 138 Cal. 81, 70 Pac. 1008. It is said in Jaffe v. Jacobson, 48 Fed. 21, 1 C. C. A. 11, 14 L. R. A. 352: "In all the cases called to our attention in which relief was afforded, it appears that the promisees had substantially discharged the obligations which they had severally assumed. In most, if not all, instances they had lived in the promisor's household as members of his family, and had rendered faithful and effectual services for a long period of years. It was not possible, therefore, to administer adequate relief otherwise than by decreeing specific performance." In Burns v. Smith, 21 Mont. 251, 53 Pac. 742, 69 Am. St. Rep. 653, it is said: "We come to this conclusion more readily, as we are of the opinion that the parties to the alleged contract never contemplated that the services of plaintiff were to be, or could be, compensated in money." In Healy v. Simpson, 113 Mo. 340, 20 S. W. 881, the court said: "And, when the mother sent her child to dwell in another's family in a distant state, she yielded much affection and love; and Brewster, by the same act, gained the companionship of one who added much, no doubt, to his enjoyment of life. * * * In the very nature of things, nine years in the life of a child so changed conditions that it is out of the power of an earthly tribunal to restore the parties to their original situation and environment, and the courts, therefore, compel them to stand upon and abide by the record they have made." So in Stellmacher v. Bruder, 89 Minn. 507, 95 N. W. 324, 99 Am. St. Rep. 609. The consideration for the deceased's promise being board, lodging, care, etc., it was alleged in the complaint that it was impossible to estimate the value in money, or by any pecuniary standard. The court, holding that the complaint did not state facts sufficient to constitute a cause of action, and that the demurrer thereto was properly sustained, said: "If the consideration for the contract be labor and services which may be estimated, and their value liquidated in money, so as reasonably to make the promisee whole, specific performance will not be decreed. But where the consideration of the contract is that the promisee shall assume peculiar and domestic relations to the promisor, and render to him services of such a peculiar character that it is practically impossible to estimate their value by any pecuniary standard, specific performance will be decreed. * * * There being no element of a peculiar personal and domestic relation in the contract, as alleged in the complaint under consideration, it does not appear upon the face thereof that the plaintiff cannot be fairly compensated in money for her uncle's breach of his oral contract." In the complaint before us we are not left in any embarrassment or doubt as to the nature of the service. There was no service at all. A married woman or widow was occupying a piece of land mortgaged to the deceased, and forbore to press a fixed monetary demand in consideration of his agreement to deed her the property upon his death. He failed to do so. The value of the forbearance is established in the terms of her complaint. Her damages for deceased's alleged breach can, with equal readiness, be found, and compensation made in money.

Plaintiff's forum is therefore a court of law, and not a court of equity; and the judgment and order appealed from are reversed, with directions to the trial court to sustain the demurrer to the complaint.

We concur: McFARLAND, J.; VAN DYKE, J.; LORIGAN, J.; SHAW, J.; ANGELLOTTI, J.

(148 Cal. 357)

TATUM et al. v. ACKERMAN. (S. F. 2,991.)

(Supreme Court of California. Dec. 15, 1905.)

SALES—ACTION FOR PRICE—AGREEMENT FOR TERM OF CREDIT.

An action to recover the price of goods sold affirms and counts on the contract of sale, including all of its terms, and where the contract provides unconditionally for a term of credit to be given the purchaser the action cannot be maintained until such term has expired, in the absence of fraud inducing the credit, even though the purchaser has repudiated the contract and refused to accept or pay for the goods.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 990.]

Beatty, C. J., and Van Dyke, J., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Henry L. Tatum and others against Albert H. Ackerman. Judgment for plaintiffs, and defendant appeals. Reversed.

Rehearing denied January 12, 1906.

Naphtaly, Freidenrich & Ackerman, for appellant. J. P. Langhorne, for respondents.

ANGELLOTTI, J. This action was brought to recover $1,581.98 and interest, in which sum, it was alleged in the complaint, the defendant "became and was indebted to plaintiffs * * * for and on account of goods, wares, and merchandise sold and delivered by plaintiffs to defendant." The allegations of the complaint were specifically denied by the answer, and, in addition, a breach of warranty was alleged, viz., that an engine, which was one of the articles sold, failed to satisfy the plaintiffs' warranty, and thereupon the defendant had rescinded the purchase and had attempted to return the engine to the plaintiffs. It appeared upon the trial that defendant, upon the alleged ground as to the breach of warranty as to the engine, refused to accept or keep any of the merchandise sold and delivered to him, but shipped all the articles from Usal, Cal., to San Francisco, addressed to the plaintiffs. Plaintiffs refused to receive the goods back from the defendant, but attached them on the institution of this action. On the trial defendant did not introduce any proof as to the alleged breach of warranty, and the court found that the engine was as represented by the plaintiffs. The merchandise had been sold by the plaintiffs to the defendant upon a credit of 60 days from September 24, 1900. This action was commenced within said 60 days, viz., on the 5th day of November following, but the court found that the defendant had refused to keep the merchandise and had shipped it back to the plaintiffs, with the intention of abandoning and repudiating his purchase thereof, and that he did repudiate such purchase, and that prior to and at the time this action was commenced he did not intend to pay plaintiffs at any time or at all for the said merchandise, and gave judgment for plaintiffs as prayed for in their complaint. This appeal is taken from the judgment and from an order denying defendant's motion for a new trial.

The contention on this appeal is that the action was prematurely brought—that an action upon the contract of sale for the purchase price of the articles sold could not be maintained until the expiration of the time of credit allowed thereby—and this contention presents the only question to be determined. It is, of course, not disputed that, where goods are sold on credit, an action cannot ordinarily be maintained for the purchase price until the term of credit has expired. Until such time the obligation to pay has not matured, and there has been no breach of contract as to payment. But it is alleged that the credit here was conditioned upon the acceptance of the goods by the vendee, and his payment for them at the expiration of the term of credit, and that by his refusal to accept he necessarily waived the condition as to credit, and, in effect, declared that he did not intend to pay for the goods at all. The stipulation here as to credit was absolutely unconditional, unless such a condition as is here claimed is necessarily implied in every contract of sale upon credit where no condition is expressed in the contract, for it is not claimed that there was any such express condition in the contract under consideration. We know of no rule of law that will warrant us in holding that such a condition may be so implied from the mere sale of goods on credit, and no case is cited supporting any such theory. In the American note in Bennett's Benjamin on Sales (7th Ed.) p. 795, the rule is stated as follows, viz.: "If credit was unconditionally given by the contract, an action for the full price cannot be maintained under any circumstances before the time of credit has expired. Such action affirms and counts upon the very contract of sale, time of credit included. The fraud or insolvency of the buyer, or abandonment of the contract does not alter the term of credit." Mechem states the rule in substantially similar terms, declaring that, by his action for the price, the vendor affirms the contract and must affirm it as an entirety. Mechem on Sales, §§ 1410, 1411. Some authorities hold that, where the credit was obtained by fraud, the stipulation as to credit may be alone rescinded, and an action brought at once for the price. These cases regard the credit stipulation as an independent one, capable of rescission by itself where it was induced by fraud, without disaffirmance of the sale. Such is the well-settled rule in New York. See Heilbronn v. Herzog, 165 N. Y. 98, 58 N. E. 759, and in some other states; volume 43, Cent. Dig. § 990. But this doctrine can, of course, have no application to a case where there was no fraud at the time the contract was made.

It appears to be universally recognized that where the credit is unconditional, if it was not obtained by fraud, or based upon a consideration which has failed, or has not been waived, an action will not lie on the contract for the purchase price until the expiration of the term of credit. See 24 Am. & Eng. Ency. of Law (2d Ed.) p. 1122. Here, as we have seen, the credit was unconditional, and there was no fraud. Nor was there any express consideration for the credit. The credit was undoubtedly given in consideration of the purchase of the goods by the defendant, but plaintiffs, maintaining an action on the contract for the price, and insisting upon the contract, are not in a position to insist that this consideration has failed. Nor was there any waiver of the credit. An attempted repudiation of the contract in toto by the vendee is no waiver of the single stipulation as to credit. The plaintiffs refused to acquiesce in such repudiation and insist that the contract shall be enforced according to its terms, which they have the right to do, but they have no right to make a new contract for the defendant. If, against the will of the vendee, the contract is to stand, the vendee may still insist that it shall stand according to its terms. Construing the refusal to keep the goods and their return as notice on the part of defendant that he would not pay upon the expiration of the term of credit, plaintiffs are not relieved from the effect of the stipulation as to credit. Section 1440 of the Civil Code, relied on by them, has no application to cases where performance is not yet due upon the part of the party who has previously given notice that he will not perform when such performance is due. In such cases, when performance on his part is due, and not before, if such notice has not been retracted, the other party may enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party. Such is the whole effect of this section. See in this connection Keller v. Strasburger, 90 N. Y. 379.

As contended by plaintiffs, there can be no doubt of the right of a vendor, where the vendee refuses to take the goods sold and delivered, and repudiates the contract, to elect to treat the contract of sale as still in full force, and the goods as belonging to the vendee, and to sue on the contract for the entire contract price. But this does not mean that he may sue for the contract price before it is due according to the terms of the contract, and we have not been able to find any case so holding. The case of Brady v. Isler, 9 Lea (Tenn.) 356, is precisely in point. There the vendee abandoned possession of the goods, and the vendor repossessed himself thereof, and elected to resell the goods and sue for the difference between the price received upon the resale and the contract price. The action was brought before the expiration of the term of credit, and it was held that the action was premature and must fail. The court said: "It will be observed that no part of the purchase money was due at the time of the resale of the goods. And in such case the vendee has not been guilty of any breach of the contract as to payment, although he may be in default in respect to his refusal to receive the goods, or, rather, in the abandonment of their possession." The court further, in effect, said that in the aspect of the case contended for by plaintiff, that the contract was valid and subsisting, the money was not due upon it when suit was brought, and that it is essential that it should be due before suit is brought to enforce the collection. We see in this case no possible answer to the objection that the action was brought to recover money alleged to be due upon a contract, before it became due under the terms of the contract. Upon the repudiation of the contract by the vendee, the vendors might have elected to keep the property as their own, and at once sue for damages on account of the breach, but this action cannot, under the most liberal rules as to construction of pleadings, be held to be such an action. It was simply and solely an action on the contract for the purchase price, based upon the promise of defendant to pay, and the evidence shows, without conflict, that, according to the terms of the contract, the liability had not accrued at the time the action was commenced.

The judgment and order denying the new trial must be reversed; and it is so ordered.

We concur: SHAW, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

BEATTY, C. J. I dissent. This is not strictly an action upon the express contract for the sale of the machinery, but is in form and substance an action in assumpsit on an implied contract to pay for the value of goods sold and delivered, and is based upon the claim that the plaintiffs had a right under the circumstances to rescind the stipulation for a credit of 60 days. There is abundant authority for the proposition that one who has sold goods or loaned money on a credit fraudulently obtained may, upon discovery of the fraud, sue in assumpsit before the credit has expired. There is no doubt authority to the contrary; one of the most noted cases being Galloway v. Holmes, 1 Doug. (Mich.) 330. But, on the other hand, the doctrine is sustained by the highest courts of New York, Massachusetts, Alabama, and perhaps other states, and it commends itself to me as a just and reasonable doctrine. It is founded upon the right of rescission. When a party has been induced to enter into a contract by fraud, he is entitled to rescind that contract by his own act, and, if upon such rescission he has a legal claim against the other party, he may proceed to enforce it by any appropriate action. The foundation of the doctrine being the right of rescission, it should be applied to any case where the right exists. In New York it has been extended to a case in which after the sale of the goods the purchaser made a transfer of his property in fraud of his creditors. Arnold v. Shapiro, 29 Hun, 478. In that case the court said: When a "fraudulent disposition of the property has taken place at the time of the making of the contract, the fact itself would also avoid credit obtained by means of its concealment in incurring the liability. *In principle the same effect should also follow such a disposition of the debtor's property, after he has contracted the debt and secured the credit, for it is always implied in such transactions that the debtor will make no disposition of his property which will operate as a fraud upon his creditor.*" I have italicized that part of the opinion which states the principle governing cases of this character; which principle, in my opinion, clearly embraces the present case, for here, according to the facts found by the court, the debtor, after obtaining the credit, did make a disposition of his property which would "operate a fraud" upon the creditor. He represented in purchasing the engine that it was to be employed in logging. Instead of putting it to work where it would earn money and enable him to meet his obligation to pay for it at the expiration of the term of credit, he shipped it back to San Francisco, in violation of his contract and at the cost of the plaintiffs, obliging them to pay the freight to prevent its being sold to pay charges, and when it was attached by them they were compelled, of course, to discharge the lien of the carrier. The case is the same in all respects as that of a mechanic who buys a kit of tools on credit, representing that he is going to work at his trade, and who, instead of going to work, pawns the tools and pays another creditor with the money so obtained. I say the two cases are the same because there is nothing in this record to show that the defendant had any means of meeting his obligation, except the proceeds of the business in which he represented the machinery was to be employed. He certainly impaired, by his own fault, his means of paying his debt as represented to the plaintiffs, and, if what he did gave them the right to rescind, I cannot see why, in view of the principle of the cases referred to, he could not maintain this action. Did he, then, have a right to rescind? I think he had under subdivision 2 of section 1689 of the Civil Code.

In asking and obtaining a credit, a purchaser of goods always represents himself as having, or being able to provide, the means of discharging his obligation at maturity, and whatever representation he makes affecting his prospective ability to pay constitutes the basis upon which the credit is accorded. If, then, he materially impairs his ability to meet his obligation, and by an inexcusable breach of the contract renders the security of his creditor worthless or precarious, there is at least a partial failure of consideration for the credit, and it will be noticed that one authority cited in the main opinion (24 Am. & Eng. Ency. of Law [2d Ed.] p. 1122) includes, among the exceptions to the rule stated, the case in which there has been a failure of consideration for the credit. It may be said that the reasoning upon which I hold this action to have been well brought is technical. I concede it, but I call attention to the fact that the main opinion rests its conclusion upon purely technical grounds. The right of plaintiffs to sue at the time they did is conceded, but their action is defeated because, as it is held, they have sued on the contract, instead of in tort. If we are to be technical, I think we should give the preference to a technicality that results in upholding a just claim against one who has, as appears by the findings of the superior court, wantonly violated his contract, to the serious injury of innocent parties. There may not be any precise precedent to sustain this action; but, if I have succeeded in showing that the right of rescission is the basis of the rule which allows a creditor to sue in assumpsit regardless of an unexpired credit expressly stipulated, I have shown that this case is within a principle sustained by abundant precedent, and, the principle applying, a court constituted like this should not be afraid to make a precedent which in all like cases would tend only to the promotion of justice.

I concur in the foregoing: VAN DYKE, J.

148 Cal. 364

ARONSON v. LEVISON et al. (S. F. 4,374.)

(Supreme Court of California. Dec. 18, 1905.)

1. Appeal — Judgments — Guardian Ad Litem—Services.

Where, in a suit to quiet title, a guardian ad litem was appointed at plaintiff's instance for a minor defendant, and after hearing the court entered judgment in favor of plaintiff, quieting his title to the premises, and added to the judgment a provision requiring plaintiff to pay the sum of $200 to such guardian ad litem for his services, such part of the judgment was not appealable as a special order made after final judgment, within Code Civ. Proc. § 939.

2. Same—Costs and Expenses.

Such portion of the judgment was merely for costs or expenses taxable against plaintiff, not amounting to $300, which was therefore insufficient to confer jurisdiction on the Supreme Court of the appeal.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by A. Aronson against Henriette Levison and others. From that portion of a judgment in favor of plaintiff which required him to pay certain fees to a guardian ad litem appointed at his instance, he appeals. On motion to dismiss. Granted.

Edward Mills Adams and Charles W. Slack, for appellant. George E. Merrill, for respondent.

VAN DYKE, J. This is a motion to dismiss the appeal. The appellant, plaintiff in the court below, brought an action to quiet title as to certain real estate in the city and county of San Francisco, and among the defendants in said action was Robert John Levison, a minor. On the application of the plaintiff in the court below to have a guardian ad litem appointed for said minor defendant, the court appointed George B. Merrill, an attorney in said city and county as such guardian ad litem. After the hearing of the cause in the court below, before rendition of judgment, said Merrill, as guardian ad litem, applied to the court, upon notice to the plaintiff, to fix his compensation as such guardian ad litem of Robert J. Levison, minor. In accordance with said notice, the court, after hearing, the plaintiff being present, ordered that the plaintiff pay to said George B. Merrill the sum of $200 for his services as guardian ad litem. Thereafter the court entered judgment in favor of the plaintiff, quieting his title to the premises in question, and added to said judgment as part thereof the following, to wit: "And a guardian ad litem for said defendant Robert J. Levison, a minor, having been appointed in this action upon the application of said plaintiff, it is ordered that said plaintiff pay to said George B. Merrill, Esq., guardian ad litem as aforesaid, the sum of $200 for his services as guardian ad litem." The plaintiff, as stated in his notice, "appeals to the Supreme Court of the state of California from the part hereafter set forth of the judgment and decree heretofore duly given and made by said court in the above-entitled action, dated and filed May 15, 1905. * * * Said part of the judgment and decree so appealed from is in the following words and figures, to wit: [Then reciting the portion of the judgment already referred to, ordering the payment by the plaintiff to the guardian ad litem of the sum of $200 for his services as such guardian.]"

The respondent, Merrill, moves the court to dismiss the appeal on the ground that no appeal is provided by law from the part of the judgment as mentioned in the notice of appeal. The portion of the judgment ordering the payment to the guardian ad litem, appointed at the request of the plaintiff, is not, properly speaking, a part of the judgment on the merits of the case. This is practically admitted on the part of the appellant. The compensation of a guardian ad litem is in the nature of expenses or costs, and an incident to the action, and forms no part of the cause of action or defense thereto. The appellant seems to rely upon Harron v. Harron, 123 Cal. 508, 56 Pac. 334. That case reviews and overrules the previous cases of Langan v. Langan, 83 Cal. 618, 23 Pac. 1084, and Fairbanks v. Lampkin, 99 Cal. 429, 34 Pac. 101. In Harron v. Harron, as stated in the opinion: "The order appealed from is a special order made after final judgment." Such an order is made appealable by an express provision of statute (Code Civ. Proc. 939), and the jurisdiction to entertain the appeal is not dependent upon the amount of money named in the order. In the Encyclopedia of Pleading and Practice (volume 10, p. 685) it is said: "Under the statutes of some states the plaintiff, or the person who procured the appointment of the guardian ad litem, is required to pay the latter's costs and expenses." And in Smith v. Smith, 69 Ill. 308, the court say: "Under the Illinois statute the guardian ad litem is to be paid by the party on whose motion he was appointed, and to be taxed in the bill of costs." And in Snyder v. Fidelity Trust, 14 Ky. Law Rep. 615, it is held: "A guardian ad litem is to be allowed a reasonable fee to be paid by the plaintiff and taxed as costs." And in Carter v. Montgomery, 2 Tenn. Ch. 455, it is said: "The party beneficially interested is compelled to bring the infant into court, and must pay necessary expenses of the proceedings, including reasonable compensation to the guardian ad litem in the nature of taxable costs." "Costs are those expenses incurred by parties in prosecuting or defending suits or proceedings in law or equity which are recognized and are allowed by law." 5 Ency. Pl. & Pr. 106. In this case no memorandum of such costs was required to be made by the guardian ad litem, as in ordinary cases after entry of judgment, as the matter was fixed by the court before the entry of judgment and decree, and incorporated in said judgment, as already shown. The appeal not being from an order made after final judgment, but from a portion of the judgment itself, and for costs or expenses of the action, not amounting to $300, this court has no jurisdiction of the appeal.

The appeal must therefore be dismissed, and it is so ordered.

We concur: McFARLAND, J.; LORIGAN, J.

SHAW, J. I concur in the judgment dismissing the appeal. Properly speaking, the order making the allowance against the plaintiff for the services of the guardian ad litem of the defendant Robert John Levison, appointed as such upon the motion of the plaintiff, is not a part of the judgment in favor of the plaintiff and against the defendants. Neither the other defendants, nor the minor defendant, were parties to the proceeding upon which said allowance was made. It was not allowed as part of the costs in the cause taxable in favor of the plaintiff, nor as costs in any sense, and the amount allowed was not in fact taxed as costs either against the plaintiff or the defendants, nor included in any judgment in favor of the plaintiff against the defendants. The case simply amounts to this: that the plaintiff procured Mr. Merrill to act in his behalf by taking the appointment of guardian ad litem for a minor defendant in the action. For the services thus performed at plaintiff's request, the plaintiff would perhaps be responsible to the extent of their reasonable value. Whether or not the court has jurisdiction in the action in which such services are rendered to make an order fixing the amount of such services rendered by the guardian ad litem, and to make an order that the party who procured the appointment should pay the amount fixed to the person who served as guardian ad litem, is a question which need not be here decided. There is an intimation to the effect that the court may have power to make such an allowance against the estate of the ward, in Cole v. Superior Court, 63 Cal. 90, 49 Am. Rep. 78. Aside from this, I know of no authority on the subject. But even if the court has jurisdiction to make such an order, it is not a part of the proceedings between the plaintiff and the defendant. The guardian ad litem could perhaps maintain an independent action against the party procuring his appointment to recover the value of his services. The fact that the order was made in the course of an auxiliary proceeding in the action in which the services were rendered makes it no more a part of the judgment as between the parties, or of an order after such judgment, than would be a judgment in an independent action to recover for such services. The reason why this court has no jurisdiction of the appeal in the present case is that the order is in effect an independent judgment in favor of George B. Merrill against A. Aronson for the sum of $200 in money, and that the jurisdiction of this court on appeals from money judgments is limited to cases where the judgment amounts to $2,000, and that the appellate jurisdiction of the district courts of appeal in such cases is limited to cases in which the judgment amounts to $300 and does not amount to $2,000; and hence we can neither entertain the appeal in this court, nor, under the provision of the late amendment to the Constitution, transfer it to the district court of appeal for consideration in that court.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; HENSHAW, J.

148 Cal. 368

SULLIVAN et al. v. SAN FRANCISCO GAS & ELECTRIC CO. et al. (S. F. 4,187.)

(Supreme Court of California. Dec. 18, 1905.)

INJUNCTION—CRIMINAL PROSECUTION.

Injunction will not lie to restrain the prosecution of house movers for violating Pen. Code, § 593, imposing a penalty on every person who unlawfully and maliciously removes or obstructs any electric line, though it is alleged that they are not guilty of such violation; there being no question as to the validity of the statute.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 178, 179.]

In Bank. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by D. J. Sullivan and others against the San Francisco Gas & Electric Company and others. From an order for injunction during the pendency of the action, defendants appeal. Reversed.

Page, McCutchen & Knight and I. Harris, for appellants. Sooy & Dorn and C. W. Eastin, for respondents.

SHAW, J. This action was begun in the superior court of the city and county of San Francisco for the purpose, as stated in the prayer of the complaint, of enjoining the defendants and each of them "from making or filing any criminal complaint, or issuing or serving any warrant of arrest, or arresting plaintiffs, or either of them, by reason of the taking down, cutting, or removal by any of said plaintiffs of the electric wires of the defendant, the San Francisco Gas & Electric Company." The court, upon application therefor and after a hearing, made an order for an injunction as prayed for, during the pendency of the action. From this order the defendants have appealed.

According to the allegations of the complaint and the proofs at the hearing, the plaintiffs are severally pursuing the occupation of house movers in the city of San Francisco, and have, and procure from the city as often as may be necessary, permits to move, over and upon the public streets of the city, the houses which they may be employed to move, and that in so doing the wires of the defendant, the San Francisco Gas & Electric Company, which overhang the streets, interfere with the moving of the houses, so that it is necessary to cut and temporarily remove the wires while the houses are being moved along the particular street over which the wires extend. The plaintiffs, or some of them, have cut these wires in some instances, and have been arrested therefor at the instigation of the electric company, and charged with violating the provisions of section 593 of the Penal Code. It is alleged that the further cutting of such wires will frequently be necessary in the business in which the plaintiffs are engaged; that they cannot carry on the business without doing so; that the electric company threaten similar criminal prosecutions against plaintiffs for each instance of interference with the said wires; and that the plaintiffs in good faith claim and believe that they have the lawful right to cut and remove such wires for said purposes, and have cut them and propose to continue so to do under and in pursuance of said belief and claim. Section 593 is as follows: "Every person who unlawfully and maliciously takes down, removes, injures, interferes with or obstructs any line erected or maintained by proper authority for the purpose of transmitting electricity for light, heat, or power, or any part thereof, or any insulator or cross-arm, appurtenance or apparatus connected therewith, or severs or in any way interferes with any wire, cable, or current thereof, is punishable by imprisonment in the state prison not exceeding five years, or by fine not exceeding five hundred dollars, or imprisonment in the county jail not exceeding one year." The San Francisco Gas & Electric Company, in the course of its business, maintains wires strung on poles, over, across, and along the streets of the city, for the purpose of supplying the city and its inhabitants with electric light, and, under the provisions of the state Constitution (article 11, § 19), it has the right to use the streets for that purpose, subject to such regulations as may be made by the municipal authorities. It may be conceded, for the purposes of this case, that the plaintiffs also have the right to use the streets for the purpose of moving houses thereon from place to place in the city, subject to such regulations as the city authorities may impose. It is not contended that section 593 is invalid or unconstitutional. Indeed, this could not well be claimed, for it forbids only the unlawful and malicious removal or interferences with the wires, and, even if such wires constituted unlawful obstructions in the street, they would still be private property, and the unlawful and malicious injury of them would be a proper subject for punishment under the police power of the state. The case of the plaintiffs, therefore, is an application to a court of equity for an injunction to prevent the officers and courts of the municipality, and the person whose property is injured, from instituting, entertaining, or maintaining criminal prosecutions against the plaintiffs for alleged violations of the valid criminal law of the state. As a ground for the application for this relief, the plaintiffs assert that they have not been guilty of such offense, and will not in the future be guilty thereof; that, although they have injured the wires of the electric company and propose to continue to injure them from time to time, they have not done so and will not in the future do so, either unlawfully or maliciously, and consequently are not and will not be guilty of any offense under the law; and that they have been, and will hereafter be, prosecuted for such acts committed without malice and lawfully, and that such prosecution will be without reasonable or probable cause, and to the injury or destruction of their right to carry on their business of house moving and their civil right to use the streets for that purpose.

The statement of the case is sufficient to show that it is without merit. Courts of equity will in proper cases enjoin the attempt to enforce a law or ordinance making certain acts a criminal offense and imposing a punishment therefor, where the law or ordinance is invalid, and its enforcement will injure or destroy the plaintiffs' property or property rights. The recent authorities are practically unanimous on this proposition. Some of the decisions even go so far as to hold that injunction will lie where the enforcement of the invalid law does not directly affect property, or rights thereto, but operates upon the plaintiff's business, and thereby causes him material and irreparable loss. City v. Beckham, 118 Fed. 399, 55 C. C. A. 333; Mills v. Chicago (C. C.) 127 Fed. 731; Greenwich Ins. Co. v. Carroll (C. C.) 125 Fed. 121. But upon this latter point there is a conflict, and the weight of authority and reason seems to be to the contrary. Brown v. Mayor, 140 Ala. 590, 37 South. 173; Bainbridge v. Reynolds, 111 Ga. 758, 36 S. E. 935; Mayor v. Patterson, 109 Ga. 370, 34 S. E. 600; Coykendall v. Hood (Sup.) 55 N. Y. Supp. 718; Davis Mfg. Co. v. Los Angeles, 189 U. S. 207, 23 Sup. Ct. 498, 47 L. Ed. 778; Ex parte Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402; Crighton v. Dahmer, 70 Miss. 602, 13 South. 237, 21 L. R. A. 84, 35 Am. St. Rep. 666, and cases cited in note thereto on page 677. These, however, are all cases where the penal law was considered invalid. The single case of Shinkle v. Covington, 83 Ky. 420, in which the law was declared valid, was based on peculiar circumstances, and has no application to the case at bar, even if it is conceded to be correctly decided. But in the case now before the court there is no question concerning the validity of the law, and the defendants cannot be justly found guilty of a violation thereof, unless they act unlawfully and maliciously. We know of no principle of jurisprudence which authorizes a court of equity, on the ground that it will prevent a multiplicity of actions, or that it will prevent an injurious interference with plaintiff's business, to proceed to investigate as to the truth of criminal charges that have been or may be preferred against him, to hear the evidence in regard to his guilt or innocence, to determine in advance of the decision of the lawfully constituted criminal courts the question of his guilt or innocence of pending charges and his probable guilt or innocence of future charges, and, if found in his favor, to forestall the action of the law courts and enjoin the enforcement of a constitutional and valid law against him on the sole ground that there is not, and never will be, sufficient evidence of his guilt. This, in substance, is the relief which the plaintiffs demand. The answer to the application is that the plaintiff's remedy in the courts of law is complete and adequate. Every person is subject to the chance that he may be prosecuted for some offense of which he is not only not guilty, but as to which there is no reasonable or probable cause to believe him guilty. The prosecution must, of course, be in some court having jurisdiction of the offense. In that court he has an opportunity to make his defense to the charge, to rebut the evidence against him, and introduce evidence in his favor. The presumption that such court will give him a fair trial and decide justly in his case is as strong as the presumption that a court of equity will fairly try and justly decide his application for an injunction involving the same facts. There is no rule which permits a person to substitute a court of equity for the courts of law in the decision of such matters of fact, and, by anticipatory action therein, take from the regularly constituted criminal courts their jurisdiction of the particular offense in question. All persons must submit to the due process of law in the courts vested with lawful jurisdiction of legal offenses charged against them, and the fact that such courts may give an erroneous decision is no ground for relief in a court of equity by way of injunction to prevent them from acting at all, or to interfere with their judgments when made. As was said in Davis v. American Society, 75 N. Y. 362: "An innocent person, upon an accusation of crime, may be arrested and ruined in his character and property, and the damage he thus sustains is damnum absque injuria, unless the case is such that he can maintain an action for malicious prosecution or false imprisonment. He is exposed to the risks of such damage by being a member of an organized society, and his compensation for such risks may be found in the general welfare which society is organized to promote."

The case seems to have grown out of a dispute between the plaintiffs and the electric company concerning the amounts which house movers should pay to the company for the expenses and damages caused by the cutting of the wires when necessary, the right of the company to demand a deposit in advance to cover such expense, and concerning the question which party has the paramount right to use the streets for the purposes of their business. The object apparently sought by the suit is a judicial determination of these questions in a court of equity, to be used as a precedent in the criminal courts upon the trial of prosecutions under section 593, or which would have the effect of deterring the defendants from beginning such prosecutions. The superior court is as competent to decide such questions when sitting as a criminal court in the trial of a criminal cause as it would be upon the trial of a suit in equity, and there is no reason why the plaintiffs should not be restricted to the criminal courts for the preservation of their rights and the maintenance of their defenses. However desirable and beneficial such a predetermination by a court of equity would be, it gives no right to invoke equity jurisdiction.

The order granting the injunction is reversed.

We concur: McFARLAND, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

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2 Cal. App. 167

HERMAN WALDECK & CO. v. PACIFIC COAST S. S. CO.

(Court of Appeal, First District, California. Nov. 10, 1905.)

1. CORPORATIONS — ACTIONS — DOMICILE — FINDING.

In an action against a foreign corporation, an allegation of the state under the law of which the corporation was organized being unnecessary, it was immaterial to the validity of the judgment against the corporation that the court failed to find whether or not the defendant was organized as alleged.

2. EVIDENCE — STATEMENT BY AGENT — PAST EVENTS—HEARSAY.

In an action against the owners of a vessel for injuries to sheep pelts, alleged to have been caused by negligent stowage, a letter written to plaintiffs by defendant's agents, through whom plaintiff had made a claim for damages, purporting to state the facts concerning the shipment and the manner in which the pelts were stowed, was a mere narrative of past events, not a part of the res gestæ, and inadmissible.

3. SAME.

Admissions of an agent are admissible only when made in regard to a transaction in the course of his agency pending at the very time the declarations are made, and unless so connected with the transaction cannot bind the principal, though they are explanatory of an act previously done by the agent in the exercise of his agency.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 908-915.]

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by Herman Waldeck & Co. against the Pacific Coast Steamship Company. From a judgment for plaintiff, defendant appeals. Reversed.

George W. Towle, Jr., for appellant. Naphtaly, Freidenrich & Ackerman, for respondent.

HALL, J. This is an appeal from a judgment for plaintiff, taken within 60 day after rendition of judgment, and is before this court upon the judgment roll and a bill of exceptions.

The action was for damages to sheep pelts owned and delivered by plaintiff to defendant at Tacoma, to be thence carried by defendant, as a common carrier, on the steamship Walla Walla, to San Francisco. It was alleged that defendant negligently and carelessly stowed said pelts in the bottom of the hold of said steamship, and carelessly and negligently piled thereon a great quantity of other freight, thereby subjecting the pelts to a great heat, in consequence of which a large number of the pelts became rotten and worthless. The complaint alleged "that the defendant now is, and at and during all the time hereinafter stated was, a body corporate, duly created, formed, and organized under the laws of the state of New York." Defendant, in its answer, admitted that it was a corporation, but denied that it was organized under the laws of the state of New York. The court found that defendant was a corporation, but failed to find as to whether or not it was organized under the laws of the state of New York, and for this failure appellant claims that the findings do not support the judgment. There is no merit in this contention. It was unnecessary for plaintiff to allege of what state defendant was a corporation. It was sufficient that it was a corporation. Of what state it was a corporation was peculiarly within the knowledge of defendant, and any error in such immaterial allegation of the complaint, or any lack of finding thereon, could not have prejudiced defendant or affect the judgment. The evidence showed that the pelts were shipped from Spokane by rail to Tacoma, and there reshipped by the steamship Walla Walla to San Francisco. The shipment of sheep pelts consisted of 26 bales of dry pelts, and 39 bales of salted pelts. It is fair to say that there is some conflict as to whether the 39 bales were what are known as "green" pelts or "salted" pelts, but from all the evidence it is fair to infer that they were, when shipped, salted pelts. When the pelts arrived at San Francisco, they were much damaged, being heated and rotten. It was claimed that this was caused by the manner in which they had been by the defendant stowed on the Walla Walla, especially in that great quantities of other freight were piled on top of the pelts, so as to subject them to much pressure, besides excluding a free circulation of the air about the bales of pelts. Plaintiff receipted for the pelts as damaged, and made a claim therefor on the defendant through its agents, Goodall, Perkins & Co.

Plaintiff offered in evidence a letter addressed to plaintiff and signed "Goodall, Perkins & Co. B." This was objected to as hearsay, incompetent, and immaterial, and the objection was overruled and exception reserved by defendant. In this ruling the court erred in a matter prejudicial to defendant. The letter purports to state the facts concerning the shipment of the pelts and the manner in which they were stowed on the Walla Walla, among other things, stating that "the pelts in question were stowed in the bottom of the hatch, over that was tarpaulins, then a large quantity of grain, another tarpaulin, and on top a large shipment of lime and the hatch covering all." The statements in the letter were narratives of past events, and no part of the res gestæ of the shipment or stowing of the pelts. The admissions of an agent, not connected with the transaction to which they refer, cannot bind his principal, even though made in explanation of an act previously done by him while in the exercise of his agency. The declarations of an agent are admissible only when made in regard to a transaction, in the course of his agency, pending at the very time of the declarations, and where the statements or declarations are a part of the res gestæ. Beasley v. S. J. Fruit Packing Co., 92 Cal. 388, 28 Pac. 485; Crawford v. Transatlantic Fire Ins. Co., 125 Cal. 609, 58 Pac. 177; Lissak v. Crocker Est. Co., 119 Cal. 443, 51 Pac. 688; Birch v. Hale, 99 Cal. 299, 33 Pac. 1088; Durkee v. C. P. R. R. Co., 69 Cal. 533, 11 Pac. 130, 58 Am. Rep. 562; Boone v. Oakland Transit Co., 139 Cal. 490, 73 Pac. 243; Luman v. Golden A. C. M. Co., 140 Cal. 700, 74 Pac. 307. The facts above quoted, concerning the manner in which the pelts were stowed, were subsequently embraced in hypothetical questions put by plaintiff to expert witnesses, to which replies were made both by a witness for the plaintiff and for defendant to the effect that such a method of stowing salted pelts would cause them to heat, ferment, and rot. Subsequently evidence was given by witnesses for defendant differing materially from the statement in the letter as to how the pelts were stowed. It is thus clear that the error was prejudicial.

No other error was committed in the admission of evidence, and we think the evidence sustains all the findings attacked, in that the evidence is either conflicting, or of such a character that different conclusions as to the ultimate facts involved might be reasonably drawn therefrom. No good purpose would be subserved by a discussion of the evidence, and, as the judgment must be reversed for the error above pointed out, such discussion might prejudice the rights of the parties on a new trial.

The judgment is reversed.

We concur: HARRISON, P. J.; COOPER, J.

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2 Cal. App. 96

PEOPLE ex rel. HARDACRE v. DAVIDSON et al.

(Court of Appeal, Third District, California. Oct. 27, 1905.)

1. Appeal—Review—Conflicting Evidence.

Where there is evidence to support the finding of the lower court, it cannot be disturbed on conflicting evidence.

2. Constables—Holding Over—Surrender of Office.

Where a constable at the close of his term, turned over to a person holding a certificate of election his badge, pistol, and handcuffs, and accepted from such person an appointment as deputy, and took the oath and thereafter acted as such, he thereby surrendered and abandoned the office, and could not thereafter claim that he was holding over after his term.

3. Same—Holding Over after Expiration of Term—Evidence of Abandonment of Office.

Code Civ. Proc. § 1870, subds. 1, 2, provides that evidence may be given upon a trial of the following facts: (1) The precise fact in dispute; (2) the act, declaration, or omission of the party as evidence against such party. In an action to oust one from office of constable who claimed to hold over after the expiration of his term, it appeared that he had vacated the office, given his successor his badge, pistol, and handcuffs, accepted an appointment as deputy constable, taken the oath as such deputy, and thereafter continued to act as such. *Held*, that there was no error in admitting the certificate of appointment of defendant as deputy, although the oath subscribed by him erroneously described the office.

4. Same—Abolishment of Office.

Pol. Code, § 879, provides that every officer must continue to discharge the duties of his office, although his term has expired, until his successor has qualified. County Government Act, § 56, as amended in 1901 (St. 1901, p. 685, c. 234), provides that in townships having a population of less than 6,000 persons there shall be but one constable. *Held* that, where the effect of the amendment was to abolish two offices which previously existed, it created a new office, which could only be filled by election or appointment, and a former "incumbent could not hold over."

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by the people of the state of California, on the complaint of W. B. Hardacre, against H. L. Davidson and others. From a judgment for plaintiff, defendant W. J. Hersom appeals. Affirmed.

C. H. Fairall, for appellant. U. S. Webb and C. W. Norton, for respondent. Ashley & Neumiller, for defendants Davidson and Peters.

McLAUGHLIN, J. This action was brought to oust the defendants from the office of constables of O'Neal township, in San Joaquin county. Section 56 of the county government act, as amended in 1901 (St. 1901, p. 685, c. 234), provides that in townships having a population of less than 6,000 persons there shall be but one constable. Prior to that amendment there were two constables in said township. At no time prior to the general election held November 4, 1902, did the population of O'Neal township equal 6,000 persons. Notwithstanding this fact, the board of supervisors of said county issued a proclamation calling for the election of two constables for this township as of yore. Ballots were printed directing the voters to vote for two, and the defendants Davidson and Peters were declared elected upon a canvass of the returns. Certificates of election were issued to them and they qualified, and in January, 1903, entered upon the discharge of the duties pertaining to said office. At the time of such election defendants Davidson and Hersom were duly elected and qualified constables of said township. Davidson was re-elected, but Hersom was not a candidate. For the purposes of this appeal, it is admitted that the election was void and that the certificates of election issued to Davidson and Peters amounted to nothing. The court found that appellant Hersom, "on or about the 7th day of January, 1903, surrendered and abandoned the office of constable of said township to defendant Frank Peters upon the apparent election of said Peters to said office at such general election held on November 4, 1902, and thereafter accepted from said Peters an appointment as deputy constable, under said Peters, for said township, took his oath of office as such deputy and filed the same in the county clerk's office of said county, and thereafter acted as such deputy for Frank Peters." As a conclusion of law it was recited that by reason of such surrender and abandonment appellant was not entitled to hold and did not hold such office. The sufficiency of the evidence to support the finding is assailed, and it is claimed that the conclusion is not justified by the finding.

The evidence is entirely sufficient to support the finding. True there is a slight conflict, but there is some evidence to sustain the finding, and under such circumstances it cannot be disturbed. Appellant vacated the office, gave Peters his badge, pistol, and handcuffs, acquiesced in Peters' desire to appoint him a deputy, and on January 7, 1903, took the oath as such deputy, and thereafter continued to act as such. This, to my mind, conclusively shows a surrender and abandonment, for a man claiming to be or assuming to act as principal would hardly accept a deputyship under his rival. Warden v. Bayfield, 87 Wis. 181, 58 N. W. 248. This brings the case at bar strictly within the decision in Drew v. Rodgers, 118 Cal. 395, 46 Pac. 740, 50 Pac. 668, which seems conclusive of the question presented. Then, too, there is evidence that he was acting as such deputy as late as October 17, 1903, thus bringing the facts within the earlier case of People v. Hartwell, 67 Cal. 12, 6 Pac. 873. There was no error in admitting the certificate of appointment of appellant as deputy constable. The appointment was signed by Peters, and the oath subscribed by appellant, and the description of the office in the oath could not affect its relevancy as evidence, even if such description was erroneous. Code Civ. Proc. § 1870, subds. 1, 2.

But it seems to us that under the admitted facts before us in this case appellant could not hold over under section 879, Pol. Code, even if he had absolutely refused to recognize the validity of the election and had disputed the claim of Peters as his successor. Up to the first Monday of January, 1903, there were two offices and two officers. After that time, under the law, there could be but one office and one officer. This new office is entirely distinct from each of the pre-existing offices. Certainly one at least of the latter ceased to exist, and, as neither was expressly continued, there is no alternative but to say that both were abolished. But taking the view most favorable to appellant's contention, and treating these two offices as merged in one, instead of being entirely abolished, the same conclusion must follow. True the two offices were identical, as far as designation is concerned, with the single office created through the merger resulting from the amended law. But it is clear that, when these two offices were merged in one, neither preserved its identity. And, the identity of each being lost, it is manifestly impossible to determine which, if any, of the offices continued. There being but one office, there can be but one officer or incumbent. And yet reference to another appeal in this same case discloses a scramble to hold over; defendants Davidson and Hersom each claiming such right. Now both cannot be so entitled, for both cannot hold one office. Neither can claim a superior right, because neither can say that the particular office occupied by him continues. Forfeiture by one or the other is a false quantity in determining the legal right to hold over under section 879 of the Political Code. The rule which gives such a right is inflexible and unchangeable, and the only fact to be considered in determining such right is the one fact mentioned in the statute as creating such right. The same rule which would apply if each had conserved whatever right he had must apply under all circumstances, for the right either exists as a matter of law, or it does not exist at all. The sins of omission or commission laid at the door of one claimant cannot increase or diminish the rights of the other, because the law alone creates the right whenever the condition arises, and extrinsic facts cannot create or change a law. Such a right must be fixed, definite, and capable of legal ascertainment. It must vest with absolute certainty in some individual, and there cannot be two who could under any state of facts be equally entitled. In the very nature of things, there could be no such certainty under the circumstances above narrated. It must therefore follow as a matter of law that while the new office possesses all the powers of the pre-existing offices, for all purposes of process and jurisdiction, as the successor of both, the effect of the amendment was to abolish the two offices previously existing, at least as far as the right to hold over is concerned, and to create a new office which could only be filled by election or appointment. Proulx v. Graves, 143 Cal. 247, 76 Pac. 1025; People v. Chaves, 122 Cal. 138, 54 Pac. 596; Kilburn v. Conlan, 56 N. J. Law, 350, 29 Atl. 162; Barkley v. Levee Com., 93 U. S. 258, 23 L. Ed. 893; People v. Jones, 17 Wend. (N. Y.) 82; People v. Morell, 21 Wend. (N. Y.) 563; Matter of Gertum v. Board, 109 N. Y. 174, 16 N. E. 328; Carter v. Board, 7 Neb. 42; State v. Bailey, 37 Ohio St. 98; Richmond Mayoralty Case, 19 Grat. (Va.) 673; Quigg v. Evans, 121 Cal. 547, 53 Pac. 1093.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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2 Cal. App. 100

PEOPLE ex rel. HARDACRE v. DAVIDSON et al.

(Court of Appeal, Third District, California, Oct. 27, 1905. On Rehearing, Nov. 25, 1905.)

1. Pleading—Amendment—Complaint.

In an action to oust defendants from the office of constable of a certain township, the complaint showed that certificates of election were issued to two of defendants, that they qualified and entered upon the discharge of their duties pertaining to said office, and that at the time of the election such township was only entitled to elect one constable under County Government Act, § 56, as amended by St. 1901, p. 685, c. 234, which provides that in townships having a population of less than 6,000 persons there shall be but one constable. At the close of plaintiff's case a motion for nonsuit was made, whereupon the complaint was amended by stating that "upon nearly all the ballots so cast in said township at said election two candidates were voted for for the office of constable for said township, and that all such ballots, together with those upon which but one candidate was voted for, for the office of constable, were regularly counted and return made of the contents thereof to the board of supervisors." *Held*, that such amendment did not change the cause of action and was properly allowed.

2. Officers—Action for Recovery of Office—Complaint.

A complaint, in an action to oust certain persons from office, showing that two of defendants had been declared elected to one office and had received certificates and qualified, and that both were performing the duties thereof and were usurpers and intruders, and averring that one received the highest number of votes, but not stating which received the highest number of legal votes, was sufficient, in the absence of a demurrer.

3. Same—Right to Elect—Evidence of Population.

Where the right of a township to elect two persons to a certain office depended upon the population of the township at the time of the election, the census taken some months afterwards was inadmissible.

4. Appeal—Review—Findings Not Necessary to Decision.

Where a finding of the lower court, supported by the evidence, is ample to sustain the judgment, it becomes immaterial whether other findings stand or fall, and the sufficiency of the evidence to support such other findings will not be reviewed.

5. Elections—Certificate of Election as Presumptive Evidence of Right.

The rule that a certificate of election, issued by the proper authority, is prima facie or presumptive evidence of right to the office, cannot apply where two certificates were issued to two persons for the same office.

6. Same—Record of Returns Overcome by Extrinsic Evidence.

Pol. Code, § 1282, provides for the record of the returns of elections by the board of supervisors. Code Civ. Proc. §§ 1920, 1926, provide that entries in public or official books or records in the course of official duty are prima facie evidence of the facts stated therein. *Held* that, although the record of the board showed the number of votes cast for each candidate for a certain office and that one of them received the highest number of votes, such evidence was overcome by other undisputed evidence showing that the number of registered voters in the township and the number of ballots cast at the election were greatly less than the number of votes counted and shown by the record.

7. Same — Illegal Votes — Destruction of Ballots.

In an action to oust certain persons from an office, it appeared that the election and the issuance of certificates to defendants were on the theory that two candidates were to be elected to the office. Election officers from different precincts testified that nearly all the voters marked their ballots for two candidates, and that all such ballots were counted for two. None of them pretended to say how many ballots were cast for only one candidate. The ballots had been destroyed, and there was no method of determining that the name of the candidate having the highest number of votes did not appear on the illegal ballots. Held, that the whole vote must be rejected.

8. Evidence—Character of Secondary Evidence of Contents of Ballot.

Where the ballots cast at an election had been destroyed before trial of an action to oust certain persons from office, evidence of the election officers that nearly all of the ballots were marked for two candidates was the best in degree that existed.

9. Appeal—Harmless Error—Admission of Evidence.

The admission of testimony of election officers that nearly all of the voters marked their ballots for two candidates, even if erroneous, was harmless, where it was shown from records and other evidence that the number of votes counted greatly exceeded the number of ballots cast.

10. Officers—Right to Elect Dependent on Population—Census as Evidence.

Where the right to elect certain officers in a township depended upon the population, it was proper to admit evidence touching the population as shown by the last federal and state census preceding the election.

11. Same—Election Proclamation.

The election proclamation issued by the board of supervisors cannot be considered as any evidence that the population of a township was more than 6,000.

12. Offices—Action for Recovery of Office—Limitations Applicable.

An action to oust certain persons from office on the ground that their election was illegal is not barred until four years, under Code Civ. Proc. § 343, providing that actions for relief not hereinbefore provided for shall be commenced within four years after the cause of action shall have accrued.

On Rehearing.

13. Elections — Illegal Ballots — Effect.

In an action to oust defendants from the office of constable, it appeared that the canvassing board counted 447 more votes than there were ballots cast; the election having been conducted on the theory that two candidates were to be elected to such office, and nearly all the ballots being marked for two candidates. This number was greater than any one candidate received. *Held* sufficient to show that the illegal ballots were sufficient in number to make a difference in the result of the election.

14. Same—Sufficiency of Evidence as to Different Precincts.

In an action to oust defendants from the office of constable, it appeared that the election and the issuance of certificates to defendants were on the erroneous theory that two candidates were to be elected. Election officers from certain precincts testified that nearly all the voters in such precincts marked their ballots for two candidates, and that all such ballots were counted for two; but there was no direct testimony that this was the case in four precincts. *Held* sufficient to indicate that the conduct of the election was substantially the same in all precincts, and to overcome the presumption that the election was legally conducted in these four precincts.

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by the people, on relation of W. B. Hardacre, against H. L. Davidson and others. From a judgment for plaintiff, defendants H. L. Davidson and Frank Peters appeal. Affirmed.

Rehearing denied by Supreme Court, December 26, 1905.

Ashley & Neumiller, for appellants. U. S. Webb and C. W. Norton, for respondents. C. H. Fairall, for defendant Hersom.

McLAUGHLIN, J. We have this day affirmed the judgment in this action as to defendant Hersom. See 83 Pac. 159. The present appeal is by the other defendants, on grounds not presented or considered on Hersom's appeal. Here, as there, it is conceded that under section 56 of the county government act, as amended in 1901 (St. 1901, p. 685, c. 234), but one constable could legally be elected at the general election held November 4, 1902, if the evidence shows that the population was less than 6,000 at that time. The complaint, in addition to facts considered on the former appeal, contained the following averments vital to this decision: "That at said election so held on said day defendant H. L. Davidson received the highest number of votes cast for constable of said O'Neal township, in the county of San Joaquin, state of California, and defendant Frank Peters received the next highest number of votes cast for constable of said township, *but on information and belief plaintiff alleges that upon nearly all the ballots so cast in said O'Neal township, at said election, two candidates were voted for for the office of constable for said township, and that all such ballots, together with those upon which but one candidate was voted for for the office of constable, were regularly counted and return made of the contents thereof to the board of supervisors of said San Joaquin county*"; that the board of supervisors duly and regularly canvassed the returns of said election, and thereupon regularly issued to said defendants H. L. Davidson and Frank Peters certificates of election as constables of said township; that said Peters and said Davidson duly qualified, and on January 5, 1903, usurped, intruded into, and unlawfully exercised and held, and still pretend and claim to exercise and hold, such office of constable. Judgment was entered ousting appellants, and from such judgment and the order denying their motion for a new trial, they appeal.

At the close of plaintiff's case a motion for a nonsuit was made, and thereupon the complaint was amended by inserting the language above italicized. Appellants objected to such amendment, at that stage of the case, as tending to make a material difference in the status of and issues in the case. The amendment did not change the cause of action, and the objection interposed was properly overruled. Lee v. Murphy, 119 Cal. 367, 51 Pac. 549, 955. It is urged that the complaint states no cause of action. It appearing therefrom that two persons had been declared elected to one office, and had received certificates and qualified, and that both were performing the duties thereof, and were usurpers and intruders, the mere averment that one received the highest number of votes, without stating which received the highest number of legal votes, might be ground for a special demurrer for ambiguity or uncertainty, but, in the absence of such demurrer, the complaint was sufficient. Treanor v. Williams, 145 Cal. 318, 78 Pac. 884; People v. Woodbury, 14 Cal. 46; People v. Reclamation Dist. 136, 121 Cal. 522, 50 Pac. 1068, 53 Pac. 1085; People v. Clayton, 4 Utah, 473, 11 Pac. 213.

It is next claimed that the evidence is insufficient to sustain the findings. We think the evidence sufficient to support the finding that at the time the election was held the township contained a population of less than 6,000 persons. The census taken some months afterward could have no bearing on this issue, and the other enumerations sustain the finding. This finding being ample to sustain the judgment in this regard, it is immaterial whether the other finding as to the specific number of inhabitants stands or falls. Hayden v. Collins (Cal. App.) 81 Pac. 1120; Costa v. Silva, 127 Cal. 354, 59 Pac. 695; Clavey v. Lord, 87 Cal. 421, 25 Pac. 493. And this rule renders immaterial other findings assailed but not specifically mentioned in this opinion. The vital question in the case is presented by the contention that the findings adverse to the right of appellants to hold such office are not supported by the evidence, and that the facts so found do not support the conclusions of law and judgment. The only way to prove the right or absence of right to occupy a public office is to present facts upon which a claim of right to hold such office depends. The only evidence pertinent to such claim must relate to election, appointment, or the right to hold over after the expiration of the term. The appellants do not pretend to claim as appointees, and we have this day held that under the peculiar circumstances of this case neither of the occupants under the old system could hold over. People v. Hersom, supra. This boils our inquiry down to the single question of election. It must be conceded at the outset that but one person could be legally elected to or hold the office of constable of O'Neal township, and it has been held that, as far as the proclamation is concerned, the election was valid as to such office. Sanches v. Fordyce, 141 Cal. 430, 75 Pac. 56. It is claimed, however, that a certificate of election issued by the proper authority is prima facie or presumptive evidence of such right. This is the rule in ordinary cases. But in the case at bar certificates were issued to two persons for the same office, and manifestly the presumption invoked cannot apply to both. It cannot be presumed that one of these certificates was properly, and the other improperly, issued, especially when it appears that both were issued advisedly and at the same time. Under such circumstances the presumption fails by reason of the inherent uncertainty and inconsistency of the action of the board of supervisors and its ministerial officer. The record of the board is invoked as proving that one of the appellants was elected and that the certificate was properly and legally issued to him. Such record contains a detailed statement of the vote in each precinct, and a summary of the vote in the district as follows: H. L. Davidson, 421 votes; Frank Peters, 312; J. B. Blankenship, 282; W. C. Looper, 300. Immediately following the tabulated statement of the vote was this official declaration of election: "On motion, duly carried, and in accordance with section 1236 of the Political Code of the state of California, the following-named persons, having received the highest number of votes for the offices for which they were candidates, were duly elected as follows: For constable in O'Neal township, H. L. Davidson; for constable in O'Neal township, Frank Peters." As but one person could legally be elected to the office, it is apparent that uncertainty and inconsistency again forbid any presumption in favor of either of the persons so declared elected. The tabulated statement, however, shows the number of votes cast for each candidate, and it is insisted that, as appellant Davidson received the highest number of votes, this record establishes his right to the office. Standing alone, the record would unquestionably have that effect. But it must be borne in mind that such records are only prima facie evidence of the facts recited. Code Civ. Proc. §§ 1920-1926; Pol. Code, § 1282 et seq.; Merkley v. Trainor, 142 Cal. 265, 75 Pac. 656. And other evidence in the record absolutely overthrows the prima facie effect of such record. Computation, based on the tabulated statement, shows that 1,315 votes were counted for said office by the canvassing board. The uncontradicted evidence of the county clerk proves that the number of registered voters in said township was 1003, and the number of ballots cast at said election, 868. It is thus made manifest that the board counted 457 more votes than were cast, and 312 more than the number of registered voters in the township. This again sets us adrift on the sea of uncertainty, for there is nothing in the record of the board, or in the evidence, to warrant a conclusion as to the number of legal votes cast for either of the candidates named. The tabulated statement, thus impeached, becomes as impotent to prove the election of any one as the certificates and declaration of election just considered. Then, too, such extrinsic evidence not only overcomes the prima facie effect of the statement, but it shows that the basis of the certificates and declaration is absolutely unreliable and illegal. Russell v. McDowell, 83 Cal. 79, 23 Pac. 183.

The determination of a canvassing board, though ordinarily accepted as prima facie evidence of facts recited, fails to be evidence of any fact, when the presumption attaching to official records is destroyed by showing that illegality, uncertainty, and inconsistency, incapable of explanation, permeate and taint every proceeding as shown by such record. The right of any public official claiming to hold by election in such a proceeding as this rests primarily on evidence contained in public records we have mentioned; and, when it is shown that such claim has no foundation in these records, it follows as a necessary corollary that the claim falls with the foundation on which it must rest, and that, prima facie, the absence of any right to occupy the office is established. In other words, when this record, provided by law for such purpose, failed to show the election of either of the appellants, the contrary presumption arose, and, in the absence of other evidence sustaining their claim, this alone would justify the findings, conclusion, and judgment here assailed. It is said that the course pursued in Russell v. McDowell, supra, should have been followed by the learned judges of the trial court. But we do not see how this could be done without indulging in the wildest kind of guesswork. If this record presented the single fact that a definite number of illegal votes were counted, the novel method approved in that case might justly have been adopted. There, however, the court had seen and counted the ballots and knew exactly how many illegal votes had been cast. Here the ballots had been destroyed before the trial of the cause, and the court could not ascertain how many illegal ballots there were. It appears from the facts admitted and proved that the whole election, from proclamation to declaration of the result, and issuance of the certificates, was conducted on the theory that two candidates were to be elected in that township. Election officers from the different precincts testified that nearly all of the voters marked their ballots for two candidates, and that all such ballots were counted for two. But none of them pretended to say how many ballots were cast for only one candidate. The difference between this case and the case cited is thus made apparent. There but one name appeared on each illegal ballot, and a pro rata deduction furnished a novel, and perhaps good, way out of a dilemma. There such method was at least harmless. Here two names appeared on every illegal ballot, and the number of "single shots," as counsel for appellant aptly styles the legal ballots cast, is unknown. It is not at all improbable that the names of the candidates having the highest number of votes appeared on every illegal ballot cast, and it is not impossible that the candidate having the lowest number may have received every legal vote. It will thus be seen that the trial court could have no definite starting point or basis to justify a pro rata deduction of illegal, or an apportionment of legal, votes. The only course, then, was to follow the other method suggested in Russell v. McDowell, at page 73 of 83 Cal., and page 184 of 23 Pac., and reject the whole vote.

It is said that the court erred in admitting the evidence of the election officers. The ballots having been destroyed, such evidence was the best in degree, and we can find no rule of law, nor can we think of any rule of public policy, forbidding such testimony. Be that as it may, however, in the absence of such testimony, the adverse presumption arising from the records, and testimony showing the general manner of conducting the election, and large number of votes counted as compared with the number of ballots cast, would defeat appellants' claims, and hence such testimony was harmless, even if it was all erroneously admitted. Russell v. McDowell, 83 Cal. 75, 77, 79, 23 Pac. 183; McPhail v. Buell, 87 Cal. 115, 25 Pac. 266; Clavey v. Lord, and cases cited supra. There was no error in admitting evidence touching the population as shown by the federal census and census taken in 1897.

The election proclamation issued by the board of supervisors cannot be considered as conclusive or any evidence that the population of the township was more than 6,000. The action was not barred by the statute of limitations. Code Civ. Proc. §§ 343-345.

The other rulings complained of were either correct, or, if erroneous, were harmless.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

On Rehearing.

McLAUGHLIN, J. A careful examination of the record, in the light of the petition for rehearing and recent decisions therein cited, has not shaken our confidence in the conclusion voiced in the decision filed herein. The cases of People ex rel. Russell v. Town of Loyalton, 82 Pac. 620, and People ex rel. Martin v. Worswick, 142 Cal. 76, 75 Pac. 663, as far as applicable to the case at bar, simply lay down the rule that the burden is on the plaintiff to show that the illegal ballots were sufficient in number to make a difference in the result if deducted. We have never doubted either the existence or wisdom of this rule, nor do we question any of the rules laid down in cases of like character cited and examined. But the facts in the case at bar are very different from the facts in any case we have been able to find. In other cases the number of legal and illegal votes was ascertained, and there was some definite or certain basis for presumption or calculation. But in the case at bar there is nothing upon which the doctrine of probability, which always underlies a presumption, can rest. The certificates of election, standing alone, destroy each other, while the statement upon which such certificates must rest is impeached by proof that the canvassing board counted 447 more votes than there were ballots cast. This is more votes than any one candidate received altogether, and it needs only this statement to show that the illegal votes were sufficient in number to make a very great difference if deducted. It is conceded that the election officers proceeded upon the theory that two candidates were to be elected, and most of the ballots cast contained two names. There is nothing to show that any candidate received a single legal vote, and the evidence clearly shows that legal ballots were exceptions and illegal ballots were the rule.

It is said that there is no evidence showing that this was the case in four precincts. We inadvertently stated in the former opinion that officers of each precinct gave testimony to that effect. This was a mistake as to the four precincts referred to. But we think the general course pursued and the general theory upon which the election proceeded is sufficient to indicate that the conduct of the election was substantially the same in all precincts. Counsel say we should have indulged the presumption that the election was legally conducted in these four precincts, and hence have found for Davidson. But an examination of this question has demonstrated the dangerous uncertainty which would attend guesswork under such circumstances. If the votes cast in these four precincts were counted as tallied in the statement of the vote, a minority candidate, Peters, would have a majority of the votes. We think it sufficiently appears that neither of the claimants has a right to the office. Such rights depend on the records provided by law, and when it is shown that such records do not sustain a claim to public office, and are utterly unreliable, the claim falls. Gibson v. Twaddle (Cal.) 81 Pac. 727, has no application to cases of this character.

The rehearing is denied.

We concur: CHIPMAN, P. J.; BUCKLES, J.

2 Cal. App. 109

PEOPLE ex rel. HARDACRE v. REA et al.

(Court of Appeal, Third District, California. Oct. 27, 1905.)

1. Appeal—Review—Error Affecting only Co-Party.

Although Code Civ. Proc. § 808, provides that, when several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons in order to try their respective rights to such office or franchise, still on appeal the judgment must be considered several as to each defendant who appeals, and errors not prejudicing appellants cannot be considered.

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by the people of the state of California, on the complaint of W. B. Hardacre, against Samuel Rea and others. From a judgment against defendants Samuel Rea and L. E. Alling, they appeal. Affirmed.

Rehearing denied by Court of Appeal November 25, 1905; by Supreme Court December 26, 1905.

Ashley & Neumiller, for appellants. U. S. Webb and C. W. Norton, for respondents. Nicol & Orr, for defendant Town.

McLAUGHLIN, J. This is an action to oust defendant from the office of justice of the peace of O'Neal township, in San Joaquin county. The court rendered judgment ousting defendants Rea and Alling, and declaring that defendant Town was entitled to the office. From such judgment and an order denying their motion for a new trial, defendants Rea and Alling prosecute this appeal.

The court found that defendant Town and one Harelson were duly qualified justices of the peace for said township for the term ending January 5, 1903, that said Harelson died December 10, 1901, and that no successor was thereafter elected or appointed to fill the position thus made vacant. As conclusion of law it was found that defendant Town was entitled to hold over under section 879 of the Political Code. Aside from the office involved, this finding and conclusion constitute the only difference between this case and the case of People ex rel. Hardacre v. Davidson and Peters, Appellants (No. 108, this day decided) 83 Pac. 161. On the authority of that case it must here be held that neither of the appellants is entitled to hold said office.

The only question remaining is whether this court is bound to consider or determine the right of defendant Town to hold said office upon this appeal. The appellants do not assail the sufficiency of the evidence to support the finding, nor do they specify any errors in the admission of such evidence. The only assault made on the conclusion of law and judgment is that involved in the affirmative assertion of their right to hold such office. In fact, counsel for appellants, in their brief, admit that, if neither of their clients be held elected to such office, it can make no difference to either of them whether defendant Town is or is not entitled to hold the office. The relator has not appealed, and we do not see that the appellants are interested in the question. So far as they are concerned, the object of the action "is to determine their right to hold the office which they are charged with usurping." Whether the defendant Town is entitled to the office, or whether in the controversy between the relator and said defendant the court committed any error, is a matter which does not concern the appellants, and upon which they are not entitled to be heard.

Under the authorities we do not think it is either the privilege or duty of this court to consider errors relating to that portion of the judgment in favor of defendant Town. Code Civ. Proc. § 475; People v. Abbott, 16 Cal. 366; People v. Campbell, 138 Cal. 17, 70 Pac. 918; People v. Flemming, 100 Cal. 541, 35 Pac. 163, 38 Am. St. Rep. 310; People v. Superior Court, 114 Cal. 478, 46 Pac. 383; March v. Barnet, 114 Cal. 375, 46 Pac. 152; Coyle v. Lamb, 123 Cal. 264, 55 Pac. 901; McCreery v. Everding, 44 Cal. 285; McDonald v. Taylor, 89 Cal. 45, 26 Pac. 595; Tripp v. Duane, 74 Cal. 91, 15 Pac. 439; Ball v. Nichols, 73 Cal. 195, 14 Pac. 831; Western Lumber Company v. Phillips, 94 Cal. 56, 29 Pac. 328; Dougherty v. Henarie, 47 Cal. 9; Smith v. Hawkins, 127 Cal. 121, 59 Pac. 295. While all claimants and intruders may be made parties to an action of this character, still, on appeal, the judgment will be considered several as to each, and errors not prejudicing appellants cannot be considered. Code Civ. Proc. § 808. It must be admitted that the result is somewhat anomalous, when considered in the light of the decisions in the cases of People v. Davidson et al. (Nos. 104 and 108) 83 Pac. 159, 161, but rules of appellate practice so well established cannot be abrogated by this court.

For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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2 Cal. App. 65

MOONEY v. BOARD OF SUP'RS OF TULARE COUNTY.

(Court of Appeal, Second District, California. Oct. 25, 1905.)

1. Schools and School Districts — High Schools — Outlying Territory — Attachment—Board of Supervisors—Powers.

Under the constitutional provision prohibiting taxation without representation, the Legislature has no power to confer on the board of supervisors power to admit territory lying entirely without the boundaries of a municipality to a city high school district generally with the consequent burden of taxation on such outlying territory which might be imposed by the municipality of which it was not a part.

2. Same—Statutes—Construction.

Pol. Code, § 1670, subd. 22, provides that any school district adjacent to a high school or joint union school district in the same or in an adjoining county may be admitted to the high school district, by action of the board of supervisors of the county in which the school district is located, on such terms as may be agreed on whenever a majority of the heads of families petition for such annexation, accompanied by a petition signed by a majority of the members of the high school board, etc. *Held*, that such section should be construed as authorizing merely a qualified admission of children residing in a school district adjoining a high school district on terms, where the general admission or annexation of territory was not permissible.

3. SAME—AGREEMENT—CONSTRUCTION.

Pol. Code, § 1670, subd. 22, provides for the qualified admission of an adjacent district school to an adjoining high school district on terms, and declares that thereafter the district shall be known as a joint union school district. *Held*, that where by an agreement pupils of the L. school district were admitted to the T. high school district, but pupils not residing within the latter were not permitted to attend the high school, except on payment of a tuition fixed by the high school board, the term "T. High School District" should not be construed as designating a new district; there having been no intention of the board of supervisors to unionize the two districts generally.

4. SAME—BOARD OF SUPERVISORS—ACTS—CONCLUSIVENESS.

Under Pol. Code, § 1670, subd. 22, authorizing the board of supervisors on petition to authorize the admission of a school district to an adjoining high school district on terms, a finding of facts necessary to the exercise of the board's jurisdiction on a petition under such section was conclusive.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Hugh M. Mooney against the board of supervisors of Tulare county. From a judgment for plaintiff, defendant appeals. Reversed.

D. McFadzean, J. W. Davis, and C. L. Russell, for appellants. Hannah & Miller and Maurice E. Power (Garber, Creswell & Garber and Sullivan & Sullivan, of counsel), for respondent.

ALLEN, J. The plaintiff obtained a writ of review from the superior court of Tulare county for the purpose of annuling an order of the supervisors of said county directing that Liberty school district shall become, and ordering the same to be made, a part of the Tulare high school district for high school purposes. Upon a return to the writ and a hearing thereon, the court rendered its judgment, annuling such order and all proceedings thereunder. From this judgment the respondents to the writ have appealed.

The return to the writ, which comprises the record before the board, shows that, upon presentation of a petition signed by certain of the heads of families in Liberty school district, the trustees of such school district and the trustees of the Tulare high school district joined in a petition to the board of supervisors of Tulare county, praying that Liberty school district be admitted to the Tulare city high school district, upon certain terms theretofore agreed upon between the boards of trustees; that upon the hearing of such petition the board of supervisors found that the signatures to the petition signed by the heads of families were sufficient in number, that the terms agreed upon were proper and reasonable, that the districts were adjacent, and made the order above referred to. These proceedings before the board of supervisors were instituted under, and the authority for the order based upon, subdivision 22 of section 1670, Pol. Code, which provides: "Any school district adjacent to a high school, union, or joint union high school district in the same or in an adjoining county, may be admitted to said high school district by action of the board of supervisors of the county in which the school district is located, upon such terms as may be agreed upon between the trustees of the school district seeking admission and the high school board, whenever a majority of the heads of families, as shown by the last preceding school census, shall present to said board of supervisors a petition for such annexation, accompanied by a petition signed by a majority of the members composing the high school board of the district to which the admission is desired. * * * All the provisions relative to the levy and collection of tax necessary to maintain a union high school district, shall apply to the levy and collection of the tax required for a joint union school district, as in this section provided."

The paramount question involved upon this appeal relates to the extent of power, if any, conferred by such subdivision upon the board of supervisors in relation to the admission for high school purposes to a city high school of an adjacent school district lying entirely without the municipality. If the object and intent of the act is to admit generally, with the consequent burden of taxation upon the outlying territory which might be imposed by the municipality, of which it was not a part, and in the election of whose taxing or administrative officers it had no voice or share, we should have no hesitancy in determining that it would be in violation of the cardinal principle that "there shall be no taxation without representation"; and when we consider that portion of subdivision 22 in relation to the taxing power in the district created as being conferred upon those who levy taxes for union high schools, namely, the board of supervisors, we are impressed with the opinion that the Legislature never sought by this act to repeal those provisions of the municipal corporation act which conferred upon the legislative body of the municipality the power to levy taxes for all municipal purposes, of which the support and maintenance of the schools is a part. Board of Education v. Board of Trustees, 129 Cal. 600, 62 Pac. 173. Again, the subdivision refers to terms of admission to be agreed upon. This is inconsistent with the idea of a general admission to the extent of its incorporation into the body of the city high school; for, if such incorporation were possible, the maintenance and support of the school district, and each and every part thereof, would be borne by all alike and properly within the district taxed as provided by section 1, art. 13, of the Constitution, and the corresponding benefits would, of necessity, extend to all within the territory so taxed. That this act shall have effect, therefore, it must be construed as providing for a qualified admission in cases where a general admission is not permissible, and that the Legislature was seeking to provide for the general admission of all children within a district entitled by reason of scholarship to high school training upon such terms as might be proper, supplementing those provisions of the school law, where in individual instances the board of trustees was authorized to admit children outside the high school district. Viewing the subdivision in this light, no reason is apparent why the power of admission upon terms should not be exercised. Looking into the return again, we find that by the agreement entered into between the Liberty school district and the Tulare high school district scholars in the eighth grade were to be admitted into the grammar school without tuition; that no pupil residing outside of the Tulare high school district should be permitted to attend said high school as a pupil, except upon payment in advance of the monthly tuition fee to be fixed by the high school board, nor even then, if their attendance for any cause was detrimental to the interests of the school.

Nor can we say that the term "Tulare High School District," employed in the agreement, had reference to such district after the admission therein of the adjacent district; for subdivision 22 designates such new district as a joint union school district. These conditions so agreed upon and incorporated in the order of admission by the board of supervisors negative any intention of general admission of Liberty high school district into the body of the city high school, or of assuming any taxing power by the city over the outlying district. Whatever may have been the intent, however, no power reposed in the supervisors to admit generally to the city high school such outlying territory in any manner other than upon terms equitable and just, which did not involve power of taxation. As we construe the act, it is eminently fair and confers a proper and constitutional power upon the board of supervisors; and their order of admission, while general in its terms, is shown to have been based upon an agreement, and such agreement forms a part of the order whereby pupils in Liberty school district are entitled to privileges of the city districts upon compliance with the terms of admission. The petitions filed conferred upon the board of supervisors jurisdiction to act, to hear and determine the questions involved, and whatever facts it was necessary to find as prerequisite to the order were found in the exercise of their jurisdiction, and when so found are conclusive. People v. Town of Loyalton (Cal.) 82 Pac. 620.

Under this view of the case, the plaintiff is not shown to be injured or affected by the order in any respect. In his petition for the writ it is alleged that grievous and burdensome taxes will be imposed upon plaintiff's land lying outside the municipality for the support of the city high school. It is sufficient to say that, if such attempt be made by the city authorities to levy and collect taxes upon lands outside the Tulare high school district, then, and not until then, may plaintiff be heard in relation thereto. Entertaining the views hereinbefore expressed, it is unnecessary to consider or determine the many other interesting questions argued by counsel in their very well-considered briefs.

The judgment and order of the superior court are reversed, and the cause remanded, with directions to dismiss the writ.

We concur: GRAY, P. J.; SMITH, J.

2 Cal. App. 158

In re SMITH, Judge.

(Court of Appeal, First District, California. Nov. 10, 1905.)

1. Courts—Judgment of Appellate Court—Finality—Transfer of Cause.

Const. art. 6, § 4, provides that the Supreme Court shall have power to order any cause pending therein to be heard by a District Court of Appeal, and to order any cause pending before a District Court of Appeal to be heard by the Supreme Court, before judgment has been pronounced by a District Court of Appeal, or within 30 days after such judgment shall have become final therein, which judgment shall become final on the expiration of 30 days after the same shall have been pronounced. *Held*, that a judgment of a District Court of Appeal was not conclusive, nor was its opinion a conclusive declaration of the law applicable to the case, until 30 days had expired after its judgment was pronounced.

2. Same—Constitution—Construction.

Const. art. 6, § 4, authorizes the Supreme Court to order the hearing and determination of any cause pending in a District Court of Appeal by the Supreme Court, within 30 days after the judgment of the District Court of Appeal shall become final, on the expiration of 30 days after the same shall have been pronounced. *Held*, that the provision that the judgment of the appellate court shall become "final therein" on the expiration of 30 days did not render such judgments conclusive at that date of the rights of the parties, but merely deprived the District Court of Appeal of any further power to set it aside or modify it; the Supreme Court being still entitled, within 30 days after the judgment became final, to order the cause to be heard and determine the same itself.

3. Same—Supreme Court Rules—Construction—Remittitur.

The word "remittitur," used in Supreme Court rule 34 (78 Pac. xiii), providing that, when a judgment of a District Court of Appeal becomes final therein, the remittitur shall not be issued until after the lapse of 30 days thereafter, unless otherwise ordered, designates the judgment of the appellate tribunal which is authenticated to the court from which the appeal is taken, and corresponds to "mandate," used in the practice of the United States Supreme Court.

4. SAME—APPLICATION.

Supreme Court rule 34 (78 Pac. xiii), providing that, when a judgment of a District Court of Appeal becomes final therein, the remittitur shall not be issued until 30 days thereafter, applies to all judgments of the Supreme Court and of the District Court of Appeal, whether rendered in the exercise of their appellate or original jurisdiction.

5. SAME—REHEARING—POWER TO GRANT.

The authority of the Supreme Court to provide for a rehearing in a case where it has pronounced judgment, and to stay the issuance of a remittitur until its decision on a petition for rehearing, exists, though the Constitution contains no provision therefor.

6. MANDAMUS—ACTS OF JUDGES—STAY OF PROCEEDINGS.

Where a trial judge was directed by mandamus to forthwith secure the services of some other judge to preside at the trial of a certain cause, and to hear all proceedings therein or show cause before the Supreme Court on a specified date why he should not do so, the writ operated as a stay of all action on his part until the rendition of the judgment of the Supreme Court and the entry of the remittitur on such judgment in the superior court.

7. SAME—VIOLATION—CONTEMPT.

Mandamus was issued directing a trial judge forthwith to secure the services of another judge to hear all proceedings in a certain action or show cause before the Supreme Court on June 26, 1905, why he should not do so. On the return day he appeared and made return of his reasons for not obeying the writ, and on August 12th the opinion denying the petitioner's application for mandamus was filed. On August 25th, before remittitur had been filed in the superior court, the judge made an order that certain motions pending in the cause be set for hearing before him on August 29th, and announced that he would hear and determine the same. *Held*, that such order constituted a technical contempt.

Petition against Lucas F. Smith, judge of the superior court of Santa Cruz county, for contempt of the Supreme Court. Citation and order to show cause discharged.

Rehearing denied December 9, 1905.

D. M. Delmas and Wm. M. Aydelotte, for petitioner. Joseph H. Skirm, Chas. M. Cassin, and Benj. K. Knight, Dist. Atty., for respondent.

HARRISON, P. J. The respondent is the judge of the superior court for the county of Santa Cruz, and in an action pending in said court, wherein Elizabeth A. Noel is plaintiff and Theophilus Noel is defendant, the latter filed an affidavit to the effect that he could not have a fair and impartial trial of the cause or hearing of any motion therein before the respondent by reason of his bias and prejudice, and for that reason moved the court to secure the services of some other judge to act in his stead. This motion was denied by the respondent, and thereupon, upon the application of the said defendant, this court issued a writ of mandate, directed to the respondent, commanding him that immediately after the receipt of said writ he do "forthwith secure the services of some judge of another court to preside at the trial of said cause and of all proceedings therein," or that he show cause before this court on June 26, 1905, why he should not do so. The writ was served upon the respondent June 2d, but he did not in any respect comply with its terms, and on the 26th day of June he appeared before this court and presented his reasons for not obeying the writ. After argument thereon the matter was submitted for decision and taken under advisement by the court, and on August 12th this court filed its opinion, holding that the petitioner for the writ of mandate was not entitled thereto, and denied his application therefor. On August 25th the respondent made an order in the superior court aforesaid that certain motions still pending in said court in the case of Noel v. Noel be set down for hearing before him on the 29th of August, and announced that he would then hear and dispose of the same. Upon presenting an affidavit of these facts this court, upon the motion of the defendant in said action of Noel v. Noel, issued a citation to the respondent, directing him to appear before it on September 11th to show cause why he should not be punished for contempt. On that day he appeared, and, in answer to the citation and in defense of his action, relied upon the opinion and judgment of the court rendered as aforesaid on August 12th.

Article 6, § 4, of the Constitution of this state declares: "The Supreme Court shall have power to order any cause pending before the Supreme Court to be heard and determined by a District Court of Appeal, and to order any cause pending before a District Court of Appeal to be heard and determined by the Supreme Court. The order last mentioned must be made before judgment has been pronounced by a District Court of Appeal, or within thirty days after such judgment shall become final therein. Judgments of the District Courts of Appeal shall become final therein upon the expiration of thirty days after the same shall have been pronounced." By virtue of the last sentence thus quoted from the Constitution the judgment of a District Court of Appeal is not conclusive upon the rights or obligations of the parties to any cause or proceeding submitted for its decision, until the expiration of 30 days after such judgment is pronounced; and during that time the opinion which the court may give as the grounds of its decision does not become a conclusive declaration of the law applicable thereto, but may be changed, modified, or set aside (see Broder v. Superior Court, 103 Cal. 121, 37 Pac. 143), and consequently cannot be invoked in any other tribunal as evidence of those rights or obligations. Neither is the provision that the judgment of said court shall become "final therein" upon the expiration of 30 days to be construed as rendering such judgment conclusive at that date of the rights of the parties. The effect of this clause is to take from the District Court of Appeal any further power to set aside or modify its judgment; but, under the preceding sentence of the section quoted above, the Supreme Court, at any time within 30 days after the judgment shall have become "final therein," may still order the cause to be heard and determined by itself. Such an order will have the effect to set aside and vacate the judgment of the District Court of Appeal, and with it the value, as an authority, of the opinion upon which the decision was rendered. For the purpose of carrying this provision of the Constitution into effect, and affording to litigants an opportunity to obtain the judgment of the Supreme Court in a cause decided by a District Court of Appeal, the Supreme Court has adopted the following rule, which, under the constitutional provision authorizing that court to adopt rules for the government of the District Courts of Appeal, is a measure of the rights of litigants in those courts, viz.: "Rule 34. When a judgment of a District Court of Appeal becomes final therein the remittitur shall not be issued until after the lapse of thirty days thereafter unless otherwise ordered." 78 Pac. xiii.

Formerly, when a writ of error was issued out of the House of Lords to the Court of King's Bench, the original record was itself taken to that body with the return upon the writ, and the judgment of the House of Lords was afterwards entered upon this record with the recital that it is sent back—remittitur—to be carried into effect by the Court of King's Bench. In the meantime, and until the remittitur was entered in the latter court, the judgment was not under the control of that court or capable of being enforced by it. A similar procedure has prevailed in many of the jurisdictions of this country, even where the appellant jurisdiction has been exercised by means of an appeal instead of by a writ of error. In this state, and in many other jurisdictions, the original record remains in the court from which the appeal is taken, and a transcript thereof is filed with the appellate court for its consideration. By reason of these changes in procedure and in the mode by which the appellate tribunal obtains jurisdiction to review the judgment of the lower court, and also by reason of the increased exercise of its appellate jurisdiction in modern days by controlling in advance the action of inferior courts, the word "remittitur" has received an additional meaning to that originally given to it; and, as used in the above rule, is the term employed to designate the judgment of the appellate tribunal which is authenticated to the court from which the appeal is taken or over which its controlling jurisdiction is exercised, and corresponds to the "mandate" used in the practice of the United States Supreme Court. The rule itself is universal in its terms and applies to all judgments of the Supreme Court or of the District Courts of Appeal, whether rendered in the exercise of their appellate jurisdiction or by virtue of their original jurisdiction exercised for the control or direction of the action of the superior courts. The Constitution contains no provision authorizing the Supreme Court to grant a rehearing after a judgment has been rendered by it sitting in bank; but its authority to provide for a rehearing in a case where it has pronounced judgment, and to stay the issuance of a remittitur upon such judgment until after its decision upon a petition for rehearing, even where there is no constitutional provision on the subject, was very clearly and conclusively shown in the opinion of the Chief Justice in Re Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 6 L. R. A. 594. In that case the court, after rendering a judgment affirming the action of the lower court, granted a rehearing, and subsequently rendered a judgment reversing the order appealed from. Its power to do this was challenged by the losing party; but its action was held to have been authorized by virtue of the principle that "it is one of the inherent powers of every appellate court to revise, to modify and to correct its judgments so long as they are under its control"; that for the purpose of enabling it to exercise this power it may temporarily stay the issuance of a remittitur upon the judgment; that its jurisdiction over a case when once obtained continues until its remittitur is regularly issued; and that while a case remains within its jurisdiction it may grant a rehearing after a judgment has once been pronounced. In Grangers' Bank v. Superior Court, 101 Cal. 198, 35 Pac. 642, it was held that the same principle is applicable to judgments rendered by the Supreme Court in the exercise of its original jurisdiction as well as in the exercise of its appellate jurisdiction. It follows from the foregoing principles that, until the remittitur upon the aforesaid judgment given by this court on August 12th should be entered in the superior court for Santa Cruz county, the respondent was precluded from taking any judicial action in the aforesaid case of Noel v. Noel.

The suggestion made at the hearing herein that, inasmuch as no order had been made staying proceedings in the case of Noel v. Noel when the writ of mandate was issued, the respondent was at liberty to hear the motions, is not entitled to consideration. There were no proceedings in the cause to be stayed except such as would be taken in pursuance of an order of court made by the respondent; and the terms of the writ, wherein he was directed to "forthwith secure the services of some other judge of another county to preside at the trial of said action and of all proceedings therein," are inconsistent with his retaining any authority to exercise judicial action in the case, and of themselves operated as a stay of all action by him therein. Permission was impliedly given him by the terms of the writ to delay a compliance with its directions until the return day thereof, and on that day to show cause, if any he had, why the writ should not be obeyed; but until this court should render its judgment that such cause had been shown and such judgment had become final the writ remained in full force; and, although a further delay in complying with its directions until the court should determine whether the cause shown by him was sufficient would be excusable, he was during all this time forbidden by the force of the writ from taking any affirmative action in disregard of its terms. It would not be contended for a moment that if, upon receipt of the writ in June, or at any time before the return day, the respondent had granted the motions then pending before him, or had himself entered upon the trial of the cause, such conduct would not have been in direct and flagrant violation of the writ and a contempt of the authority of this court. As above shown, however, such action would be equally in violation of the writ if taken at any time before the remittitur upon the judgment therein should be entered in the superior court. In this connection it is not inappropriate to observe, although it has no bearing upon the decision herein, that, after this court had rendered its aforesaid judgment and since the hearing upon this citation, the Supreme Court ordered the application for the mandate to be heard and determined by itself, thus vacating the judgment rendered by this court and leaving the writ of mandate with the same effect as when originally issued. It must be held, therefore, that in making the order of August 25th appointing a day for hearing the aforesaid motions in said cause of Noel v. Noel, and declaring that on that day he would personally hear and dispose of the same, the respondent acted in disregard of the writ of mandate and in violation of the order of this court. But while we are compelled to hold that in this violation of the order of the court the respondent was technically guilty of contempt, we are at the same time satisfied that his action was the result of an erroneous interpretation of the terms of the writ and of the law applicable thereto, made by him in good faith, and that his action was not taken by reason of any disrespect to this court or with any intention to disobey its order; and for these reasons we are not inclined to visit his action with any penalty by way of punishment.

The citation and order to show cause herein are discharged.

We concur: COOPER, J.; HALL, J.

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2 Cal. App. 154

McCARTY v. WILSON.

(Court of Appeal, Third District, California. Nov. 9, 1905.)

1. EXCEPTIONS, BILL OF—FILING—SERVICE—TIME—STATUTES.

The right of a party to an election contest to serve and file a bill of exceptions after an adverse judgment is granted by Code Civ. Proc. § 650, providing that a party desiring to have exceptions taken at the trial settled in a bill of exceptions must, within 10 days after the judgment and motion therefor, prepare and serve the draft of the bill, unless time for so doing is extended by the judge, or by stipulation of the opposing attorney, and not by section 649, declaring that a bill containing the exception to any decision may be presented for settlement at the time the decision is made, and, after having been settled, shall be signed by the judge and filed with the clerk, etc.

2. SAME—EXTENSION OF TIME—CONDITIONS—JURISDICTION.

The court has jurisdiction to make an order extending the time within which a party is entitled to serve and file his draft of a bill of exceptions conditional.

3. SAME—DISCRETION—EXERCISE.

Where, in an election contest, the Supreme Court, having before it the merits of the contest, had decided that contestant was elected to the office, and on the second trial contestant prevailed, and contestee failed to serve and file a draft of his bill of exceptions within the time required and the appeal might result in contestee holding the office until the close of the term, it was not an abuse of the trial court's discretion to make an order extending the time within which contestee's bill of exceptions could be served and filed conditioned on his surrendering the office to contestant pending appeal; contestant being required to give security to repay emoluments received in case contestee prevailed in the appeal.

Appeal from Superior Court, El Dorado County; H. D. Arnot, Judge.

Election contest by T. E. McCarty against S. B. Wilson. From an order extending the time within which defendant could file and serve his draft of a bill of exceptions on conditions specified, after an adverse judgment, he appeals. Affirmed.

William F. Bray and W. C. Burgess, for appellant. Charles A. Swissler and Abe Darlington, for respondent.

CHIPMAN, P. J. This cause is an election contest for the office of superintendent of schools for El Dorado county, arising at the election held November 4, 1902. At the first trial judgment went in favor of the contestee, who had been declared elected and to whom a certificate of election had been issued, but on appeal to the Supreme Court the judgment was, on February 23, 1905, reversed. 82 Pac. 243. At the second trial judgment went for contestant on June 12, 1905, annulling contestee's certificate of election and setting aside his election to said office. On June 17, 1905, contestant served and filed notice of entry of judgment, and contestee having failed to serve his draft of bill of exceptions within

10 days, and having failed to apply to the court or to counsel for contestant for an extension of time, contestee on July 1, 1905, applied to the court for relief under section 473, Code Civ. Proc. The court granted contestee's motion on the following condition: "The respondent [contestee] shall within 8 days let the contestant into the possession of the office in controversy, and permit the contestant to fully enjoy the emoluments thereof pending an appeal of this case to the District Court of Appeal and to the Supreme Court of the United States, should said last appeal be taken. Before surrendering said office, as here required, the contestant, McCarty shall give security to the respondent, Wilson that if said appeals, or either of them, are successful, that said contestant will pay to the respondent within 10 days after the coming down of the remittitur therein the same emoluments of the said office that the respondent would have been entitled to had he remained in said office during the time contestant shall have been in possession thereof, together with respondent's costs on appeal. If said appeals, or either of them, are unsuccessful respondent shall pay to the contestant contestant's costs on appeal, the respondent to give security to contestant for the payment of costs. If respondent shall fail within 8 days to do this, his motion for time to file and serve a bill of exception herein will be denied. Doing this he will be granted 10 days, and such additional time as may be necessary within which to file and serve his bill of exceptions." Contestee appeals from this order.

1. Appellant contends that the bill of exceptions was settled and filed within 30 days after notice of judgment, and hence the court erred in refusing to allow it. The contention is based upon the assumption, first, that the case falls under section 649, Code Civ. Proc., which prescribes no time within which the exception shall be settled, but that it may be settled within a reasonable time; and, second, that under section 650, Code Civ. Proc., the bill may be settled and filed at any time within 30 days. Appellant is clearly in error in this contention. The case falls under section 650, and that section requires that the party, who desires to have exceptions taken at the trial, settled in a bill of exceptions, must within 10 days after the entry of judgment and motion therefor, prepare and serve the draft of the bill, unless the time for so doing is extended by the judge or by stipulation of the opposing attorney. Scott's Estate, 128 Cal. 579, 61 Pac. 98; In re Clary's Estate, 112 Cal. 292, 44 Pac. 569.

2. The grounds for asking the court to relieve contestee from his neglect to comply with the statute amounts to little more than excusable forgetfulness or failure to observe the flight of time, arising out of occupation in other cases. The facts are such as would ordinarily have justified the court either to grant or refuse the motion without such abuse of discretion in either case as would warrant reversal. The real point involved is whether the court abused its discretion in making its order conditional. Appellant claims that it is an unreasonable condition and that the order should, on this ground, be reversed. That the court had the power to make its order conditional we have no doubt. Watson v. San Francisco, etc., R. R. Co., 41 Cal. 21, Youngman v. Tonner, 82 Cal. 611, 23 Pac. 120, and Douglass v. Todd, 96 Cal. 655, 31 Pac. 623, 31 Am. St. Rep. 247, are instances where conditions have been imposed in granting relief under section 473, Code Civ. Proc.

Each case must be governed by its own facts and circumstances, which are seldom found to be the same in any two cases. In the present instance the Supreme Court had before it the merit of the controversy so far as the controverted ballots were concerned, and decided that contestant was elected to the office. At the second trial contestant prevailed and was declared entitled to the office, and contestee's certificate of office was annulled. There is nothing now before us on this motion to show that any question will be presented on the appeal from the judgment not already decided by the Supreme Court. Indeed, the present transcript does not show that an appeal has been taken from the judgment. Our records elsewhere show that such appeal has been taken, but that transcript is not referred to or made part of this appeal and cannot be looked to. For aught that appears the appeal from the judgment may be upon wholly insufficient grounds and may, through delay, result in contestee holding the office until the close of the term. Under such circumstances we cannot say that the court abused its discretion or imposed an unreasonable condition in requiring contestee to surrender the office to contestant pending the appeal; especially as the court required contestant to give security that he would repay to contestee whatever emoluments of the office contestant received should contestee prevail in his appeal.

It is claimed that the court did, in fact, settle the bill of exceptions. It does not so appear. The bill is not made part of this record nor does the indorsement of the judge thereon, if he made any, appear. Counsel for contestant state in their brief, and it is not denied, that the court certified the bill to be correct, but expressly refused to settle it because not filed and served within the statutory time, and because the contestee refused to comply with the conditions upon which the court ordered that the time, within which to file and serve the bill, would be extended. This statement accords with the order found in the record. This proceeding would not have been initiated if the court had in fact settled the bill. The purpose of contestee's motion, as stated therein, is to obtain time in "which to prepare, file, and serve his said exceptions."

The order is affirmed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

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2 Cal. App. 165

McDONALD v. CALIFORNIA TIMBER CO.

(Court of Appeal, First District, California. Nov. 10, 1905.)

1. DISMISSAL AND NONSUIT—RIGHT TO DISMISS—STATUTES.

Code Civ. Proc. § 581, provides that an action may be dismissed by plaintiff by written request to the clerk at any time before trial on payment of costs, provided a counterclaim has not been made or affirmative relief asked. *Held*, that the provision requiring a written request filed with the clerk was neither mandatory nor exclusive, and that plaintiff was entitled to move for a dismissal in open court and for an order of dismissal, with the same effect as though made by an entry in the clerk's register.

2. SAME—EX PARTE PROCEEDINGS.

An application by plaintiff to dismiss his action is an ex parte proceeding, of which defendant is not entitled to either notice or hearing.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Dismissal and Nonsuit, § 65.]

3. SAME — APPLICATION FOR CHANGE OF VENUE.

Under Code Civ. Proc. § 581, entitling the plaintiff to dismiss before trial on payment of costs, unless a counterclaim has been pleaded or affirmative relief asked, plaintiff was absolutely entitled to dismiss the action after the filing, but before the hearing, of defendant's application for a change of place of trial.

Appeal from Superior Court, Santa Cruz County, Lucas F. Smith, Judge.

Action by John R. McDonald against the California Timber Company. From an order denying a motion to change the place of trial, defendant appeals. Affirmed.

Charles B. Younger, Jr., for appellant. Charles M. Cassin and Benjamin K. Knight, for respondent.

HARRISON, P. J. The plaintiff brought this action in the superior court of the county of Santa Cruz to recover damages from the defendant sustained by reason of a personal injury caused by the negligence of the defendant. September 12, 1903, the defendant filed and served a demurrer to the complaint, together with an affidavit of merits, and a demand in writing that the cause be transferred for trial to the city and county of San Francisco, and on the same day gave notice to the plaintiff that on September 21, 1903, it would move the court to change the place of trial to the city and county of San Francisco upon the grounds, set forth in the affidavits annexed to said notice of motion, that the residence of the defendant is in that city and county by reason of that being the place designated in its articles of incorporation as its principal place of business, and that the injuries sustained by the plaintiff were not received in the county of Santa Cruz. September 19, 1903, upon motion of the plaintiff, the court made an order dismissing the action, and judgment thereon was rendered on September 21st. Upon the hearing of the motion to change the place of trial the court denied the same upon the ground that the action had been dismissed before the motion was brought on for hearing. From this order the defendant has appealed.

Section 581, Code Civ. Proc., declares that an action may be dismissed: "(1) By the plaintiff himself by written request to the clerk filed among the papers in the case at any time before trial upon payment of costs; provided a counterclaim has not been made or affirmative relief asked by the cross-complaint or answer of the defendant." Under these provisions the only limitation upon the right of the plaintiff to dismiss his action is that the defendant has filed a counterclaim or asked for affirmative relief. The provision in the section that the plaintiff file a written request with the clerk is not mandatory or exclusive. The plaintiff could move for the dismissal in open court, and have its order made and entered with the same effect as though made by an entry in the clerk's register. Richards v. Bradley, 129 Cal. 670, 62 Pac. 316.

The defendant cannot, by making a demand for a change of the place of trial and giving notice thereof, deprive the plaintiff of the right thus given to dismiss the action, or oust the court of jurisdiction to hear an application therefor. If his demand be well founded and his motion granted, any judicial action of the court affecting his rights adversely would be set at naught, and for this reason it is held that under a proper exercise of its discretion the court is required to hear and determine the motion before taking any other judicial action in the cause; but this rule has no application to an ex parte proceeding at the instance of the plaintiff, or to any proceedings in which the rights of the defendant are not adversely affected, or upon which he is not entitled to be heard. An application of the plaintiff to dismiss his action is ex parte, upon which the defendant is not entitled to be heard, and may be made or granted without any notice to him. The motion of the defendant was therefore properly denied. After the judgment dismissing the action there was no cause to be tried, and, consequently, there was no place of trial to be changed.

The order is affirmed.

We concur: HALL, J.; COOPER, J.

2 Cal. App. 148

FRIES v. AMERICAN LEAD PENCIL CO.

(Court of Appeal, Third District, California. Nov. 9, 1905.)

MASTER AND SERVANT—INJURIES TO SERVANT —INFANT EMPLOYÉS—FAILURE TO WARN— NEGLIGENCE.

Plaintiff, a boy nine years old, was employed by defendant to work in a sawmill, and commenced work at 7 in the morning under the direction of his brother, who was 18 years of age, near one of the saws. He was unadmonished and unskilled, and about 1½ hours after he began work two of his fingers were cut off by his hand coming in contact with the saw. *Held* that, notwithstanding he testified that he knew the saw was dangerous, such facts justified a finding that defendant was negligent in permitting the child to work in such place uninstructed and unwarned.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 314, 316½, 601-609.]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by Alec Fries, by Mary Fries, his guardian ad litem, against the American Lead Pencil Company. A judgment was rendered in favor of plaintiff, and defendant appeals. Affirmed.

Rehearing denied by Supreme Court, January 8, 1906.

L. L. Cory, for appellant. A. M. Drew and F. H. Short, for respondent.

McLAUGHLIN, J. This is an action to recover damages for injuries sustained by plaintiff while employed by defendant in a sawmill, or factory, where lumber was being sawed into small slabs called "pencil boards." From a judgment in favor of plaintiff, defendant appeals.

The record here discloses the facts recited in the decision upon a former appeal in this case. 141 Cal. 612, 75 Pac. 164. Other additional and pertinent facts are gathered from the uncontradicted evidence of an older brother of plaintiff, named Jack, who was working in the factory, and who testified as follows: "Mr. Jones had told me what work he wanted Alec to do; that is, to bring the blocks over to me at the machine, and when they were cut up into slabs to tie them up into bundles, and take them away. When we went to the millroom where the saws were, Alec went with me. I guess there were five or six others there. There was a big circular saw and another saw that were cutting the slabs, with six or seven saws on it all at once cutting the slabs. They were all in the same room and the room was 50 by 40 feet, I should judge. There was considerable noise in the room. He was working four or five feet from me. The table where I was at work was three or four feet wide, machine and everything, and two feet to two feet and a half long. The saw was, I guess, a 10-inch saw in diameter. I did not tell him before anything about the danger of the machine, neither did the superintendent, or the manager, Mr. Jones. No instructions were given to him at all, nor warning about the danger from the saw. His duty was really to work in picking up blocks and binding them into bundles and piling them up, and to bring me blocks on the other side of the table for sawing. * * * I had not got any blocks from the other saw when I called him over. When I ran out of blocks I called him to get some more blocks for me. Alec had no work to do about the machine or handle the machine or with the machine. He was working about a foot and a half to two feet from the end of the machine where I was working, about four feet away from me. As I ran the blocks through the machine and made the slabs they fell into a box below. It was Alec's duty to keep the box empty and pick out the slabs as they were cut up, and put them in bundles, and take them away. The saw was at the side of the machine and there was a fence over it. It is a kind of a protection to a person handling the machine so they would not cut their hands on it. Alec was picking up slabs when I called him over to me. I could hardly talk to him when he was four feet away, and had to have him come over nearer so I could talk to him. I could have talked to him at a distance of four feet if I talked pretty loud. I had to call him twice, and he heard me when I hallooed to him. When he heard me he came over to see me. As he came over, I don't know as he put his hand on the machine, but that was the way it happened. When he came over his hand went down on the machine—put his hand on the machine. In other words, the accident could not have happened unless he put his hand on the saw. It was running all the time, and had been so all the morning. It was perfectly visible to him, as well as anybody else that the saw was running. He was a boy of good eyesight, and the saw was running all right. The sole reason I called him over was to tell him to get blocks. The reason I did not tell him at the distance of four feet instead of calling him over, was because I did not want to halloo to him, and call the other boys' attention from their work." The manager, Mr. Jones, testified that he told Jack to bring his brother to work the evening before, and that the next morning he said to him: "You take him and put him to work under you. Instruct him how to tie the bundles up and carry them over and set them up against the wall." This is denied by both plaintiff and his brother, but all agree that at no time did any person warn plaintiff, who was but nine years old, that he would have to be careful when he was near the saws or moving about the table. It is apparent from the foregoing statement that while plaintiff had nothing to do with the operation of the saw, his duties called him dangerously close to where it was being operated by his brother. Thus, unadmonished, uncautioned, and unskilled, this little boy commenced to work in that noisy room at 7 o'clock in the morning, under the direction of a brother, 18 years of age. About 1½ hours thereafter, two of his fingers were cut off by the small circular saw on the side of the table near which he was at work, under the circumstances above narrated.

The principal point urged by appellant is that, under the decision rendered upon the former appeal, the testimony of plaintiff is absolutely fatal to his right to recover. The evidence of plaintiff relied upon, is to the effect that plaintiff noticed the saw running and cutting boards; that he knew that it would cut fingers as well as boards; and that he would get hurt if he went near the saw or got against it when it was going. It is said that this shows that the child was of sufficient intelligence to be able to comprehend, and did in fact, comprehend the danger surrounding his occupation, and there being no evidence to the contrary, no negligence could be imputed to defendant if it did not give plaintiff instructions as to danger. But the decision upon the former appeal lays down the well-known rule that the tender years of plaintiff, his capacity for understanding and appreciating the dangers surrounding his employment, were potent factors in determining whether defendant was absolved from the duty of instructing plaintiff as to such dangers and the necessity for caution and care. In Foley v. California Horseshoe Co., 115 Cal. 192, 47 Pac. 42, 56 Am. St. Rep. 87, the same learned justice who wrote the opinion on the former appeal, explained this rule in a masterly and comprehensive opinion. It was there said: "The question of the taking of a risk, the question of the assumption of responsibility in a given act, is determined as much upon the matter of judgment as upon the matter of knowledge. * * * Children are taught obedience. They are taught not to oppose their will and their judgment to those in authority over them; but in addition to this, and more important than all, the judgment of the child is the last faculty developed. * * * Knowledge he may have; facts he may acquire; but the ability to apply his knowledge or reason upon his facts, comes to him later in life. The very accidents of childhood come from thoughtlessness and carelessness which are but other words for absence of judgment. * * * Their conduct is to be judged in accordance with the limited knowledge, experience, and judgment which they possess when called upon to act and it must, from the nature of the case, be a question of fact for the jury, rather than of law for the court, to say whether or not, in the performance of a given task the child duly exercised such judgment as he possessed, taking into consideration his years, his experience, and his ability." This exposition of the law has been pronounced "unquestionably sound" in many well-considered cases. O'Connor v. Golden Gate, 135 Cal. 545, 67 Pac. 966, 87 Am. St. Rep. 127; Mansfield v. Eagle Co., 136 Cal. 622, 69 Pac. 425; Killelea v. Cal. Horseshoe Co., 140 Cal. 605, 74 Pac. 157. Had the jury, in the case at bar, before them facts or circumstances sufficient to justify the conclusion that plaintiff did not understand and appreciate the dangers surrounding him? We think they had. Appellant's contention rests upon a literal construction of plaintiff's words. But the jury knew that the child was only 9 years old when injured, though 13 years of age when testifying. His evidence justified the full application of their intuitive knowledge, that thoughtlessness is at once the source of happiness and danger to children of that age. His evidence as to knowledge is offset by the absence of judgment and want of appreciation eloquently attested by the fact that, notwithstanding his knowledge, and the natural tendency to shrink from pain and injury, he did the very thing which judgment born of reason would prompt him to avoid. After stating his knowledge touching the cutting power of the saw, in the same connection he artlessly said: "Jack called me, and I went over there, and leaned against the table, and got my hand against the saw, and that is the way my hand got cut." This is precisely what might be expected of a child of that age whose "thoughtlessness and carelessness are but other words for absence of judgment." And this is precisely what the appellant should have anticipated and guarded against, by impressing upon the mind of this mere child the lesson that he must carefully avoid coming in contact with the machinery or saws.

This is the very reason the law made it the duty of appellant to give cautionary instructions when this nine year old boy was employed and placed amid unusual surroundings in a noisy room, full of danger even to adults. The laws of nature constitute an integral part of the evidence in every case, and the jury had a right to view the acts of this child in the light of general and immutable laws governing the conduct, impulses, and mental development of children. They had a right to consider every fact and circumstance bearing upon his knowledge and appreciation of dangers surrounding him, and to measure his words by the standard of his acts. They saw him on the stand and heard him testify. With the knowledge of his mental capacity thus gained, they could measure both his words and acts with far more accuracy than an appellate court, having before it only a transcript of his evidence in narrative form. Having this knowledge, they could reason what an ordinary child would be likely to do when called to receive instructions from an older brother, whom he would naturally look up to, and whom he had been given to understand he must obey. Children, under such circumstances, intuitively advance with upward look of expectancy or inquiry, and the jury could gather from his statements and acts that this was what he did, as he leaned forward to catch the words of command from his brother's lips. He had not been cautioned. On the contrary, he must have understood that he was to obey his brother, toward whom he was leaning in listening attitude when the accident occurred. It was suggested in oral argument that his brother was a fellow servant, and that his negligence contributed to plaintiff's injury. Conceding, solely for the purpose of answering this suggestion, that Jack occupied the position of a fellow servant when engaged in giving commands to the lad placed under him, still, the noise and circumstances considered, we do not think Jack was negligent. We therefore hold that there is sufficient evidence to support the verdict and judgment. If employers will aid and abet heartless and mercenary parents in taking little children from the playground and the schoolroom to place them in factories or mills where dangerous machinery is in operation, they can hardly expect courts to indulge in nice discriminations touching the quantum of care and caution to be expected of such children. Nor can they expect courts to place technical limitations on the right of a jury to weigh the words, acts, ability and capacity of children in the light of natural impulses, attributes and characteristics, in actions for injuries received during the course of an employment denounced by rules of humanity and by a law of this state. We have carefully examined the instructions complained of, and are satisfied that, read as a whole, the instructions contain a fair and correct statement of the law.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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2 Cal. App. 179

KINARD v. POLICE COURT OF CITY OF OAKLAND et al.

(Court of Appeal, First District, California. Nov. 14, 1905.)

1. PROHIBITION — GROUNDS — ADEQUACY OF OTHER REMEDIES.

The question whether a prosecution of accused for a misdemeanor is barred, by reason of a former dismissal of a prosecution for the same offense, under Pen. Code, §§ 1385, 1387, declaring that an order of dismissal shall be a bar to another prosecution for the same offense, is a matter within the jurisdiction of the court; and a writ of prohibition will not lie to prevent it from exercising its jurisdiction, as accused has an adequate remedy by appeal.

2. SAME—EXCESS OF JURISDICTION.

The writ of prohibition only issues in cases where the inferior court is proceeding or is about to proceed in excess of its jurisdiction, and it cannot be used to correct anticipated errors.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Prohibition, §§ 36–56.]

Appeal from Superior Court, Alameda County; Henry A. Melvin, Judge.

Petition for a writ of prohibition by C. E. Kinard against the police court of the city of Oakland and others. From a judgment denying the writ, the petitioner appeals. Affirmed.

C. E. Kinard, in pro. per. George Samuels, for respondent.

COOPER, J. Appeal from judgment and order denying writ of prohibition.

Petitioner alleges that he is being prosecuted in the police court of the city of Oakland, before Mortimer Smith, the judge of said court, upon a charge of misdemeanor in embezzling the sum of $14, the property of one Holloway. He moved to dismiss the proceedings upon the ground that the charge was the same offense included in a prior charge against him in the police court, which prior charge was dismissed. His position is that, the prior charge being dismissed, such dismissal is a bar to any other or further prosecution for the same offense, under the provisions of sections 1385 and 1387, Pen. Code. If it be conceded that petitioner had been before the court on a prior charge for the same offense, and the charge dismissed, and that such dismissal constitutes a bar, it does not follow that the court has no jurisdiction. The court has power to hear and determine the charge, and any and all matters tending to show a prior acquittal, or that the offense is barred by prior proceedings. It is presumed that the police court will hear and determine all questions, and give a correct judgment thereon. On a motion to dismiss the court may not have had all the facts before it. On the trial the defendant will be entitled, if properly pleaded, to prove all the facts, and if they constitute a bar, and the court does not so hold, defendant will have a plain and speedy remedy by appeal.

The writ of prohibition will only issue in cases where the inferior tribunal is proceeding, or is about to proceed, in excess of its jurisdiction. It cannot be used for the purpose of correcting anticipated errors. Raine v. Lawlor, 82 Pac. 688.

The judgment is affirmed.

We concur: HARRISON, P. J.; HALL, J.

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2 Cal. App. 170

McCARTHY CO. v. BOOTHE et al.

(Court of Appeal, Second District, California. Nov. 10, 1905.)

1. ATTACHMENT—LIABILITY ON BOND—MEASURE OF DAMAGES.

The depreciation of attached shares of stock between the date of the attachment and the date of the release is within the undertaking for attachment made in the statutory form, binding plaintiff in attachment to pay all damages which the defendant may sustain by reason of the attachment, and also within Civ. Code, § 3300, providing that for the breach of an obligation arising on contract the measure of damages is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby.

2. SAME—DEFENSES.

In an action on an undertaking given by an attachment plaintiff on attaching shares of stock, it is no defense that plaintiff might have avoided the damages by giving the statutory bond under the provisions of the Code of Civil Procedure.

Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by the McCarthy Company against C. B. Boothe and others. From a judgment for plaintiff, defendant appeals. Affirmed.

M. L. Graff and Lawler, Allen & Van Dyke, for appellants. Charles Silent, for respondent.

SMITH, J. Appeal from a judgment for the plaintiff, and from an order denying the defendants' motion for a new trial.

The suit was brought upon an undertaking for attachment, in the statutory form, in the sum of $2,000, given by the defendants in the suit of one Humphris against the plaintiff herein. The facts shown by the findings are: The attachment was levied June 30, 1900, on 5,400 shares of the Westlake Oil Company and 7,060 shares of the Wilson Oil Company, the property of the defendant in that case, now plaintiff. Judgment was rendered for the defendant in the attachment case October 7, 1901. It appears also that on March 19, 1901, another attachment was levied upon the same property in a second suit between the same plaintiff and defendant, which is still pending. At the date of the attachment, June 30, 1900, the stock of the Westlake Oil Company was of the market value of 48 cents per share and that of the Wilson Oil Company of the value of 40 cents per share. But at the date of the second attachment the market value of the former shares had depreciated to 20 cents and that of the latter to 30 cents per share; and that the market value of both at the date of the judgment, October 7, 1901, had fallen to 5 cents per share. The aggregate depreciation of the stock at the former date was $2,218 and at the latter $4,793, and it was found that the plaintiff was damaged in the latter amount. Judgment was given for the amount of the undertaking, $2,000. It is also found "that the plaintiff herein was during all of the said time engaged in the business of buying and selling shares of oil companies for profit; that it had bought said shares for resale and could have and would have sold the same, if it could have obtained possession and made delivery and transfer thereof." Some objection is made to this finding, but it seems to be fully supported by the evidence.

It is claimed by the respondent, and apparently admitted by the appellant, that in the case of attachment of personal property generally the measure of damages is the difference in value of the attached property when seized and when restored, with the loss of its use meanwhile. Waples on Attachment, § 682; Wade on Attachment, § 302; Coulson v. Panhandle National Bank, 54 Fed. 859, 4 C. C. A. 616; Frankel v. Stern, 44 Cal. 173; Elder v. Kutner, 97 Cal. 494, 495, 32 Pac. 563; Witherspoon v. Cross, 135 Cal. 96, 67 Pac. 18. But it is claimed by the appellant that the rule is different in the case of an attachment of real property (Heath v. Lent, 1 Cal. 410; Elder v. Kutner, 97 Cal. 490, 32 Pac. 563), and that the case of an attachment of stock comes under the reasoning of the latter rule. But, assuming the rules as to personal and as to real property generally to be as above stated, we do not think this contention can be sustained; but, rather, we think that there is more reason for the application of the former rule to the case of an attachment of stock than in the case of personal property generally. For stock generally, more than other species of personal property, is bought for sale, and its principal value in general consists in its selling value; and not only is this destroyed by the attachment, but all the profits and dividends to accrue from it are impounded equally with the stock itself. Code Civ. Proc. § 698.

But in this case there is another feature which we regard as material, which is that it is found that the stock in question was bought for resale, and that the plaintiff "could have and would have sold the same if it could have obtained possession and made delivery and transfer thereof." And the loss thus incurred, we think, comes clearly within the obligation of the defendants to pay "all damages which [plaintiff] may sustain by reason of the attachment," etc., and within the provisions of section 3300 of the Civil Code as to the measure of damages for breach of contract. We do not deem it necessary to discuss the cases cited by the appellant from other states, which do not seem to have involved this particular feature of the case before us. But our position seems to be supported by the decision in Girard v. Moore, 86 Tex. 675, 26 S. W. 945, cited by the appellant in support of his contention that the rules as to stock and as to real estate are the same. For it is there, in effect, held as to both species of property that the "loss resulting from [plaintiff's] being deprived of an opportunity to make an advantageous disposition of the estate," may be recovered as special damages, when pleaded as it is here.

Another point made by the appellant is, in effect, that the plaintiff might have avoided the damages by giving the statutory bond under the provisions of the Code of Civil Procedure. But we do not think this position requires discussion.

The judgment and order appealed from are affirmed.

We concur: GRAY, P. J.; ALLEN, J.

148 Cal. 404

BELL v. STAACKE et al. (S. F. 4,398.)

(Supreme Court of California. Jan. 2, 1906.)

1. APPEAL—FILING TRANSCRIPT—TIME.

Supreme Court Rule 2 (78 Pac. vii) provides that appellant in a civil action shall, within 40 days after the appeal is perfected, serve and file a printed transcript of the record, provided that, when there is a proceeding pending for the settlement of a statement which may be used in support of such appeal, the time for filing the transcript shall not begin to run until the settled statement or bill of exceptions has been filed, and that, when a party appealing from the judgment has given notice of a motion for a new trial before perfecting the appeal, the time for filing and serving a printed transcript shall not begin to run until the motion for a new trial has been decided or the proceedings dismissed for want of prosecution, and the appeal from the judgment and from the order denying a new trial may, in all cases, be presented on the same transcript. *Held* that, where a motion for a new trial has been made, the time for filing the transcript on an appeal from the judgment began to run from the date the order denying or dismissing the motion for the new trial was filed with the clerk, and not from the date the appeal from the order denying the new trial was perfected.

2. NEW TRIAL—DENIAL—ORDERS—NOTICE.

A party making a motion for a new trial is bound to take notice of the filing of an order denying the same, and is not entitled to the service of notice thereof by the adverse party.

3. APPEAL—FILING TRANSCRIPT—DENIAL OF NEW TRIAL.

Where a party moving for a new trial is not entitled to notice of the making, filing, or entry of the order denying the new trial, the time for an appeal therefrom and the time for filing the transcript on appeal begin to run at once upon the filing or entry of such order.

In Bank. Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by John S. Bell against George Staacke and others. From a judgment in favor of defendants, plaintiff appeals. On motion to dismiss. Granted.

See 74 Pac. 774.

Richards & Carrier, James L. Crittenden, and B. F. Thomas, for appellant. Canfield & Starbuck and T. Z. Blakeman, for respondents.

SHAW, J. The defendant Teresa Bell, as administratrix with the will annexed of the estate of Thomas Bell, deceased, moves the court to dismiss the appeal of the plaintiff from the judgment of the superior court entered therein on October 28, 1904. The motion is made on the ground that the time allowed by law and by the rules of this court for the filing of the transcript on appeal has expired, and hence that under the provisions of rule 5 (78 Pac. viii) the appeal from the judgment must be dismissed. At the time the appeal was perfected a proceeding was pending for the settlement of a statement of the case to be used on a motion then pending in the lower court for a new trial. The time for the filing of the transcript of the record in this court, under such circumstances, is fixed by subdivision 1 of rule 2 (78 Pac. vii), which is as follows: "(1) The appellant in a civil action shall, within forty days after the appeal is perfected, serve and file the printed transcript of the record, duly certified to be correct by the attorneys of the respective parties, or by the clerk of the court from which the appeal is taken; provided, that when there is a proceeding pending for the settlement of a bill of exceptions or a statement which may be used in support of such appeal, the time for filing and serving the transcript shall not begin to run until the settled and authenticated statement or bill of exceptions has been filed; and provided further, that, when a party appealing from a judgment has given notice of motion for a new trial before perfecting said appeal, the time for filing and serving the printed transcript shall not begin to run until the motion for a new trial has been decided or the proceeding dismissed for want of prosecution; and the appeal from the judgment and from an order denying a new trial of the issue may in all cases be presented upon the same transcript." The statement to be used on the motion for a new trial was settled, authenticated, and filed on May 29, 1905, and the motion for new trial was denied by an order filed with the clerk of the superior court on June 24, 1905. The date of its entry is uncertain. The purpose of this part of rule 2 was to give the appellant an opportunity, if he so desired, to present the appeals from the judgment and from the order denying a new trial upon the same transcript. To give effect to this purpose it is necessary to construe the words of the last proviso as meaning that the time for filing the transcript shall not begin to run until the order denying or dismissing the motion for a new trial has not only been made, but has also been either entered on the minutes of the superior court, or filed with the clerk thereof, so as to give an immediate right to appeal therefrom, under section 939 of the Code of Civil Procedure, and the decisions of this court construing the same in that particular. Upon this construction of the rule, the time prescribed for the filing of the transcript began to run at all events on June 24, 1905, when the order denying the motion for new trial was filed with the clerk, and, according to the language of the rule, the time expired 40 days thereafter; that is, on August 3, 1905. The notice of motion to dismiss this appeal for this cause was served on the attorney for the appellant and filed in this court on August 16, 1905. At that time no transcript of the record had been filed nor had it been filed on September 5, 1905, the date when the appellant's affidavit in opposition to this motion was sworn to by his attorney. We are therefore constrained to hold that the motion is well founded, and that the appeal from the judgment must be dismissed.

It is further contended, on behalf of the appellant, that the last clause of the subdivision of the rule above quoted, that "the appeal from the judgment and from the order denying a new trial of the issue may in all cases be presented upon the same transcript," was intended to allow still further time for the filing of the transcript, and must be construed to allow the appellant to file his transcript on an appeal from the judgment, at any time within 40 days after he has perfected an appeal from the order denying a new trial. In furtherance of this contention he shows by affidavit that on August 15, 1905, he perfected an appeal from that order, and that the time for filing the transcript on that appeal would not expire until September 24, 1905, which was after the submission of this motion to dismiss. In answer to this contention, we have to say that such was not the purpose of the rule, and it is not so expressed. It should be, and is, the policy of the court to expedite proceedings on appeal, rather than to delay them, or permit opportunities for delay. The rule in question, in order to avoid the expense of unnecessary and oftentimes burdensome costs, where a party intends to appeal both from the judgment and from the order denying a new trial, and there is unavoidable delay in the decision of the motion for new trial, so far departs from this policy as to permit such further delay only as may be sufficient to enable a party, by proper diligence, to have both appeals heard together and on the same transcript. But the rule was not intended to encourage delay, nor to give more time than, with diligent effort, is necessary to accomplish the object sought. When the order denying a new trial is filed or entered, the party aggrieved may immediately perfect an appeal therefrom, and the 40 days allowed by the rule after the day when the time for that appeal begins to run is ample time within which to print, serve, and file the transcript, including the record on both appeals. If a party chooses to delay for more than 40 days the taking of an appeal from the order, he thereby loses the opportunity afforded to him by the rule to save the expense of twice printing the judgment roll and the clerk's fee for an additional filing.

In view of some matters alleged in the affidavit filed on behalf of the appellant on the hearing of this motion, it may be further stated that the appellant was not entitled to notice from the adverse party, or from any one, of the making, filing, or entry of the order denying a new trial, and that the time for an appeal therefrom, and also the time for the filing of the transcript on the present appeal, began to run at once upon such filing or entry, without regard to any notice or knowledge thereof by the appellant, or his attorneys. Parties and their attorneys are bound to take notice and inform themselves of such proceedings without assistance from the adverse parties. This is the general rule. The time for the doing of an act or the taking of a step in a proceeding in court begins to run from the service of a notice of some previous act or step, only in cases where by some law or rule of court it is so provided.

The appeal from the judgment is dismissed.

We concur: BEATTY, C. J., VAN DYKE, J.; McFARLAND, J.; HENSHAW, J.; ANGELLOTTI, J.; LORIGAN, J.

148 Cal. 380

LOS ANGELES CITY SCHOOL DIST. OF LOS ANGELES COUNTY et al. v. LONGDEN et al., County Sup'rs.

(L. A. 1,802.)

(Supreme Court of California. Dec. 26, 1905.)

1. SCHOOLS AND SCHOOL DISTRICTS—NATURE OF SCHOOL DISTRICT—CORPORATE ENTITY—MERGER IN CITY.

A school district is a corporation of quasi municipal character, and, though its territorial limits may be actually coterminous with those of a city, the identity of the school district as a corporate entity is not lost or merged in that of the city.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Schools and School Districts, §§ 39, 40.]

2. SAME — DISTRICTS EMBRACING CITY — POWER TO ISSUE BONDS.

Const. art. 11, § 6, provides that city charters adopted by authority of the Constitution shall be subject to and controlled by general laws, except in municipal affairs. Article 4, § 25, subd. 27, prohibits the passage of local laws for the management of common schools. Article 9, § 5, requires the Legislature to provide for a system of common schools. Pol. Code, § 1576, provides, in effect, that a city, together with territory annexed thereto for school purposes, shall constitute a separate school district. Sections 1880–1887 authorize the board of trustees of a school district to issue bonds to raise money for purchasing school sites or building and improving schoolhouses, etc., and prescribe the procedure for the issuance of such bonds. *Held*, that while a city may, when authorized by its charter, issue municipal bonds for school purposes, yet its power so to do is not exclusive, and the school district, embracing the city and territory attached thereto for school purposes, may, independently of the city, issue district school bonds in the manner prescribed by the Political Code.

In Bank. Application by the Los Angeles city school district of Los Angeles county and others for a writ of mandate, prayed to be directed against O. W. Longden and others, constituting the board of supervisors of Los Angeles county. Writ awarded.

W. B. Mathews and S. B. Robinson, for plaintiffs. J. D. Fredericks, Dist. Atty., and Hartley Shaw, Chief Deputy, for defendants.

HENSHAW, J. This is an original application to this court for a writ of mandate, growing out of the following facts: The Los Angeles city school district of Los Angeles county comprises for its territory the city of Los Angeles and certain contiguous outlying lands. Its governing body is the board of trustees of Los Angeles city school district of Los Angeles county, whose members are the same as those of the board of education of the city of Los Angeles. This board of trustees, in compliance with the provisions of section 1880 et seq. of the Political Code, initiated proceedings for the issuance of bonds of the school district, which proceedings were regularly carried to the point where the board of trustees certified to the board of supervisors of the county its action in the premises, as provided by section 1884 of the Political Code. The board of supervisors has refused to issue the bonds, as required by section 1884, upon the ground that the city of Los Angeles, as a municipal corporation, has, under its charter and the laws of the state, the sole and exclusive right to issue bonds for the purpose specified. This is the only issue presented by this controversy. It has been repeatedly decided that a school district is a corporation of quasi municipal character, and, though its territorial limits may be actually coterminous with those of a city, the identity of the school district, as a corporate entity, is not lost nor merged in that of the city. Estate of Bulmer, 59 Cal. 131; Hughes v. Ewing, 93 Cal. 414, 28 Pac. 1067; Kennedy v. Miller, 97 Cal. 429, 32 Pac. 558; In re Wetmore, 99 Cal. 146, 33 Pac. 769; Board of Education v. Board of Trustees, 129 Cal. 599, 62 Pac. 173; Mitchell v. Board of Education, 137 Cal. 372, 70 Pac. 180; Hancock v. Board of Education, 140 Cal. 554, 74 Pac. 44. Thus, in the last-cited case, it is said: "Every city constitutes a separate school district, including such outlying territory as may be legally attached to it. (Pol. Code, § 1576.) * * * A city charter adopted under the provisions of the constitution, has no effect whatever upon the existence or legal character of a school district formed under the general law."

That school districts may, in proper cases, issue bonds, is, of course, not disputed. It remains to be considered whether this general power to issue bonds, which has been granted to school districts, has been taken away from this particular school district by force of the charter of the city of Los Angeles. Upon this proposition the contention of respondent is that all matters touching schools within the corporate limits of a city are "municipal affairs," and that as, under the provisions of section 6 of article 11 of the Constitution, the charter of a city is supreme in municipal affairs, the charter of Los Angeles thus becomes the sole guide, authority, and power for the issuance of school bonds; that the charter of Los Angeles denies the power to its board of education to take the initiatory steps towards the issuance of school bonds, and confers that power upon its city council; and that its city council, under the provisions of section 78 of the charter, draws its power from the provisions of the general improvement act of 1901. Herein reliance is placed upon the language of this court in the case of Law v. San Francisco, 144 Cal. 384, 77 Pac. 1014. There this court had under consideration the question of the power of the municipality to issue bonds for the erection of new schoolhouses and the improvements of existing schoolhouses, and the case of In re Wetmore, 99 Cal. 151, 33 Pac. 769, was cited and quoted from, to the effect that, as schoolhouses are essential aids in the promotion of education, their erection is but incidental to the maintenance of the schools, and falls as completely within the functions of a municipal government, as does the erection of a hospital for its indigent poor, or buildings for its fire engines. It thus may be taken as decided and settled that a city, as such, may bond itself for public school purposes, and that this power extends to all cases where the object is in furtherance, and not in derogation of, or in conflict with, the general school system established by the state. For in this connection it must be remembered, as was said in Hancock v. Board of Education, 140 Cal. 554, 74 Pac. 44, that the school system of the state is a matter of general concern, and not a municipal affair. It may be well to dwell upon this distinction with more particularity, and in so doing to point out the well-recognized and oft-repeated difference between the acts of the city as a city, and the acts of the school district, which may comprise the same territory. They are essentially the acts of two different corporate entities —the powers of the city being drawn from its charter, the powers of the school district being derived from the provisions of the Political Code; the bonds which the city issues being municipal bonds of that city, and the power to issue them being derived from the charter taken with the general laws, while the bonds of the school district are, in name and in fact, school district bonds, the right and power to issue them being derived from the Political Code. What, therefore, the Wetmore Case and the Law Case decided was that the erection of schoolhouses within the corporate limits of a municipality was justly to be regarded as a municipal affair, and that the city, therefore, as such, could create a bonded indebtedness for such and like purposes, even though power to do the same thing was, under the general school system of the state, vested in a school district, which, while occupying the same territory as that of the city, was still in point of law a distinct corporate entity. It follows, therefore, that the declaration of this court that the issuing of bonds for the building of schoolhouses by a city is a municipal affair constitutes in no sense a negation of the fact that another corporate entity—the school district—may, under the general school system of the state, do the same thing for the same purpose.

Moreover, it should be finally emphasized that the power of a municipality in this regard can only run current with, and never counter to, the general laws of the state touching the common school system. To such general laws, if conflict arises, all municipal charters must be subservient. Const. art. 9, § 5, and article 4, § 25, subd. 27. In the case of In re Wetmore, 99 Cal. 146, 33 Pac. 769, the identical question here presented was, under a somewhat dissimilar guise, considered and disposed of, and an analysis of the Wetmore Case will make this plain. In that case the city council of the city of Oakland had issued its bonds for school purposes under the act of March 19, 1889; the successor to which act being the present general improvement act of 1901. A taxpayer called in question the validity of the bond issue, and urged, as one of his objections, that such bonds could be issued only by the school district. It will be noted, therefore, that the question under consideration in Re Wetmore was the reverse of the one here presented; in the Wetmore Case it being contended that the school district had exclusive power to issue school bonds, while in the case at bar the contention is that the city holds this exclusive power. This court declared that the provisions of sections 1880–1887 of the Political Code for the issuance by the supervisors of the county of school district bonds do not limit or qualify the power conferred by the act of March 19, 1889, upon an incorporated city to issue its own bonds for the same purpose, notwithstanding the provisions of section 1576 of the same Code making such incorporated city a school district, saying: "There is not, however, any inconsistency between the two acts. The bonds authorized by these sections of the Political Code are different obligations from those issued by the municipal corporation under the act of March 19, 1889. A school district has not, like an incorporated city, any financial officers, nor has it been intrusted with the power of assessment and taxation which is conferred upon an incorporated city, and for these reasons, as well as others, the Legislature would naturally intrust to the supervisors of the county, as being the body having the financial supervision of the school district, the function of issuing and providing for the payment of school district bonds; and as by the Constitution bonds cannot in any case be issued, except upon a vote of two-thirds of the qualified electors of the district voting upon the question of their issuance, the agency by which they might be executed would seem immaterial, and there would be little likelihood of an issuance being authorized to be made for the same purpose by each agency. * * * If it should be conceded that the power to issue bonds for the same purposes rests in the supervisors at the instance of the school district, and also in the city itself, the bonds which are authorized by the Political Code are to be issued in the corporate name of the school district, which by section 1575 of that Code must be '——— district of ——— county,' whereas the bonds in question are those of the municipality of the city of Oakland, and their validity is to be determined by the power of the municipal corporation to issue them."

It follows from the foregoing that while the city of Los Angeles, in a proper case, would have the power to issue its municipal bonds for the erection of new schoolhouses and the improvement of existing ones, for the acquisition of land for these purposes, and the like, the school district, petitioner herein, has also its separate and independent power to do the same thing, and that the bonds so issued are not municipal bonds of the city of Los Angeles, but are the bonds of the school district proper, and the writ of mandate should issue accordingly.

Let the mandate issue as prayed for.

We concur: McFARLAND, J.; ANGELLOTTI, J.; VAN DYKE, J.; LORIGAN, J.

LOS ANGELES CITY HIGH SCHOOL DIST. et al. v. LONGDEN et al., County Sup'rs. (L. A. 1,803.)

(Supreme Court of California. Dec. 26, 1905.)

In Bank. Application by the Los Angeles city high school district and others for a writ of mandate, prayed to be directed against O. W. Longden and others, as supervisors of the county of Los Angeles. Writ awarded.

W. B. Mathews and S. B. Robinson, for plaintiffs. J. D. Fredericks, Dist. Atty., and Hartley Shaw, Chief Deputy, for defendants.

PER CURIAM. The question here presented is identical with that considered and decided in Los Angeles City School District v. Longden et al. (L. A. 1,802) 83 Pac. 246; the bonds in this case being for the purpose of acquiring lands for high school purposes and for the erection of appropriate high school buildings.

For the reasons given in L. A. 1,802, let mandate issue as prayed for.

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148 Cal. 393

HAWLEY et al. v. KAFITZ et al. (L. A. 1,454.)

(Supreme Court of California. Dec. 30, 1905.)

1. DEEDS — CONSTRUCTION — COVENANTS — CONDITIONS SUBSEQUENT.

Where a deed provided that it was "upon the express agreement" of the grantee to build or cause to be built on the premises, within six months, a dwelling house to cost not less than $1,500, which agreement was considered as a part of the consideration for the conveyance, such provision constituted a mere personal covenant on the part of the grantee, and was not a condition subsequent, authorizing a forfeiture for nonperformance.

2. EVIDENCE—EXPLANATION OF DEED BY PAROL.

Where a clause in a deed providing for the construction of a building was neither ambiguous nor equivocal, and whether it created a condition subsequent or a mere personal covenant was a matter of pure legal interpretation, parol evidence was inadmissible to show that the parties intended it to be a condition subsequent and clause of forfeiture.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2068.]

Department 2. Appeal from Superior Court, Los Angeles County; **B. N.** Smith, Judge.

Action by F. Robert Hawley and others against William Kafitz and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

J. Marion Brooks and Edward H. Bentley, for appellants. P. W. Dooner, for respondents.

LORIGAN, J. The plaintiffs on November 26, 1901, executed to defendant William Kafitz a grant, bargain, and sale deed of a lot in the Electric Railway Homestead Association Tract in the city of Los Angeles for a money consideration of $375. The deed contained the following provision: "This deed is given by the parties of the first part, and accepted by the second party, upon the express agreement of the second party to build, or cause to be built, upon the said premises within six (6) months from the date hereof a dwelling house to cost not less than fifteen hundred ($1,500.00) dollars. Said agreement being considered by the parties hereto as part consideration for this conveyance." No dwelling of any kind was built upon the lot within the six months specified, and subsequent to the expiration of that period plaintiffs brought this action to have the right of defendant in said lot declared forfeited and for a decree requiring a reconveyance to them by defendant of the property. Defendant had judgment, from which plaintiffs appeal; their appeal being accompanied by a bill of exceptions.

The only question arising on this appeal from the judgment is as to the nature of the provision inserted in the deed relative to the building of a house on the lot granted within six months and the correctness of the construction the trial court gave it. As to this provision it is insisted by plaintiff that by virtue of its incorporation in the deed an estate on condition subsequent was created, and, defendant having failed to perform the condition, his interest in the property was subject to forfeiture at the instance of plaintiffs for nonperformance of the condition. The trial court held that this provision did not create a condition subsequent; that it amounted simply to a personal covenant. We think there can be no question of the accuracy of the construction placed upon it by the court. Conditions subsequent are those which in terms operate upon an estate conveyed and render it liable to be defeated for breach of the conditions. Such conditions are not favored in law because they tend to destroy estates, and no provision in a deed relied on to create a condition subsequent will be so interpreted, if the language of the provision will bear any other reasonable construction. While no precise form of words is necessary to create a condition subsequent, still it must be created by express terms or by clear implication. Merely reciting in a deed that it is in consideration of a certain sum, and that the grantee shall do other things specified therein, does not create an estate upon condition. There must be language used which is so clear as to leave no doubt but that the grantor intended that an estate upon condition subsequent should be created—language which ex proprio vigore imports such a condition. Cullen v. Sprigg, 83 Cal. 64, 23 Pac. 222; Behlow v. S. P. R. R. Co., 130 Cal. 19, 62 Pac. 295.

In the case at bar the provision in question, which it is claimed created a condition subsequent, contains no language which in terms declares such a condition, or which by necessary implication imports one. There is an entire absence of any of those apt or appropriate words or expressions which are usually employed for the purpose of creating a condition subsequent—technical terms, which, if a condition subsequent is intended to be created, generally follow the granting clause of the deed, and declare that the estate conveyed is upon "express condition" that certain things shall be done, or "provided, however," or "in the event that" certain terms imposed are or are not complied with, the deed shall be void, and the estate granted shall be terminated and forfeited. Neither is there in the deed any declaration that in the event of the failure of the grantee to build within the stipulated time the deed shall be void, nor any provision declaring a forfeiture or right of re-entry for breach of condition. Nor does it appear from the deed that any specified purpose was to be attained by the grantor in having the building erected on the lot within the given time, or that its erection was the sole consideration for the conveyance. In fact, there is not only an entire omission on the part of the grantor to use any technical language, such as is ordinarily employed to create an estate on condition subsequent, but there is also an entire absence of any language indicating that for noncompliance with the stipulation to build it was the intention of the grantor that the estate granted should be defeated and forfeited. Not only is there no language which would create a condition subsequent, but the language actually employed, "this deed is upon the express agreement," implies a personal covenant, and not a condition. As supporting this conclusion we refer to Cullen v. Sprigg, supra; Behlow v. S. P. R. R. Co., supra; City of Portland v. Terwilliger, 16 Or. 465, 19 Pac. 90; Palmer's Ex'r v. Ryan, 63 Vt. 227, 22 Atl. 574; Graves v. Deterling, 120 N. Y. 447, 24 N. E. 655; and Stone v. Houghton, 139 Mass. 175, 31 N. E. 719. In this last case cited a provision almost identical with the instant provision under review here was declared not to create a condition, and one of the same general nature was, in Behlow v. S. P. R. R. Co., supra, construed as simply a personal covenant.

Under the bill of exceptions, accompanying the appeal from the judgment, the only point presented is as to the ruling of the lower court upon the admissibility of certain evidence offered on the part of the plaintiffs. The offer was to prove that the clause in the deed was understood by the parties as "intended to be a condition subsequent and clause of forfeiture." The court refused the offer, and properly so. The clause in the deed was in no wise ambiguous or equivocal. Its language was plain and clear, and whether the clause created a condition subsequent, as contended by plaintiffs, or a mere personal covenant, as insisted by defendant, was a matter of pure legal interpretation for the court. That neither evidence of the understanding of the plaintiffs nor the interpretation they desired to place upon the unambiguous language of the clause in their deed was admissible is so elementary that it is disposed of merely by stating it.

The judgment appealed from is affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

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148 Cal. 385

LOS ANGELES COUNTY v. KIRK, Superintendent of Public Instruction. (L. A. 1,837.)

(Supreme Court of California. Dec. 27, 1905.)

1. Schools and School Districts — State School Fund—Apportionment.

Const. art. 9, § 5, requires the Legislature to provide for a system of "common schools" by which a free school shall be kept up and supported in each district. Section 6 provides that the "public school system" shall include "primary and grammar schools," and such high schools, evening schools, etc., as may be established by legislative or local authority, and further provides that the entire revenue derived from the state school fund shall be applied exclusively to the support of "primary and grammar schools." Pol. Code, §§ 1622, 1861, reiterate the requirement that the revenue of the state school fund shall be applied solely to primary and grammar schools. Section 1532 requires the Superintendent of Public Instruction to apportion the balance of the state school fund which remains after providing for teachers to the several counties according to their "average daily attendance," as shown by reports of the county superintendents for the preceding year. Sections 1617, 1662, and 1663 recognize, and make certain provisions in relation to, the adoption of kindergartens as part of the "public primary schools" in cities and towns. *Held* that, notwithstanding the legislative designation of kindergartens as "primary" schools, such institutions are not "primary and grammar schools," within the meaning of the constitutional and statutory provisions for the distribution of the state school fund, and the kindergarten attendance is not to be computed in ascertaining the proportion of the school fund to which a county is entitled.

2. Same—Establishment of Kindergartens—Constitutional Provisions.

Pol. Code, §§ 1617, 1662, 1663, which recognize and make provision for the establishment of kindergartens in cities and towns, do not, when construed so as not to entitle kindergartens to participate in the state school fund, conflict with Const. art. 9, § 5, requiring the Legislature to provide a system of common schools by which a free school shall be kept up and supported in each district, and section 6 of the same article, requiring the state school fund to be applied exclusively to the support of primary and grammar schools.

3. Statutes—Special Legislation.

Nor do such sections, when so construed, conceding that they are applicable only to cities and towns, conflict with Const. art. 4, § 25, subd. 27, prohibiting the passage of local or special laws providing for the management of common schools.

In Bank. Application by the county of Los Angeles for a writ of mandate, prayed to be directed against Thomas J. Kirk, Superintendent of Public Instruction. Denied.

J. D. Fredericks, Dist. Atty., and Hartley Shaw, Chief Deputy, for petitioner. U. S. Webb, Atty. Gen., for respondent.

ANGELLOTTI, J. This is an application for a writ of mandate compelling the Superintendent of Public Instruction of the state, in making his apportionment of the state school fund to the various counties, to include and consider, as a part of the average daily attendance of the schools of plaintiff, the attendance of children between the ages of four and five years, who have been regularly admitted to the kindergarten classes established by the educational authorities of certain cities of plaintiff county. It appears from the petition that defendant proposes to include the attendance on such classes of children between five and six years of age, but, in view of his conclusion as to the effect of certain provisions of our Codes, has determined that children between the ages of four and five years should not be included. We do not deem it necessary to consider the argument relative to this position of the defendant, for we have concluded that the point made by the Attorney General upon the argument, to the effect that under our law the attendance upon kindergarten classes cannot be considered as a part of the attendance for purposes of apportionment of the state school fund, is well made. The rule laid down by the Legislature for the guidance of the Superintendent of Public Instruction in the apportionment of the state school fund, is to be found in section 1532 of the Political Code, as amended March 18, 1905. It is there declared as follows, viz.: "It is the duty of the Superintendent of Public Instruction: * * * Fourth. To apportion the state school fund; * * * In apportioning said fund he shall apportion to every county and to every city and county two hundred fifty dollars ($250) for every teacher determined and assigned to it on school census by the county or city and county school superintendent for the next preceding school year, as required; * * * and after thus apportioning two hundred fifty dollars on teacher or census basis, he shall apportion the balance of the state school fund to the several counties or cities and counties according to their average daily attendance as shown by the reports of the county or city and county school superintendents for the next preceding school year."

The question presented, it will thus be seen, is as to the meaning of the words "average daily attendance" as used in this section. It is admitted that in view of the provision of section 6 of article 9 of our Constitution, declaring that "the entire revenue derived from the state school fund and from the general state school tax shall be applied exclusively to the support of primary and grammar schools," the corresponding provisions of sections 1622 and 1861, Pol. Code, and the decision of this court in Stockton School District v. Wright, 134 Cal. 64, 66 Pac. 34, only the attendance upon the primary and grammar schools is included within the words "average daily attendance" as used in this section. It was clearly shown in the case cited, where a similar provision regarding apportionment of state school moneys was construed, that it could never have been intended to include attendance upon other schools, such as high schools or evening schools, for the maintenance of which no part of the state school money could, under the law, be used. Plaintiff's case must therefore rest upon its claim that the kindergarten classes are, under the law, part and parcel of the primary schools of the state, that state school money may be appropriated to their maintenance, and that attendance thereon is attendance upon "primary schools," within the meaning of that term as used in the constitutional provisions quoted above. This is, in fact, the claim upon which plaintiff rests its case. The nature and object of kindergarten classes were quite fully discussed in the case of Sinnott v. Colombet, 107 Cal. 187, 40 Pac. 329, 28 L. R. A. 594. It was there shown that the term "kindergarten" was devised to apply to a system elaborated for the instruction of children of very tender years, which, by guiding their inclination to play into organized movement, and investing their games with an ethical and educational value, teaches, besides physical exercises, habits of discipline, self-control, harmonious action and purpose, together with some definite lesson of fact. It is apparent that the work contemplated by such a system is purely preliminary to, and entirely different in character from the ordinary work of the common school; and is, in fact, designed to fit very young children, whose minds and bodies are, solely because of their tender age, not yet capable of the instruction contemplated in an ordinary school, for such school work.

It may be conceded that the work contemplated is of such a character that it might, to some extent, be included by the Legislature in the general primary school system of the state, just as it may be conceded that the Legislature may extend the general grammar school course so as to include some subjects that have hitherto been pursued only in the more advanced schools, such as high schools But the statutory provisions upon the subject of the kindergarten make it clear that the Legislature has not made the same a part of the "system of common schools, by which a free school shall be kept up and supported in each district at least six months in every year," which, by section 5 of article 9 of the Constitution, the Legislature is required to provide, but, at most, has made it only a part of the "public school system" described in section 6 of the same article, in the same way that high schools, evening schools, normal schools, and technical schools established directly by the Legislature, or by municipal or district authority, are parts of such public school system. The two constitutional provisions cited, taken together, contemplate (1) the establishment of a uniform system of "common schools," including solely the primary and grammar schools, which shall be applicable and mandatory in every school district of the state, as to which all local or special laws are expressly forbidden (Const. subd. 27, § 25, art. 4), and to the support of which the entire revenue derived from the state school fund and the general state school tax shall be exclusively applied; and (2) the establishment, either by the Legislature or by municipal or district authority, under statutes authorizing the same, of other schools, such as high and technical schools, which, however, can in no degree, be supported from the state school fund, but must obtain their whole support from other sources. The intention of the framers of the Constitution to devote the whole of the revenue of the state school fund and the general state school tax, exclusively to the support of the schools included in the first class mentioned above, viz., those which are known as "common schools," and which by the Constitution are required to be maintained in every district of the state, is too clear to admit of question.

Coming to a consideration of the only existing statutory provisions relative to kindergarten schools, we find the following, viz.: Section 1663, Pol. Code, provides that "the public schools of California, other than those supported exclusively by the state, shall be classed as high schools, technical schools, and grammar and primary schools [including kindergarten classes], and no teacher shall be employed to teach in any school if the certificate held by the teacher is of a grade below that of the school or class to be taught: * * * Provided that nothing herein contained shall be construed as prohibiting the employment of any person holding a valid special certificate for kindergarten work heretofore granted * * * as a teacher in any kindergarten class of a primary school. * * *" Section 1662, Pol. Code, provides that "every school, unless otherwise provided by law, must be open for the admission of all children between six and twenty-one years of age residing in the district: * * * Provided, that in cities and towns in which the kindergarten has been adopted or may hereafter be adopted as part of the public primary schools, children may be admitted to such kindergarten classes at the age of four years." * * * Section 1617, Pol. Code, provides that "the powers and duties of trustees of school districts, and of boards of education in cities, are as follows: * * * Ninth. To exclude from schools children under six years of age: Provided that in cities and towns in which the kindergarten has been adopted, or may hereafter be adopted, as a part of the public primary schools, children may be admitted to such kindergarten classes at the age of four years."

These are the only provisions relative to the kindergarten that are to be found in our statutes. They show, at most, an intention on the part of the Legislature to authorize the maintenance by any district, as its option, of kindergarten classes, for the doing of a special work preliminary to the beginning of what is generally designated as primary school work. The fact that it is entirely optional with any district to do or not to do this preliminary special work is alone sufficient to exclude kindergarten classes from the uniform and mandatory system of common schools called for by section 5 of article 9 of the Constitution; and, consequently, from the term "primary and grammar schools," as those words are used in section 6 of the same article, in relation to the use which may be made of the general state school funds, and relegate them to that portion of the "public school system," which includes schools constituted by municipal or district authority, and maintained from other sources. In view of this fact, the fact that the Legislature may have declared that when the kindergarten is adopted by any district, it shall be a part of the public primary schools, is unavailing, so far as the question under consideration is concerned. Such a declaration might make it a part of the public school system, maintainable from other sources than the state fund, but could not operate to bring it within the uniform and mandatory system of common schools applicable in every district, and to the support of which the general state funds must be exclusively applied, any more than could a declaration in regard to a technical or high school established by a district, to the effect that the same, if established, shall be a part of the public grammar schools, make such school a part of such system. It must be borne in mind that we are not in any way questioning the power of the Legislature to add to or take from the course of study to be pursued in the "common schools" of the state, but are simply discussing the status of a system useful only for the training of children, who have not attained the ordinary school age, which it is left optional with a district to adopt or not to adopt, in its relation to the "common schools" of the state, to which alone any portion of the general state fund may be devoted, and our conclusion is that it is no more a part of such common schools than is the high or technical school. Under these circumstances, the case of Stockton School District v. Wright, supra, is conclusive against plaintiff's claim.

We have no disposition to question the correctness of the decision in Sinnott v. Colombet, supra. That case involved the question as to the right of a teacher holding a special certificate for kindergarten work, to be paid for her services in teaching kindergarten classes from the "grammar and primary school fund" of the city of San José, which fund consisted of money levied and collected by said city for school purposes within its limits other than for the maintenance of high schools. The kindergarten system had been adopted by the city board of education as a special study to be taught in the public schools of said city. There was no question in that case as to whether the kindergarten so adopted had become a part of the "common school system" of the state, for the support of which general state school money could be used; and that question was in no way discussed. The decision, in effect, goes simply this far, that when a city has adopted this special system, the kindergarten becomes a part of the primary schools of such city, to the extent that it may legally be maintained at the expense of the city, just as a high or technical school may be so maintained, and does not compel a conclusion that the adoption by a district of this special system makes it a part of the "common schools" of the state, or a part of the "primary schools" of the state, within the meaning of those words as used in the Constitution. To construe the decision as warranting any such conclusion, would, in our judgment, make it clearly opposed to the plain intent of the Constitution. We are inclined to the opinion that the language of section 6 of article 9 of the Constitution is broad enough to authorize provision by the Legislature for the establishment by districts, at their option, of kindergarten schools, as a part of the public school system of the state, supported from other sources than general state school money. At any rate, there is therein no express prohibition of any such provision, and the case of Sinnott v. Colombet, supra, is authority for the proposition that this may be done.

The conclusion we have reached probably avoids all constitutional objections that may be successfully made to the legislation relative to the kindergarten. Construed in this way, such legislation does not conflict with the requirements of the Constitution for a uniform system of common schools in every district of the state, for which alone the general state school money shall be used. This construction, we think, also overcomes the objection that if the kindergarten law is applicable only to "cities and towns," it is violative of other provisions of the Constitution relative to local or special laws. Regarding the kindergartens as a special mode of education to be adopted and maintained at their own expense by such communities as desire them, there appear to be natural and intrinsic reasons which would warrant legislation making provision for their establishment in cities and towns, for we cannot conceive that there could be any demand for or any possibility of the successful practical working of such a system, outside of the centers of population, such as cities and towns, where there are a sufficient number of children of kindergarten age near enough to the school to avail themselves of the privilege thereof.

The alternative writ of mandate heretofore issued is discharged, and the application for a peremptory writ is denied.

We concur: McFARLAND, J.; VAN DYKE, J.; HENSHAW, J.; LORIGAN, J.; BEATTY, J.

SHAW, J., deeming himself disqualified, does not participate in the foregoing.

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148 Cal. 407

HUBBS & MINER DITCH CO. v. PIONEER WATER CO. (Sac. 1,059.)

(Supreme Court of California. Jan. 2, 1906.)

WATERS—APPROPRIATION—PRESCRIPTION.

Where for nine years an appropriator of water continuously diverted a certain amount of water, which deprived an appropriator lower on the stream of the full quantity appropriated by him, and the ditch of the former was maintained continuously and uninterruptedly under a claim of right, and during that time the diversion was not disturbed by the lower appropriator, the upper appropriator acquired a prescriptive title to the use of such amount of water.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, §§ 13–15, 143–152.]

In Bank. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by the Hubbs & Miner Ditch Company against the Pioneer Water Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Alfred Daggett and George G. Murry (Thomas, Gerstle & Frick, of counsel), for appellant. Charles G. Lamberson, for respondent.

BEATTY, C. J. The parties to this action are California corporations organized for the purpose, among others, of acquiring water rights, and distributing water for irrigation, manufacturing, and other beneficial uses, and the controversy arises out of their conflicting claims to priority in the appropriation of the waters of Tule river, a stream arising in the Sierra Nevada Mountains and flowing in a southwesterly direction, through Tulare county, to Tulare Lake. The defendant was incorporated in January, 1888, and the plaintiff in November, 1894. The original complaint, filed in April, 1897, was entirely superseded by an amended complaint filed in November, 1897. A supplemental complaint was filed in November, 1900, and on October 30, 1900, the case came on for a second trial upon the issues made by the amended and supplemental complaints and the answers thereto. The trial was by the court, and upon very full findings as to the facts (filed August 30, 1901) a decree was rendered by which the relative priorities of the parties were determined in the manner hereinafter stated. From that decree the defendant appealed within 60 days after the findings were filed, and in support of its appeal contends that the evidence set forth in its bill of exceptions is insufficient to justify the findings and decision of the court. It also alleges errors in the rulings of the court at the trial upon objections to evidence, and contends that the findings are at variance with the pleadings, and the conclusions of law and decree inconsistent with the findings, as well as with the facts admitted by the pleadings. It asks that the judgment be reversed and the cause remanded, with directions to the superior court to enter a decree in its favor, adjudging that it has the prior right as against the plaintiff to divert from Tule river 50 cubic feet of water per second, or at least that it has such prior right to divert 25 cubic feet per second. But, if the court should not deem it entitled to a decree upon the findings and pleadings as they stand, it asks that the judgment be reversed for errors committed at the trial, and for insufficiency of the evidence to sustain the findings and that the cause be remanded for a new trial. In view of these various contentions, it will be necessary, in the first place, to state the substance of the pleadings and of the findings and conclusions of the court.

It is alleged in the amended complaint that in the year 1862 the grantors and predecessors of the plaintiff constructed a ditch capable of carrying 15 cubic feet of water per second, by which they did actually divert that quantity of water from Tule river for the purpose of irrigating their lands, watering their stock, and for other domestic uses, and that said ditch from the date of its construction up to the year 1869 did continuously carry that quantity of water for said uses and purposes. It is alleged that a similar appropriation of 30 cubic feet of water per second was made in 1863 by means of a ditch heading in the river above the head of the first ditch, and that it continuously carried to the lands of plaintiff's grantors and predecessors that quantity of water for the uses and purposes aforesaid from the date of its construction until the year 1868. It is alleged that in 1866 the two ditches were connected, and the first ditch enlarged below the point of junction so as to carry all the water diverted by both ditches. It is alleged that in 1869 another ditch was constructed by plaintiff's grantors and predecessors heading in the river at a point between the heads of the first two ditches (of 1862 and 1863), and capable of carrying 45 cubic feet of water per second, and which was at the date of its construction connected with the first two ditches, and thereafter, until the year 1893, supplied them with water. It is then alleged that in 1893 plaintiff's grantors and predecessors constructed a new ditch heading in the river at a point about six miles above the head of the ditch of 1869, by which they diverted the 45 cubic feet of water per second previously appropriated by them, and conducted it to their lands, where it has ever since been continuously used for the purposes aforesaid, except during such times as its diversion has been prevented by the unlawful acts of defendant. It is alleged that in the year 1888 the defendant entered upon the channel of the river at a point above the head of the plaintiff's ditch of 1893 and constructed a dam by which it diverted into a ditch theretofore constructed 25 cubic feet of water, which was used by defendant for supplying power to a mill near the town of Porterville; that in 1896 the defendant enlarged this ditch to a capacity of 100 cubic feet of water per second, and thereafter, during the irrigating season of 1896, diverted that quantity of water from the stream; and, finally, that the diversion of said last-mentioned quantity of water interfered with the appropriation by plaintiff of the quantity of water which the plaintiff had been accustomed to divert by means of its said ditch from said river," etc. Upon these and other allegations, not material to the questions arising upon this appeal, the plaintiff prays the judgment of the court enjoining the maintenance of defendant's dam, enjoining any diversion of water by it and for general relief.

The defendant, by its answer to the amended complaint, denies all of the alleged acts of appropriation by plaintiff's grantors prior to the year 1888; denies that it diverted only 25 cubic feet per second in that year and alleges that ever since, and including the year 1888, it has diverted 72 cubic feet of water per second by means of its dam and the ditch connected therewith, and that it has applied the same to the use of a flouring mill and to the irrigation of agricultural lands and the watering of stock and to domestic purposes. It denies any enlargement of the ditch in 1896, or at any time, to a capacity of 100 cubic feet, or at all, and denies that it has ever, at any time, diverted any water in excess of 72 cubic feet per second, which amount it admits it is diverting, and will continue to divert, if not restrained. For a further answer and defense to the action the defendant alleges that upon its incorporation in January, 1888, it received a conveyance of the canal and water rights of a corporation formed in the year 1866, and known as the "Tule River Pioneer Water Ditch Company," which in the year 1866 had commenced, and in 1867 completed, a ditch by means of which it diverted from the Tule river, at a point several miles above the head of any of the plaintiff's ditches, the full quantity of 72 cubic feet of water per second, which said water was appropriated and distributed for the purposes of running a flouring mill, for irrigation, and watering stock; that the dam in the river was constructed at the same time and ever afterwards maintained peaceably, continuously, and uninterruptedly under claim of right adversely to plaintiff, its predecessors, and grantors from the year 1867 up to the time of its sale and transfer to the defendant in January, 1888; and that during the whole period from 1867 to 1888 the Tule River Pioneer Water Ditch Company diverted and carried away from the channel of said river, by means of said ditch and dam, 72 cubic feet of water per second, which was used for the purposes aforesaid, all of which was done openly, peaceably, continuously, and uninterruptedly, under claim of right adversely to the plaintiff, its predecessors, and grantors, and to the whole world, with the knowledge and acquiescence of the plaintiff, its grantors, and predecessors for more than five years prior to January, 1888. For further and separate answers defendant pleads various clauses of the statute of limitations, and prays for a decree establishing its prior right to 72 cubic feet of water per second, and for general relief.

No reference is necessary to the supplemental complaint and answer, which relate exclusively to changes in the course and connections of some of plaintiff's ditches made since the action was commenced. The material issues, so far at least as concerns the present appeal, are made by the amended complaint and the answer thereto. The substance of these pleadings has been fully stated in order that it may clearly appear what the points of the controversy before the superior court were. And it will be seen that the plaintiff, claiming under appropriations of 45 cubic feet of water, dating back to 1863 and earlier, makes no complaint of any act of the defendant committed prior to the year 1896, when, as alleged, it increased a diversion of 25 feet per second commenced in 1888, and thereafter continued to a diversion of 100 cubic feet per second. The diversion of this last-mentioned quantity of water—i. e., the 75 cubic feet in excess of the 25 cubic feet diverted ever since 1888—is the only injury alleged, for by that means alone was plaintiff's appropriation of the quantity of water it had been accustomed to divert interfered with. Upon the amended complaint taken pro confesso we cannot see how the court could have gone further than to enjoin the defendant from diverting more than 25 feet per second, for there is nothing in the complaint to show that the diversion of that, or twice that, quantity of water by defendant ever had deprived, or ever would deprive, the plaintiff of any part of the 45 cubic feet claimed by it. The court, however, made findings and adopted conclusions upon which it based a decree more favorable to the plaintiff than its complaint warranted. It was adjudged by the decree that the defendant is the owner and has the prior right to divert from the channel of Tule river at the head of the Pioneer ditch 15 cubic feet of water per second at all times before said plaintiff has the right to divert any water from said river; that after defendant has taken and diverted 15 cubic feet of water per second the plaintiff is entitled to take and divert 12 cubic feet of water per second from said river; that after plaintiff has diverted and taken said 12 cubic feet of water per second the defendant has the right to take and divert 10 cubic feet per second in addition to its first 15; that after this additional diversion by defendant plaintiff has the right to 3 more cubic feet in preference to defendant, and thereafter defendant has the right to divert as much altogether as 60 cubic feet. A perpetual injunction conforming to the terms of the decree follows.

The defendant's appeal is from those parts of the decree which are inconsistent with its claim of prior right to 72 cubic feet per second over any right in the plaintiff to divert any water from said river. The findings of the superior court were against the plaintiff upon its allegations as to diversions and appropriations of water prior to the year 1869. On the other hand, it was found that in 1866 the Tule River Pioneer Water Ditch Company commenced, and that in 1867 it completed, a ditch known as the "Pioneer Ditch," from a point on the river entirely above the head of any of plaintiff's ditches to the vicinity of Porterville, by means of which that company diverted 25 cubic feet of water per second from that year up to the year 1888, and distributed the same for the purpose of running a flouring mill and for the irrigation of lands along the line of the ditch for watering live stock, etc. This finding was, however, qualified as follows: "That of the quantity of water diverted by said Pioneer ditch up to the year 1888 about 15 cubic feet thereof constantly flowing day and night was used for the purpose of running the said flouring mill; and was distributed for the purpose of irrigation, for watering live stock and for domestic purposes at points along the line of said ditch, and said quantity of 15 feet per second was all that was reasonably necessary for all of said purposes." It is next found that the dam at the head of the Pioneer ditch was constructed in the fall of 1868, immediately below the point where the channel of the ditch connects with the channel of the stream, and has been maintained at the head of said ditch continuously ever since under claim of right adversely to plaintiff and its predecessors, and during all of said time its maintenance has not been interrupted or disturbed by plaintiff or its predecessors, though its existence and maintenance by defendant and its predecessor, the Tule River Pioneer Water Ditch Company, was at all times well known to plaintiff and its predecessors and grantors. It is found that the first appropriation of the waters of Tule river by the predecessors of plaintiff was made in 1869 by means of a small irrigation ditch through which they diverted about six cubic feet of water per second at first; that subsequently the area of land irrigated from this ditch was increased, and the ditch enlarged so that in 1875 12 cubic feet per second were diverted and used for irrigation, etc., during that season of the year when water flowed down the channel of Tule river to the head of the Hubbs & Miner ditch; that said river from the time the Pioneer ditch was constructed down to the commencement of this action carried no water in its channel to the head of the Hubbs & Miner ditch from and after the 1st day of August of each year until the 15th of November following, but carried water the year round down to and past the head of the Pioneer ditch; that said Hubbs & Miner ditch never had a capacity in excess of 6 cubic feet of water per second prior to 1875, and never was connected with the ditches alleged to have been constructed in 1862 and 1863. It is next found that the defendant was incorporated January 8, 1888, and that on the 13th of the same month the Tule River Pioneer Water Ditch Company sold and conveyed to it in fee simple absolute said Pioneer ditch and all the water rights, easements, etc., thereto appertaining; and thereupon defendant entered into possession of said ditch, water rights, etc.; that thereafter it increased its diversion of water until in the year 1893 it was taking from the channel of the river 50 cubic feet per second, and this increase continued until 1897, so that at the commencement of the action it was diverting 60 cubic feet per second, all of which has been used by defendant in irrigating about 3,500 acres of land and for other beneficial purposes. It is next found that after the incorporation of the plaintiff in 1894 it acquired the title to the Hubbs & Miner ditch constructed in 1869, together with all of the water rights and easements appertaining thereto; that in the year 1888 said ditch, when there was sufficient water in the channel of the river at its head, carried away 15 cubic feet per second, which was used for irrigation of 640 acres of vineyards, orchards, grain, and alfalfa. The eleventh finding is somewhat ambiguous in its terms, but I construe it to mean that the defendant never, after it became the owner of the Pioneer ditch, made any enlargement thereof prior to the fall of 1888, and that it has never at any time diverted from the river more than 60 cubic feet of water per second. The twelfth finding relates to the plea of the statute of limitations, and is as follows: "That the said Tule River Pioneer Water Ditch Company, from and including the year 1867 up to the time said Pioneer ditch was sold and conveyed to the defendant, as hereinbefore stated, diverted and carried away from the channel of said Tule river, by means of said Pioneer ditch and said dam constructed at the head thereof, 25 cubic feet of water per second, which said water was diverted and used in the manner stated in the fourth paragraph of these findings, but no more than 15 cubic feet of water per second was necessarily used in said manner for said purposes, and that the diversion of said water, to the quantity of 15 cubic feet per second, and the maintenance of said dam, was done by said Tule River Pioneer Water Ditch Company, peaceably, continuously, uninterruptedly, under a claim of right adversely to said plaintiff, its predecessors, and grantors, and to the whole world, with the knowledge and acquiescence of the plaintiff, for more than five years immediately prior to the 13th day of January, 1888, and thereafter until the commencement of this action, and the said Tule River Pioneer Water Ditch Company during all of said times paid all state and county and other taxes, which were levied and assessed upon said Pioneer ditch and said dam and the water right appertaining to said Pioneer ditch and belonging thereto." Other findings of the court relate to matters immaterial to this discussion.

The argument of appellant opens with a discussion of certain alleged errors of the superior court in ruling upon objections to evidence offered at the trial by respondent. But since these rulings, if erroneous, could have had no effect, except to render the findings somewhat less favorable to appellant than otherwise they would have been, it will be wholly unnecessary to consider them, if upon the facts found and admitted it shall be held that appellant is entitled to a decree awarding it the prior right to not less than 25 cubic feet of water per second. For, as above stated, we understand the position of counsel to be that a retrial of the issues is desired only in case such a modification of the decree cannot be made upon the record as it stands. We shall, therefore, first consider the question of modification. The claim of defendant to a prior right to 50 cubic feet per second cannot be sustained. Both plaintiff and defendant are mere appropriators of the waters of a natural stream for use on nonriparian lands, and since it is found that plaintiff made a valid appropriation of at least 12 cubic feet per second before defendant ever diverted more than 25 cubic feet per second, it is clear that defendant cannot, as an appropriator, claim a prior right to more than 25 cubic feet on any theory of the law of appropriation. Nor can he claim a superior title to a greater quantity by prescription. Five years adverse user is the period of prescription in such cases, and there is no finding that defendant diverted 50 cubic feet per second, or any definite quantity in excess of 25 cubic feet, prior to the season of 1893, which was less than five years before the commencement of the action. It is not inconsistent with the findings to suppose that defendant, as early as 1892, diverted more than 25 cubic feet per second through the Pioneer ditch, but this is a mere conjecture upon which no order can be based. All that clearly appears is that from the year 1888, down to the year 1893, defendant continually diverted and applied to beneficial uses 25 cubic feet per second. In 1893 it was using 50 feet, and thereafter increased its appropriation to 60 feet.

The claim of prior or prescriptive right to 25 cubic feet per second rests upon firmer ground. It is by no means clear that the failure of defendant's predecessors to use the entire quantity of water by them diverted in 1868, down to the year 1888, would cut their appropriation down to the quantity used. There are cases which hold that the diversion of a large quantity of water is a good appropriation of the whole ab initio, although it is not all used at first, if the design is to gradually extend the use, and that design is carried out before an adverse appropriation of the surplus below the point where it is returned to the stream. But this is a point which has not been argued, and we merely allude to it in passing. For, irrespective of any claim to priority as an appropriator, we think the findings sustain the conclusion that defendant has a perfect prescriptive title to 25 cubic feet per second. The twelfth finding above quoted does not sustain this claim, for in terms it deals only with the rights acquired by defendant's predecessor, the Tule River Pioneer Water Ditch Company, to the use of 15 cubic feet per second. But in the fourth, sixth, seventh, and other findings facts are found which include all the elements of a prescriptive title in defendant to the use of 25 cubic feet per second, superior to any right in plaintiff to any water at all. It is there found that from the year 1868 to the beginning of the action the dam by which water is diverted from the stream through the Pioneer ditch has been maintained continuously, and uninterruptedly, under a claim of right, and adversely to the plaintiff and its predecessors and grantors, and that during all of said time the maintenance of said dam was not disturbed by the plaintiff, or any of its grantors or predecessors in interest, and that its existence and maintenance by defendant and its predecessors was during all said time well known to plaintiff and its predecessors. It is found that in 1888 defendant succeeded to the title and rights of the Tule River Pioneer Water Ditch Company in and to said dam and ditch, and during that season, and ever since, has continuously diverted and applied to beneficial uses 25 cubic feet of water per second, which, by 1893, was increased to 50 cubic feet, and since that time to 60 feet. Necessarily the use of this water has been adverse to the right asserted by plaintiff and its predecessors, and actionable at all times when such use deprived them of the full quantity by them appropriated, and this, according to the findings, has happened every year between August and November, when defendant was diverting 25 feet per second through the Pioneer ditch, and no water flowed to the point of plaintiff's diversion. The authorities which support this view are numerous and uniform. We cite the following: Coonradt v. Hill, 79 Cal. 587, 21 Pac. 1099; Smith v. Hawkins, 110 Cal. 122, 42 Pac. 453; Gallaher v. Montecito V. W. Co., 101 Cal. 242, 35 Pac. 770; Spargur v. Heard, 90 Cal. 222, 27 Pac. 198; Heilbron v. Last Chance Co., 75 Cal. 117, 17 Pac. 65; Alhambra Co. v. Richardson, 72 Cal. 598, 14 Pac. 379.

The judgment of the superior court is reversed, and the cause remanded, with directions to the superior court to enter a modified decree upon the findings, awarding to the defendant, as against the plaintiff, the prior right to divert from the Tule river 25 cubic feet of water per second, after which the plaintiff will be entitled as against the defendant to the next 15 cubic feet of water per second, and the defendant against the plaintiff to the next 35 cubic feet of water per second.

We concur: McFARLAND, J.; ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J.

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2 Cal. App. 509

KESSLER v. KESSLER et al.

(Court of Appeal, Second District, California. Dec. 20, 1905.)

1. Divorce—Wife Living Apart from Husband—Justification.

The fact that a husband deposited in the name of his daughter an amount of money which constituted a small share of his estate, and that both the husband and wife were ill and nervous, and that in a quarrel he had said to her that what she would get out of his property she would have to earn, did not, in a suit by her for divorce, warrant a finding that the wife was justified in leaving the husband.

2. Husband and Wife — Husband's Duty to Support—Abandonment.

Civ. Code, § 156, makes the husband the head of the family, and provides that he may choose any reasonable place or mode of living, to which the wife must conform. By section 175 a husband, abandoned by his wife, is not liable for her support until she offers to return, unless she was justified by his misconduct in abandoning him. *Held* that, where a wife abandoned her husband without justification, he was not required to solicit her return, it being her duty to return; and until she did so he was under no obligation to support her.

3. Same—Conveyance in Fraud of Wife's Right.

A wife's right of maintenance is within the protection of Civ. Code, § 3439, making transfers to delay or defraud creditors void as against them.

4. Same—Impairment of Right—Evidence.

Inasmuch as, under Civ. Code, § 157, neither spouse has any interest in the property of the other, a conveyance of land by a husband did not affect his power to perform his obligation to maintain his wife, so as to give her any rights under section 3439, making transfers to hinder or delay creditors void as against them, where the husband had ability to earn wages and carry on business.

5. Divorce—Grounds for Relief.

In an action for divorce and alimony and to declare a trust in land conveyed by the husband, the fact that defendant owned property which he represented to be worth a certain amount, and upon the faith of which the wife married him, afforded no grounds for relief.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 37.]

6. Same—Judgment for Alimony—Appealability.

A judgment for alimony pendente lite is a final one, and appealable.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 764.]

7. Same—Appeal—Disposition.

Judgments for alimony pendente lite fell with the main judgment, though their existence was recited therein; it appearing on appeal that no final judgment for alimony or maintenance was warranted under the facts.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Suit by Celia E. Kessler against William J. Kessler and others for divorce, alimony, and to declare a trust. From a judgment for defendant denying a divorce, and for plaintiff for maintenance, and declaring a trust, all the defendants appeal. Reversed.

Rehearing denied by Supreme Court February 15, 1906.

Edwin A. Meserve and Luther G. Brown, for appellants. J. L. Murphey, for respondent.

ALLEN, J. Upon a reconsideration of this case on a rehearing we are of opinion that the judgment and order of the trial court should be reversed to the extent and on the grounds stated in the opinion originally filed, which is as follows:

Action for divorce, alimony, and to declare a trust. Judgment for defendant Kessler denying a divorce, and for plaintiff for $50 per month maintenance during her natural life, with decree that defendant Minor holds property described in complaint in trust for defendant Kessler, from which judgment of maintenance and decree declaring trust all the defendants appeal.

The court finds that plaintiff and defendant Kessler were married in 1901, and are husband and wife; that at the date of the marriage defendant was the owner of certain real property of the value of $15,000, subject to an incumbrance of $3,000; that, in addition, he was possessed of money to the amount of $1,300, and some other personal property of small value; that he had two daughters by a former marriage, one of whom is defendant Anita Minor, the other a daughter of 17 years; that shortly after the marriage the husband, preparatory to a trip to Mexico, placed the $1,300 in bank in the name of his daughter Anita, who, the court found, held the same in trust for the father. This the wife objected to, and quarrels were precipitated on account thereof; that afterwards, on or about September 12, 1902, plaintiff left defendant's home and has never since lived with him as his wife; that afterwards, on October 8, 1902, Kessler made a conveyance of all his separate estate, being the premises described in this action, to his daughter Anita Minor; that at said date he was of the age of 46 years, and had ability to earn wages and carry on business; that after the plaintiff left her home the husband invited her to return, but such invitation was not in good faith and was not accepted. She never offered at any time to return to him. In June, 1903, she commenced this action, and in her complaint specifies acts of the grossest cruelty on the part of her husband, on account of which she justified her living apart from him. The court, upon the final hearing, found none of the material allegations to be true, but, on the contrary, "that it is not true that the actions of the defendant Kessler were sufficient to constitute extreme cruelty towards plaintiff," and, further, that the following part of paragraph 7 was untrue: "That her condition became so intolerable by reason of his actions that she was forced to leave him." The only facts of any materiality found by the court in plaintiff's favor were that before the separation both parties were nervous and irritable, caused by ill health, and that upon one occasion, during a controversy over the payment to the daughter of a sum of money, defendant Kessler said to plaintiff that she would get only what she helped to earn, and nothing more. But the court further finds that at this time, or shortly after this quarrel, a reconciliation took place, and each mutually forgave their unkindness toward each other. From these facts the trial court, as a conclusion of law, determined that the wife was justified in leaving her husband, and, while it denied the divorce, rendered a judgment in plaintiff's favor for $50 per month as for her separate maintenance, and in such judgment found that certain other judgments, aggregating $1,250, for alimony pendente lite, were unpaid, all of which sums were made a charge upon the premises conveyed to Mrs. Anita Minor, and the deed to her was declared to be in fraud of plaintiff's rights, and as to plaintiff Mrs. Minor held only the legal title in trust for her father, and directed a sale of the premises upon default of payment.

The first contention of appellants is that the conclusion of law and judgment that plaintiff was justified in leaving her husband have no support in the findings. With this we quite agree. The fact that the husband would deposit in his daughter's name an amount of money then constituting but a small share of his estate, and that both husband and wife were sick and nervous, and that in a quarrel he had said to her that what she would get out of his property she would have to earn, were in themselves no justification for the wife's abandonment, were we even to disregard the subsequent forgiveness and reconciliation. The judgment for separate maintenance was unwarranted. By section 156, Civ. Code, the husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto. Section 175, Civ. Code, provides: "A husband abandoned by his wife is not liable for her support until she offers to return, unless she was justified by his misconduct in abandoning him." There is nothing in the record to indicate that the place or mode of living provided by the husband was not all that could be desired, and it does appear that she abandoned him and his home without justification. The wife having so abandoned the husband, he was not required to solicit her return, and that he did so, either in good or bad faith, is not material. Under our Civil Code it was the duty of the erring one to offer to return, and until she did so no obligation of support rested upon the husband, and no violation of duty arose warranting a judgment against him.

Appellant Minor next contends that, there being no violation of the obligation of support, plaintiff was not a creditor and not interested in the husband's separate estate, and thereupn the decree against her and her property was without authority. With this we also agree. Section 155 of the Civil Code provides: "Husband and wife contract toward each other obligations of mutual respect, fidelity and support." This support, contracted by the husband, is a duty to be performed subject to the provisions of sections 156 and 175, heretofore cited. Until that obligation is violated no cause of action arises in favor of either. While it is true, as stated in Murray v. Murray, 115 Cal. 273, 47 Pac. 37, 37 L. R. A. 626, 56 Am. St. Rep. 97, that the right of maintenance is so far within the protection of section 3439, Civ. Code, that it avoids transfers made with intent to defeat that right, yet it must follow as a natural consequence that, in order to maintain an action in equity to enforce such right, the plaintiff should show, and the court should find, that her conduct had been such as to entitle her to the right of separate maintenance. Respondent, however, claims that by the conveyance of his property the husband placed it without his power to perform the obligation of maintenance. This cannot be truthfully said of one able to earn wages and carry on business. To hold otherwise would be to say that every man without property violates his marriage obligation as soon as it is taken, and the wife may leave him upon the theory that he has no ability to perform his obligation of support. The everyday observation of life teaches us that the indulgent husband and father, who is diligent in caring for his wife and family is more frequently found among those whose only revenue is derived from their hands or brains, than among those possessed of means, curtailing every expense that they may add more to a present sufficiency. In this state, under section 157 of our Civil Code, "neither spouse has any interest in the property of the other." Hence it follows that, if the obligation of support was not affected by this transfer to the daughter, the plaintiff had no interest which could be affected. We do not regard with favor the contention of respondent that the fact that Kessler owned property which he represented to be worth $15,000, and upon the faith of which plaintiff married him, affords ground of relief. Purely mercenary marriages may be, and undoubtedly are, frequently contracted; but, when these unnatural alliances are sought, the law wisely provides for a marriage settlement, or antenuptial contract, out of which rights may be established, and in the absence of such agreement the general property laws of the state control. Where the right of support has not been affected by the transfer of property in which she has no other interest, no cause of action lies in the wife to disturb conveyances thereof. Greer v. Greer, 135 Cal. 121, 67 Pac. 20. Nor can any rule suggested in Volkmar v. Volkmar (Cal. Sup.) 81 Pac. 413, have application in this action.

Nor, in our opinion, did the judgments for alimony pendente lite entitle the plaintiff to a decree as against defendant Minor. These orders were final judgments and appealable. Sharon v. Sharon, 67 Cal. 198, 7 Pac. 456, 635, 8 Pac. 709. When granted, they have nothing to do with the final judgment in the case, and will not be affected by it. Baker v. Baker, 136 Cal. 304, 68 Pac. 971. The mere recital in the final judgment and decree in this case of the existence of such former judgments did not give to them any additional vitality or force. Had the findings and judgment been correctly rendered in favor of the plaintiff, these previous judgments rendered in the same action might very properly have been included in the order directing the application of the proceeds of the sale made in the event of default of the payment of the final judgment for maintenance; but, there being no final judgment for alimony or maintenance possible under the facts, as a consequence no decree or order affecting the real property of the defendant Minor could be made. These previous judgments and any orders in relation thereto were but incidents of a final judgment, and the orders in relation thereto must fall when the main judgment fails.

We are further of the opinion that it could not be said in any event, under the facts of this case, that the conveyance was made to defeat these judgments pendente lite. For, as before shown, the wife was not a creditor, and had no cause of action against her husband, either at the date of the filing of the complaint or the final decree, and how can one be said to have made a conveyance to defeat a claim not in existence, or to defeat the collection of a judgment given as expense money in an unsuccessful attempt to establish such claim? In our opinion, plaintiff had no claim or interest in the real estate standing in the name of Mrs. Minor at the date of the final decree, and had no right to question the conveyance to her, and the decree and judgment of the court in that behalf have no support in the findings.

Judgment reversed, with directions to enter a judgment upon the findings in favor of defendant Minor; also, judgment in favor of defendant Kessler in conformity with this decision.

I concur: GRAY, P. J.

SMITH, J. I concur in the judgment, and, generally, in what is said in the opinion as to the judgment of the lower court for maintenance. I concur, also, in the conclusion of the majority of the court as to attorney's fees and alimony pendente lite on the grounds stated in the opinion.

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2 Cal. App. 329

McCONNELL v. FOX et al.

(Court of Appeal, Second District, California. Dec. 2, 1905.)

CONTINUANCE—ABSENCE OF PARTY—SHOWING—SUFFICIENCY.

On a motion for a continuance by defendant in a suit to quiet title, it appeared that, though the case had been at issue for nine months, he left the state after it was set for trial and about 20 days prior to the trial, his reason for absenting himself being that he desired to sell certain bonds for a city; but there was no showing that it could not have been attended to by some other person, or that his efforts in in such direction could not have preceded or followed the date of the trial. Defendant's claim to the land did not appear from the answer, and the showing for continuance consisted of an affidavit of defendant's attorney and a telegram from defendant. *Held*, that there was no abuse of discretion in denying the motion.

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by Lee A. McConnell against Edwin R. Fox and others. Judgment for plaintiff. From an order denying defendant Fox a new trial, he appeals. Affirmed.

Cole & Cole, for appellant. F. C. Austin and D. M. McDonald, for respondent.

GRAY, P. J. This is an action to quiet title. The plaintiff had judgment, and defendant Fox appeals from an order denying him a new trial.

The sole ground urged for reversal is that the court erred in denying defendant's motion for a continuance. We think the matter of continuance was in the discretion of the trial judge, and that he did not abuse such discretion. The showing was that, though the case had been at issue for nine months, the defendant voluntarily went to New York after the case was set for trial and some 20 days prior to said trial. His reason for absenting himself is stated to have been that he desired to negotiate and sell certain bonds for the city of Los Angeles in the money centers of the East. There is no showing that this could not have been attended to for the city to its greater advantage by some other person, nor does it appear to what extent the defendant's presence in New York would promote the sale of the bonds or was necessary thereto. Nor is it shown that his necessary presence in New York could not have preceded or followed the date of this trial without injury to himself or the city of Los Angeles. The showing made is weak, much weaker than in the case of Wilkinson v. Parrott, 32 Cal. 102, and there the action of the trial court was upheld upon the ground that the refusal of the court to postpone the trial upon such a showing did not amount to an abuse of discretion. Besides, there are several features of the case that naturally make us hesitate to interfere with the action of the court in denying a new trial. The suit is to quiet title. What the defendant's claim to the land consists in nowhere appears. He contents himself in the answer with denying that he "has no estate, right, title, or interest in said land and premises, or in any part thereof." This is the only hint we have that he is in any way interested in the result of the suit. The showing for continuance consisted of an affidavit of defendant's attorney and a brief telegram from defendant, and the affidavits of plaintiff in rebuttal; and, though these had proven insufficient to secure the favorable action of the court in the first instance, yet nothing was added to them on the motion for a new trial made some nine months later. No affidavit of the defendant himself was at any time presented to the court, and, of course, the material parts of his attorney's affidavit must of necessity have been based upon hearsay. Of course, if the defendant's only purpose was delay, most anything would do, but, to invoke successfully the favorable discretion of the court, a stronger showing should have been made.

The appeal is without merit. The order is affirmed.

I concur: ALLEN, J.

SMITH, J. I concur in the judgment. I am not prepared to say that on the showing made by the appellant the case should not have been continued, or that the denial of a continuance by the court was not an abuse of discretion. But in the absence of the evidence, or of any showing to the contrary on the motion for new trial, either by the affidavit of the defendant or otherwise, I think it must be presumed, in support of the order of the trial court, that the case was fairly tried, and the appellant in no wise injured by his absence, and that there was no error or abuse of discretion in the denial of the motion for new trial.

2 Cal. App. 195

DAVIS v. BAKERSFIELD OIL & STOCK EXCH.

(Court of Appeal, Second District, California. Nov. 16, 1905.)

SET-OFF AND COUNTERCLAIM — ADVANCES — PARTIES.

Certain associates doing business under the same name and style afterwards adopted by a corporation organized by them, and keeping a bank account under the same name, agreed to advance to Y. $50 per month, and accept in payment stock of a corporation thereafter to be organized at par. Y. executed receipts for such monthly advances, which were paid by the bank in which the association kept its funds. The corporation, after its organization, opened an account in the same bank, under the same name, and Y., for eleven months thereafter, continued to present vouchers for $50 each month for such advances, which the bank paid. *Held*, that such advances were not available by the corporation as a counterclaim in an action against it on a claim for Y.'s unpaid salary, which had been assigned to plaintiff.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by George J. Davis against the Bakersfield Oil & Stock Exchange. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Smith & Allen, for appellant. Emmons & Irwin and C. E. Young, for respondent.

ALLEN, J. Action by plaintiff, as assignee of one Young, to recover salary due Young from defendant. Judgment for plaintiff, from which, and an order denying a new trial, defendant appeals.

The only question presented upon this appeal which is urged by counsel is as to the sufficiency of the evidence to support the finding that "it is untrue that the defendant advanced to C. E. Young the sum of $1,457.56, or any other sum." The evidence discloses that a number of persons, prior to May, 1901, were engaged in business under the same name and style afterwards adopted by a corporation organized by them; that these persons kept a bank account under such name, and entered into an agreement with Young that they would advance him $50 per month, and accept in payment therefor stock of the corporation thereafter to be organized at its par value; and that upon the faith of this agreement Young executed receipts for such monthly advances, and the same were paid by the bank in which the association kept its funds. The corporation, after its organization, opened an account in the same bank under the same name, and Young, for 11 months thereafter, continued to present his vouchers for $50 during each month on account of such agreed advances, and the same were paid by the bank, but out of which fund it does not with certainty appear. It is not denied that a subsequent agreed salary of $150 per month to Young was unpaid to the extent of $375, and that the same, for value, was assigned to plaintiff, for which judgment was awarded.

Appellant's contention, however, is that these advances of $50 per month were made in fact by the corporation, through its president, and constituted a valid counterclaim against plaintiff's demand for unpaid salary. This proposition is untenable. The court was justified in finding, as it did, that the corporation did not make the advancements and had nothing to do with the contract in relation thereto. If the fact were conceded that the bank made the payments out of the wrong account, and charged up the vouchers to the corporation when they should have been charged to the association, still it would not form the basis of an action in favor of the corporation and against Young, and especially against one who, in good faith, for value, had purchased the salary claim. But, as before stated, it is not clear that the bank even paid the money out of the corporate fund. Some surmises of the president of the bank to that effect are not convincing.

There is no prejudicial error in the record, and the judgment and order are affirmed.

We concur: GRAY, P. J.; SMITH, J.

7 Cal. Unrep. 245

Ex parte OATES.

(Court of Appeal, Third District, California. Nov. 10, 1905.)

HABEAS CORPUS—INABILITY OF JUSTICES TO AGREE ON JUDGMENT—DISMISSAL.

Rule 33 (78 Pac. xiii), providing that when the judges of a District Court of Appeal fail to agree on a judgment in any cause, and their opinions have been forwarded to the Supreme Court, that court will order such cause to be transferred to the Supreme Court or to another District Court of Appeal, to be there heard and determined, does not apply to habeas corpus proceedings; and where three of the justices fail to agree in such proceeding, as required by Const. art. 6, § 4, the writ must be dismissed.

Application of W. W. Oates for a writ of habeas corpus. Writ dismissed.

W. W. Middenoff, for petitioner. E. J. Williams, for respondent.

CHIPMAN, P. J. The petition for the writ was ordered to be heard by the court. Under the provisions of the Constitution the concurrence of three justices shall be necessary to pronounce a judgment. Article 6, § 4, Const. Rule 33 (78 Pac. xiii), provides that when the judges of a District Court of Appeal fail to agree on a judgment in any cause, and their opinions have been forwarded to the Supreme Court, that court will order such cause to be transferred to the Supreme Court or to another District Court of Appeal, to be there heard and determined. We do not think this rule applies to habeas corpus proceedings. In the matter now before us the three justices constituting the court are unable to agree upon the question as to whether or not the court before which the contempt proceedings were brought had jurisdiction.

The writ is therefore dismissed, and the petitioner remanded to the custody of the sheriff of San Joaquin county.

We concur: BUCKLES, J.; McLAUGHLIN, J.

2 Cal. App. 143

KING v. ELTON et al.

(Court of Appeal, Second District, California. Nov. 9, 1905.)

NEW TRIAL—VERDICT—IMPEACHMENT — AFFIDAVITS—SUFFICIENCY.

The affidavits of two credible jurors in behalf of one moving for a new trial to the effect that there had been a quotient verdict, as against seven jurors making affidavits for the other party, was sufficient to sustain an order granting a new trial, especially where the statements contained in the affidavits of the two were not expressly denied or met by any inconsistent statement.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Mortimer A. King against Charles Elton and others. From an order granting defendants a new trial, plaintiff appeals. Affirmed.

Stephens, Sherer & Neighbours, Burrell D. Neighbours, and Albert Lee Stephens, for appellant. W. B. Matthews, Leslie Hewitt, and Hartley Shaw, for respondents.

SMITH, J. This is an appeal from an order made after a judgment for the plaintiff granting the defendants a new trial. The motion was granted solely on the ground of misconduct of the jury, "in that the jurors were induced to assent to said verdict by a resort to the determination of chance."

The verdict was given by 9 jurors out of 12, and the order was based on the affidavits of two of the nonconcurring jurors, which were to the following effect: That after all nine jurors had agreed upon a verdict "it was thereupon moved by one of said nine jurors that each juror should put down privately on a slip of paper the amount which he favored for the verdict; that these several amounts should be added together and their sum divided by twelve, and that the quotient so obtained should be the amount of the verdict; that said motion was agreed to and carried by the votes of nine jurors"; that this plan was carried into effect, resulting in the adoption of the amount of the verdict, "which amount was then at once, without further discussion and consideration, in pursuance to said previous agreement, accepted by said nine jurors as to the amount of the verdict, and entered in the form of verdict provided by the court." To rebut these affidavits, the affidavits of 7 of the concurring jurors were filed, and it is claimed that these contradict the affidavits filed by defendants, and that the preponderance of the evidence was so great that it was an abuse of discretion in the court to grant the motion. But we think neither point can be sustained. The statement of two credible witnesses against 7 would have been quite sufficient to sustain the decision of the court; and in this case the statements are not expressly denied, nor is there anything inconsistent with them in the statements of defendants' witnesses.

The order appealed from is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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2 Cal. App. 146

BANK OF PASO ROBLES v. BLACKBURN.

(Court of Appeal, Second District, California. Nov. 9, 1905.)

Bills and Notes—Pleading—Complaint—Defensive Matter.

In a suit on a note secured by mortgage, which mortgage had been extinguished by agreement between the parties, it was not necessary for plaintiff to allege the execution of the mortgage or its extinction; Code Civ. Proc. § 437, providing that defendant's answer shall contain any new matter constituting a defense.

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by the Bank of Paso Robles against Frank J. Blackburn. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Bishop, Wheeler & Hoefler, Louis Lamy, and R. W. Putnam, for appellant. W. H. Spencer, for respondent.

SMITH, J. The suit was brought on the promissory note of date March 12, 1900, set out in the complaint, which is in the ordinary form. One of the defenses set up in the answer is that the note was secured by a mortgage on certain growing crops, and that plaintiff took possession of the mortgaged property and sold the same. The court finds that the mortgage was executed to secure the note in suit, "and also to secure to plaintiff the payment of such other moneys as might thereafter be advanced," etc.; that prior to November, 1900, plaintiff advanced to defendant, under the provisions of the mortgage, the sum of $400, of which $356.80 has been repaid and no more; and "that more than 2½ years prior to the commencement of this action all the security given by defendant to plaintiff to secure the payment of said note and said advances had, without any act of the plaintiff, become valueless," etc. From the evidence it appears that by an agreement between the defendant and the plaintiff's agent the mortgaged crop was transferred by the former to the latter in satisfaction of the amount due for advances.

The only point made by appellant is in effect that it was incumbent upon the plaintiff to allege the execution of the mortgage and its subsequent extinction, and that the complaint was fatally defective on this account. But the point is obviously untenable for two reasons: The facts referred to constituted no part of the plaintiff's cause of action, and come clearly within the definition of "new matter" (Code Civ. Proc. [Revisers' Ed.] § 437, and authorities cited in note on page 370 et seq.); and, were it otherwise, the error would be immaterial.

The judgment is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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2 Cal. App. 181

COUSON v. WILSON.

(Court of Appeal, First District, California. Nov. 16, 1905.)

1. Easements — Injuries to Ways — Purchaser of Dominant Estate—Damages.

A person injuring a way appurtenant to land is liable to a subsequent purchaser of the land only for the damage sustained by him since his purchase.

2. Same—Evidence—Admissibility.

Where, in a suit by a purchaser of land to which a road was appurtenant for injury to the road resulting from the removal of culverts, it was shown that the culverts were removed in November, 1900, and that the purchaser purchased the land in September, 1901, the court erred in overruling an objection to a question asked the purchaser as to what the damage had been to the road since the removal of the culverts, as against the objection that it did not limit the damage done to the road since the purchaser became the owner of the land.

3. Appeal—Harmless Error.

That the effect of the question could have been obviated by cross-examination did not cure the error.

4. Easement — Injuries to Ways—Finding of Damages—Evidence—Sufficiency.

In a suit by a purchaser of land to which a road was appurtenant, for injury to the road by reason of the removal of culverts therein, the evidence showed that the culverts were removed in November, 1900, and that the purchaser became the owner of the land in September, 1901. He testified that the road had been damaged $300. A witness testified that it would take $150 to replace the culverts. There was no evidence of any damage to the road after the purchaser became the owner of the land. *Held*, that a finding that the road of the purchaser was damaged $150 was not supported by the evidence.

5. Same — Findings — Construction — Materiality.

A finding, in a suit by a purchaser of land to which a road was appurtenant for injury thereto by reason of the removal of culverts therein, that the road of the purchaser had been damaged a specified sum, if construed as a finding of the damage to the road by the removal of the culverts, was irrelevant, unless it showed that the damage occurred while the purchaser was the owner of the road.

6. Appeal—Record—Bill of Exceptions—Presumptions.

A bill of exceptions is presumed to contain all the evidence material to errors specified, and, in case there is any evidence which will overcome that in the bill, it is the duty of the respondent to cause it to be incorporated therein.

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by W. B. Couson against John William Wilson. From a judgment for defendant, plaintiff appeals. Reversed.

J. E. Gardner, for appellant. Hugh R. Osborn and Benj. K. Knight, for respondent.

HARRISON, P. J. The plaintiff is the owner of a tract of land in Santa Cruz county bordering upon the county road leading from Watsonville to Santa Cruz, upon which there is a right of way appurtenant to an adjacent tract of land known as the "Wilson Ranch," and extending therefrom to the county road. For the purpose of enjoying this right of way, the owners of the Wilson ranch constructed a roadway about 18 years ago across the plaintiff's land, with several culverts therein, for the purpose of carrying below the road the surface water that would otherwise accumulate upon the upper or higher slopes of the land. In November, 1900, the plaintiff destroyed these culverts, with the result that thereafter the water flowed along the road, washing it out and making it almost impassable for vehicles, and carrying much débris down upon the lower portion of the land. The defendant became a part owner of the Wilson ranch in September, 1901, and thereupon entered into possession thereof, and thereafter used the said roadway in passing back and forth between his ranch and the county road. After he went into possession of the ranch the plaintiff demanded of him that he repair the roadway and fill it in and grade it in such a manner that the surface water would not be cast upon the lands below the road; and upon his refusal to do so brought this action to have the road declared a nuisance, and to recover damages sustained by him by reason of its defective condition. The defendant, in his answer to the complaint, and also by way of cross-complaint against the plaintiff, set forth many of the above facts, and alleged that by reason of the acts of the plaintiff in destroying the said culverts and making the road impassable he had sustained damage by being delayed in marketing his produce and in the enjoyment of his right to pass along the road, and that the road belonging to him had also been damaged in the sum of $300. The cause was tried by the court, and, in addition to finding the facts above set forth, it also found that the plaintiff had not been damaged by any of the acts of the defendant, and that defendant had not sustained any damage by being delayed in marketing his produce or in the enjoyment of his right to pass over the road, but that he had been damaged in the sum of $150 by reason of the wrongful removal of the culverts by the plaintiff. Judgment was thereupon rendered in favor of the defendant and against the plaintiff for the sum of $150, with a perpetual injunction against the plaintiff from in any way interfering with the defendant's free use and enjoyment of the road. A motion for a new trial was made by the plaintiff and denied, and from this order the present appeal has been taken.

At the trial of the cause the defendant was called as a witness in his own behalf, and, after testifying that the plaintiff had removed the culverts in November, 1900, and that he had become the owner of the Wilson ranch in September, 1901, was asked: "What has been your damage, if any, Mr. Wilson, to the road since the tearing out of these culverts one year ago last November?" To this question the plaintiff objected on the ground that it was incompetent, irrelevant, and immaterial, and that the question was not limited to the damage done to the road since the defendant became one of its owners. The objection was overruled, and an exception taken by the plaintiff to the ruling of the court. The objection to this question should have been sustained. The plaintiff is not liable to the defendant for any injury done to the road while it was the property of another, nor is the defendant entitled to any damages which he had not himself sustained. He was a stranger to the property when the culverts were destroyed, and could recover from the plaintiff only such damage as the plaintiff had caused him after he became the owner, and when this objection was pointed out the court should have directed the defendant to limit the inquiry as suggested by the objection. The contention of the respondent that the effect of the question could have been obviated by cross-examination does not cure the error. If no objection had been made to the question, the appellant would have had the right to show in his defense that the damage was caused at a time when he would not be liable therefor, but he had also the right to insist that the respondent should show that it was caused at a time when he would have been liable. The burden was upon the respondent to establish his right of recovery by competent and relevant evidence. He was not entitled to introduce irrelevant evidence and throw upon his adversary the burden of overcoming its effect by showing its irrelevancy.

Although the defendant was thus asked, "What has been your damage to the road since the tearing out of the culverts?" he only testified in reply that "the road has been damaged to the extent of $300." No other evidence was given of any damage sustained by him, and the court accordingly found against such allegations of individual damage. He further testified that within a week after the culverts were taken out there were heavy rains, and that that was when most of the damage was done to the road; that he based his testimony of $300 damages on the cost of repairing the road and fixing it up again as it was; that it had not been repaired at all. Another witness testified that it would cost $150 to replace the culverts. There was no evidence of any damage done to the road by the plaintiff, or that the road had been in any respect damaged after the defendant became an owner of the Wilson ranch, and it must be held that the evidence was insufficient to sustain the finding of the court that "the defendant has been damaged in the sum of $150 by the wrongful removal of the culverts by the plaintiff," or its other finding that, by reason of the wrongful removal of the culverts by the plaintiff, "the road of the defendant" has been damaged in the sum of $150. There was no "road of the defendant" when the culverts were removed; but, if this latter finding is to be construed as simply declaring the damage done to the road by the removal of the culverts, then it is irrelevant to any right of the defendant, unless shown to have been caused while he was the owner of the road.

The respondent is in error in suggesting that this finding is to be sustained upon the ground that there may have been other evidence in its support than such as is set forth in the bill of exceptions. It is to be presumed that the bill of exceptions contains all the evidence given at the trial which is material to the points specified as error. Abbey Homestead Ass'n v. Willard, 48 Cal. 614; Judson v. Lyford, 84 Cal. 505, 24 Pac. 286. If there was any evidence which would explain or overcome that set forth in the bill, it was the duty of the respondent to cause it to be incorporated therein.

Certain other findings are objected to as not sustained by the evidence—for instance, the finding that the defendant is the "sole owner" of the Wilson ranch, or that he was an owner at any time prior to September, 1901, or that the defendant is the owner of a private road, instead of a right of way over the lands of the plaintiff, or that he is entitled to have the same left free and unobstructed by the plaintiff; but, as the order denying a new trial must be reversed, and these objections may not exist when another trial shall be had, it is unnecessary to give them further consideration.

The order denying a new trial is reversed.

We concur: HALL, J.; COOPER, J.

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2 Cal. App. 142

KIPP v. O'MELVENY et al.

(Court of Appeal, Second District, California. Nov. 9, 1905.)

1. Trusts—Powers of Trustees—Mortgage of Property.

Where property subject to a trust deed was incumbered with tax sales and administration expenses, and the deed authorized the trustee to borrow a sum sufficient to pay the incumbrances, and to execute promissory notes and such mortgages as might be necessary to obtain money to pay off such incumbrances, and to redeem from tax sales, and to make one or more mortgages for the payment of the sums necessary to pay off the charges upon the property, the trustee was authorized to mortgage any part of the property, and was not required, in executing the mortgage, to include the whole of the property therein, and was further authorized to pay off the claims on an incumbrancer by executing the mortgage directly to him to secure the amount thereof.

2. Same—Implied Powers of Trustee.

Where a trustee conforms with the provisions of a trust in their true spirit and meaning, he may adopt measures and do acts which, though not specified in the trust instrument, are implied in its general directions and are reasonable and proper means for making them effectual.

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by Sylvester Kipp against H. W. O'Melveny and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Rehearing denied by Court of Appeal, December 9, 1905; by Supreme Court, January 8, 1906.

Withington & Carter, McNutt & Hannon, H. W. O'Melveny, and Works, Lee & Works, for appellants. Stearns & Sweet, for respondent.

CONREY, Special Judge. In this action, a decree was entered in favor of respondent, Kipp, foreclosing a certain mortgage. This mortgage had been executed to Kipp by Carlos Olvera, as trustee under a certain deed of trust. The mortgage was given to secure a promissory note made by the trustee to the mortgagee. Some time before the execution of said note and mortgage, the appellants Smith and others, together with certain other owners—all of them being tenants in common—had executed to said Olvera a deed granting to him, as trustee, certain real property, of which said mortgaged premises are a part. The plaintiff claims that the mortgage was made in the course of the trustee's performance of his duties as such trustee, and in conformity with the powers conferred upon him by the trust deed. The appellants, as owners of interests in said property and beneficiaries of said trust deed, appeal from the decree; and they contend here that said mortgage was not executed for a purpose named by the trust deed, and was not within the scope of the powers conferred upon the trustee, and that, therefore, said instrument is void.

From the trust deed it appears that at its date the real property described therein was subject to various incumbrances, such as tax sales and administration expenses of an estate; that the trustee was authorized "to borrow upon said real property a sum sufficient to pay the incumbrances existing thereon," and to execute "such promissory note or notes and such indenture or indentures of mortgage as may be necessary * * * for the purpose of obtaining money to pay off and discharge the charges existing against said lands." He is further authorized to redeem from such tax sales as can be redeemed from, and he is made the sole judge of the advisability of contesting any of such tax sales. It is further provided that he "shall have power to make one or more mortgages for the payment of the sums necessary to pay off the charges upon said property." The plaintiff, Kipp, at the time of the execution of the mortgage, was the owner of certain certificates of tax sales against 4,277 acres of said land. The trustee and Kipp agreed upon the amount of the incumbrances against the land by reason of said tax sales. Pursuant to an agreement thereupon made between them, the trustee paid the amount of Kipp's claims against the property by executing the note and mortgage which are the subject of this action; and, thereupon, and in consideration thereof, the plaintiff released all of his said former claims. The amount of land covered by the mortgage is 600 acres. On behalf of the appellants it is argued that the trustee in executing said mortgage exceeded his powers in that he mortgaged a part of the premises described in the trust deed, when he was only authorized to mortgage the whole; and also in that he mortgaged in consideration of the surrender and cancellation of tax certificates, whereas he was only authorized to mortgage as security for money that he might receive as a direct cash loan.

We are of the opinion that, by virtue of said trust deed, the trustee was empowered to mortgage any part of said lands, when, in the course of performance of his duty to get rid of the incumbrances thereon, he should find it expedient to make such mortgage. The trust deed does not contain apt words to indicate an intention that any mortgage made by the trustee must necessarily include all of the trust property. We are further of the opinion that the trustee was authorized to pay off plaintiff's claims by executing this mortgage to secure the amount thereof. There is no substantial difference between that transaction and the transaction of borrowing the same amount of money from a third party in order to pay such money over into the hands of Kipp. Where a trustee conforms with the provisions of the trust in their true spirit and meaning, he has authority "to adopt measures and to do acts which, though not specified in the instrument, are implied in its general directions, and are reasonable and proper means for making them effectual." 2 Pomeroy's Equity, § 1062; Gilbert v. Penfield, 124 Cal. 234, 56 Pac. 1107. Appellants do not dispute this proposition. They simply contend that the mortgage made by Olvera was not such a mortgage as should be held to be within the scope of the power to mortgage, as limited by the terms of the trust deed. And as we do not agree with the appellants on this question concerning the scope of that power, there is no further ground for discussion of the case. In their final brief, appellants repeatedly urge that the trustee was plainly violating the provisions of the trust, because he was mortgaging more than four-fifths of the property in order to release only a part of the incumbrances. It is sufficient to reply, that the mortgage covers less than one-eighth of the land described in the trust deed. So far as appears from the record, this mortgage may have been the very best or the only measure then available to the trustee, in meeting his obligation to save the whole property ultimately for the owners, whose interests he represented.

The judgment appealed from is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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2 Cal. App. 173

BRAUNTON & ROBERTSON v. SOUTHERN PAC. CO.

(Court of Appeal, Third District, California. Nov. 11, 1905. On Rehearing, Dec. 11, 1905.)

1. CARRIERS—LOSS OF GOODS—NEGLIGENCE—TRIAL—QUESTIONS OF LAW.

Where the facts in relation to the loss by fire at a depot of goods intrusted to a railroad are undisputed, the question of negligence on the part of the railroad is one of law for the court.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 596.]

2. SAME—ARRIVAL OF GOODS—NOTICE TO CONSIGNEE—SUFFICIENCY.

Where the consignee of goods is not present to receive verbal notice of their arrival, a notice sent through the mail is sufficient.

3. SAME—NEGLIGENCE OF CARRIER.

A railroad was not negligent in not notifying the consignee of the arrival of the goods so as to enable him to have removed them between their arrival and their destruction by fire, where the consignee left town early in the morning of the day the goods arrived, and did not return until the afternoon of that day, when the goods were burning or had been consumed.

4. SAME—ACTIONS—PLEADING—VARIANCE.

A variance between a complaint to enforce the common-law liability of a carrier for the loss of goods and evidence showing a special contract between plaintiffs and the carrier is such as to justify a nonsuit.

On Rehearing.

5. TRIAL—NONSUIT—WHEN PROPER.

A nonsuit can only be granted when there is no evidence whatever to support plaintiff's cause of action.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Braunton & Robertson against the Southern Pacific Company. From a judgment of dismissal, plaintiffs appeal. Affirmed.

Rehearing denied by Court of Appeal, December 11, 1905; by Supreme Court, January 10, 1906.

W. A. Gett, for appellants. Devlin & Devlin, for respondent.

BUCKLES, J. This is an appeal by the plaintiffs from a judgment dismissing their action upon motion of defendant for nonsuit and motion granted.

The complaint is for damages in the sum of $387.18 against the defendant for failure, as a common carrier, to carry from Sacramento and deliver at Wheatland to the consignee certain moldings and other building material, said defendant having undertaken and agreed to do so; alleging as follows: "That defendant did not safely carry and deliver the said goods pursuant to said agreement, but, on the contrary, defendant so negligently and carelessly carried and hauled the same in his calling as common carrier, that the said goods were wholly destroyed and lost to the plaintiffs."

Defendant's answer denies all the material allegations of the complaint, and alleges that the goods were received by it under a special contract, which contained the following: "Delivery: Freight carried by this line must be removed from the station immediately on its arrival, being at owner's risk thereafter, and if not taken within 24 hours after arrival it may be stored at the owner's risk. Responsibility: The responsibility of this company and each succeeding carrier for loss or damage does not extend beyond its own line. None of said carriers is to be liable for any loss or damage of any kind, except such as may be proximately caused by its negligence." There is still another clause in the agreement referred to in the answer, which reads as follows: "* * * We hereby agree that none of the said carriers is to be liable for any loss or damage of any kind except such as may be caused by its gross negligence. * * *"

There seems to have been a failure of plaintiffs to execute this release claim, and therefore it could have no binding effect.

The execution of this written contract was admitted, and went in evidence without objection on cross-examination of plaintiffs' witnesses and as a part of plaintiffs' case, and the bill of exceptions contains the following stipulation relating thereto: "It is hereby stipulated that at the time of the making of the aforesaid shipping order, the said Southern Pacific Company made and delivered to the said Braunton & Robertson a shipping receipt signed by it which was and is in the words and figures the same as the foregoing shipping order, and on the back of said shipping receipt was and is the same words and figures as those contained on the back of the foregoing shipping order, and the said shipping order and shipping receipt constituted the contract between the aforesaid parties, as plead in the answer." Plaintiffs also admit in their brief that defendant could limit its liability as a common carrier. Civ. Code, § 2174.

On July 3, 1903, plaintiffs delivered to the defendant at Sacramento the goods mentioned, to be shipped to Wheatland and there to be delivered free on board cars to one J. A. Swanton; the plaintiffs signing the shipping order, and defendant executing and delivering to plaintiffs the said shipping receipt, in relation to which the above stipulation was made. On July 4, 1903, about 1 or 1:30 o'clock p. m., the car in which the said goods were contained arrived at Wheatland and was set out on a siding in front of defendant's warehouse ready to be unloaded. Wheatland is a town of 600 or 700 inhabitants, and at 8 o'clock a. m. of July 4th the consignee, with many citizens, had gone to Lincoln to a celebration, and did not return until about 3:30 o'clock p. m. of that day. About 2:30 o'clock the same afternoon a fire started in a dwelling situated about 125 or 150 yards from the depot, and where the said car was standing and spread rapidly in that direction, burning and consuming several buildings before reaching the depot. The car containing said goods, three other cars, the depot, warehouse, and freight shed all caught from this fire and were burned. There was no switch engine at the station; the trains doing their own switching. The assistant station agent and a warehouseman, defendant's employés, were present and assisted with buckets and a hose to put out the fire, but the fire reached the car in 30 minutes after starting, and said car could not be saved, and the said car and its contents were consumed. There was no claim to that effect and no evidence that the fire was started by this defendant or through any negligence of any of its agents or servants. There was no evidence on the part of plaintiffs tending to show negligence on the part of defendant. Plaintiffs proved the delivery of the goods to defendant to be carried to Wheatland, that they were so carried, the value, and nondelivery, because being destroyed by fire after their arrival at Wheatland and while still in the car. At the close of plaintiffs' testimony defendant moved for a nonsuit, which was granted.

The contention of plaintiffs is that, having proved the shipment, value, nondelivery, and the destruction of the goods, the burden of proving the loss to have been from causes other than the negligence of the defendant, was upon defendant, and therefore a nonsuit should not have been granted. All the facts in relation to the loss and the cause thereof, the conditions at the depot, and what was done by defendant's agents, servants, and employés toward extinguishing the fire and to preserve the said goods, was fully gone into in plaintiffs' case, in the direct and cross-examination, the defendant showing by the cross-examination all that apparently could be shown in relation to no negligence on the railroad's part, and, the facts being undisputed, the question of negligence becomes one of law, and the mere deduction as to whether there was negligence on the part of the defendant which proximately or at all contributed to the loss or not is a conclusion of law for the court to reach in passing upon the motion for a nonsuit. Flemming v. W. P. R. R. Co., 49 Cal. 253; Fagundes v. Central P. R. R. Co., 79 Cal. 97, 21 Pac. 437, 3 L. R. A. 824; Overacre v. Blake, 82 Cal. 77, 22 Pac. 979.

It seems to me, under the authority of Wilson v. Cal. C. R. R. Co., 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685, and the authorities there cited, that where a common carrier undertakes to carry goods, and the undertaking is under a special contract exempting such carrier from liability for loss or damage, excepting for negligence, and the goods are burned while in the possession of the carrier, and, when sued to recover for the property, he sets up the fire and that destruction of the goods was by no negligence of his, the burden of proof will be upon him to show that the loss did not occur by reason of any negligence of his. A contrary rule exists, I know, in some other states, notably in Indiana and New York, as shown by authorities from those states, presented by defendant in its brief.

But to my mind it is immaterial what the rule may be in this state, so far as this case is concerned, for the whole question of the fire, so far as defendant was concerned, was fully gone into by plaintiffs in their examination in chief of the witnesses and by the defendant in its cross-examination of plaintiffs' witnesses. And this testimony showed clearly that the defendant was not guilty of negligence or want of proper care. True it might be said defendant should have notified the consignee immediately of the arrival of the goods, so that he might have removed them between the hour of their arrival and the time when the fire occurred. In this respect all that would be required would be that notice be sent through the mail, where the consignee was not present to receive any verbal notice. But the testimony, undisputed, shows that the consignee left town at 8 o'clock a. m. of the day the goods arrived and did not return until 3:30 o'clock p. m., when the goods were burning or had been consumed. Under the circumstances of the fire it becomes immaterial whether there was any notice attempted to be given the consignee, or that freight was not delivered on July 4th or other holidays, or that the goods were not unloaded on arrival and put in the warehouse. The consignee could not have been notified to take the goods away before their destruction by the fire. Upon these grounds we think the nonsuit was properly granted.

Another cause for the nonsuit argued by the defendant is that the complaint proceeds upon the theory that the liability of defendant for the loss of the goods was the common-law liability of a common carrier, and that it was responsible unless it could show that the loss was the result of some inherent defect, the act of a public enemy, the act of law, or the act of God, and that, when it comes to the proof, it was shown that the liability, if any, must be determined by the special contract under which the goods were received and carried to Wheatland. The special contract was set up and pleaded in the answer, and the admission of plaintiffs that it constituted the contract between themselves and the carrier, seems to me, shows such a variance between the complaint and plaintiffs' proof as would justify a nonsuit on motion of defendant.

As the nonsuit was properly granted upon other grounds herein stated, we do not deem it necessary to decide the question as to who has the right to sue—the consignor or consignee.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

On Rehearing.

BUCKLES, J. This is a petition for rehearing. Petitioner insists that his authorities all unite in showing that a nonsuit can only be granted when there is no evidence whatever in supporting plaintiffs' cause of action. We agree with this contention. In the opinion in the case we rehearsed the evidence very fully, and there is absolutely no evidence of negligence on the part of the railroad company. As we are still of the opinion that the nonsuit was properly granted, we see no reason for granting a rehearing.

The petition for rehearing is denied.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

2 Cal. App. 185

MAHONEY v. AMERICAN LAND & WATER CO.

(Court of Appeal, First District, California. Nov. 16, 1905.)

1. Appeal — Presumptions — Evidence Not in Record.

Where the judgment of the lower court was fully sustained by its findings of fact, it must be assumed, in the absence of a bill of exceptions, that those findings were supported by relevant and competent evidence, free from any objection on the part of appellant.

2. Waters and Water Courses—Action to Compel Water Company to Furnish Water—Petition.

A petition for a writ of mandate to compel a water company to furnish plaintiff with a supply of water, averring that one of the purposes for which defendant was incorporated and in which it has been since its incorporation and is now engaged is to distribute water for compensation to the residents of L., that the petitioner is and has been for more than 10 years a resident of L. and a freeholder thereof and during that time defendant has supplied him with water upon his premises, and that it has a sufficient quantity of water to supply him, sufficiently shows that defendant is in the control of a public use, within Const. art. 14, providing that "the use of all water now appropriated or that may hereafter be appropriated for sale, rental or distribution, is hereby declared to be a public use," and that plaintiff is a beneficiary of that use.

3. SAME—DEFECTS IN PETITION SUPPLIED BY ANSWER.

If there was any defect in such petition, it was supplied by defendant's answer, setting forth that it was organized for the purpose of constructing, owning, and operating waterworks to supply the inhabitants of L. with pure fresh water, and that it undertook to supply persons who live or might live therein with pure fresh water, and to that end caused to be dug wells, tunnels, and reservoirs, with mains and pipe lines leading therefrom to the houses within said townsite.

4. SAME—JUDGMENT.

The petition, in an action to compel a water company to furnish plaintiff with water, alleged facts showing that he was a resident of the town and was entitled to a supply of water from defendant's waterworks and that he had paid defendant the amount demanded by it as an advance payment for water to be delivered during a certain month, and prayed for a writ commanding defendant to furnish him a supply of water during said month and thereafter as long as he should comply with its rules and regulations. *Held*, that such petition authorized the court to direct in its judgment that defendant should continue such supply, not only during the month specified, but thereafter so long as plaintiff should comply with the conditions upon which defendant's obligation depended.

Appeal from Superior Court, Marin County; Thomas J. Lennon, Judge.

Action by W. H. Mahoney against the American Land & Water Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Edgar C. Chapman and James W. Keyes, for appellant. W. H. Mahoney, in pro per.

HARRISON, P. J. The defendant is a corporation, organized as such under the laws of this state, for the purpose, among others, of distributing water for compensation to the residents of the town site of Larkspur, in Marin county. The plaintiff is a resident of that township, and on the 1st day of November, 1903, paid to the defendant the amount demanded by it as an advance payment for water to be delivered to him upon his premises during the said month of November, and made demand that it supply him with water thereon. The pipes of the defendant were at that time connected with the pipes upon the plaintiff's premises, and in a condition to carry water thereto, and the appellant had supplied him with water upon said premises for more than 10 years prior thereto, and had at that time a sufficient quantity of water with which to comply with his demand. It refused, however, to deliver any water to him upon his said premises, and he thereupon applied to the superior court of Marin county for a writ of mandate, commanding it to furnish him with a continuous supply of water during said month of November, and thereafter as long as he should comply with its rules and regulations. The defendant demurred to the petition of the plaintiff, and, its demurrer having been overruled, answered the same. Upon the hearing the court granted the petition, and the defendant has appealed therefrom upon the judgment roll without any bill of exceptions.

The judgment of the court is fully sustained by its findings of fact, and, in the absence of a bill of exceptions, it must be assumed that those findings and each of them were supported by relevant and competent evidence, free from any objection on the part of the defendant. The appellant, however, contends in support of its appeal that the petition of plaintiff does not state facts sufficient to entitle him to the relief demanded, and that its demurrer on that ground should have been sustained. The point urged in support of this contention is that there is no averment in the petition that the defendant is in control of a public use, or that the plaintiff is a beneficiary thereof. While it is true that the petition does not make these averments in direct language, yet the facts which are set forth therein show, not only that the appellant is in fact in control of a public use, but also that the respondent is a beneficiary of that use. The Constitution (article 14) recites that "the use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use." In Merrill v. South Side Irrigation Co., 112 Cal. 426, 44 Pac. 720, it was held that "when water is designated, set apart, and devoted to the purpose of sale, rental, or distribution, it is appropriated to these uses or some of them, and becomes subject to the public use declared by the Constitution without reference to the mode of its acquisition." The averments in the petition herein that one of the purposes for which the appellant was incorporated, and in which it has been since its incorporation and is now engaged, is to distribute water for compensation to the residents of Larkspur; that the petitioner is and has been for more than 10 years a resident of Larkspur and a freeholder therein; that during that time the appellant has supplied him with water upon his premises, and that it has a sufficient quantity of water to supply him, sufficiently show that it is in the control of a public use, and that the respondent is a beneficiary of that use.

The case of Hildreth v. Montecito C. W. Co., 139 Cal. 23, 72 Pac. 395, upon which the appellant relies, is inapplicable to the facts thus alleged. In that case the court held that a person claiming to be a beneficiary of a public use of water, and seeking to enforce such claim against one claimed by him to be in charge of such use, must show in his complaint that the latter has the ownership or control of water which is the subject of the use, and said that the complaint therein was "carefully and skillfully drawn so as to avoid the statement of this fact." It alleged that the defendant was the owner of a "system of waterworks and water pipes" constructed for the distribution of the waters of the creek, by means of which waterworks and pipes the said waters had been appropriated to public use; but there was no averment that the defendant had appropriated the waters of the creek, or owned or controlled or had the right to control the said waters, or that the waters still remained subject to the use for which they had been originally appropriated. The court said: "For all that appears in the complaint, some other person may at all times have been the owner and in control of the water, and may have made the dedication to public use, using the defendant's waterworks as the means, and defendant as the agent, for the distribution." A comparison of the petition herein with these averments shows that the above facts, said to be essential to a cause of action, are fully set forth in the petition. That the plaintiff is a beneficiary of the public use which is under the control of the appellant is also shown by the following extract from the opinion in the Hildreth Case: "The right of an individual to a public use of water is in the nature of a public right possessed by reason of his status as a person of the class for whose benefit the water is appropriated or dedicated." As one of the residents of Larkspur for whose benefit the appellant had appropriated the water owned by it, he was a beneficiary of that public use. If there was any defect in the complaint in its averment that the defendant was in charge of a public use, it was sufficiently supplied by the answer of the defendant. In its answer the defendant sets forth that it was organized for the purpose of constructing, owning, and operating waterworks to supply the inhabitants of Larkspur with pure, fresh water, and that it undertook to supply persons who live, or who might live, therein with pure, fresh water, and to that end caused to be dug and constructed wells, tunnels, and reservoirs, with mains and pipe lines leading therefrom to the houses within said townsite, and the court finds that at all times during said month of November the defendant had under its control a sufficient supply of water to supply the plaintiff in addition to its other consumers. See Cohen v. Knox, 90 Cal. 266, 27 Pac. 215, 13 L. R. A. 711.

The objection that, as the plaintiff does not aver in his petition that he is entitled to the water beyond the month of November, the court was not authorized to render a judgment which compels the defendant to furnish it after that month, is without merit. The judgment in this respect corresponds with the prayer of the plaintiff's petition. The defendant, while in the control of a public use, is under the obligation to supply water to the beneficiaries of that use so long as they comply with the conditions upon which the use is administered. In its answer it did not set up any act to be performed by the plaintiff as a condition requisite for its discharge of this obligation, other than the payment of its rates; and when the plaintiff had shown his compliance with this condition, and thereby established his right to a supply of the water during the month of November, it was proper for the court to direct in its judgment that the defendant should continue such supply so long as the plaintiff should comply with the conditions upon which its obligation depended.

The judgment is affirmed.

We concur: HALL, J.; COOPER, J.

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2 Cal. App. 211

DELMONTE v. SOUTHERN PAC. CO.

(Court of Appeal, First District, California. Nov. 17, 1905.)

1. CARRIERS—CARRIAGE OF PASSENGERS—RELIANCE ON CARRIER'S CUSTOM.

A passenger, though required to see to it that the train he boards will carry him by virtue of his ticket, may rely on the custom of the carrier to carry passengers on like tickets, in the absence of information to the contrary.

2. SAME—EJECTION OF PASSENGERS—ACTIONS—NATURE AND FORM.

A passenger wrongfully ejected from a train may sue on the contract of carriage or in tort at his election.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1463.]

3. SAME—EXCESSIVE DAMAGES.

In an action for wrongfully ejecting a passenger from a train, the evidence showed that the conductor, on the passenger's refusal to leave the train, put him off, and that the passenger then walked to his home three miles away, getting wet in so doing, catching cold, which developed into pneumonia. *Held*, that a verdict for $500 would not be set aside as excessive.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1490.]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by F. Delmonte against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Naphtaly, Freidenrich & Ackerman, for appellant. A. T. Roche and Sullivan & Sullivan, for respondent.

HALL, J. Appeal from order denying defendant's motion for a new trial.

The action was for damages alleged to have resulted to plaintiff from being ejected from a train of defendant on the evening of November 25, 1896, which was the day before Thanksgiving Day. It was shown that plaintiff was, on the 25th of November, 1896, and for several years prior thereto had been, a government employé at Mare Island, and that ever since May 21, 1893, his family had resided at a small station on the railroad of defendant known as Rodeo. Defendant testified that it had always been his custom on Saturdays and days immediately preceding a government holiday to go to his home at Rodeo, taking a boat operated by defendant from Vallejo to Vallejo Junction, and thence by train to Rodeo. On the day in question he bought a ticket from the agent of the defendant at Vallejo to Rodeo, went onto the boat, where his ticket was punched, was conveyed by the boat to Vallejo Junction, but on entering the train at Vallejo Junction he was told by the conductor that the train did not and would not stop at Rodeo, and on his refusal to get off the train he was put off by the conductor. He then walked to his home at Rodeo, some three miles away, getting wet in so doing, and thus catching cold, which finally developed into pneumonia. The train that plaintiff attempted to take passage on was an overland through train bound for San Francisco, known as No. 2, and was not scheduled to stop either at Vallejo Junction or Rodeo. The boat was not regularly run by defendant from Vallejo to Vallejo Junction after 4:20 p. m., except that on Saturdays and days immediately preceding a holiday it was run, and had been so run for a long time, at 6 o'clock p. m. from Vallejo, connecting at Vallejo Junction with a train for San Francisco for the accommodation of the government employés at Mare Island. On this date, however, it did not leave at 6 o'clock, but left Vallejo at about 7 o'clock p. m., of which due notice had been given by the agent of defendant. Evidence was given (and on this point there was no dispute) that the said late boat on Saturdays and on days immediately preceding holidays connected with a train at Vallejo Junction for San Francisco, and Mr. Wilder, trainmaster for defendant, testified: "It was the general custom for train No. 2 to stop at Vallejo Junction on every day next preceding a holiday prior to November 25, 1896, to take in the employés from Mare Island Navy Yard." There was a conflict of evidence, however, as to whether or not it was the custom for this train to stop for the purpose of discharging passengers at any of the stations between Vallejo Junction and Oakland on such days. It was the last train on that day from Vallejo Junction going toward San Francisco.

The defendant requested the court to give several instructions which were by the court refused as requested, but were by the court modified and given as modified. The following are two of such instructions, which are types of the others, the modifications being in italics: "It is the duty of a passenger before he takes a train to see to it that his ticket will carry him on that train, *but he may depend on custom, or until he gets express notice of a change from any source.* If the train is what is called a through train, namely, one which does not stop at all stations and does not stop at the station called for by the ticket, then such passenger is not *ordinarily* entitled to ride on that train, and it is his duty, when requested by the conductor to alight, to comply with that request, unless the car is then running at such a high rate of speed as to make it dangerous for him to attempt to alight, and if the passenger refuses to comply with the request, the conductor and those in charge of the train have the right to eject him, using such force, and no more, as is requisite for that purpose, provided, of course, that the train is not then moving at such a high rate of speed as would make it dangerous for a person to alight." And "the defendant, as a common carrier of passengers, has the right to regulate the operation of its trains over its track, and to fix the various stopping places of such trains, and if you find from the evidence that the boat that left North Vallejo on the evening of November 25, 1896, was a special excursion boat connecting with the train at Vallejo Junction, then I charge you that it was the duty of the plaintiff, before taking passage on such boat, to ascertain if said connecting train would stop at Rodeo, *unless a prior custom to stop had rendered that unnecessary.*" The court also, at the request of plaintiff, gave instructions to the jury embodying similar principles as to the rights of plaintiff under prior custom.

It is now insisted by appellant that the court erred in thus modifying the instructions requested by defendant, and in giving those requested by plaintiff. The law, however, seems to be as given by the trial court. In St. Louis, I. M. & S. Ry. Co. v. Adcock, 12 S. W. 874, 52 Ark. 406, it is said: "If the plaintiff, without fault of his, was misled by the company's custom into believing that the place was a flag station for night passenger trains, then his right to recover was the same as though he had been misdirected by its authorized agent. It would be otherwise if he was not informed of, or had not relied upon, the custom, or if the stoppage of the train was only casual and not habitual." In Hull v. E. Line R. Co., 2 S. W. 831, 66 Tex. 619, it is said: "If it be true, as the great weight of evidence tends to show, that the trains of appellee frequently stopped at 'Veal's Switch,' and there received and discharged passengers, it is unimportant that conductors may have had no authority from the company to do so. What they frequently did in the course of their employment in the conduct of the business of the principal, in so far as the traveling public are concerned, must be deemed to have been done in the exercise of power conferred by the principal, though, in fact, the principal may have forbidden the act." In Humphries v. Ill. Cent. Ry. Co. (Miss.) 12 South. 155, the plaintiff had a ticket for Crystal Springs purchased outside the state, and was on a train not scheduled to stop at that place. His action had been by the trial court dismissed, and in reversing the judgment the appellate court said: "We think the jury should have been permitted to say whether appellant had a special contract to be carried on the particular train to Crystal Springs, and whether there was a custom—a fixed habit—known to the traveling public to stop for the debarkation of foreign passengers." To the same effect is Illinois Cent. Ry. Co. v. Siddons, 53 Ill. App. 607, where it was held that "where a railroad company has been for a long time in the habit of stopping trains at a station on signal, such a course of dealing with the public imposed the duty on the company to stop such train on being signaled. A failure of the servants to perform such duty, when a ticket has been purchased on the faith that they would do so, creates as clear a liability as that of a train which has been advertised to stop at a station and fails to do so." In another case from the same state this language is used: "It then follows that where a passenger purchases a ticket he only acquires the right to be carried according to the custom of the road. When he obtains a ticket he has a right to go to the place for which it calls on any train that usually carries passengers to that place." C. & A. R. R. Co. v. Randolph, 53 Ill. 510, 5 Am. Rep. 60.

From the foregoing authorities it is seen that a passenger has a right to rely on the custom of the common carrier, at least in the absence of information to the contrary. In none of the cases cited by appellant was the question of a custom involved. In the case of Ames v. S. P. Co., 141 Cal. 728, 75 Pac. 310, 99 Am. St. Rep. 98, relied on by appellant, it was shown by parol testimony that when the plaintiff purchased his ticket he was informed that it would not be good on the "Owl" train unless he also secured a ticket for a sleeping berth. He procured no such ticket, and therefore had no right on the train. The question upon which the case was decided was as to the admissibility of the parol testimony; the ticket itself making no reference to the requirement to procure a sleeping berth. The right to rely on a custom was not involved.

Appellant also insists that plaintiff's only redress is an action on the contract, and not an action in tort. It has been decided otherwise in this state. Sheldon v. The Uncle Sam, 18 Cal. 526, 79 Am. Dec. 193; Jones v. Steamship Cortes, 17 Cal. 487, 79 Am. Dec. 142; Sloane v. S. Cal. R. R. Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193.

We do not think the amount of damages awarded, $500, was excessive. The court fairly submitted to the jury the question as to whether the plaintiff had aggravated his injuries or sickness by his own negligence, and the determination of the jury on that question in the state of the evidence in this case is conclusive on this court.

The order denying the motion for a new trial is affirmed.

We concur: HARRISON, P. J.; COOPER, J.

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2 Cal. App. 190

WILE v. LOS ANGELES ICE & COLD STORAGE CO.

(Court of Appeal, Second District, California. Nov. 16, 1905.)

1. MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALK—INJURIES—PRESUMPTIONS.

In an action for injuries to one who tripped on a nail projecting from planks placed upon a sidewalk to admit the approach of teams to defendant's building, there was a presumption that it was defendant's driveway, his board, and his nail, maintained by him and with his knowledge.

2. SAME—QUESTION FOR JURY.

The testimony of defendant's manager and two or three agents and employés that they did not place the boards there and did not know who placed them there raised a question for the court as to whether such evidence rebutted the presumption.

3. SAME—NUISANCE.

The maintenance of a spike two inches high in a sidewalk is a nuisance.

4. SAME—ORDINANCE AS PROTECTION.

A city ordinance authorizing planks to be placed across a sidewalk, in order to create a driveway giving access to a building in process of construction, is no defense to an action for injuries sustained by one who tripped over a spike protruding from a plank.

5. SAME—NEGLIGENCE OF INDEPENDENT CONTRACTOR—KNOWLEDGE.

Where an independent contractor placed planks across a sidewalk, so as to make a driveway to a building in process of construction, the owner of the building was liable for the dangerous condition of the planks, if his manager or agents knew, or as careful and prudent men they should have known, thereof.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1689.]

6. SAME—INJURIES—QUESTION FOR JURY.

In an action for injuries to one who tripped over a spike projecting from planks placed across a sidewalk by defendant, *held*, that the question as to what was ordinary care under the circumstances was one for the jury.

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by Z. E. Wile against the Los Angeles Ice & Cold Storage Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Rehearing denied by Supreme Court, January 15, 1906.

Sidney J. Parsons, for appellant. Powers & Holland, for respondent.

GRAY, P. J. Action for damages incurred by plaintiff in tripping on a large nail projecting from one of a number of planks placed upon the cement sidewalk to admit of the approach of teams temporarily to defendant's building while the same was in course of construction. The plaintiff had a verdict and judgment in his favor. The appeal is by the defendant from the judgment and from an order denying it a new trial.

The main contention of appellant is that the evidence is insufficient to support the verdict as a matter of law, but we think this contention cannot be upheld. The board which contained the offending nail was part of a driveway to defendant's property, constructed for a temporary use in connection with said property. From this a presumption arises that it was defendant's driveway, defendant's board, and defendant's nail, all maintained there by defendant and with defendant's knowledge. The duty was cast, in the first instance at least, upon the trial court to determine whether the testimony of the manager and two or three other agents and employés of the defendant, to the effect that they did not place the boards there and did not know who placed them there, was sufficient to rebut the presumption arising from the other facts. "At least in such a case the injured party ought not to be compelled to show affirmatively that there was no intervention of a third person which contributed to the result." Barry v. Terkildsen, 72 Cal. 254, 13 Pac. 657, 1 Am. St. Rep. 55; McKune v. Santa Clara, etc., 110 Cal. 480, 42 Pac. 980. The manager said the defendant was in occupation and possession of the premises as a whole and had authority there, and the fact that this manager did not know who placed these boards there might have led the jury to infer that he did not want to know. At all events, the question of who placed the planks there was one of fact, and after a careful examination of all the evidence we are thoroughly persuaded that the jury in its verdict, as well as the judge in denying the new trial, made no mistake in the solution of that question of fact. The same thing may properly be said as to the other questions of fact involved in the case. There can be no question that the maintenance of a spike two inches high in a sidewalk is, to put it mildly, a nuisance. It seems to have been dangerous "to life and limb." The jury were fully warranted in declining to excuse the defendant for maintaining the same on any such ground as that "the spike was hard to see." This, too, was a question of fact, and we find nothing in the record to transform it into a question of law. A city ordinance authorizing the planks does not necessarily include the protruding spike. It was the spike that caused the plaintiff's downfall, and not the plank.

If it be conceded that there is evidence showing that the planks were placed there by an independent contractor, yet the defendant is liable if its manager or agents knew of their dangerous condition, or if, as careful and prudent men, they should have known it. Frassi v. McDonald, 122 Cal. 400, 55 Pac. 139. The instructions recognizing this rule were properly given. Said instructions were also within the issues as presented to the jury. There was much evidence elicited by defendant to the effect that the nail was of the same color as the board and difficult to see. There was also evidence that others saw this nail, and it is not improbable that if the agents of defendant had exercised ordinary care they would have discovered this nail. What was ordinary care, under the circumstances of the case here presented, was again a question for the jury.

Appellant's briefs are somewhat extended, but we think it will be seen upon a close analysis of the same that the foregoing disposes, either directly or indirectly, of every point contained in said briefs. The appeal seems to be without merit.

The judgment and order are affirmed.

We concur: ALLEN, J.; SMITH, J.

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2 Cal. App. 193

FOX v. TOWNSEND et al.

(Court of Appeal, Second District, California. Nov. 6, 1905.)

JUDGMENT — SETTING ASIDE — FAILURE TO SERVE DEFENDANT—TIME FOR MOTION.

Code Civ. Proc. § 473, provides that the court may, in furtherance of justice, when from any cause the summons in an action has not been personally served on defendant, allow on such terms as may be just, at any time within one year after judgment, an answer to the merits. Section 939 provided that an appeal might be taken within one year, but by amendment in 1897 the time was shortened to six months. Section 1049 provides that an action is deemed to be pending from the time of its commencement until its final determination on appeal, or until the time for appeal has passed. *Held*, that the amendment shortening the time of appeal did not shorten the time within which an order might be made under section 473.

Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by Edwin R. Fox against W. H. Townsend and others. From an order setting aside as to certain defendants a decree quieting title, plaintiff appeals. Affirmed.

Rehearing denied by Supreme Court, January 15, 1906.

Cole & Cole, for appellant. O. B. Carter, for respondent.

GRAY, P. J. This is an appeal by plaintiff from an order, made December 18, 1903, setting aside, as to defendants Green and Harris, a decree quieting title, which decree bears date December 22, 1902, and permitting an answer to the merits of the action. The order was granted in pursuance of the provisions of section 473 of the Code of Civil Procedure on the ground that the summons was not personally served upon the said defendants Green and Harris.

Appellant's contention is that by the provisions of section 939 of the Code of Civil Procedure the time for appeal is limited to six months, and that section 1049 of the same Code provides that "an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied," and that the amendment of said section 939 in 1897, shortening the time of appeal from one year to six months, must be taken as nullifying the provision of section 473, giving a year's time after the judgment in which to move to set aside the same, where personal service of summons has not been had. We can see no good reason why the amendment of 1897, relating to appeals only, should be treated as an amendment or "nullification" of another section of the Code relating to another remedy independent of an appeal and having no necessary connection therewith. We know that repeals and amendments to the law have sometimes been implied. But repeals by implication are not favored in the law. We know of no case, and are cited to none, wherein the shortening of the time of one remedy given by the statute has been held by implication to shorten the time of another existing and independent remedy. The fact that the case is no longer "pending" in no way interferes with any attack on the judgment based upon any reason for which the judgment should be held absolutely void; and the statute having expressly given the defendant a remedy against the judgment, which he may take advantage of at any time within a year, it will not be presumed that it was intended to curtail this right by any other statute which makes no reference to such remedy, but the other statute will be permitted to operate only on the remedy to which it expressly refers. No contention is made that the court abused its discretion in setting aside the judgment. The only point urged by appellant is the above, and is to the effect that, the judgment having become final, the court had lost jurisdiction to proceed, as it did, under section 473, Code Civ. Proc.

The order appealed from is affirmed.

We concur: SMITH, J.; ALLEN, J.

2 Cal. App. 227

MIXER v. MIXER.

(Court of Appeal, First District, California. Nov. 21, 1905.)

1. SET-OFF AND COUNTERCLAIM—SUBJECT OF ACTION—"TRANSACTION."

Where, in a suit to compel defendant to leave complainant's house, he alleged that she had been employed as his servant at $20 per month and, though she had been discharged and paid, she refused to leave the house and claimed the right to remain there, a cross-complaint, in which defendant alleged that she had been fraudulently induced to believe that she was complainant's lawful wife and that her services were reasonably worth $50 per month, and demanding judgment for the difference, was properly filed as relating to the "transaction" which was the subject of the action.

2. MASTER AND SERVANT—ACTION FOR SERVICES—ILLEGAL CONSIDERATION—FINDINGS.

Where, on a cross-complaint for services, the court found that defendant assumed the position of mistress of plaintiff's house and remained there in such capacity until the commencement of the suit under the belief that she was complainant's wife, such finding negatived an intent to find that defendant was complainant's paramour, or that her services were rendered on consideration that she should be his illicit mistress.

3. SAME—DEFENSES—FRAUD.

Where, on a cross-complaint for services, the court found that complainant had fraudulently induced defendant to render the services on the belief that she was complainant's wife, complainant could not avail himself of his own fraud in inducing such belief, by pleading that her services were rendered as his illicit mistress and that the contract was therefore illegal.

4. SAME—ACCRUAL OF WAGES—TIME OF PAYMENT.

Where services were not rendered under a contract specifying the amount of wages or the time of payment, the wages did not accrue monthly.

5. JUDGMENT—CONSTRUCTION—INTEREST.

A judgment awarding defendant a certain sum of money, "with interest thereon," on a cross-complaint, should be construed as allowing legal interest only from the date of its rendition.

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Suit by George H. Mixer against Nettie A. Mixer. From a judgment in favor of defendant on a cross-complaint, plaintiff appeals. Affirmed.

Robert Ash, for appellant. J. L. Boone, for respondent.

HARRISON, P. J. In this action, brought by the plaintiff to procure an injunction against the defendant, the latter filed a cross-complaint against the plaintiff, under which she sought to recover for services rendered him by her. It is recited in the bill of exceptions that before the trial of the case the court had granted the injunction prayed for, and that the only questions for trial were the issues raised by the cross-complaint as to wages. Judgment upon these issues was rendered in favor of the defendant, giving her $360, the value of her services. The plaintiff has appealed.

The plaintiff alleges in his complaint that in July, 1901, he employed the defendant as a servant in his house at the wages of $20 per month, and that she continued to work for him until May, 1902, and that about that date he had discharged her from his employment, but that she refused to leave the house and claimed a right to remain there; and by so doing she deprived him of the free use of his property, and he therefore asked that she be enjoined from further remaining in the house. In her answer the defendant denied these allegations, and also denied that she ever had been employed by him as a servant, and by way of cross-complaint against him alleged that they had once been husband and wife, but had been divorced in 1898, and that a few months thereafter, upon the plaintiff's request, they had agreed to remarry, and that such marriage should take place in the state of Nevada; that in pursuance thereof they started for that state, and at Sacramento took passage upon a train which the plaintiff informed her would take them to Reno, and went to a place which she believed to be Reno; that while they were at that place she became unconscious, and upon recovering consciousness was told by the plaintiff that the marriage had taken place and that they were again husband and wife; that they then returned to San Francisco and assumed marital relations at her place of residence; that at that time the plaintiff was the proprietor of a lodging house in another part of the city, and that subsequently, at his request, she went with him to that place as his wife, and in connection with him assumed its management and control, and so continued until May 24, 1902, during all of which time she believed that she had been legally married to him and was his wife; and that in so doing she had rendered him services which were worth $50 per month. These allegations of the defendant were denied by the plaintiff in his answer to the cross-complaint, but the court found them to be true. The court also found that no marriage ceremony had taken place between them, and that the defendant is not the wife of the plaintiff, but that she believed during all of said time that she was his wife; that her unconscious condition, upon recovering from which he told her that the marriage had taken place, was produced by him by administering drugs to her; that he never employed her in his house in the capacity of a servant, but that she performed all the duties of a servant for him from May, 1901, until May, 1902; and that her services were worth $50 a month, of which he had paid her $20 a month. These findings are fully sustained by the evidence set forth in the bill of exceptions.

1. The court did not err in refusing to strike out the cross-complaint or in overruling the demurrer thereto. The "transaction" upon which the action was brought embraced the relations between the plaintiff and the defendant under which the latter rendered the services alleged by him, and the affirmative relief sought by her under her cross-complaint related to and depended upon those relations. The plaintiff could not, by alleging that the services were rendered under an employment, deprive her of the right of showing the facts under which they were rendered or of obtaining whatever relief she was entitled to upon the ascertainment of those facts by the court. Story & Isham Co. v. Story, 100 Cal. 30, 34 Pac. 671.

2. The facts set forth in the cross-complaint sufficiently state a cause of action entitling the defendant to relief against the plaintiff. The averments therein of the relation which she sustained to him, and of the circumstances under which she rendered services to him, are inconsistent with the construction contended for by the appellant that the services were of an immoral nature or rendered upon an illegal consideration; and the finding of the court that she "assumed the position of mistress in plaintiff's house and remained there in such capacity until the commencement of this suit," under the belief that she was his wife, negatives any idea that the court intended to find that she was his paramour, or that the services were rendered upon the consideration that she would be his illicit mistress. If the plaintiff fraudulently induced her to render the services found by the court, he cannot avail himself of his own fraud in so doing in order to escape liability for their value.

3. In its conclusions of law the court finds that the plaintiff is indebted to the defendant in the sum of $30 per month, "with interest thereon from the several dates at which it accrued." The court does not specify these dates, and as the services were not rendered under any contract specifying the amount or the time for payment, the wages cannot be held to have accrued monthly. The court was, therefore, in error in this respect. The judgment, however, awards the defendant the sum of $360, "with interest thereon," which is to be construed as legal interest from the date of its rendition.

The judgment and order are affirmed.

We concur: COOPER, J.; HALL, J.

2 Cal. App. 216

PROVIDENT MUT. BLDG. LOAN ASS'N v. SHAFFER et al.

(Court of Appeal, Second District, California. Nov. 17, 1905.)

1. MORTGAGES — DEBTS SECURED — FUTURE ADVANCES.

In order that a payment by a mortgagee on the mortgagor's account shall constitute an advancement within the meaning of a clause of the mortgage securing "further advances" by the mortgagee, such payment must involve a contract relation, express or implied, and a payment made without the knowledge of the mortgagor cannot constitute such an advancement.

2. SAME—INCUMBRANCES.

A claim of a lumber company for lumber used in constructing a house on mortgaged premises cannot be deemed an incumbrance, within the meaning of the clause of the mortgage authorizing the mortgagee to pay incumbrances, in the absence of anything to show when the lumber was purchased, or by whom, or when the house was completed, or that any steps were taken or contemplated by the lumber company to assert a lien.

3. SAME—MECHANICS' LIENS—TIME FOR ESTABLISHMENT—EFFECT OF DELAY.

The inchoate right of lien which arises by furnishing lumber used in the construction of a house ceases to exist after the expiration of 60 days from the completion of the house.

4. SAME — RIGHTS OF MORTGAGEE — PAYMENT OF INCUMBRANCES—BURDEN OF PROOF.

A mortgagee, seeking to charge a mortgagor with a sum paid in discharge of a materialman's claim against a house erected on the mortgaged premises, has the burden of establishing that the claim was a lien at the date of payment, and therefore an incumbrance within the meaning of a clause of the mortgage authorizing the mortgagee to pay incumbrances.

5. Same—Debts Secured—General Obligations of Mortgagor.

A clause of a mortgage securing further advances by the mortgagee and all other indebtedness of the mortgagors to the mortgagee, and authorizing the mortgagee to pay incumbrances on the premises, does not authorize the mortgagee to buy up obligations of the mortgagor disconnected from the mortgage or the premises and to hold the same as secured by the mortgage.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the Provident Mutual Building Loan Association against Susan E. Shaffer and another. From the judgment rendered, plaintiff appeals. Affirmed.

O. B. Carter, for appellant. E. B. Coil, for respondents.

ALLEN, J. Action to foreclose mortgage. Finding of the court that one note alleged to be secured thereby was never executed. Judgment and decree for amount of one note only, and for defendant upon the second note, from which judgment plaintiff appeals.

It appears from the record that defendant Susan E. Shaffer was a married woman, the wife of her codefendant, J. W. Shaffer, that she owned as her separate estate the premises described in the complaint; that on July 18, 1899, she and her husband executed to the plaintiff a mortgage on said premises to secure a note for $1,600 and any further advances by the mortgagee, and all other indebtedness of the mortgagors to the mortgagee existing or thereafter arising, or to be contracted for before satisfaction of the mortgage, not exceeding $1,599, with a covenant to pay all incumbrances on said premises, and, upon default, authorizing the mortgagee to pay the same. Before the execution of the mortgage defendant Mrs. Shaffer had commenced the construction of a house on said premises. In September, 1899, plaintiff, ascertaining that a lumber company had a bill amounting to $300 for lumber used in constructing such house, paid the same without the knowledge of Mrs. Shaffer. Afterwards the husband signed a note for such amount, and some one, without authority, signed the wife's name to such note. She never had knowledge of the payment of the money or the execution of the note, until the time of the trial of this action.

It is insisted by appellant that, regardless of the note, her property was liable on account of such payment under the terms of the mortgage, upon the theory that it was either an advancement for her use and benefit, or paid in order to relieve her property from an incumbrance, or was a debt which arose between the parties after the mortgage. That it should be an advancement as contemplated by the mortgage would, of necessity, involve a contract relation, express or implied. No such relation is shown by the record, and the court finds against the plaintiff upon such issue. It does not appear that the husband knew of the payment to the lumber company, but, if he did have such knowledge, it appears that he was acting as agent for plaintiff during the whole time within which the house was being constructed, and was not acting for the wife at any time except in supervising the construction of the house. Neither were there any facts alleged or found from which it may be inferred that the claim of the lumber company was an incumbrance upon the premises; it is not shown when the lumber was purchased, by whom, when the house was completed, or that any steps had been taken, or even contemplated, by the lumber company to assert a lien on account of such debt. The lumber company, at most, was but a creditor of the wife, if she authorized or knew of the purchase. The inchoate right of lien existed in virtue of the admitted furnishing of lumber actually used in the house. If, however, 60 days had elapsed between its completion and the payment by plaintiff, such lien no longer existed. Morris v. Wilson, 97 Cal. 646, 32 Pac. 801; Weithoff v. Murray, 76 Cal. 508, 18 Pac. 435. If the fact was that the house had not been completed 60 days before payment by plaintiff, we should have no hesitancy in saying that a lien existed under the Constitution of this state, and that plaintiff possessed the right under the mortgage to extinguish the same; but the burden of establishing the existence of such a lien at the date of the payment was upon the plaintiff. We are not of opinion that from the record any debt or obligation in favor of the lumber company is shown by reason of the furnishing of the lumber to be used in Mrs. Shaffer's house. For aught appearing therein, the circumstances might have been such as to have precluded a personal liability upon her part. In addition to this, even were she a general debtor of the lumber company, we do not think that by a fair construction of the mortgage the plaintiff can go out and buy up obligations of the mortgagor disconnected from the mortgage or the premises, and hold the same secured by such mortgage. This, we think, is warranted by the decision in Moran v. Gardemeyer, 82 Cal. 101, 23 Pac. 6. There is nothing in the record showing any agency of the husband, nor that he even contracted for the lumber on behalf of the wife, or assumed any authority in relation thereto.

Judgment affirmed.

We concur: GRAY, P. J.; SMITH, J.

2 Cal. App. 241

FAY v. COSTA.

(Court of Appeal, First District, California, Nov. 23, 1905. On Rehearing, Dec. 21, 1905.)

1. Executors and Administrators—Estates of Persons Not Dead.

Probate proceedings on the estate of a person who is not dead are void.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 15.]

2. LIMITATION OF ACTIONS—IGNORANCE OF CAUSE OF ACTION.

Under Code Civ. Proc. § 338, prescribing a three-year limitation in actions for detention of goods or chattels, including recovery of personal property, and providing the action shall not accrue until discovery of the facts by the aggrieved party, where probate proceedings were had on plaintiff's estate on the supposition that he was dead, his action against the administrator, who took possession of his property, which was commenced three years after he learned the facts, was barred.

3. SAME — COMMENCEMENT OF ACTION — REVERSAL—FILING NEW SUIT.

Under Code Civ. Proc. § 355, providing that, if an action is commenced within the time prescribed therefor and a judgment for plaintiff is reversed on "appeal," the plaintiff may commence a new action within a year after reversal, the commencement of a suit and the bringing of an action within a year from the annulling of a decree therein on a "writ of review" does not prevent the bar of limitations.

On Rehearing.

4. PLEADING—DEMURRER—GROUNDS—LIMITATION OF ACTIONS.

Where a petition is demurred to on the ground that the action is barred by limitations, reference need not be made to the particular section relied on; it being sufficient to specify the statute as ground of demurrer.

5. SAME.

Where defendant demurs on the ground that plaintiff's cause of action accrued more than four years before the action was commenced, the demurrer must be sustained, if it appears from the complaint that the action accrued more than four years before it was brought and is of such a nature that it would be barred under the law in four years, or in any less period.

Appeal from Superior Court, Santa Clara County; S. F. Leib, Judge.

Action by George W. Fay against James A. Costa. From a judgment for plaintiff, defendant appeals. Reversed.

Rehearing denied by Supreme Court, January 22, 1906.

H. A. Gabriel and C. D. Wright, for appellant. E. E. Cothran, for respondent.

HALL, J. This is an appeal from a judgment in favor of plaintiff and against defendant for the sum of $1,518.68, and comes before us on the judgment roll.

The facts necessary to an understanding of the points involved are as follows: This action was brought August 27, 1902. The complaint, among other things, alleges in substance: That on the 29th day of November, 1897, defendant petitioned the superior court of Santa Clara county for letters of administration on the estate of plaintiff, alleging that he had died on or about the 1st day of January, 1897. That thereafter defendant was in form appointed administrator of said estate, and on the 3d day of January, 1898, took into his possession $1,543.68 belonging to plaintiff and previously distributed to plaintiff from another estate. In May, 1898, a decree of distribution was in form made and recorded in said estate; that is to say, the estate of plaintiff. Plaintiff learned of his rights in March, 1899, and came to San José, Cal., and defendant paid him $25, but refused to pay the balance of plaintiff's money. On the 10th day of April, 1899, plaintiff filed and presented his petition before said court (superior court of Santa Clara county), upon which a citation was issued to defendant, Costa, to show cause why all the proceedings had in the matter of the estate of plaintiff should not be set aside and annulled, and why all property received by said Costa as such alleged administrator should not be returned to said court free from all charges and claims of every nature. That thereafter, on the 3d day of May, 1899, the court made its decree that all said proceedings be set aside and annulled, and that all property received by defendant, $1,543.68, less $25, be returned to plaintiff, and that defendant pay to plaintiff the sum of $1,518.68 and costs, and that the clerk issue execution in favor of plaintiff. From this order defendant took an appeal, but the same was dismissed for want of proper bond. Estate of Fay, 126 Cal. 457, 58 Pac. 936. Subsequently, on July 23, 1902, the Supreme Court, on application of defendant, granted a writ of review, and set aside and annulled so much of said decree as directs the payment by defendant Costa to plaintiff of $1,518.68 and the issuance by the clerk of execution. 137 Cal. 79, 69 Pac. 840. It is also alleged in an amendment to the complaint, filed before demurrer or answer, that in the petition presented April 10, 1899, plaintiff set forth the same cause of action against Costa that is set forth in the complaint in this action, and sought to recover the same identical property. Defendant demurred to the amended complaint upon the ground that the action was barred by sections 338, 339, and 343 of the Code of Civil Procedure; each section being separately pleaded. The demurrer was overruled, and defendant answered, and again pleaded the same sections in bar of the action; but the court found that the action was not barred, and rendered judgment for plaintiff.

The correctness of the ruling of the court as to the plea of the statute of limitations is the question to be determined on this appeal. It will be observed from the foregoing statement of facts that this action was commenced more than four years after the day upon which defendant took possession of plaintiff's money, and more than three years after plaintiff learned of the facts of the case and the probate court had vacated the proceedings upon the estate of plaintiff. Inasmuch as plaintiff is not dead, the probate proceedings on his estate were void. Costa v. Superior Court, 137 Cal. 82, 69 Pac. 840; Stevenson v. Superior Court, 62 Cal. 60. In a concurring opinion by one of the justices in Stevenson v. Superior Court, it is said: "Administration of the estate of a living person is void ab initio and throughout." In the leading opinion it is said: "It is true that the court of probate, before issuing letters of administration, must first determine affirmatively the question of death. But notwithstanding such determination, the fact that the supposed intestate is alive may still be shown, and when shown establishes the nullity of the entire proceedings." Among the cases cited in the prevailing opinion in support of the doctrine there declared is Jochumsen v. Suffolk Savings Bank, 3 Allen (Mass.) 87, where it is held that the plaintiff was entitled to recover money by him deposited in a bank which had been paid by the bank to a person appointed administrator of the estate of plaintiff, upon the supposition that plaintiff was dead. To the same effect is the similar case of Lavin v. Emigrant Ind. Savings Bank (C. C.) 1 Fed. 641, 18 Blatchf. 1. In neither case had any steps been taken to annul the probate proceedings, but such proceedings were held to be absolutely void. In accordance with the law as laid down in the foregoing authorities, it is alleged in plaintiff's complaint "that said superior court never had or acquired jurisdiction to administer upon plaintiff's said estate by reason of the fact that plaintiff is still alive and resident in the flesh." In Elliott v. Peirsol, 26 U. S. 328, 7 L. Ed. 164, in speaking of a case where a court acts without jurisdiction, it is said: "But, if it act without authority, its judgment and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought even prior to a reversal in opposition to them."

The probate proceedings upon the estate of plaintiff being void and a nullity, plaintiff had a right of action against defendant as soon as defendant took possession of plaintiff's money; and even if it be said that the statute did not begin to run until plaintiff learned of the facts under section 338, still three years elapsed after that time before this action was commenced. We are obliged, therefore, to hold that this action was barred before commenced, unless the filing of the petition in the probate proceedings and the bringing of this action within one year from the annulling, on a writ of review, of the decree obtained by plaintiff on said petition prevents the bar of the statute. And this seems to be the real contention of respondent, and the theory upon which his complaint is framed. Section 355 of the Code of Civil Procedure is as follows: "If an action is commenced within the time prescribed therefor, and a judgment thereon for the plaintiff be reversed on appeal, the plaintiff * * * may commence a new action within one year after the reversal." The judgment in question here was not "reversed on appeal," but was annulled and set aside on a writ of review, and in order to uphold the action of the trial court we are asked to hold that a reversal on appeal includes an annulling on a writ of review.

We are cited to McOmber v. Chapman, 42 Mich. 117, 3 N. W. 288, as sufficient authority for such construction. It was held in the above-entitled case that a reversal on a writ of certiorari was sufficient to authorize a new suit under a statute which authorized a new suit where the first judgment was reversed on a writ of error. The Michigan statute, however, had other provisions which seemed to indicate a general intent to save the right to bring a new suit where the first suit had abated or failed without fault of the plaintiff. Furthermore, in McOmber v. Chapman the judgment that had been reversed was one rendered by a justice of the peace, and in Michigan a writ of certiorari is used to review errors of law committed during the trial of a cause in a justice's court, and is not confined, as in this state, to setting aside proceedings for want of jurisdiction. How. Ann. St. Mich. § 7031 et seq. Even the evidence may be reviewed where there it a total lack of evidence to support the judgment, or some material fact necessary to support a recovery. Welch v. Bagg, 12 Mich. 43; McGraw v. Schwab, 23 Mich. 13; Brown v. Blanchard, 39 Mich. 790; L. S. Building Co. v. Thompson, 32 Mich. 293. So, generally, in Michigan both writs of certiorari and writs of error are used to correct errors of law occurring in the trial court; writs of error to review judgments of courts of law and of record, in proceedings had according to the course of the common law (Holbrook v. Cook, 5 Mich. 225), or proceedings substantially analogous thereto (Fletcher v. Clark, 39 Mich. 374), and writs of certiorari to correct errors of law in proceedings that are not according to the course of the common law (How. Ann. St. Mich. § 8691, and cases cited in note). The time within which either may issue is the same. Id. § 8693. It is thus seen that the Michigan court had good grounds for holding that a reversal under a writ of certiorari was in substance a reversal under a writ of error, within the meaning of the statute allowing a new action to be brought within a year from such reversal. Both writs are used in that state for procuring a reversal of the action of the trial court for errors of law committed in the trial of the action. Our Code lays down the rule for its own construction in these words: "Words and phrases are construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to such peculiar or appropriate meaning or definition." The word "appeal" in the law of this state refers to the proceedings that are provided for in title 13, part 2, of the Code of Civil Procedure, where the time and method of taking an "appeal" are minutely set forth. A writ of review (certiorari) is provided for in chapter 1, title 1, of part 3 of the Code of Civil Procedure, and may be granted in certain prescribed cases, where there is no appeal (section 1068, Code Civ. Proc.), and only where jurisdiction has been exceeded. Our Code, in the section just cited, uses the word "appeal" as indicating something different from a writ of review. While to some minds it may be difficult to suggest a reason why the Legislature, in the case of a reversal on appeal, should provide that a new action may be brought, and not when the same result is secured by a writ of review, it seems to be so written. It may be suggested, in this connection, however, that limitations exist as to appeals that do not exist as to writs of review. Thus appeals must be taken within a very limited time (the longest being six months from the judgment to be reviewed), while no such limitation exists with regard to the right to a writ of review. This difference may well be said to justify a rule allowing the right to bring a new action in the one case and not in the other. We do not think that we are justified in construing the word "appeal," as used in section 355 of the Code of Civil Procedure, as including a writ of review. For the reasons above set forth, the demurrer should have been sustained.

Appellant also urges that the filing of the petition by plaintiff in the probate court was not the bringing of an action such as would interrupt the running of the statute of limitations, for the reason that such court had no jurisdiction in such a proceeding to enter a judgment that defendant pay the money obtained by him to plaintiff; but, in view of the conclusion we have reached on the question last discussed, it is not necessary to determine the sufficiency of this point. Suffice it to say that in some states it is held that the bringing of an action in a court without jurisdiction of such action is not sufficient to interrupt the running of the statute (Gray v. Hodge, 50 Ga. 262; Edwards v. Ross, 58 Ga. 147; Sweet v. Electric Light Co., 97 Tenn. 252, 36 S. W. 1090; Donnel v. Gatchell, 38 Me. 217); while the contrary doctrine is held elsewhere (Smith v. McNeal, 109 U. S. 426, 3 Sup. Ct. 319, 27 L. Ed. 986; L. R. M. R. & T. Ry. v. Manees, 49 Ark. 248, 4 S. W. 778, 4 Am. St. Rep. 45; Ball v. Biggam, 6 Kan. App. 42, 49 Pac. 678; Blume v. City of New Orleans, 104 La. Ann. 345, 29 South. 106; Woods v. Houghton, 67 Mass. 580).

The judgment is reversed.

We concur: HARRISON, P. J.; COOPER, J.

On Rehearing.

HALL, J. The petition for a rehearing is denied, but for the purpose of more clearly presenting the point decided, the opinion heretofore filed is amended as follows: The following portion is struck out, to wit: "Defendant demurred to the amended complaint upon the ground that the action was barred by sections 338, 339, and 343 of the Code of Civil Procedure, each section being separately pleaded. The demurrer was overruled and the defendant answered, and again pleaded the same sections in bar of the action, but the court found that the action was not barred, and rendered judgment for plaintiff. The correctness of the ruling of the court as to the plea of the statute of limitations is the question to be determined on this appeal;" and in lieu thereof the following is inserted, to wit:

"Defendant demurred to the amended complaint upon the ground that the action was barred by sections 338, subd. 4, 339, subd. 1, and 343, Code Civ. Proc., each section being separately pleaded; and also upon the ground that the cause of action had accrued to plaintiff more than four years before the commencement thereof, and did not accrue within four years before the commencement thereof. The demurrer was overruled and the defendant answered, and again pleaded the same sections, and that the cause of action accrued to plaintiff more than four years before the commencement thereof. The correctness of the ruling of the court as to the plea by demurrer of the statute of limitations is the question to be determined on this appeal.

"In presenting the question of the bar of the statute of limitations by demurrer it is not necessary to refer to the particular section relied on. In such a case it is sufficient to specify the statute as one of the grounds of the demurrer. Williams v. Bergin, 116 Cal. 56, 47 Pac. 877; Brennan v. Ford, 46 Cal. 7. The defendant having demurred upon the ground that the cause of action accrued to plaintiff more than four years before the action was commenced was entitled to have his demurrer sustained if it appeared upon the face of the complaint that the action did accrue more than four years before it was brought, and was of such a nature that it would be barred under the law in four years or in any less period. Boyd v. Blankman, 29 Cal. 20, 87 Am. Dec. 146."

We concur: HARRISON, P. J.; COOPER, J.

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2 Cal. App. 249

MURPHY v. BONDSHU, County Auditor.

(Court of Appeal, Third District, California. Nov. 23, 1905.)

1. COUNTIES — BOARD OF SUPERVISORS — ALLOWANCE OF CLAIM—LIMITATIONS.

Pol. Code, § 3804, provides that all taxes, penalties, or costs, paid more than once or illegally collected, may by order of the board of supervisors be refunded by the county treasurer; and County Government Act 1897 (St. 1897, p. 470, c. 277) § 40, provides that the board must not allow any claim, unless presented within a year after the last item of the claim or the account accrued. *Held*, that the board of supervisors has no power to allow a claim, under section 3804, not filed with the board for more than a year after it accrued.

2. Mandamus—Scope of Remedy—Mistake.

Where, by a mistake in the amount necessary to redeem land sold for taxes, plaintiff paid a sum in excess of that required by law to redeem, and the mistake was not discovered until his claim for a refund was barred, whereupon he procured an allowance from the county board, and upon refusal of the auditor to draw a warrant brought mandamus, he was not entitled to relief under Code Civ. Proc. § 338, providing for granting relief in certain cases on the ground of mistake.

3. Statutes—Constitutional Provisions—Subjects and Titles.

Const. art. 4, § 24, declares that every act shall embrace but one subject, which shall be embraced in the title. *Held*, that St. 1901, p. 647, c. 215, entitled "An act" to add certain sections to the Political Code, to re-enact others, to amend others, and to repeal others, "all relating to the revenue and taxes of the state," and all the sections embraced in the act in fact pertaining to the revenue and tax system of the state, is not unconstitutional.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 127, 173, 174.]

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Mandamus by Charles H. Murphy to compel F. A. Bondshu, as auditor of the county of Mariposa, to pay certain warrants. From a judgment sustaining a demurrer to the petition, plaintiff appeals. Affirmed.

Rehearing denied by Supreme Court, January 22, 1906.

J. S. Larew, for appellant. J. A. Adair, for respondent.

CHIPMAN, P. J. Mandate. The petition avers: That defendant is auditor of the county of Mariposa, and that on December 27, 1900, he, "by errors and mistakes * * * made in the estimate of the amount necessary to redeem a certain piece of real estate assessed to * * * plaintiff herein, * * * and sold to the state of California for delinquent taxes, the plaintiff paid to the county treasurer of Mariposa county on said date the sum of $3.61 in penalties for delinquencies in excess of what was due upon the redemption of said real estate; that at the time of said payment the said plaintiff herein, and all persons on his behalf, did not know of said errors or said mistakes in the auditor's said estimate," and that by reason of said errors said payment was made; that said errors and mistakes, and the fact that payment in excess of what was due had been made by the plaintiff, were not discovered by plaintiff, and he had no knowledge thereof prior to the month of February, 1903; that immediately on discovery of said errors and mistakes plaintiff employed counsel to collect his said claim, and on July 1, 1903, filed an itemized statement with the board of supervisors, "accompanied by an affidavit showing that the said sum of $3.61 belonged to and was due to the plaintiff herein"; that said board, on September 23, 1903, made an order that said sum be paid to plaintiff, and directed the auditor (defendant) to draw his warrant for the same; that on September 24, 1903, plaintiff made demand on defendant to draw his warrant for said sum as so directed, but he refused and still refuses so to do. Defendant interposed a general demurrer; also pleaded by demurrer that the action is barred by section 3804 of the Political Code; also that it is barred by section 4072 of the same Code; also that it is barred by section 40 of the county government act of 1897. St. 1897, p. 470, c. 277. Defendant also demurred specially on several grounds, which need not be stated, in view of the conclusion we have reached. The court sustained the demurrer without leave to amend, and gave judgment for defendant, from which plaintiff appeals.

So far as we can discover, the case at bar is similar in all respects to Perrin v. Honeycutt, 144 Cal. 87, 77 Pac. 776. It was there held that the board of supervisors had no jurisdiction to allow the claim, because (1) presented for allowance more than one year after the payment was made and the claim therefor accrued (County Government Act 1897, § 40 [St. 1897, p. 470, c. 277]); (2) that the auditor was justified in refusing to draw his warrant for the amount if the board had no power to allow the claim; (3) the writ of mandate cannot be used to obtain relief on the ground of fraud or mistake, the court saying: "When it is applied for, there must be a clear case to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." It was also held that the action is not one for relief on the ground of mistake, and does not come within section 338 of the Code of Civil Procedure, but is an action brought for relief under section 3804 of the Political Code. The court declined to consider the question then and now raised as to the constitutionality of section 3804, because the board of supervisors was prohibited from allowing the claim by the county government act, and hence the six months' limitation provided by section 3804 need not be passed upon. The court said: "If the section is unconstitutional, it would seem that the plaintiff could not in any case recover upon his claim." We think the petition shows on its face facts sufficient to raise the question of the statutory bar by demurrer.

The contention that the act is unconstitutional as violative of section 24 of article 4 of the Constitution, because, as is alleged, "two subjects of legislation are embraced in the act of 1901 (St. 1901, p. 647, c. 215), viz., 'Revenue and Taxation,'" cannot be maintained. The act is entitled "An act" to add certain sections to the Political Code, to re-enact others, to amend others (among them section 3804), and to repeal others, "all relating to the revenue and taxes of this state, and fixing the time within which claims for refunds of taxes must be made." It was held in San Francisco, etc., R. R. v. State Board, 60 Cal. 12, that a title expressing the object of the act to be "to amend section * * *" of a named Code, "relating" to the particular object treated of in the body of the act, is valid. All the sections embraced in the act of 1901 pertain to the revenue and tax system of the state. The Constitution reads: "Every act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title. * * *" Here the subject was embraced in the act, and, by reference to the number of the Code section (3804), was also expressed in the title. Furthermore it has been held that numerous provisions having one general object fairly indicated by the title may be united. Ex parte Liddell, 93 Cal. 633, 29 Pac. 251; People v. Parks, 58 Cal. 624; Ex parte Kohler, 74 Cal. 38, 15 Pac. 436.

Some doubt of the authority of Perrin v. Honeycutt seems to be entertained by counsel for appellant, because the petition for rehearing was not considered; the reason being that it was received too late for action. Non constat but that, had a rehearing been granted, the department decision would have been affirmed. The decision stands unimpaired, and must rule this case.

The judgment is affirmed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

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2 Cal. App. 233

CALKINS v. HOWARD et al.

(Court of Appeal, Third District, California. Nov. 21, 1905.)

1. APPEAL—TIME—DISMISSAL.

An appeal from a judgment, not taken within six months after its rendition, will be dismissed.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1926.]

2. FRAUDULENT CONVEYANCES—CREDITORS.

Civ. Code, § 3429, defines a debtor to be one who, by reason of an existing obligation, is or may become liable to pay money to another, whether such liability be certain or contingent; and section 3430 provides that a creditor is one in whose favor the obligation exists by reason of which he is or may become entitled to the payment of money. *Held*, that a mortgagee is a "creditor" of the mortgagor before the docketing of a deficiency judgment, within section 3440, providing that the sale or transfer of a stock in trade outside of the ordinary course of business will be conclusively presumed to be fraudulent and void as against existing creditors of the vendor unless a certain notice is recorded five days before consummation of the sale.

3. SAME—FRAUD IN FACT.

Under Civ. Code, § 3440, providing that a sale of a stock of goods outside the ordinary course of business will be "conclusively presumed to be fraudulent and void as against existing creditors," etc., a finding that there was no fraud in fact in a transfer within the statute cannot control the conclusive presumption raised thereby.

4. SAME—INSOLVENCY—PROOF.

Where, on an issue of fraud in the transfer of personal property, it was proved that an execution had been issued and returned nulla bona and that the sheriff had been unable to find other property, such proof was prima facie sufficient to show the debtor's insolvency.

5. EXECUTION — CLAIMS OF THIRD PERSON — TRANSFER OF PROPERTY — INSOLVENCY OF SELLER.

Where certain property levied on had been transferred by the debtor in violation of Civ. Code, § 3440, making such transfers fraudulent and void as against existing creditors, and was claimed by the transferee, the sheriff was not bound either to allege or prove the insolvency of the debtor in order to maintain his claim to the property.

Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by William Calkins against Charles B. Howard and others. From a judgment in favor of plaintiff, and from an order denying defendants' motion for a new trial, they appeal. Reversed.

Coburn & Collier, for appellants. James F. Lodge, and R. S. Taylor, for respondent.

McLAUGHLIN, J. This is an action against defendant Howard, and the sureties on his official bond as sheriff of Siskiyou county, to recover certain personal property or the value thereof. The plaintiff had judgment, and from such judgment and the order denying their motion for a new trial, defendants appeal. The appeal from the judgment was not taken within six months, and hence it must be dismissed. Michaelson v. Fish (Cal.) 81 Pac. 661. The defendant sheriff holds the property by virtue of an execution issued in a case entitled "G. W. Small v. W. H. Hubbard." In that case Small recovered a judgment foreclosing a mortgage, the amount found due being $453.50. The mortgaged property was sold pursuant to this judgment, and on August 10, 1903, a deficiency judgment for the sum of $242.62 was docketed. Two weeks later an execution was issued on said deficiency judgment, and the defendant sheriff levied the same by seizing the property here in dispute. This property comprised the stock in trade and fixtures of a saloon conducted by Hubbard, who sold it to plaintiff in bulk on July 15, 1903. Plaintiff took possession of the same, and while he was so in possession the property was seized by the sheriff. Plaintiff gave due notice of his claim to the property, and demanded its return, but the sheriff refused to comply with such demand, and thereupon this action was brought. No notice of the sale by Hubbard to plaintiff was recorded, as required by the provisions of section 3440 of the Civil Code, and the principal question presented for decision involves the construction of that portion of said section, which provides that the sale or transfer of a stock in trade in bulk, or in any manner otherwise than in the ordinary course of trade, and in the regular and usual method of the vendor, will be conclusively presumed to be fraudulent and void, as against existing creditors of the vendor, unless the notice therein provided for is recorded at least five days before the consummation of the sale.

It is contended by respondent that Small was not an existing creditor within the meaning of the section cited, because at the time of the sale, no deficiency judgment had been docketed. We cannot concur in this view. A debtor is one who, by reason of an existing obligation is, or may become, liable to pay money to another, whether such liability be certain or contingent. Civ. Code, § 3429. A creditor is one in whose favor an obligation exists by reason of which he is, or may become entitled to the payment of money. Civ. Code, § 3430. A mortgagee is none the less a creditor because the payment of the debt due him is secured by a lien on specific property. As to this property, he is a preferred creditor; but, if a balance remains after the security is exhausted, his right to have recourse against the general assets of his debtor is unquestionable. "The taking of the security operated to suspend the right of proceeding against the property fraudulently conveyed, or any other property of the debtor, until the mortgaged property should be exhausted and a deficiency judgment docketed; but we cannot perceive any principle upon which suspension of the remedy, without more, could operate more favorably upon property fraudulently conveyed than upon other property of the debtor, all being alike, subject to the process of law in favor of existing creditors." First National Bank, etc. v. Maxwell, 123 Cal. 369, 55 Pac. 980, 69 Am. St. Rep. 64. The word "creditor" is given very broad significance in determining the right to assail a fraudulent transfer of property. Murray v. Murray, 115 Cal. 273, 7 Pac. 37, 37 L. R. A. 626, 56 Am. St. Rep. 97; Chalmers v. Sheehy, 132 Cal. 465, 64 Pac. 709, 84 Am. St. Rep. 62. If persons having a claim for a tort, or for maintenance, can be considered creditors, if those whose rights are inchoate, indefinite, uncertain, and contingent upon judicial award, can assail fraudulent transfers, surely a mortgage creditor, pursuing his special remedy and security, is not robbed of the legal status which attaches the moment the obligation is created and continues until the debt is paid. It is argued that the contrary conclusion follows because, if notice had been given, this mortgage creditor would have been remediless, and hence no harm or disadvantage resulted to Small by reason of the failure to record the statutory notice. Waiving the thought that this is a false quantity in determining the status of a creditor in the absence of such notice, we think that the law affords preventive or protective remedies to all whose rights require conservation.

It is next urged that the finding as to absence of fraudulent intent neutralizes the effect of failure to record the notice. We do not think any finding of fact, however strong in its demonstration of good faith, can avail to validate the sale of a stock in trade in bulk without the statutory notice, as against existing creditors of the vendor. The clause of section 3440, under consideration, is plain and unambiguous, and when it is shown that such a sale was made without the required notice, it is "conclusively presumed to be fraudulent and void as against the existing creditors of the vendor." This presumption is incontrovertible. "Where the law makes a certain fact a conclusive presumption, evidence will not be received to the contrary." Estate of Mills, 137 Cal. 303, 70 Pac. 91, 92 Am. St. Rep. 175; Filipini v. Trobock, 134 Cal. 444, 66 Pac. 587. Under the undisputed facts in this case, therefore, the finding in question must fall before the conclusive presumption raised by the statute. The court found that there was no proof of the insolvency of Hubbard, "nor any proof that he did not have sufficient property out of which said execution issued on said deficiency judgment could have been satisfied." This finding is relied upon to support the judgment regardless of the fraudulent nature of the transfer. But the finding is contrary to the only evidence bearing on the facts found. An execution had been issued and returned nulla bona, and certainly the return of the sheriff that he was unable to find other property, is sufficient, prima facie, to show that no other property is available to satisfy the judgment. 14 Am. & Eng. Ency. of Law (2d Ed.) p. 331; Herrlich v. Kaufmann, 99 Cal. 277, 33 Pac. 857, 37 Am. St. Rep. 50. In any event, however, the transfer being absolutely void as to Small, the sheriff was not required to plead or prove the insolvency of Hubbard. First National Bank v. Maxwell, supra; Mason v. Vestal, 88 Cal. 397, 26 Pac. 213, 22 Am. St. Rep. 310; Banning v. Marleau, 121 Cal. 242, 53 Pac. 692.

The order is reversed, and the cause remanded for a new trial.

We concur: CHIPMAN, P. J.; BUCKLES, J.

2 Cal. App. 225

PEOPLE v. SOLANI.

(Court of Appeal, Third District, California. Nov. 20, 1905.)

1. Homicide—Instructions—Self-Defense.

Where, on a trial for homicide, defendant testified that he fired the fatal shot because he thought his life was in danger; that he was down and two men were over him, striking at him; and that he did not know which one he shot—an instruction that the law presumed that defendant intended to kill decedent, and, unless it was shown that his intention was other than his acts indicated, the law would not hold him guiltless, was erroneous, for one might intend to kill and yet be guiltless.

2. Criminal Law—Errors in Instructions—Cured by Other Instructions.

The error in an instruction on a trial for homicide, defended on the ground of self-defense, that the law presumed, on the proof of the killing, that defendant intended to kill, and that, unless it was shown that his intention was other than his acts indicated, the law would not hold him guiltless, in ignoring the fact that one might intend to kill and yet be guiltless, was not cured by other instructions to the effect that intent is manifested by the circumstances connected with the offense, which intent must be proved, and that, when an unlawful act is proved, the law presumes it to have been intended unless otherwise shown, and that it is not necessary to prove an unlawful intent by direct evidence.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

John Solani was convicted of manslaughter, and he appeals. Reversed.

W. F. Cowan and James P. Berry, for appellant. U. S. Webb, Atty. Gen., for the People.

BUCKLES, J. The defendant was charged with the murder of one John Guidotti, and was convicted of manslaughter. He appeals from the judgment and from an order denying his motion for a new trial.

The appellant bases his contention for a reversal upon the grounds: (1) Insufficiency of the evidence to justify the verdict; (2) misconduct of the jury; and, (3) errors committed by the court in its instructions to the jury. As a new trial must be granted on the last assignment of error, it is not necessary to notice the others. The instruction complained of is as follows: "Intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. The intent must be proved; but, when an unlawful act is proved, the law presumes it to have been intended, unless otherwise shown by the evidence. It is never required by the prosecution to prove an unlawful intent by positive and direct evidence. In many cases such proof could not be made; and it is deemed sufficient to prove the unlawful act and from such proof the law presumes the unlawful intent. And, if the defendant in this case shot John Guidotti, and killed him, the law presumes the defendant intended to kill the deceased, and, unless it is shown by the evidence that his intention was other than his acts indicated, the law will not hold him guiltless." The defendant testified that he fired the shot because he thought his life was in danger, and that he was down and two men were over him striking at him, but he did not know which one he shot. The vice of this instruction is found in the last paragraph: "And, unless it is shown by the evidence that his intention was other than his acts indicated, the law will not hold him guiltless." This same language was used in the instruction given in People v. Newcomer, 118 Cal. 263, 50 Pac. 405, which was a case in which the defense of self-defense was involved, and the Supreme Court held the words to be error, and directed a new trial. The shooting with a pistol would naturally indicate intent to kill, and would be sufficient proof of such intent, if there was no other proof tending to show that he did not intend to kill. One might intend to kill, however, and yet be entirely guiltless. The Attorney General maintains that all the instructions must be viewed together; and this is correct. People v. Armstrong, 114 Cal. 570, 46 Pac. 611. The court had told the jury that intent is manifested by the circumstances connected with the offense; that this intent must be proved, but, when an unlawful act is proved, the law presumes it to have been intended, unless otherwise shown by the evidence; and that it is never required by the prosecution to prove an unlawful intent by positive and direct evidence —following this up by telling the jury that, if defendant shot and killed the deceased, the law presumes he intended to kill him, "and, unless it is shown by the evidence that his intention was other than his acts indicated, the law will not hold him guiltless." Taking the whole instruction together, it is difficult to see how it can be said to be free from error. The inference is too readily drawn by the jury from the words "the law will not hold him guiltless" that, the killing being shown and the intent to kill being presumed, the mere killing would make the one killing guilty of some crime. With these considerations, we think that the error was prejudicial.

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

2 Cal. App. 220

FITZHUGH v. MASON et al.

(Court of Appeal, Second District, California. Nov. 20, 1905.)

1. APPEAL—FINDINGS—SUFFICIENCY — SPECIFICATIONS.

Where, in an action for architect's services, plaintiff appealed from a judgment awarding him $700, and claimed that under the evidence he was entitled to $13,580, but the finding as to damage was not attacked in plaintiff's specifications of insufficiency, the point was not reviewable.

2. JUDGMENT—CONFORMITY TO VERDICT.

Where, in an action for breach of a contract for architect's services, there was no finding as to the earnings of plaintiff and his probable expenses in carrying out the contract, he was not entitled to judgment for a percentage of the actual cost of the building erected by defendants, less his earnings and estimated expenses.

3. DISMISSAL AND NONSUIT — DISCRETION — FINDINGS—JUDGMENT—FAILURE TO ENTER —TIME.

Under Code Civ. Proc. § 581, subd. 6, providing that an action may be dismissed or a judgment of nonsuit entered by the court, when, after verdict or final submission, the party entitled to judgment neglects to demand or have the same entered for more than six months, it is within the discretion of the court to dismiss the action for such cause or not at its election.

4. CONTRACTS—ARCHITECT'S SERVICES—RIGHT TO PRACTICE.

Failure of an architect to obtain a certificate entitling him to practice architecture within the state, as required by Act March 23, 1901 (St. 1901, p. 641, c. 212), prior to the making of a contract for his services in the erection of a building, did not invalidate the contract, though he could not legally perform the same without procuring such certificate.

5. SAME—CONSTRUCTION OF CONTRACT.

An architect, in the last of his correspondence with reference to his employment in the construction of a building, stated certain conditions on which he would accept employment, followed by the clause: "You are doubtless posted on regular fees for architectural services. Full services, 5 per cent. Drawings and specifications, 3 per cent."—and added that he could not accept employment except on conditions specified. There was no express acceptance of the terms named or agreement with reference thereto, but defendants sent plaintiff a draft for certain expenses, and at the same time requested him to make certain investigations as to buildings in other cities. *Held*, that the allusion to fees in plaintiff's letter did not constitute one of the terms of the contract, and that defendants were therefore only bound under an implied provision to pay the regular fees.

6. SAME—TERMINATION OF CONTRACT.

Where defendants employed plaintiff to perform certain services as an architect, defendants were entitled to discontinue the work at their option, in the absence of a contract to the contrary, on paying plaintiff for services and expenses incurred.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 1009.]

7. APPEAL—HARMLESS ERROR.

Where, in an action for architect's services, the decision in favor of plaintiff did not rest on an erroneous finding as to the contract for the services, but on the finding as to damage which plaintiff had sustained, which finding was not attacked in defendants' specifications of error, such erroneous finding was not prejudicial to defendants.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Thornton Fitzhugh against John A. Mason and another, copartners. From a judgment in favor of plaintiff for less than the relief demanded, and from an order denying his motion for a new trial, plaintiff and defendant John A. Mason appeal. Affirmed.

Johnstone Jones, for appellant Mason. G. P. Adams, for respondent.

SMITH, J. The plaintiff is an architect, and brings this suit for the breach of an alleged contract of employment by the defendants. On May 5, 1903, the court made the following order: "Findings ordered in favor of the plaintiff. Damages will be fixed at the sum of $700." The findings and judgment were filed February 2, 1904, and judgment thereon entered for plaintiff in the sum of $700; from which, and an order denying his motion for a new trial, he and the defendant Mason each appeal.

The allegations of the complaint as to the contract are, in effect: That during the month of October, 1901, the defendants entered into negotiations with plaintiff, which continued until about the 18th day of November, 1901, and resulted in a contract, whereby "the defendants employed plaintiff to act as architect for them in the erection and construction by them, in the city of Los Angeles," etc., "of an opera house and an eight or ten story building, *and agreed to pay him five per cent. on the cost price thereof* and his traveling expenses for his services as such architect"; that the cost of said buildings as contemplated by said defendants at the time of said agreement would be not less than $300,000; that plaintiff performed certain services under the contract, and was not only ready and willing to carry it out, but offered to do so to the defendants, who refused to carry out the terms of the agreement, or to pay the plaintiff therefor; and that plaintiff's compensation as architect under the said agreement would amount to $15,000, and his damages, by reason of the breach, to the like sum. The court finds the contract as set out in the complaint; but further finds "*that the cost of said building, as contemplated by said defendants at the time of said agreement, was not definitely determined, and defendants did not agree that the building should cost any certain sum.*" It is further found: That the plaintiff offered to perform; that at that time he had not obtained a certificate from the state board of architecture under the act of March 23, 1901 (St. 1901, p. 641, c. 212); that the defendants refused to carry out the agreement; that the opera house, as contemplated by the defendants and subsequently modified by them, was constructed by the defendant Mason, after the commencement of this action, "at a cost of more than $130,000"; and that the plaintiff was damaged in the sum of $700. The only specification made by the plaintiff is that the evidence is insufficient to justify the finding italicized. But we think this finding is fully supported by the evidence.

Other points urged by the plaintiff appellant are: That, on the evidence, he was entitled to damages in the sum of $13,580—being the amount claimed by him in the complaint ($15,000), less his earnings and estimated expenses, as shown by his testimony; and that upon the findings he was entitled at least to 5 per cent. on the actual cost of the building put up by Mason, $130,000, less his earnings and estimated expenses. But with reference to the former point it is sufficient to say that the finding as to damage is not attacked in the plaintiff's specifications of insufficiency. The second point is also untenable: First, because there is no finding as to the earnings of plaintiff, or his probable expenses, in carrying out the contract (Cederberg v. Robison, 100 Cal. 93, 34 Pac. 625); and also because we are of the opinion—for reasons that will be given in the sequel—that under the contract proven and found he was not entitled to the sum claimed.

The points urged by the defendant appellant are: (1) That the demurrer to the complaint should have been sustained; (2) that the finding as to the contract was not justified by the evidence; (3) that the contract, if any, was illegal and void; and (4) that the suit should have been dismissed for failure of plaintiff to demand judgment within six months after the order for findings. The last point is obviously untenable. It was in the discretion of the court to dismiss the action, or not to do so. Code Civ. Proc. § 581, subd. 6. The third point is also untenable. By the act of March 23, 1901, "to regulate the practice of architecture," it is made a misdemeanor "for any person to practice architecture without a certificate in this state"; and hence, in order to carry out the contract, it would have been necessary for the plaintiff to take out his certificate. But we can see no reason why it should be held that a contract made in advance of the issue of a certificate should be void.

As to the other points of the appellant defendant, which will be considered together, we are of the opinion that the evidence was sufficient to justify the finding that the plaintiff was employed by the defendants. But we are also of the opinion that the evidence did not establish the allegation of the complaint that defendants agreed to pay plaintiff 5 per cent. on the contemplated cost of the building, or justify the finding of the court to that effect. In the plaintiff's letter of November 2, 1901, to the defendant Eaton—the last from him in the correspondence—he states certain conditions upon which he would accept employment, and in this letter occurs the following clause: "You are doubtless posted on regular fees for architectural services. Full services, 5 per cent. Drawings and specifications, 3 per cent."—and it is added: "I will await your answer anxiously and act promptly, if you can give me the work on the conditions named, which, as I am situated, are the only conditions I can accept." There was no express acceptance of the terms named, or agreement with reference thereto; but on November 13th, in response apparently to a telegram from the plaintiff, a draft for $375, for certain expenses, was forwarded to him by the defendants, and at the same time a letter written requesting him to start for Los Angeles as soon as possible, and on his way to make certain investigations as to buildings, etc., in Chicago; which closed the correspondence. We do not regard the allusion to fees in the letter of plaintiff as constituting one of the terms of the contract, but simply as stating the regular fees charged by architects for services, which were doubtless already known to the defendants. From this, an agreement might be inferred that the defendants would pay the regular fees. But there is no evidence in the case as to when, according to the custom of trade, such fees should become due, and, in the absence of such evidence, it is reasonable to suppose that the employer would be liable for them only upon completed work; and that, in the absence of an explicit contract to the contrary, he would be at liberty to discontinue the work at his option, paying the architect for services rendered and expenses incurred. Civ. Code, §§ 1643, 1655–1656. We are of the opinion, therefore, that the finding of the court upon this point was not sustained by the evidence. But as the decision of the court does not rest upon this finding, but on the finding as to damages in the sum of $700—which is not attacked in the defendant appellant's specifications—we are also of the opinion that the error is immaterial.

For the reasons given, it is also clear that the facts alleged in the complaint are insufficient to show an indebtedness to plaintiff in the sum of $15,000, or damages in that amount; but the complaint is sufficient to show an employment, and to justify the finding of the court that plaintiff was injured in the amount found.

For these reasons, the judgment and the order appealed from are affirmed.

We concur: GRAY, P. J.; ALLEN, J.

2 Cal. App. 219

NOFZIGER BROS. LUMBER CO. v. SHAFER et al.

(Court of Appeal, Second District, California. Nov. 20, 1905.)

1. APPEAL—EVIDENCE—FINDINGS—REVIEW.
Where there is some evidence to support the findings of the trial court, they will not be disturbed on appeal.

2. MECHANICS' LIENS—NOTICE OF LIEN—REQUISITES.
Where a notice of a claim for a mechanic's lien did not correctly state and set out the terms of the contract under which the materials sued for were sold and delivered, it was insufficient to support the lien.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanic's Lien, §§ 168, 239.]

Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by Nofziger Bros. Lumber Company against W. H. Shafer and another. From a judgment in favor of defendant Webster Batcheler, and from an order denying a new trial, plaintiff appeals. Affirmed.

Scarborough & Bowen, for appellant. Sidney J. Parsons, for respondents.

ALLEN, J. Action to foreclose a mechanic's lien. Judgment in favor of defendant Batcheler, from which, and an order denying a new trial, plaintiff appeals.

The complaint alleges that the lumber, on account of the furnishing of which the lien was claimed, was received by defendant Shafer, who, as tenant of defendant Batcheler, was constructing a house upon the lands of and with knowledge of and with the consent of the latter. The claim of lien set out in the complaint asserts that the lumber was sold under a contract with Shafer that he was to pay therefor the then prevailing list price; that no terms for payment were specially agreed to. The court finds that said claim of lien "did not and does not correctly state and set out the terms of the contract made between plaintiff and defendant W. H. Shafer for the lumber and materials sold and delivered, * * * nor does said claim of lien correctly state and set out the terms, time given, and conditions of said contract." The court further finds that there was no agreement to pay the list price, or any particular price; that the contract was that the lumber should be paid for upon completion of the house; that the house was not completed at the date of the filing of the lien; and that work had not been suspended thereon for 30 days, or at all. There was testimony offered tending to establish all of these facts so found. It was within the province of the trial court to determine these facts, and, where there is some evidence in support, they will not be disturbed. "The notice of lien must contain a correct statement of the facts required by the statute, and, unless so stated, no claim can be enforced." Santa Monica, etc., Co. v. Hege, 119 Cal. 380, 51 Pac. 555; Malone v. Big Flat, etc., Co., 76 Cal. 578, 18 Pac. 772. "These facts, to be correctly stated, must embrace a statement of the terms, time given, and conditions of the contract. In all essential particulars, the statement of claims of lien must be true." Wagner v. Hansen, 103 Cal. 107, 37 Pac. 195. The court, finding that the claim of lien was untrue in essential particulars, and the evidence warranting such finding, the claim of lien could not be enforced. There being no basis for a decree in plaintiff's favor against defendant Batcheler under these findings, it is needless to discuss the other points involved.

The judgment and order are affirmed.

We concur: GRAY, P. J.; SMITH, J.

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2 Cal. App. 253

ALVEY v. CONTINENTAL INS. CO. OF CITY OF NEW YORK.

(Court of Appeal, First District, California. Nov. 25, 1905.)

INSURANCE — CONSTRUCTION OF CONTRACT — MODIFICATIONS OF POLICY.

Civ. Code, § 1647, provides that a contract may be explained with reference to extrinsic circumstances and the subject-matter. Section 1648 provides that a contract extends only to those things concerning which it appears that the parties intended to contract. Section 1651 provides that written parts of a contract control printed parts, and original parts control those copied from a form. An insurance policy covered, in separate items and for distinct amounts, a building and household furniture, and provided that the entire policy should be void if the building should become vacant or unoccupied. Subsequently the furniture covered by the policy was moved from the insured premises to another house, and the policy was accordingly modified by an attached slip, on which was written "the second item of this policy is hereby made to read and cover as follows." Following the writing, the form printed on the slip was filled out, so as to provide for insurance on household furniture. The form contained a clause permitting vacancy during a change of tenants. *Held*, that the attached slip modified the original policy only so far as it related to the insurance on the furniture, and did not modify the provisions relating to insurance on the house, and there could be no recovery for the destruction of the house by fire while vacant and unoccupied, contrary to the stipulations of the original policy.

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Hattie L. Alvey against the Continental Insurance Company of the City of New York. From an order denying a new trial, defendant appeals. Reversed.

F. H. Gould, for appellant. Riordan & Lande, for respondent.

HALL, J. This is an action to recover for loss occasioned by destruction by fire of a building insured by defendant. Plaintiff recovered judgment, and this appeal is from the order denying defendant's motion for a new trial.

The complaint alleges that defendant, on the 2d day of May, 1898, by its policy of insurance, in writing insured plaintiff for the term of three years, ending May 2, 1901, against loss or damage, not exceeding $1,000, by fire to her one-story, shingle roof, frame building, No. 952 Park Way, East Oakland, Alameda county. The house was totally destroyed by fire March 8, 1901. Defendant in its answer set forth the entire policy as the same was executed May 2, 1898, and among other things pleaded a breach of one of the conditions of the policy, which condition is in these words: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the building herein described, whether intended to be occupied by owner or tenant, be or become vacant or unoccupied, and so remain for ten days." The policy as set forth in the answer provided for an insurance of $1,000 on the house therein described, and $400 on the furniture contained in the house. Upon the trial, plaintiff proved by her own testimony that the house was destroyed by fire on the 7th day of March, 1901, and at that time had been vacant and unoccupied for 30 days. The plaintiff offered in evidence the policy as the same was originally issued and dated May 2, 1898, together with a slip attached thereto January 23, 1901, and bearing the latter date. Defendant objected to the introduction of the slip dated January 23, 1901, upon the ground that it was incompetent, irrelevant, and immaterial; that it had no reference to the contract sued on, but is a subsequent contract and refers to personal property after the same had been removed to San Francisco; and that no variation of the original contract was pleaded. The court overruled defendant's objection, and the slip, of date January 23, 1901, was admitted in evidence, and defendant reserved an exception. The same point was again presented on defendant's motion for a nonsuit, and also under its objections as to certain findings of the court in regard to this slip.

Passing the objection that the contract sued on was alleged to have been executed May 2, 1898, and no subsequent modification thereof was pleaded, we will pass to a discussion of the point (that we think was fairly raised) that the slip of January 23, 1901, had reference to the personal property and not to the house, as the more vital question to be determined. The policy executed May 2, 1898, consisted of a main document and a slip attached thereto, and both executed and dated May 2, 1898, and which will hereafter in this opinion be referred to as the "original policy."

The terms of the original policy, so far as they throw light upon the question now under discussion, are as follows:

"No. 20,533. $1,400 at 80 c.

"Organized, 1852.

"The Continental Insurance Co. of the City of New York.

"In consideration of the stipulations herein named, and of eleven ²⁰/₁₀₀ dollars premium, does insure Mrs. Hattie L. Alvey for the term of three years from the 2d of May, 1901, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding fourteen hundred dollars, to the following described property while located and contained as described herein, and not elsewhere, to wit:

"Dwelling and contents Policy Form.

"One thousand dollars on the ——— story shingle-roof frame building and its additions, including foundations and verandas [here follows an enumeration of various classes of fixtures], while occupied as a dwelling, situate No. 952 Park Way, being southeast corner East Ninth street, East Oakland, Cal.

"Four hundred dollars on household and kitchen furniture, useful and ornamental, including beds, bedding [here follows an enumeration of various classes of articles for domestic use], all while contained in above-described dwelling.

"[Here follows a clause concerning use of coal oil, electric lights, repairs, etc., a clause concerning loss by lightning, and a clause concerning use of gasoline stove, down to the ending of the slip that was executed May 2, 1898, as a part of the original policy. The body of the original policy continues with various provisions, among which are the following:]

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto shall be void * * * if the hazard be increased by any means within the control or knowledge of the insured * * * or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days."

The slip which was introduced in evidence, over the objection and exception of defendant, was dated January 23, 1901, and was duly signed by the agent of defendant. It is a printed form containing some written matter. So far as the same concerns the question under discussion, the slip is as follows, the written words of the slip being italicized herein:

"*The second item of this policy is hereby made to read and cover as follows:* Dwelling and Contents Policy Form.

"*Nil on the* frame building and its additions * * * while occupied only as a dwelling situate *No. 1117 Leavenworth street, between California and Sacramento streets, San Francisco, Cal.*

"*$400* on household and kitchen furniture, useful and ornamental, including beds, bedding [Here follows an enumeration of various articles of domestic use] all while contained in above-described dwelling. * * * Plumbing, gas, steam and electric fittings; alterations and repairs; and the use of gas and coal oil stoves and lamps and electric light, permitted without notice; also vacancy during change of tenants if the subject of insurance be a dwelling located in a town. [Here follows a clause concerning the use of gasoline stove.]

"This slip is attached to and made a part of Policy No. *20,533* of Continental Insurance Company of New York.

"Dated this *23d* day of *January, 1901.*"

The question to be determined is: Did the slip of date January 23, 1901, modify the contract dated May 2, 1898, so far as such contract related to the insurance on the house, or did it only modify such contract with regard to the insurance on the furniture? We are of the opinion that the latter is the correct construction of the terms of the slip. By the original policy two items were insured. The first was the house No. 952 Park Way, in the sum of $1,000, and the second was the furniture then contained in said house, in the sum of $400. By the terms of the original policy the furniture was insured only while contained in said house. Apparently the furniture was subsequently moved from the Oakland house to a house in San Francisco, and in order to prevent the lapsing of the policy in regard to the furniture it became necessary to modify the policy with regard to the furniture. This was done by attaching the slip dated January 23, 1901. Omitting some portions of the blank form (which we have not set forth in this opinion because they do not throw any light upon the question involved), the first contractual words are written and are: "The second item of this policy is hereby made to read and cover as follows," and then follow the various provisions of the slip in question. By the written words of the slip, as well as by the circumstances under which the slip was executed, it is evident that the parties were contracting with reference only to the second item of the original policy, to wit, the furniture.

Section 1647 of the Civil Code provides: "A contract may be explained by reference to the circumstances under which it is made, and the matter to which it relates." The circumstances under which this slip was executed evidently were that the furniture had been moved to San Francisco, and it therefore became necessary to modify the original policy in regard to that item, and by the written words of the slip it related to the second item of the original policy; that is, the furniture. Section 1648 of the Civil Code provides that: "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." Section 1651 of the Civil Code provides that: "Where a contract is partly written and partly printed, or where part of it is written or printed under the special directions of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and the parts which are purely original control those which are copied from a form. And, if the two are absolutely repugnant, the latter must be so far disregarded." Applying the principles of the two foregoing sections to the slip under discussion, it cannot be construed as modifying the original policy so far as it related to the insurance on the Oakland house. The presence of the clause in the slip of date January 23, 1901, permitting "vacancy during change of tenants, if the subject of insurance be a dwelling located in a town," is explained by the fact that a printed form was used, prepared to meet various conditions. But by the very words of the clause, it is only effective where the subject of insurance is a dwelling; and, as we have seen, the subject of the insurance treated of by this slip is, by the written words of the slip, limited to the second item of the original policy, which is the furniture. In considering this question we have not overlooked the rule that in construing insurance policies, uncertainties should be resolved against the insurer. We do not think there is any uncertainty as to the effect of this slip. By the terms of the original policy, the same was to be void if the house became and remained vacant and unoccupied for 10 days. Plaintiff testified that it had been vacant and unoccupied for 30 days before the fire, and was so vacant at the time of the fire.

It follows from the above views that the court erred in admitting in evidence the slip dated January 23, 1901, and in denying defendant's motion for a nonsuit. In view of the conclusion we have reached as to the effect of the slip in question, it is not necessary to discuss any other question raised on this appeal.

The order denying the motion for a new trial is reversed.

We concur: HARRISON, P. J.; COOPER, J.

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2 Cal. App. 267

MILLER v. QUEEN INS. CO. OF AMERICA.

(Court of Appeal, First District, California. Nov. 25, 1905.)

1. NEW TRIAL — PROCEEDINGS—DELAY—DISMISSAL.

Defendant, moving for a new trial, gave notice that on June 28th it would present a bill of exceptions and amendments to the judge for settlement. On that day the judge was absent, and the bill and amendments were delivered to the clerk. Postponements were had, and no further steps were taken until the following May, when plaintiff moved for a dismissal of the motion for a new trial for lack of diligence in its prosecution. *Held*, that the burden was on defendant to show some excuse or explanation for such delay.

2. SAME—EXCUSES FOR DELAY.

Where the judge was absent on the day fixed for the presentation of a bill of exceptions, and the bill and amendments were delivered to the clerk, it was the duty of the party moving for a new trial to ascertain when the judge would return and to obtain an order fixing a day for settlement, and the moving party was not relieved from taking further steps until he should have received notice that the judge had fixed a day.

3. SAME—BILL OF EXCEPTIONS—DAY FOR SETTLEMENT—NOTICE—WAIVER.

Where, on the day fixed by a party moving for a new trial for presentation of the bill of exception and amendments to the judge for settlement, the judge was absent and the bill and amendments were delivered to the clerk, and subsequently, by agreement between the parties, there were meetings at the judge's chambers for the purpose of settling the bill, such meetings amounted to a waiver of any notice that the moving party might have been entitled to from the judge fixing a day for settlement.

4. SAME — DISMISSAL—MOTION—SUBSEQUENT PROSECUTION—EFFECT.

Where, after a motion to dismiss a motion for a new trial for lack of diligence in prosecution, the moving party gave notice fixing a day for settlement of the bill of exceptions, such notice did not obviate the moving party's previous negligence in failing to take the requisite steps to bring the motion to a hearing and to procure a settlement of the bill of exceptions.

5. SAME—EXCUSES FOR DELAY—BUSINESS OF COUNSEL.

On a motion to dismiss a motion for a new trial on the ground of lack of prosecution, the fact that there were other causes in which the moving party was interested, wherein the time of its attorney was occupied in settling bills of exceptions, was a circumstance proper to be considered by the judge in determining whether there had been negligence in the settlement of the bill in the case in question.

6. APPEAL—REVIEW—TRIAL COURT'S DISCRETION—NEW TRIAL.

The determination of the trial court upon such question was not open to review.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by John Miller against the Queen Insurance Company of America. From an order dismissing defendant's motion for a new trial, it appeals. Affirmed.

James Alva Watt, for appellant. Page, McCutchen, Harding & Knight, for respondent.

HARRISON, P. J. Appeal from an order dismissing the defendant's motion for a new trial. The defendant gave notice of its intention to move for a new trial April 4, 1902, and having thereafter served upon the plaintiff its proposed bill exceptions, to which the plaintiff had proposed certain amendments, gave the plaintiff notice of its rejection of the amendments, and that on June 28th it would present the bill and the amendments to the judge for settlement. On that day the judge was absent from San Francisco, and the defendant delivered the proposed bill and amendments to the clerk for the judge. It does not appear that the judge after his return was requested to fix any time for the settlement of the bill, or that any time was fixed by him, but in the early part of November the attorneys for the respective parties agreed to meet at his chambers at a designated time for the purpose of effecting its settlement, and in pursuance of said agreement had such meeting. At the request of the judge, the meeting was postponed until the next day, and thereafter, until December 24th, other postponements were had and meetings held at his chambers, at which the parties sought to effect a settlement of the bill. After December 24th no further steps were taken in the matter until May 20, 1903, on which day the plaintiff served a notice on the defendant of his intention to move the court for an order dismissing the defendant's motion for a new trial on the ground that the defendant had not prosecuted the same with due diligence. The motion was heard May 29th and succeeding days, and on June 30th was granted. From this order the defendant has appealed.

Upon the foregoing facts the burden was thrown upon the defendant to show some excuse or explanation for its delay in taking the steps requisite for enabling the court to hear and determine its motion for a new trial, including the settlement and filing of the bill of exceptions setting forth the matters upon which the motion was to be heard; otherwise, the court would be authorized to hold that it had not acted with due diligence and to grant the motion of the plaintiff. The defendant was the moving party in the proceeding for a new trial, and the burden was at all times upon it to take whatever steps were necessary to enable the court to hear its motion. Kubli v. Hawkett, 89 Cal. 638, 27 Pac. 57; San José Land Co. v. Allen, 129 Cal. 247, 61 Pac. 1083; Mowry v. Weisenborn, 137 Cal. 110, 69 Pac. 971; Galbraith v. Lowe, 142 Cal. 295, 75 Pac. 831. Its contention that, after delivering the proposed bill and amendments to the clerk for the judge, it was not required to take any further steps towards procuring its settlement until it should receive notice that the judge had fixed a day therefor, is without support. It was its duty to ascertain when the judge should return to the city, and to obtain from him an order fixing a day for the settlement of the bill. The judge was not required to act in the premises until requested thereto by one of the parties to the suit; and, although it was competent for either party to obtain such order from him, the plaintiff was under no obligation to take any step in aid of the defendant for having its motion heard. But, even if the defendant had been entitled to any notice, the agreement between it and the plaintiff and their subsequent meetings at the judge's chambers for the purpose of settling the bill operated as a waiver of any objection to the absence of such notice. At the hearing of the plaintiff's motion the attorneys held different views upon the results of the last meeting at the judge's chambers on December 24th—the plaintiff claiming that at that time the bill was settled by the agreement between them as to its form and contents; the defendant, on the other hand, claiming that the form of certain proposed amendments had not been agreed upon. Neither the proposed bill nor the amendments thereto are set forth in the record herein, and it does not appear whether the judge made any decision upon this dispute, but, as the proceedings for its settlement had been taken before him, he was in a position to know whether at that meeting they had agreed upon the form of the bill or not; and, if necessary for sustaining the order appealed from, it may be assumed, from the fact that the judge granted the plaintiff's motion, that he held in accordance with his contention. If the parties had, in fact, agreed upon the form and contents of the bill, it was incumbent upon the defendant to cause it to be engrossed and present it to the judge for his signature without any unreasonable delay, and its unexplained neglect for five months to cause it to be engrossed was inexcusable.

We do not, however, deem it necessary to assume that the judge made any decision upon this disputed point. If it be assumed that the parties did not then agree and that the bill was not settled, the defendant was still required to be diligent in procuring its settlement. By his own statement of that result of that meeting the defendant's attorney "undertook to prepare a modified form subject to future agreement" of the matters then in dispute; but he did not, in fact, take any further step in reference thereto or for the purpose of procuring a settlement of the bill until after the plaintiff in May, 1903, had given him notice of his intention to make the motion under consideration. The notice given by the defendant, after receiving the above notice from the plaintiff, that on a subsequent day it would proceed with the settlement of the bill, did not obviate or palliate its previous negligence.

The fact that there were other causes in which the defendant was interested, wherein the time of its attorney was occupied in settling bills of exceptions, was a circumstance proper to be considered by the judge in determining whether there had been undue negligence in the settlement of the bill in this case, but his determination upon that point is not open to review.

The order is affirmed.

We concur: HALL, J.; COOPER, J.

2 Cal. App. 271

MILLER v. AMERICAN CENTRAL INS. CO.

(Court of Appeal, First District, California. Nov. 25, 1905.)

1. New Trial—Motion—Dismissal—Bill of Exceptions — Signature—Delay in Procuring.

A proposed bill of exceptions was settled by the judge, and on June 18th delivered to defendant's attorney, with a direction that it be engrossed within 10 days. The bill was engrossed, and on June 24th defendant's attorney, being informed that the judge was absent and would return in about two weeks, left the bill with a deputy clerk. The judge returned July 8th, and was absent between that date and August 5th, at different times, aggregating 15 days, and from August 5th to October 28th he was continuously at home, and was during some part of each day during that period, except holidays, in his chambers. Defendant failed to procure the judge's signature to the bill. *Held*, that the motion for a new trial was properly dismissed on account of delay in procuring the judge's signature to the bill.

2. Same.

That the trial judge was absent at the time the engrossment of the bill of exceptions was completed, and for several days thereafter, did not relieve the party moving for a new trial from the necessity of diligence in ascertaining the date of the judge's return and in procuring his signature to the bill.

3. Same.

Any unreasonable delay in procuring the judge's signature to the engrossed bill of exceptions is subject to the same rule that governs the case of unreasonable delay in failing to engross the bill.

4. Same — Filing — Right to File before Signed by Judge.

There is no law authorizing the filing of a bill of exceptions before it has received the signature of the judge.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exceptions, Bill of, § 95.]

5. Same — Duty of Clerk to Procure Judge's Signature.

It is not the duty of the clerk, with whom a bill of exceptions has been left before signed by the judge, to deliver the bill to the judge for his signature.

6. Appeal — Review—Discretion of Trial Court—Diligence in Perfecting Bill of Exceptions.

Whether a party has exercised due diligence in causing a bill of exceptions to be engrossed after it is settled, or in presenting it to the judge for his signature, is for the determination of the judge, and in the absence of an abuse of discretion his ruling is conclusive on appeal.

7. Same — Decisions Reviewable—Refusal to Settle Bill of Exceptions.

An order refusing to settle a bill of exceptions is not appealable, but any error therein may be corrected by writ of mandate.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by John Miller against the American Central Insurance Company. From an order dismissing a motion for a new trial and refusing to settle a bill of exceptions after a verdict for plaintiff, defendant appeals. Affirmed.

James Alva Watt, for appellant. Page, McCutchen, Harding & Knight and Bledsoe & McGarvey, for respondent.

HARRISON, P. J. Appeal from an order dismissing a motion for a new trial and refusing to settle a bill of exceptions. The action was tried by a jury, and a verdict rendered in favor of the plaintiff, January 27, 1902. February 6th the defendant filed and served a notice of its intention to move for a new trial. The times for preparing and serving a bill of exceptions and amendments thereto having been extended, the proposed bill and amendments were settled by the judge before whom the cause was tried, and on June 18th delivered to the defendant's attorney with a direction that the bill be engrossed within 10 days from that date. The bill was thereupon engrossed, and on June 24th the defendant's attorney, being informed that the judge was absent from San Francisco and would return in the course of 10 days or 2 weeks, left the engrossed bill with a deputy clerk in the county clerk's office. The judge returned to San Francisco July 8th, and was again absent from the city between that date and August 5th, at different times, aggregating 15 days; but from August 5th to October 28th, when notice of the motion to dismiss the motion for a new trial was given, he was continuously in San Francisco, and, except upon holidays, was during some part of each day in his chambers at the city hall. After the engrossed bill had been left with the deputy clerk, as above stated, it was withdrawn by the defendant's attorney "for a brief period"; but at what date it was withdrawn or for how long a time it was retained by him, is not stated. October 28th the plaintiff gave notice to the defendant that he would move the court to dismiss the motion for a new trial, upon the ground that the defendant had not prosecuted the motion with due diligence. On the same day the defendant's attorney, after having been served with the notice of this motion, delivered to a clerk in the office of the plaintiff's attorney the engrossed bill, and informed him that he had withdrawn it from the possession of the deputy clerk with whom he had previously left it, and asked the clerk to have it approved in order that it might be certified by the judge. The plaintiff's motion came on for hearing November 7th, and on November 11th was granted by the court. From this order the present appeal has been taken.

In Galbraith v. Lowe, 142 Cal. 295, 5 Pac. 831, the court said: "The motion for a new trial is an independent proceeding in an action, in which the burden of acting is at all times upon the moving party. * * * It is the moving party who is the actor in the proceeding, and who is seeking the settlement of the bill of exceptions and the determination of the motion for a new trial, and it devolves upon him to proceed with diligence." In that case the moving party did not cause the bill to be engrossed for 39 days after he had knowledge that it had been settled by the judge, and it was held that he thereby failed to exercise proper diligence; and upon that ground an order dismissing his motion for a new trial was affirmed. In the present case the bill was engrossed as early as June 24th; and in his affidavit, read at the hearing of the motion, the defendant's attorney states that the bill "is and has been since the 24th day of June, 1902, ready for the certificate of the judge"; but he does not show that he ever requested the judge to certify it, or that it was presented to the judge for his signature, nor does it appear that the judge was ever informed, prior to the time that the plaintiff's notice of motion was given, that the bill had been engrossed. The fact that the judge was absent from the city at the time the engrossment was completed, and for several days thereafter, did not relieve the defendant from the necessity of diligence in ascertaining the date of his return and in seeking to procure his authentication to the bill. Any unreasonable delay therein is subject to the same rule as in the case of failing to engross the bill. Although he states that, upon finding that the judge was absent from the city, he "left" the engrossed bill with a "deputy clerk" in the county clerk's office, it does not appear that he requested him to present it to the judge for his signature, or that he gave him any direction as to its disposition, except that about a month later he requested him to note upon it the fact that it was then "on file" in the county clerk's office. There is, however, no provision of law authorizing a bill of exceptions to be filed with the clerk before it has received the signature of the judge; nor is it made the duty of the clerk with whom it may be "left," to deliver the engrossed bill to the judge for his signature. The attorney, by this act, merely made the deputy clerk his depositary of the document until he subsequently withdrew it from his custody.

Whether a party has exercised due diligence in causing a bill of exceptions to be engrossed after it is settled, or in presenting it to the judge for his signature after it has been engrossed, is to be determined by the judge under the circumstances of each case; and his determination thereon is so largely a matter of discretion that, unless it is made to appear that he has abused his discretion, his determination will be accepted as correct and conclusive. Galbraith v. Lowe, supra. The refusal of the judge to settle the bill of exceptions is not an appealable order or the subject of an appeal. Any improper or unauthorized refusal to settle or to certify to a bill of exceptions is to be corrected by means of a writ of mandate. Whipple v. Hopkins, 119 Cal. 349, 51 Pac. 535; Murphy v. Stelling, 138 Cal. 641, 72 Pac. 176.

The order is affirmed.

We concur: HALL, J.; COOPER, J.

2 Cal. App. 248

COX v. SOUTHERN PAC. R. CO.

(Court of Appeal, Second District, California. Nov. 23, 1905.)

APPEAL—TITLE TO LAND.

In an action against a railroad company for killing horses, where the gist of the action was defendant's negligence after the horses were on the track and the judgment was less than $300, findings as to the title to the land adjacent to the railroad were immaterial, and the appeal was not within the jurisdiction of the appellate court.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Richard F. Cox against the Southern Pacific Railroad Company. From a judgment for plaintiff, defendant appeals. Dismissed.

Rehearing denied by Court of Appeal, December 22, 1905; by Supreme Court, January 22, 1906.

Maurice E. Power, for appellant. T. E. Clark, for respondent.

SMITH, J. The defendant appeals from a judgment against it for the sum of $250, rendered on appeal from a justice's court. The judgment is for damages for the killing of a horse and mare of the respondent by the appellant's train; and, the amount involved being less than $300, the respondent urges that the case is not within the jurisdiction of this court. There is no reply from the appellant on this point; but it seems that the point was urged by the defendant in the lower court on the ground that the case involved a question of title as to real property. There is, however, nothing in this contention. The first count of the complaint, indeed, alleges that the plaintiff's horse entered upon the track through a gap in defendant's fence, which was negligently and carelessly left open; and in the amended answer it is alleged, in effect, that the land adjacent to the fence, where the gap was, was at all the times mentioned in the complaint the property of Kittie Colburn, and that plaintiff did not have any right or title thereto; and the court finds that this and all the other allegations and denials of defendant's answer are untrue, which is, in effect, to find on a question as to the title of the land. And it is also true that it appears from the evidence, without contradiction, that the land was the land of Kittie Colburn, and that it was expressly admitted by the plaintiff on the trial that he neither had nor claimed any interest therein. But, looking at the complaint, it will be seen that it is alleged that the death of the horse resulted from the negligence and recklessness of the defendant's employés after the horse was on the track; and this must be taken as the gist of the action. The allegation and finding as to the title of Kittie Colburn and the plaintiff, respectively, to the land adjacent to the railroad, are therefore immaterial.

The appeal must therefore be dismissed, and it is so ordered.

We concur: GRAY, P. J.; ALLEN, J.

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2 Cal. App. 231

LANGLEY v. FINNALL et al.

(Court of Appeal, Second District, California. Nov. 21, 1905.)

EXEMPTIONS — HOUSEHOLD FURNITURE — INSURANCE FUNDS.

The proceeds of a policy of insurance covering household furniture, which is exempt from execution under Code Civ. Proc. § 690, are likewise exempt.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Exemptions, § 79.]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Georgia Langley, trustee, against the Glens Falls Insurance Company in which John E. Finnall and others were substituted as defendants. From the judgment rendered, certain defendants appeal. Affirmed.

Munson & Barclay and Trusten P. Dyer, for appellants. John R. Layng, for respondent.

SMITH, J. The suit was originally brought by the plaintiff, as trustee of her mother, Mrs. Mary E. Langley, against the Glens Falls Insurance Company to recover $650, due to Mrs. Langley as beneficiary under a policy of insurance of certain household furniture and family wearing apparel belonging to her; but on affidavit of the original defendant, under section 386 of the Code of Civil Procedure, and payment of the amount claimed into court, the present defendants, who had garnisheed the amount due, were substituted in place of the original defendant. Judgment was afterwards rendered against the corporation defendant and the defendant Walker, who now appeal.

It is admitted that the insured property was exempt from execution under the provisions of section 690 of the Code of Civil Procedure, and the question involved is, whether, under the circumstances of the case, the money received upon the policy of insurance is likewise exempt. On this question, the authorities of other states are somewhat conflicting, but the weight of authority seems to be for the affirmative of the question. Freeman on Executions, § 235; 12 Am. & Eng. Ency. of Law, 152; Puget Sound, etc., Co. v. Jeffs (Wash.) 39 Pac. 962, 27 L. R. A. 808, 48 Am. St. Rep. 885. This, we think, is the better opinion, and it is supported by the decision of the Supreme Court in Houghton v. Lee, 50 Cal. 101, where it was held, with regard to money received from insurance on the homestead and household furniture, "that the sum due from the insurance company was not subject to garnishment by a creditor of the husband," or, as otherwise expressed, "that money due from an insurance company for indemnity for loss of the homestead residence by fire, retains the character of the premises destroyed, and is not subject to execution." Freeman on Executions, § 235 ad fin. It is true, as pointed out by the appellants' counsel, that no distinction was made in the case cited by counsel, or by the court, between the money due for the loss of the building and that due for the loss of the furniture; and, hence, it is claimed the case is not a direct authority for the position that the same rule will apply to the case where the property insured was exempt furniture, and this we are inclined to concede, or, rather, we think it probable the court regarded the furniture as merely an accessory to the homestead. Freeman on Executions, § 236 ad fin. But no distinction in principle can be made between the proceeds of the sale of the homestead and those of other exempt property, and the decision must therefore be held to apply to the case before us. The principle of the decision seems to be—at least in the case where the conversion of exempt property is in invitum—that the conversion of the property does not affect its status. There may be, indeed, some qualifications to the principle thus established; such, e. g., as that the principle will apply only where the proceeds of the sale remain distinguishable, or even that it may not apply where the intention is manifestly not to reconvert the money into exempt property. But these questions are not involved in the present case.

The judgment is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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2 Cal. App. 259

CLARK et al. v. RAUER.

(Court of Appeal, First District, California. Nov. 25, 1905.)

1. APPEAL — PRESUMPTIONS — NEW TRIAL — GROUNDS FOR DECISION.

An order granting a new trial is presumed on appeal to have been made on a valid reason.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3775.]

2. New Trial — Statement on Motion — Amendment.

Where a statement on a motion for a new trial contained no specifications of error or particulars wherein the evidence was insufficient to justify the decision, it was proper for the court to allow an amendment by inserting them.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 269.]

3. Same — Specifications of Error—Sufficiency.

A specification of error in a statement on a motion for a new trial that "there has been no evidence introduced at the trial tending to show that the plaintiffs were injured by any acts of the defendant, or that the plaintiff has sustained any loss by reason of any act of the defendant," was sufficient.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 257.]

4. Appeal — Review — Findings— Evidence Pointing Out—Evidence Relied on.

It is the duty of the appellant to point out the evidence to overthrow the ruling of the trial court on the sufficiency of the evidence to support a finding, and not the duty of the appellate court to look for it in the evidence.

Appeal from Superior Court, City and County of San Francisco; J. M. Troutt, Judge.

Action by Charles H. Clark and another against J. J. Rauer. From an order granting plaintiffs' motion for a new trial, defendant appeals. Affirmed.

I. F. Chapman, for appellant. Macks & Tomsky, for respondents.

COOPER, J. This appeal is from an order granting the motion of plaintiffs for a new trial. In such case all presumptions are in favor of the order, and, unless it is shown to the contrary, we will presume that the order was made upon some valid reason.

Appellant states that the motion for a new trial was argued in October, 1902, and his "contention there was that respondents' motion should be denied on the ground that the statement on motion for a new trial contained no specifications of error, or particulars wherein the evidence was insufficient to justify the decision." The court, however, permitted the respondents to amend their statement by inserting such specifications and particulars. The court did not abuse its discretion in allowing the statement to be so amended. It was proper and right for the court to allow the amendment, so that the motion might be presented on its merits. In re Lamb, 95 Cal. 408, 30 Pac. 568. The specifications as amended are sufficient under the liberal rule now allowed in this court. It is specified "that there has been no evidence introduced at the trial of this cause tending to show that the plaintiffs were injured by any acts of the defendant, or that the plaintiff has sustained any loss by reason of any act of the defendant." Appellant has not pointed out the evidence that tends to support the findings in this regard. It is not the duty of this court, when a finding is attacked and the court below has held it without support, to look through a mass of evidence for the purpose of finding sufficient to overthrow the ruling of the trial court.

The complaint alleges two different causes of action. It is alleged in each that in April, 1899, the defendant, on a claim belonging to plaintiffs and assigned to defendant for collection only, obtained a judgment against James Roundtree and M. E. Roundtree for $350.55, with interest from date of judgment. The first cause of action alleges that the defendant, without the consent of plaintiffs, compromised and settled said judgment and caused it to be satisfied of record; that plaintiffs have received no part of said judgment, and the same has been lost to them, to their damage in the sum of $350.55. It is not alleged what amount was paid to defendant by way of compromise, if anything, nor that the judgment was of any value. Our attention is not called to any evidence as to these matters, or showing any damage to plaintiffs. The second cause of action alleges that defendant received the sum of $350.55 on said judgment, and has not paid the same to plaintiffs, nor any part thereof. There is no claim that any evidence was introduced to sustain this latter cause of action.

It follows that the order must be affirmed, and it is so ordered.

We concur: HARRISON, P. J.; HALL, J.

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2 Cal. App. 303

LOS ANGELES PRESSED BRICK CO. v. LOS ANGELES PACIFIC BOULEVARD & DEVELOPMENT CO. et al.

(Court of Appeal, Second District, California. Nov. 28, 1905.)

Mechanics' Liens—Materialmen—Subcontractors—Appeal.

Where a complaint to foreclose a mechanic's lien for materials furnished a subcontractor showed the existence of an unpaid balance in the hands of the owner and that plaintiff had a claim against it which he was entitled to enforce by the foreclosure of a mechanic's lien, the complaint, in the absence of any claim on the fund by the contractor, was not demurrable for failure to allege that anything was due and unpaid from the contractors to the subcontractor at the time the notice was given.

Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by the Los Angeles Pressed Brick Company against the Los Angeles Pacific Boulevard & Development Company and others. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Rehearing denied by Court of Appeal, December 23, 1905; by Supreme Court, January 24, 1906.

Munson & Barclay, for appellant. Chas. L. Batcheler, R. H. F. Variel, and Barstow & Variel, for respondents.

GRAY, P. J. The action is to foreclose a mechanic's lien. The defendants' demurrer to the complaint was sustained, and from the judgment which followed the plaintiff appeals.

The complaint shows that plaintiff furnished materials to defendant Leonard, subcontractor under Brown & Alcorn, contractors, to be used, and which were used, in the construction of the building belonging to defendant corporation the Los Angeles Pacific Boulevard & Development Company. The complaint is in the usual form in such cases, and sets forth that at the time the statutory notice was given by the plaintiff to the owner $4,609 was yet unpaid to the contractors, Brown & Alcorn, but contains no allegation that anything was due and unpaid from the contractors to the subcontractor at the time this notice was given; and it is claimed that for this reason alone the complaint is fatally defective, and that the demurrer was therefore properly sustained.

We do not think this contention can be upheld. The plaintiff is not asking for a personal judgment against the contractor. All he seeks is to enforce his claim upon and against a certain fund which he in effect alleges to be in the hands of the defendant, owner of the building. It is not necessary for plaintiff to allege or show that no one else has a claim upon that fund. If any other party also claims the same fund, it will be time enough to determine that claim when it is set up by the claimant in some appropriate manner. Without its being set up the court should not presume that it exists, nor is the court, upon a mere demurrer to the complaint, to act upon any theory that there may possibly be any such claim. The complaint shows the existence of this unpaid balance in the hands of the owner, and that plaintiff has a claim against it that he is entitled to enforce by the foreclosure of a lien given him by statute, and this is all that is necessary to constitute a cause of action. Nor can there be any possible reason for the claim of the contractor here made that the complaint is not as certain as it ought to be in this respect. Greater certainty in a complaint is required only where something necessary to constitute a cause of action cannot be thoroughly understood from the language used, and the defendant desires more accurate information. Does not the contractor defendant know whether he has a claim against the fund or not? And why does he demand more accurate information as to a matter which must from the nature of things be peculiarly within his own knowledge? Why, also, does he demand that a claim of his that he has never yet made should be negatived in the complaint of a party that presumptively knows nothing of its existence? There is no requirement that any notice shall be given the contractor, and hence no necessity to allege any such notice in the complaint. As the case is presented to us, the decision of any further question would be mere dictum, not binding in this or any other case. We cannot properly determine the effect of the payment of the subcontractor by the contractor until we know that such payment has been made.

The judgment is reversed, with directions to overrule the demurrer and permit the defendants to answer.

We concur: SMITH, J.; ALLEN, J.

2 Cal. App. 294

SANGUINETTI v. PELLIGRINI.

(Court of Appeal, Third District, California. Nov. 27, 1905.)

1. EXECUTORS AND ADMINISTRATORS—ACTIONS—EVIDENCE.

In an action on a claim against a decedent's estate, a letter written by plaintiff to third persons in respect to the claim, in which he stated the amount owed by the decedent to him to be greater than the amount of the claim sued on, and endeavored to explain such amount, was properly admitted as evidence tending to discredit plaintiff's claim.

2. APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Exclusion of evidence as to items of indebtedness is not reversible error, where immediately thereafter the witness is permitted to testify to the composition of the items.

3. SAME—REFUSAL TO STRIKE EVIDENCE.

The refusal to strike out hearsay evidence is harmless, where the facts shown by such evidence are otherwise proven.

4. EXECUTORS AND ADMINISTRATORS—ACTIONS ON CLAIMS — PAYMENT — SUFFICIENCY OF EVIDENCE.

In an action on a claim against the estate of a decedent, evidence *held* sufficient to support a finding that the claim had been fully paid and discharged prior to the decedent's death.

5. TRIAL—FINDINGS—SUFFICIENCY.

In an action on a claim against the estate of a decedent, where the court finds that the claim has been paid and that nothing is due, it is unnecessary to make a further finding on evidence of the usury law of the country in which the debt was contracted.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 940, 941.]

6. PAYMENT—EVIDENCE—BURDEN OF PROOF.

Where a complaint alleges a debt and the answer alleges payment, and plaintiff proves that the debt was contracted, the burden of proving payment is upon defendant.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Payment, § 196.]

Appeal from Superior Court, San Joaquin County; F. H. Smith, Judge.

Action by John Sanguinetti against Antonia Pelligrini, as administratrix of the estate of Louis T. Banche, deceased. From a judgment for defendant, plaintiff appeals. Affirmed.

Miller & Clark, for appellant. A. H. Ashley and J. Frank Brown, for respondent.

BUCKLES, J. This is an action against the administratrix to recover the amount claimed to be due upon the following instruments set out in a claim presented to the administratrix and rejected, to wit:

"Hunker Creek, November 16, 1900.
No. 10 Above.

"I, Thomas Banche, received this 16th day of November, A. D. 1900, the sum of $300 hundred dollars from John Sanguinetti of this place, as a loan, for the purchase of a rooming house on Third St., and between Second and Third avenue, in the city of Dawson, Y. T., called Gandolpos House, at five per cent a month.

"Louis Thomas Banche, Debtor.
"Vitnes: L. Podesta."

"Hunker Creek, December 11, 1900.

"I, L. Thomas Banche, have this day received $152.80 in gold dust, as a loan, from John Sanguinetti, to be paid in 6 months, at five per cent. a month interest.

"L. Thomas Banche, of Dawson, Y. T.
"Weitness: L. Podesta."

These two instruments were made into a claim, presented to the administratrix in due time, and the claim was rejected. The two instruments amounted to $452.80 and the interest claimed thereon, $636.84, making a total claim of $1,089.64. The answer alleges payment. The court found nothing due, and judgment was rendered for defendant.

The appeal is from the judgment. The said Louis Banche died intestate on February 14, 1902, at Dawson City, Yukon Territory, and Antonia Pelligrini was duly appointed administratrix by the superior court of San Joaquin county, Cal., qualified, gave notice to creditors, and plaintiff presented his said claim and the same was rejected as aforesaid. The plaintiff was a witness, and testified that when Banche died he owed him the $300 represented in Exhibit 1 and the $152.80 represented in Exhibit 2. After Banche's death plaintiff made out a typewritten statement that Banche owed him $700 and sent it to Cooper Bros., at Dawson, and, upon inquiry from the Cooper Bros. as to the claim that Banche owed plaintiff $700, plaintiff sent the following letter to explain the matter: "Stockton, Cal., May 11th, 1902. Mess. Cooper Bros., Dawson.—Gentlemen: In regard to the $700.00 I loaned to Thomas Banche, which you do not understand, will state that at one time I gave him $300.00 and at another $200.00 when he went into the lodging house business, for which I hold notes. And I paid to Mrs. George Cooper, of San Francisco, $100.00, and Tom collected from Jack Collins $100.00, which was due me. I remain, yours truly, John Sanguinetti." This letter was introduced in evidence by defendant over the objection of plaintiff. It bore directly upon the transaction about which the court was then inquiring, and was properly admitted as evidence tending to discredit plaintiff's claim. It will be observed that he was trying to explain his claim that Banche owed him $700, and that the $300, the $200, and the $100 he says he paid Mrs. Cooper, and the $100 Banche had collected from Collins, just make the $700 he claims Banche owed him. It appears from other witnesses in the case that plaintiff had received the $100 Banche collected from Collins for him, and that he asked Collins to pay it again. Cooper paid Banche the $100, to be given plaintiff to carry to Cooper's wife in Stockton. There is no legal evidence, however, to show that Banche ever paid it over to plaintiff. However, the claims for the $100 collected from Collins and the $100 paid to Cooper's wife were abandoned by plaintiff, when he presented his claims against the estate of Banche, and it must therefore be presumed that Banche did not owe him these two amounts. The witness Luigi Podesto, who signed both instruments on which this claim is based, came to Dawson City with plaintiff in 1898, and they worked together in the mines and were partners, says: Plaintiff gave Banche the $300 mentioned in plaintiff's Exhibit 1, in his presence, and Banche wrote the paper and signed it and gave it to plaintiff. He signed as a witness, but does not remember at whose request. That Banche said he wanted the money to start a lodging house. The money was in gold dust, and all that was said by either about interest was when Banche read over the note to Sanguinetti before he signed it, and said that he put in the note that he was to pay 5 per cent. per month interest. This witness says that this exhibit was delivered when the $300 was, and that it was November 16, 1900. The same thing was repeated in relation to the $152.80, with the exception that the witness did not see plaintiff deliver to Banche any gold dust at that time, but saw Banche give the paper to plaintiff, and that it was signed and executed December 11, 1900. He did not know anything about the interest, or whether Banche promised to deliver back to plaintiff gold dust or money. On cross-examination Podesto said he had received a letter from plaintiff about a month before his deposition was taken. He did not know whether Banche had repaid plaintiff the $152.80 just before plaintiff had left Dawson or not, but did not think he had; finally was sure that he had not paid it. He said he and plaintiff loaned Banche and a man by the name of Cooper $500 to get "grub" with to work the American Gulch property, that this was in October, 1900, and that this $500 had been repaid, and payment is contradicted by other witnesses.

The plaintiff was asked on redirect examination this question: "Mr. Miller: What items of indebtedness did Banche owe you, outside of the items set out in your claim against the estate, at the time he died? Mr. Ashley: We object to that, unless it be limited to after the death, not being redirect examination and within the inhibition of section 1880, Code of Civil Procedure. The Court: Objection sustained to question in its present form. Mr. Miller: We except." We think there is no reversible error in this ruling, inasmuch as plaintiff was immediately permitted to give evidence to show of what the item of $200 was composed, as follows: The following question was then asked plaintiff, to which there was no objection: "What is that amount of $200 set out in Defendant's Exhibit A, composed of—what items make up the amount of $200 as set out there?" The answer was that the $152.80 was a part of that $200 in Exhibit A, and that "I gave him gold dust to make up the $200; I gave him four ounces at one time and three ounces at another to make up the balance of $200." Plaintiff further testified that the said dust was worth from $15.40 to $16 an ounce. No objection was made to these questions. This evidence surely had a tendency to impeach the plaintiff's evidence. The difference between $200 and the $152.80 is $47.20, while seven ounces of gold dust, at the lowest price stated by plaintiff, would be worth $107.80, which latter sum, added to the $152.80, would make the sum of $260.60, instead of $200. Evidently, when plaintiff stated he had given Banche seven ounces of gold dust to make up the balance of the $200, he did not consider what the seven ounces would amount to. This discrepancy is important, in view of other differences in other parts of the testimony in the case which tend to impeach the plaintiff. After the plaintiff had heard of the death of Banche he visited and talked with the witness Dominico Bertotti at Stockton, who says the plaintiff asked him if Banche had any property, and when he asked plaintiff, "What do you ask me for?" plaintiff replied: "Because he tell me that he wanted to put a little stand close to the lodging house he had, and he said he didn't have no money; he asked me for money; I didn't have no money. I had some gold dust for $86 and a few cents. Now I am ashamed to ask the old lady." The plaintiff denied having mentioned $86 to Bertotti.

Antonia Pelligrini testified that in March, 1902, the plaintiff called upon her at her home in Sacramento, and said to her: "Tom had bad luck there. He was a good boy. Towards the last one day he asked me if I could lend him some money. He said he had no money. I had some gold chunks or gold dust. I told him I would let him have that gold dust. I took it out of the sack and weighed it in the store. Tom had a little store in front of the lodging house, and we weighed it in the store there, and it amounted to $86.70; that was all the money and gold dust I had in my possession at that time. He said nothing about Banche owing him any other money or amount, and then, when he had said this, he said, 'But that's all right.'" Mrs. Banche, the mother of said deceased, also testified to the same statement, and was present when plaintiff called on Antonia Pelligrini. James Cooper, who was mining in American Gulch, 25 miles from Dawson, one of the party for whom Banche borrowed the $300 from plaintiff, and the $200 from plaintiff's partner, the witness Luigi Podesto, testified to the payment of the said sum of $300 and $200, and after Cooper had received the typewritten statement from plaintiff showing Banche to be indebted to him in the sum of $700 he says plaintiff was in Dawson and met James and George Cooper, when the Coopers interrogated him about all the items of his statement. This witness says: "We asked him all about the items of his typewritten statement and all he could account for was the item of $152.80. He merely said Banche had borrowed it one time and another, but he could not tell us for what he had borrowed it. * * * The $152.80 was borrowed for the lodging house and paid when Sanguinetti went outside. * * * I told Banche in the presence of Sanguinetti he could turn over the $150 of the gold dust he was holding for me and my brother to Sanguinetti to pay that $152.80, which I am sure he did." As to the loan of $300 to Banche by Sanguinetti, the witness said he was not present, but that he knew Banche went to Sanguinetti to borrow it and came back with the money and said he had borrowed it from Sanguinetti.

Defendant moved to strike out all the testimony of witness relating to the indebtedness of the $300 on the ground that it was hearsay. The motion was denied. The witness only knew from what Banche did and said that the money was borrowed from Sanguinetti, and the evidence was therefore hearsay. But it had already appeared in the case from the testimony of the witness Podesto that Banche had borrowed $300 of Sanguinetti for the Cooper boys, and that the same had been paid. There was, therefore, no harm to plaintiff in the court refusing to strike out. The witness then testified, further, as to what Banche had told him: "He told me he had got a receipt for it. He told me he gave such a memoranda to Sanguinetti. Banche told me he had borrowed from Sanguinetti $152.80, and he borrowed from my brother George and I $150 to pay it back." The witness further testified that plaintiff never told him after Banche's death that Banche owed him anything. There was no objection made to this testimony. The witness George Cooper testified that he was familiar with the business transactions of Banche and Sanguinetti about loaning certain money in the winter of 1900, and said: "Yes, I know of the loan of $300 which Banche borrowed from Sanguinetti to work a lay on American Gulch, and another loan of $152.80 with which to purchase a rooming house in Dawson. I know of no other loans, and don't believe there were any others. Banche was working a lay on American Gulch with me and my partners, and I know he borrowed $300 from Sanguinetti to work a lay with us; and that he afterwards borrowed about $150 from Sanguinetti to buy a rooming house in Dawson. Banche told me this, and so did Sanguinetti.

* * * Banche told me he gave receipts for these amounts, but I never saw anything in writing concerning them. Banche borrowed $200 from Luigi Podesto at the time he borrowed the $300 from Sanguinetti to work a lay on American Gulch. Banche stated that he gave him a receipt for the same. My brother and I gave Banche $500 on May 23, 1901, with which to pay Sanguinetti and Podesto, * * * and both Sanguinetti and Podesto acknowledged to me personally that they received the money. * * * I know the written memoranda of these loans were not returned to Banche because Sanguinetti said he left them on Hunker Creek, and Banche told me he guessed it was all right, as he had known the boys so long that he didn't think it made any difference whether he got his receipts or not." The witness further testified that, when plaintiff returned to Dawson in June, 1902, he questioned him about his claim of $700 against Banche, asking him if Banche had borrowed that much and what it was for, and plaintiff could not explain, and the only account he could give was that he had let Banche have $152.80 for his lodging house.

From this evidence the court had to determine the question involved. There are some sharp conflicts in minor parts of the evidence. The testimony of Podesto, the plaintiff's partner, would seem to be sufficient to establish the plaintiff's claim, if true. But the facts that the Coopers, who were mining with Banche before he went to Dawson to take charge of the rooming house, knew nothing of this claim of plaintiff that, when asked about the $300 in the claim, plaintiff could not explain it or tell when, where, or for what it was loaned to Banche, may have indicated to the court that Podesto was testifying solely with reference to the $300 Sanguinetti loaned Banche to enable him and the Cooper Bros. to work their mine in American Gulch, and was confused as to Banche wanting this $300 for the lodging house. The testimony of Podesto was by deposition, and appears to have been on interrogatories. He testified he could read English, but could not write it, and yet says he signed his name as a witness to both instruments. His particularity as to the rate of interest, and how it came to be placed in the $300 note, may of itself seem as though the witness had been posted to answer in that way. We think that, to bring all the testimony in the case together, there is sufficient to have shown the court below that Podesto's evidence was not true. Then the testimony of plaintiff in reference to the $152.80, and the letter written to the Cooper boys, when analyzed, would hardly be sufficient to support his claim; besides, it is shown that Cooper gave Banche the money, or gold dust, with which to pay that item, though Cooper did not see Banche pay it over to plaintiff, but it might be fairly presumed he did, because Cooper directed him to do so, in the presence of plaintiff, out of the gold dust the Cooper boys had left with Banche to be exchanged into currency, and because Banche did pay over to plaintiff, at that time, the $100 left with him to be taken to Cooper's wife, and the $100 that Banche had collected for plaintiff from Collins. The fact that plaintiff told defendant and Banche's mother, and also the witness Bertotti, that Banche owed him $86.70 at the time of his death, would indicate that he owed no more, and that the claim presented to the administratrix was false and an after consideration. The Exhibits 1 and 2 were not taken up when payment was made, as the Cooper boys stated, because they were not present, and Banche did not think it necessary. They were mentioned. We have set out so much of the evidence because it was deemed necessary in order that it may be seen that the evidence supports the court's findings that all the indebtedness of Banche to plaintiff, as set forth in the claim sued on, had been fully paid and discharged prior to Banche's death.

At the close of the testimony defendant asked to file amendments to the answer, and was permitted over the objections of plaintiff. Those amendments contained a copy of the act of the Canadian Parliament passed June 29, 1897, providing that when "any interest is made payable at a rate or percentage per day, week, month or any rate or percentage for any period less than a year, no interest exceeding the rate or percentage of six per cent. per annum shall be chargeable." There was no finding upon this, and, as the court found the debt had been fully paid and nothing was due, a finding upon this was unnecessary. The complaint alleging a debt due, and the answer alleging payment, if the plaintiff proves that the debt was contracted, the burden of proving payment is upon the defendant. Stuart v. Lord, 138 Cal. 672, 72 Pac. 142. The plaintiff was permitted to testify as to some matters connected with the $152.80 claim, but to which no objection was made on the ground that he could not testify under the provisions of section 1880 of the Code of Civil Procedure. But we think that the evidence supports the findings that payment had been made.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

2 Cal. App. 278

PEOPLE v. AH LUNG.

(Court of Appeal, Third District, California. Nov. 27, 1905.)

1. INDICTMENT—CONVICTION OF LESSER OFFENSE—RAPE—ATTEMPT TO RAPE.

Under Pen. Code, § 1159, providing that the jury may find defendant guilty of any offense, the commission of which is necessarily included in that which is charged, or of an attempt to commit the offense, on an information charging rape on a female under 16 years, defendant may be convicted of an attempt to commit rape.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 603, 616.]

2. Rape—Corroborative Evidence.

In a prosecution for rape, the evidence corroborative of the prosecutrix need not tend directly to connect the defendant with the offense charged.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Rape, §§ 83, 84.]

3. Same—Sufficiency of Evidence.

In a prosecution for rape, the evidence corroborative of the testimony of the prosecutrix considered, and *held* sufficient to sustain a conviction of attempt to commit rape.

4. Same—Preponderance of Evidence.

A conviction of attempt to rape a child under 16 years on her unsupported testimony, though it is contradictory, and the corroboration slight, will not be disturbed, unless the preponderance of the evidence requires it.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Rape, § 84.]

5. Criminal Law—Admission of Evidence—Harmless Error.

In a prosecution for rape of a child under 16 years, the admission of testimony tending to prove penetration, though erroneous, was harmless, where defendant was convicted of an attempt to rape.

6. Rape—Evidence—Admissibility.

In a prosecution for rape, testimony touching the actions of defendant and his associates with the prosecutrix was admissible.

7. Criminal Law—Declarations of Third Person.

Under Code Civ. Proc. § 1870, subd. 3, relating to the facts which may be proved on the trial, and Pen. Code, § 1102, making such section applicable to criminal prosecutions, the declarations of a third person in the presence of accused, and his conduct in relation thereto, are admissible, in a prosecution for rape.

8. Rape—Evidence—Admissibility.

In a prosecution for rape of a girl under 16 years, it was not error to permit a witness to testify as to an understanding as to a room defendant was to occupy; it being competent for the prosecution to show that he was to occupy a room found locked on the occasion of witness' visit.

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Ah Lung was convicted of an attempt to rape, and he appeals. Affirmed.

J. M. Fulweiler, for appellant. U. S. Webb, Atty. Gen., for the People.

McLAUGHLIN, J. The defendant was charged by the information with the crime of rape upon a female under the age of 16 years, and convicted of an attempt to commit rape. The first point made in his behalf on this appeal is that the crime of which he was convicted is not included in a charge of rape, under subdivision 1 of section 261 of the Penal Code, unless it is charged that the rape was accomplished by force and violence, and against the will of the female. Section 1159 of the Penal Code provides that "the jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense." Where a statute is free from ambiguity, there is no room for construction. Courts are not at liberty to add to, or subtract from, language susceptible of but one interpretation. The meaning of this section is clear, and hence it must be held that every information charging a public offense, includes an attempt to commit the crime charged. In People v. Gardner, 98 Cal. 128, 32 Pac. 880, the defendant was charged with and convicted of an attempt to commit rape. The information and proof were assailed as insufficient, but the judgment was affirmed. We have examined the original record in that case, and find that the information charged an attempt to commit rape in language almost identical with the descriptive portion of the information in the case at bar. There was no mention of force, violence, assault, or want of consent. That case is therefore express authority against the contention of the appellant here, and we have neither the inclination nor the right to depart from the rule thus announced. The subsequent enactment of section 288 of the Penal Code does not impair or affect the rule. Under this section, children, regardless of sex, are afforded protection from lewd or lascivious acts, not "constituting other crimes," and this clearly excludes the offense of which the defendant stands convicted.

It is contended that there is no evidence tending to corroborate the testimony of the prosecutrix, and that her evidence is so contradictory that the verdict should not be allowed to stand. It must be borne in mind, however, that in cases like the one at bar, the corroborative evidence need not tend directly to connect the defendant with the offense charged. Indeed, there is no absolute rule requiring corroboration in such cases. People v. Gardner, 98 Cal. 130, 32 Pac. 880; People v. Mesa, 93 Cal. 584, 29 Pac. 116; People v. Fleming, 94 Cal. 311, 29 Pac. 647; People v. Mayes, 66 Cal. 597, 6 Pac. 691, 56 Am. Rep. 126; People v. Stewart, 97 Cal. 238, 32 Pac. 8. It is only when the testimony of the prosecutrix is not only uncorroborated, but is so inherently improbable as to warrant the belief that the verdict was the result of prejudice, that an appellate court will reverse a judgment in cases of this character. People v. Benson, 6 Cal. 221, 65 Am. Dec. 506; People v. Hamilton, 46 Cal. 540; People v. Ardaga, 51 Cal. 371. We think no such condition exists in this case. The testimony of prosecutrix is supported by facts and circumstances of deep significance. Defendant was seen standing directly in front of this little girl with his arms around her. They were seen at different times with their arms around each other, and he was seen kissing and hugging her and acting "lovingly" toward her. They were noticed leaving the trail together and going sometimes six feet and sometimes a greater distance therefrom, returning in a "few moments or seconds." He told an officer for the prevention of cruelty to children that he could not keep her away, that she came there often, that her mother didn't care; that she sometimes came for the horse, and sometimes for something to eat. He also said that "the old lady had taken those children to the Chinamen for the purpose of prostitution." The mother testified that the girl frequently ran away, and went down to the defendant's house, sometimes staying there all night. She also stated that on one occasion, she saw the defendant and her daughter lying on the bed together. Another daughter testified that the prosecutrix had remained at the defendant's house 17 or 18 nights in all. The defendant admitted that she remained there all night on one occasion, but denied that at any time he kissed or hugged or had any improper relations with her.

It is apparent from the testimony of the girl that she was a reluctant witness. She admitted that she liked the defendant, and at first denied that he had done anything wrong with or to her. Only by the use of leading questions was she induced to tell the disgusting story of what he did while she was lying on her back in the barn. Omitting details, it is sufficient to say that her testimony was ample to prove that he not only attempted to, but that he did actually have sexual intercourse with her. It is said that most of the evidence tending to show guilt was unworthy of credence. This, however, was a matter for the jury to determine, and it is quite evident that they did not agree with counsel, who undoubtedly made the same point in argument before them. It is said in defendant's behalf that pity prompted him to allow the girl to come to his house, because she was half starved and illtreated at home; that he bought shoes and clothing for her, and was in many ways her benefactor. But sinister motives frequently prompt such benefactions, and the jury had a right to view his gifts, in the light of other disclosures, not so worthy of commendation. The conduct of the mother stamps her as unfit to bear that honored and sacred title. But her faults cannot excuse defendant's conduct. He was 35 years of age, and, though a Chinaman, he must have known that the course pursued would inevitably subject him to suspicion and bring disgrace and shame to the girl. Children of her age cannot measure consequences, but he was old enough to know that she should be at her home, however poor its shelter might be, instead of walking and riding about with him. He must have known that to allow her to stay even one night in his house, would compromise him and ruin her reputation.

It is the humane and enlightened policy of our statute to throw the protecting arm of the law around our young girls, supplanting the arm of the seducer. Men, whatsoever their nationality, are familiar with the terrible penalty entailed upon young girls by one false step. They cannot close their eyes to such consequences and disregard the warning voice of law without risking the punishment the law imposes on their lust. They cannot indulge in suspicious and compromising conduct with females who are mere children, and expect that corroborative evidence supplied by such conduct will be treated lightly or held insufficient to support the story of the child victim. In the nature of things, direct corroborative evidence is seldom obtainable, and the prosecution must usually rely on the unsupported testimony of the child. This alone is sufficient; and, though it be contradictory and the corroboration slight, appellate courts will not interfere unless the preponderance of evidence against the verdict makes reversal a duty. People v. Kaiser, 119 Cal. 458, 51 Pac. 702; People v. Stratton, 141 Cal. 609, 75 Pac. 166; People v. Roach, 129 Cal. 34, 61 Pac. 574; People v. Allen, 144 Cal. 300, 77 Pac. 948; People v. Cesena, 90 Cal. 383, 27 Pac. 300; People v. Wessel, 98 Cal. 352, 33 Pac. 216. It could serve no useful purpose to indulge in a homily touching the testimony of the physicians, who stated that the hymen was ruptured when they examined her about six months after the occurrence in the barn. This evidence could have no bearing on the crime of which defendant stands convicted. Penetration is not an element of such offense, and this testimony only tended to prove sexual penetration. Hence, its admission was harmless, if erroneous, for the jury must have disregarded it in reaching a verdict. We think, however, it was relevant and competent as tending in some degree to prove the crime charged in the information. We cannot find evidence of the witness Healey as to declarations made by Ah Moon. As we read the transcript his evidence was confined to declarations made by defendant, but be this as it may, the declarations of Ah Moon in the presence of the accused, and his conduct in relation thereto, were relevant and competent. Code Civ. Proc. § 1870, subd. 3; Pen. Code, § 1102.

There was no error in permitting Mrs. Keeley and Frank Keeley to testify touching the actions of defendant and his association with the prosecutrix. We cannot find the question upon which the fifth assignment of error is based. The court did not err in permitting the witness Jansen to testify touching the understanding as to the room defendant was to occupy. It was competent for the prosecution to show, if they could, that he was to occupy the room found locked on the occasion of Jansen's morning visit. The questions asked the prosecutrix, and excepted to by defendant, were calculated to throw light on the credibility of her testimony, and were favorable, rather than harmful, to appellant.

We deem it unnecessary to examine the instructions excepted to. Most of the objections were based on the premise that an attempt to commit rape was not included in the offense charged, and we have seen that this contention cannot be sustained. The instruction as to assault certainly did not harm appellant. It was more than favorable to him, and besides, he was not found guilty of assault. We find no error in the record.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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2 Cal. App. 275

MURPHEY v. SOUTHERN PAC. CO.

(Court of Appeal, Second District, California. Nov. 25, 1905.)

CARRIERS — DISCHARGE OF PASSENGERS — NEGLIGENCE—QUESTIONS FOR JURY.

In an action for injuries to a passenger, where it appeared that passengers usually alighted on either side of the train as best suited their convenience, and that there was a track on the easterly side next the station, it was for the jury whether plaintiff was negligent in alighting on the westerly side, and whether defendant was negligent in starting the train without examining as to the safety of passengers who might alight by either exit, and whether the train was started before an opportunity was afforded to alight.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1228, 1389, 1390.]

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by J. L. Murphey against the Southern Pacific Company. From a judgment for plaintiff, and a motion denying a new trial, defendant appeals. Affirmed.

Rehearing denied by Supreme Court, January 24, 1906.

J. W. McKinley, for appellant. C. C. Wright, E. A. Meserve, and J. L. Murphey, for respondent.

ALLEN, J. Action for damages on account of alleged negligence. Judgment for plaintiff, from which and a motion denying a new trial, defendant appeals.

The record discloses the situation of affairs at the time of the accident to be substantially as follows: Alameda street, one of the streets in the city of Los Angeles, runs north and south. Upon this street defendant maintains a double line of railroad track upon which all of its southern traffic, including switch engines, is operated. Trains going south run on the western track. Upon the east side of Alameda street, near First, the company has a ticket office, the agent at which station left the same at 6:15 p. m. on the day mentioned, and before the accident. No lights were provided at the station after such hour other than a coal oil lamp within the station room. No platform or other convenience was provided at the station upon which passengers might alight, but the passengers alighted upon the surface of the street, usually upon either side of the train as best suited their convenience. On December 5, 1902, plaintiff was a passenger on a train going south, which was stopped at the station above named after notice to passengers that it would stop. Plaintiff undertook to alight therefrom, in company with other passengers, on the westerly side of the train and on the side opposite from the easterly track; and while in the act of alighting the train was started, by reason of which the injuries were occasioned.

The first contention of appellant is that the plaintiff should have alighted on the side of the train next the station, and that the employés being upon that side were warranted in starting the train, not having information that passengers were alighting upon the other side, and that no negligence was therefore shown in starting the train under these circumstances. The question of negligence, as well as the claim of contributory negligence, were questions of fact properly submitted to the jury, and it found against appellant upon both issues, and testimony appears in support thereof. It was for the jury to say whether the act of the plaintiff in alighting, as he did, and thus avoiding the necessity of alighting upon another railroad track—both means of exit being open to him—was justifiable. And it was within the province of the jury to say whether it was negligence upon the part of the defendant to start its train without first making some examination as to the safety of passengers who might alight by either exit thus provided, and from either side of a train where no barriers were present preventing exit, or notices to make exit in any particular way; and it was also within their province to determine the reasonableness of the celerity with which passengers alighted therefrom, as well as to the question of fact whether the train was started before an opportunity was afforded to alight; or, upon the other hand, whether the plaintiff undertook to alight from a moving train. All of these matters were properly submitted to the jury; and, no question of negligence in law being presented by the record, this court, under the well-established rule, will not disturb the verdict.

Appellant's criticisms of the charges given, we think, are unfounded. Reading all the charges together, they clearly set forth the law applicable to the various questions involved, and upon which they treated respectively, and none of them can be said to charge as to any question of fact, and the language used therein could not have produced upon the mind of an intelligent juror the idea that the court was intending to assert that any question of fact had been established. Nor was there error in refusing the charges offered by defendant. Everything contained therein had been fully and carefully presented in the other charges given, and no necessity is apparent for their repetition.

A careful examination of the entire record, upon the various other points presented, indicates to us that there is no prejudicial error in the record; and the judgment and order appealed from are therefore affirmed.

We concur: GRAY, P. J.; SMITH, J.

2 Cal. App. 274

PHILLIPS v. MIRES.

(Court of Appeal, Second District, California. Nov. 25, 1905.)

PARTNERSHIP — WHAT CONSTITUTES — EVIDENCE.

An agreement by a rancher with another that he may milk the cows on the ranch, and for his labor in their care and milking have a certain part of the proceeds of cream sold and of any calves born, and that he shall feed the skimmed milk to hogs owned by both parties equally, does not establish a partnership.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, §§ 13-15, 25.]

Appeal from Superior Court, Kings County; E. N. Rector, Judge.

Action by Perry C. Phillips against George S. Mires. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Dixon L. Phillips, for appellant. Letus N. Crowell and E. T. Cosper, for respondent.

ALLEN, J. Action for money had and received by defendant for plaintiff's use. Judgment for plaintiff. Defendant appeals upon a bill of exceptions.

The action was originally commenced in a justice's court. An answer was filed, which was considered by the court and all parties to the proceedings as sufficient to authorize the certification of the case to the superior court, under section 838 of the Code of Civil Procedure, and the superior court proceeded to the trial of the action upon the same theory. It is apparently assumed by both parties that the case is within the jurisdiction of this court, and for the purposes of the decision we will so assume. The sole contention of appellant is that a partnership existed between plaintiff and defendant, and the rule that one partner may not sue his copartner at law, where no accounting or settlement of the partnership affairs has been had, is invoked. In our opinion, no partnership relation is shown. The mere fact that a rancher agrees with another that he may milk the cows upon a ranch belonging to the former and for his labor in their care and milking shall have one-half of the proceeds of the cream sold, and one-half of any calves born while he is so caring for them, and, in addition, shall feed the skimmed milk to hogs owned by both parties equally, does not establish a partnership.

There was no error in the rendition of the judgment, and the same is affirmed.

We concur: GRAY, P. J.; SMITH, J.

2 Cal. App. 261

MEEK v. DE LATOUR.

(Court of Appeal, First District, California. Nov. 25, 1905.)

1. NUISANCE—RIGHTS OF PRIVATE PERSONS.

A nuisance, rendering the occupancy of dwellings materially uncomfortable, is a private one as to each occupant, for which each may have an action.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, § 24.]

2. SAME — ACTION TO ABATE — NATURE OF REMEDY.

An action to abate a private nuisance is an action in equity.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, §§ 49, 50.]

3. JURY—RIGHT TO JURY TRIAL—ACTION IN EQUITY.

In an action in equity to abate a nuisance and for damages, neither party is entitled to a trial by jury as a matter of right.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 49, 78.]

4. SAME—DEMAND FOR JURY.

Even if one is entitled to have the question of damages in an equitable action tried by a jury, it is not error to refuse a general demand for a jury.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 166.]

5. TRIAL—FINDINGS—DUTY TO MAKE.

Where, in an action to abate a nuisance and for damages, the complaint alleged that plaintiff had frequently notified defendant of the nuisance and requested an abatement, defendant having denied the nuisance and the court having found damages, there was no error in the court's failure to find as to the requests to defendant.

6. NUISANCE—ACTION TO ABATE—EVIDENCE—ADMISSIBILITY—ATTEMPTS TO MITIGATE.

In an action to abate a nuisance consisting of a factory, it was not error to permit several witnesses to testify that, after complaint had been made, defendant caused a longer smokestack to be used, and that thereafter the evils were not so great.

7. SAME—DEPRECIATION IN VALUE OF PROPERTY.

Code Civ. Proc. § 731, defines a nuisance as anything injurious to health, indecent or offensive to the senses, or an obstruction to the free use of property, interfering with the comfortable enjoyment of life or property. *Held* that, in an action for damages from a nuisance, evidence as to the depreciation in the value of plaintiff's property is not admissible to show the actual existence and gravity of the nuisance.

8. SAME.

In an action for damages from a nuisance and to abate the same, evidence as to the depreciation in the value of plaintiff's property is not admissible on the question of damages.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, § 117.]

Appeal from Superior Court, Santa Clara County; W. G. Lorigan, Judge.

Action by Nellie R. Meek against George De Latour. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Duncan Hayne and William A. Bowden, for appellant. J. H. Campbell and C. C. Coolidge, for respondent.

HALL, J. Action to abate a nuisance (a cream of tartar works) and for damages.

The action was tried before the court without a jury, findings made and filed, and judgment entered for plaintiff that the nuisance be abated and for $1,000 as damages. A motion for new trial was denied, and the case comes here upon an appeal from the judgment and order, upon the judgment roll and a bill of exceptions.

The first question presented is as to the correctness of the ruling of the trial court overruling defendant's demurrer to the complaint; it being urged that, because the complaint shows that many persons lived near to the works complained of and were similarly injured, the complaint states a public and not a private nuisance. The complaint, among other things, alleges that the works of the defendant are situated within 100 feet of the property of plaintiff, upon which there are two dwelling houses, and that defendant, in conducting his works for the manufacture of cream of tartar, has permitted foul, vile, and noxious odors, stenches, etc., to emanate therefrom, etc.; that, by reason of said odors, stenches, and smells, plaintiff's said premises and dwelling houses have been rendered uncomfortable and unfit for occupation by plaintiff, and that by reason thereof her enjoyment of her said premises has been interfered with; that the maintenance of said business by said defendant has been, and now is, injurious to the health and offensive to the senses of plaintiff, and has interfered, and does interfere, with the comfortable enjoyment of her said premises, and has been, and is, an obstruction to the free use of the same. The rule applicable to a case of this kind is fully discussed in Fisher v. Zumwalt, 128 Cal. 493, 61 Pac. 82, which was a case of a nuisance caused by the operation of a creamery in a thickly settled community. It was there held that a nuisance, the effect of which extends to the dwellings of other persons to such an extent as to render their occupancy materially uncomfortable, is a private nuisance as to each of them, for which each one thus injured may have a private action, though there are many persons thus affected. The case at bar comes fairly within the rule as laid down in Fisher v. Zumwalt, supra. The case of Reynolds v. Presidio & Ferries R. R. Co. (Cal. App.) 81 Pac. 1118, is a case of an obstruction to a public highway, an interference with a right which the plaintiff enjoyed in common with the public, and belongs to a class of cases clearly differentiated from this case in Fisher v. Zumwalt. The court did not err in overruling the demurrer.

Defendant demanded a jury trial, which demand was by the court refused, and this refusal is now assigned as error. It has uniformly been held in this state that an action to abate a nuisance is an action in equity. People v. Moore, 29 Cal. 428; Courtwright v. Bear R. W. & M. Co., 30 Cal. 573; Sullivan v. Royer, 72 Cal. 248, 13 Pac. 655, 1 Am. St. Rep. 51; Richardson v. City of Eureka, 110 Cal. 441, 42 Pac. 965; Fisher v. Zumwalt, supra; McCarthy v. Gaston Ridge M. Co., 144 Cal. 542, 78 Pac. 7. In such a case the verdict of the jury would be advisory only, and neither party is entitled to a trial by jury as a matter of right. Richardson v. City of Eureka, supra; Fisher v. Zumwalt, supra. The demand for damages is but incidental to the main purpose of the suit (Courtwright v. Bear R. W. & M. Co., supra); but, if it should be conceded that defendant may have been entitled to have the question of damages determined by a jury, no such demand was made; but the demand was for a jury to try the entire case.

It is not error to refuse a general demand for a jury to try a cause consisting of legal and equitable issues. 6 Am. & Eng. Ency. of Law, 975; Greenleaf v. Eagan, 30 Minn. 316, 15 N. W. 254; Lace v. Fixen, 39 Minn. 46, 38 N. W. 762; Peden v. Cavins, 134 Ind. 494, 34 N. E. 7, 39 Am. St. Rep. 276.

As to the point that the evidence is insufficient, it is sufficient to say that there is a conflict of evidence as to the facts tending to show the existence of a nuisance.

Appellant insists that "the defendant was entitled to a finding upon the issue tendered by paragraph 7 of the complaint and the denial as exhibited in paragraph 7 of the answer." The paragraph in question contains allegations to the effect that plaintiff had frequently notified defendant of the effects of maintaining said business upon her and her property, and that she had requested defendant to abate the same, and also allegations as to damages suffered by plaintiff; upon all and each of which allegations defendant took issue. The court found as to the damages. The other allegations are immaterial ones, especially in view of the fact that defendant denied the existence of any nuisance.

The court, over the objection and exception of defendant, allowed evidence from several witnesses to the effect that, after complaint had been made to defendant, he caused a longer smokestack to be used, etc. Several witnesses testified that thereafter the evils were not so great. This was not error. The matters thus testified to were a part of the history of the alleged nuisance—a part of the res gestæ. It all tended to show in what manner defendant conducted the works complained of during the time complained of. The ruling of the court in this regard in no way contravenes the doctrine, laid down in Sappenfield v. Railroad Co., 91 Cal. 61, 27 Pac. 590, and Limberg v. Glenwood Co., 127 Cal. 604, 60 Pac. 176, 49 L. R. A. 33, that a plaintiff cannot show that after an accident the defendant took new or additional precautions to prevent the recurrence of such accident. Over the objection and exception of defendant, several witnesses were permitted to testify that, by reason of the presence of the cream of tartar works, property in the vicinity had been depreciated in value, and that particular parcels other than the property of plaintiff had been depreciated in value. The following may be taken as types of the questions now under discussion: "What effect, in your judgment, has the cream of tartar works in that vicinity had upon the value of real estate in that locality? A. I think the maintenance of the tartar works in that vicinity depreciated the surrounding property over 50 per cent. in value." And to another witness (not the plaintiff): "How did the location of the works affect the value of your property? A. In 1888 my property was worth $2,700, and now I am offering it for $1,500." To each of the above questions, and to others of like character, the defendant lodged the objection that they were incompetent, irrelevant, and immaterial. It seems perfectly clear that such testimony, even where limited to the property of plaintiff, where the abatement of a nuisance is sought, is inadmissible on the question of damages. Otherwise a plaintiff could recover for the depreciation in value of his property and at the same time remove the depreciation by abating the cause of it. "The nuisance may be abated or removed, and to give damages on account of the decreased value of the land would be to give damages for all the injury the premises would ever sustain, which would be clearly wrong." Bigley v. Nunan, 53 Cal. 403. See, also, Hopkins v. W. P. R. R. Co., 50 Cal. 194, and the cases there cited; Severy v. C. P. R. R. Co., 51 Cal. 195. (It was stated at the oral argument in this case that the works have, since the trial, been removed to another county.)

It is insisted, however, by plaintiff that, though the depreciation in the value of property may not be recovered in an action of this sort, such evidence is proper for the purpose of proving the actual existence of the nuisance and the gravity thereof. No authorities have been cited to us in support of this contention. "Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action." Code Civ. Proc. § 731. Under this section, neither the existence of the nuisance nor the right to have the same abated depends upon the depreciation in value of neighboring property. The erection of an unsightly structure in a fashionable residence section might very much depreciate the value of property for residence purposes, yet, unless the structure interfered with comfortable enjoyment of life or property in the manner pointed out in the above section, it would not be a nuisance, and, if it did, it could be abated whether it depreciated the market value of property in its vicinity or not. The existence of the nuisance must be proved by evidence of the things that constitute the nuisance. The gravamen of the charge made in the complaint in this case is that defendant permitted the most foul, vile, and noxious odors, stenches, and smells to emanate from his premises in the maintenance of his business, and that the maintenance thereof has been, and is, injurious to the health and offensive to the senses of plaintiff, and has interfered, and does interfere, with the comfortable enjoyment of her premises, and has been, and is, an obstruction to the free use of the same. The proof of the above recited matters established the existence of a nuisance, and the depreciation of the value of property was an immaterial matter. The allegations of the complaint as to damages are that plaintiff has been damaged "one thousand dollars for distress and inconvenience suffered by plaintiff by reason of said nuisance, and three thousand ($3,000) for the loss and damage to her said property by reason thereof." The court found that plaintiff has suffered damage in the sum of $1,000. We cannot say that this finding is not in large part based upon the evidence as to depreciation in the value of property. The court erred in admitting the testimony as to depreciation in the value of property.

It was also urged at the oral argument that the court erred in allowing testimony to be given, over the objections of defendant, that there was a general complaint in the community with reference to the tartar works conducted by defendant, and that a public meeting had been called and held by the people of the vicinity to protest against the carrying on of the manufacture of cream of tartar. The question, "Is there, or is there not, a general complaint in that community with reference to the tartar works conducted by the defendant?" clearly called for hearsay testimony; but the objection was not upon that ground. Doubtless, if it had been, the objection would have been sustained. Neither the fact that meetings were held at which defendant was not present, nor what took place at such meetings, was evidence against defendant.

For the errors above pointed out, the judgment and order are reversed.

We concur: HARRISON, P. J.; COOPER, J.

2 Cal. App. 306

BRENNEKE et ux. v. SMALLMAN et al.

(Court of Appeal, First District, California. Dec. 1, 1905.)

1. CHATTEL MORTGAGES—ACTIONS TO FORECLOSE—TRIAL—FINDINGS.

A finding, in an action to foreclose a chattel mortgage, of the execution by defendant of a mortgage, in accord with the allegations of the complaint, is sufficient, though not in so many words referring to the mortgage described in the complaint; it being perfectly apparent that it is the same mortgage.

2. CHATTEL MORTGAGES—FORECLOSURE—DESCRIPTION OF PROPERTY.

The mortgagor, in an action to foreclose a chattel mortgage as written, may not complain of the indefinite description of the property.

3. Bills and Notes—Extending Time of Payment.

Time for payment of a note is not extended by the acceptance of interest in advance to a time beyond that at which the note is due on its face, so as to prevent action before expiration of the time for which interest was paid; Civ. Code, § 1698, providing that a contract in writing may be altered by a contract in writing or by an executed oral agreement, but not otherwise.

4. Husband and Wife—Loan of Community Property—Note to Wife.

That the note given for a loan of money, the joint earnings of husband and wife, was made payable to the wife, does not prevent the husband suing thereon, in the absence of evidence that he intended to give it to his wife; and he is not required to first litigate with her the question of ownership, but, if the maker is in doubt as to whom he should pay, he may require them to interplead.

5. Bills and Notes—Extension—Indefinite Indorsement.

The words "Renewed July 6," indorsed on the back of a note over the signature of the payee, are too indefinite to extend time of payment.

Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by Louis Brenneke and wife against A. H. Smallman and others. From an adverse judgment, defendant Smallman appeals. Affirmed.

Maguire & Gallagher and James G. Maguire, for appellant. Frank Schilling, R. Percy Wright, and J. J. Roche, for respondents.

HALL, J. This is an action to foreclose a chattel mortgage, and the appeal by defendant A. H. Smallman is from a judgment of foreclosure in favor of Louis Brenneke, and an order denying appellant's motion for a new trial.

The complaint alleges that the plaintiffs, Louis Brenneke and Lena Brenneke, are, and have been at all times in the complaint mentioned, husband and wife. It is alleged that defendant A. H. Smallman, on January 5, 1900, borrowed from plaintiff Louis Brenneke $1,000, and made and delivered to him, through plaintiff Lena Brenneke, a promissory note, which is set out in full. The note bears date January 5, 1900, and is in terms payable to Lena Brenneke January 5, 1901. It is alleged that the $1,000 loaned is a part of the joint earnings of plaintiffs, and that, though Lena Brenneke appears as the payee in said note, and mortgagee in the mortgage which is alleged to have been given to secure the note, Louis Brenneke is, and at all times has been, the owner and holder of said note and mortgage.

It is urged that the findings do not support the judgment in this, that "the findings do not show that the defendant A. H. Smallman ever executed the chattel mortgage described in plaintiff's complaint." The finding in question follows a finding as to the execution of the note, and is as follows: "At the same time, as part of the same transaction, and for the purpose of securing the payment of said promissory note and the interest to accrue thereon, and also, in case of foreclosure of mortgage, in order to secure the payment of the costs and charges thereof, together with a counsel fee at the rate of 5 per cent. on the total principal and interest unpaid, the defendant A. H. Smallman executed to the plaintiff Louis Brenneke, through said Lena Brenneke, a mortgage of the personal property described in paragraph 3 of the complaint herein." The wording of this finding is in exact accord with the allegations of the complaint. The next succeeding finding, which is also in exact accord with the next succeeding allegation of the complaint, finds that said mortgage was recorded in the office of the county recorder of said city and county, in volume 85 of Mortgages of Personal Property, at page 271 thereof. While the finding attacked does not in so many words refer to the mortgage described in the complaint, it is perfectly apparent that it is the same mortgage referred to in the complaint. The objections to its sufficiency we regard as hypercritical. Findings are to be liberally construed in support of the judgment (Ames v. San Diego, 101 Cal. 390, 35 Pac. 1005), and any uncertainty in the findings is to be construed so as to support the judgment rather than to defeat it (Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986).

It is further objected that the property mortgaged is not sufficiently described in the findings. The findings refer to the property described in paragraph 3 of the complaint. As originally drawn, this paragraph, besides naming the articles as "one Royal Wilton carpet," etc., also described them as being in the house designated as No. 109 Devisadero street, at the city and county of San Francisco, state of California. The mortgage, however, on being introduced in evidence, simply gave an enumeration of the articles, but did not locate them or otherwise describe them. At the close of the case the complaint was amended to conform to the proof by striking out certain lines of paragraph 3, and inserting matter which, if we correctly understand the record, leaves the description of the property simply as set forth in the mortgage; that is, it is enumerated and not otherwise described. The result of this is that, reading the decree, the findings, and complaint as amended, we have simply an enumeration of various articles of household furniture as set forth in the mortgage, but not otherwise described. If this were an action in claim and delivery, it might well be said that the description was too vague, but it is an action to foreclose a chattel mortgage. "In an action to foreclose a mortgage as it is written, a mortgagor cannot be heard to complain of an indefinite description of the property mortgaged, whatever might be the effect of a sale under the description." Graham v. Steward, 68 Cal. 374, 9 Pac. 555; Whitney

v. Buckman, 13 Cal. 536; Tryon v. Sutton, 13 Cal. 490.

It is urged that the findings show that the action was commenced prematurely, because it appears that the action was brought May 10, 1901, although interest had been paid in advance to and including June 4, 1901. Plaintiff's theory seems to be that by accepting interest in advance plaintiff extended the time of payment accordingly. The promissory note is, of course, a written contract, and in this instance it was past due on its face. "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, but not otherwise." Civ. Code, § 1698. The payment of interest in advance was in strict compliance with the terms of the promissory note, and, if the receipt thereof could be held to imply an agreement to forbear for the time for which the interest was paid, such contract would not be fully executed until the expiration of the time for which interest was paid, and could not be effectual to vary the terms of the note or to extend the time of payment thereof. Henehan v. Hart, 127 Cal. 656, 60 Pac. 426; Civ. Code, § 1698. The finding that the money loaned was part of the joint earnings of Louis Brenneke and Lena Brenneke is amply supported by the evidence in the record, as is also the finding that defendant A. H. Smallman borrowed the sum of $1,000 from plaintiff Louis Brenneke. Louis Brenneke testified that he told his wife to go to the bank and get the money and give it to Smallman. The fact that the note and mortgage were made payable to Mrs. Brenneke did not divest her husband of his ownership thereof, in the absence of evidence that he intended to make her a gift of the same. The husband has a right to sue for and recover community property. This right is necessarily incident to his right to the control and disposition of such property. Fennell v. Drinkhouse, 131 Cal. 451, 63 Pac. 734, 82 Am. St. Rep. 361; Rowe v. Hibernia Bank, 134 Cal. 403, 66 Pac. 569; Meyer v. Kinzer, 12 Cal. 248, 73 Am. Dec. 538. We see no force in the suggestion that the husband should, by a judicial proceeding, litigate the question of ownership of the note and mortgage with his wife before enforcing his rights against the defendant. If the mortgagor had any doubt as to whom he should pay the money to, he could have required the Brennekes to interplead; but as Mrs Brenneke joined in this action, praying for a judgment in favor of her husband, she would doubtless be forever estopped from claiming anything in her own right against the defendant.

It is urged that the evidence shows that on the 5th day of January, 1901, Lena Brenneke agreed to extend the time of the maturity of the note to July 6, 1901, and that certain findings to the contrary are not supported by the evidence. This contention is predicated upon the fact that interest was paid and received monthly in advance, and that on the 5th day of January, 1901, Lena Brenneke indorsed on the back of the note these words: "Renewed July 6. Lena Brenneke." We have already seen that in this state a payment of interest in advance does not amount to a contract to extend the time for payment of a written contract (Henehan v. Hart, supra; Civ. Code, § 1698), which leaves for consideration the written words above set forth. The word "renewed" may properly be used to express an agreement on the part of the maker of a note, but is quite out of place as expressing an agreement on the part of the payee extending the time of payment. "July 6" does not indicate with any certainty the period to which the note was "renewed," or to which payment was extended, if we should construe "renewed" as meaning "extended." We may conjecture that it was intended by the words written to extend the time for payment of the note to July 6, 1901, but it would be but a conjecture, which is not sufficient upon which to base judicial action. The original agreement was to pay at a certain time. The burden of proving any modification which would afford a defense to the action on the original contract was upon the defendant. The words relied upon are too vague and uncertain in their meaning to amount to a modification of the promissory note as originally executed. The case of Corbett v. Clough, 8 S. D. 176, 65 N. W. 1074, cited by appellant, is a striking example of the kind of language that should have been used in this case to effectuate the object claimed to have been intended by appellant. The words were "Extended to December 1st, 1891," written by the payee. The language was apt, and the time certain. Of the same nature is Niblack v. Champeny, 10 S. D. 165, 72 N. W. 402. In Lime Rock Bank v. Mallett, 34 Me. 547, 56 Am. Dec. 673, there was no uncertainty as to the time, and there was no controversy as to the action of the court as to the meaning of the words giving the extension, but the controversy was as to whether or not the defendant was a surety only, and had consented to the extension. We do not think that the words "Renewed July 6" can be construed as expressing an agreement to extend the time of payment of a note upon which they are written to July 6, 1901. Defendant asked a witness the question: "What was that conversation?" to which plaintiff objected, whereupon counsel for defendant stated that he offered to prove that "Lena Brenneke verbally agreed with the defendant A. H. Smallman that the time of payment of said note should be extended to the 6th day of July, 1901," and thereupon the court sustained the objection. This was not error. A written contract may not be altered, except by a contract in writing, or by an executed oral agreement. Civ. Code, § 1698; Henehan v. Hart, supra.

The judgment and order are affirmed.

We concur: HARRISON, P. J.; COOPER, J.

148 Cal. 501

SPEAR et al., Board of State Harbor Com'rs, v. REEVES, State Treasurer.

(Sac. 1,445.)

(Supreme Court of California. Jan. 18, 1906.)

1. STATUTES—ENACTMENT—PUBLICATION—AUTHORITY OF GOVERNOR TO PROVIDE FOR.

Const. art. 16, provides that the Legislature shall not create a debt exceeding $300,000, unless the law providing therefor shall have been submitted to a vote at a general election and received a majority of the votes cast on the question, and declares that such law shall be published in each county for a specified period preceding the election. Article 5, §§ 1, 7, vests the executive power of the Governor and makes it his duty to execute the laws. St. 1903, p. 247, c. 211, providing for the issuance of state bonds for the payment of a debt not exceeding $2,000,000 incurred in the erection of a sea wall, made no provision for the publication of the act. *Held*, that it was the duty of the Governor to provide for the publication of the act, and on his doing so the constitutional mandate was carried out.

2. SAME—AUTHORITY TO DIRECT SECRETARY OF STATE.

The Governor, in discharging the duty, could direct the Secretary of State, in whose official custody the act was, to provide for its publication.

3. SAME—PUBLICATION—SUFFICIENCY.

The publication of a law creating a debt for the time specified in Const. art. 16, requiring the submission of a law creating a debt in excess of $300,000 to the voters and directing that such law shall be published in every county for a specified period before the election, is not insufficient for the failure of the Secretary of State providing for the publication to accompany the law with a certificate as to its authenticity.

In Bank. Application for mandamus by Charles H. Spear and others, constituting the board of state harbor commissioners, against Truman Reeves, to compel respondent, as State Treasurer, to sell certain state bonds. Writ granted.

Devlin & Devlin and William H. Davis, for petitioner. U. S. Webb, Atty. Gen., and George A. Sturtevant, Deputy Atty. Gen., for respondent.

LORIGAN, J. This is an application for a writ of mandate to compel the respondent, as State Treasurer, to proceed with the sale of certain bonds alleged to be salable under what is called the "San Francisco Sea Wall Act." This act was passed March 20, 1903 (St. 1903, p. 247, c. 211), and provided for the issuance and sale of state bonds, not exceeding the sum of $2,000,000, for the payment of indebtedness to be incurred in the erection of a sea wall and appurtenances in the city and county of San Francisco. As the indebtedness contemplated to be created by the act exceeded the sum of $300,000, it was essential, under article 16 of the Constitution, that such act should be submitted to the people at a general election (and the act itself provided for such submission), and that it should receive a majority of all the votes cast for and against it at such election; the constitutional provision further declaring that "such law shall be published in at least one newspaper in each county, and city and county, if one be published therein, throughout the state for three months next preceding the election at which it is submitted to the people." At the general election held in the state November 8, 1904, the said act was submitted to the people for ratification. Prior to said general election the Governor of the state, in his proclamation calling for such election, included therein the submission of the said "San Francisco Sea Wall Act" to the people of the state, and such act was set out in full in said proclamation. Anterior to the issuance of said proclamation said Governor directed and empowered the Secretary of State of the state of California to take all necessary steps to provide for the publication and cause to be published the said act in accordance with said article 16 of the Constitution. This the Secretary of State did by causing said act to be published in a newspaper published in each of the counties of the state of California for a period of three months next before the said election of November 8, 1904, save in the county of Alpine, where no newspaper was then being published. At said general election held on November 8, 1904, the said act was ratified by the people, receiving 119,460 votes in its favor, the number of votes against it being 26,835, and in due time, and according to law, the Governor of the state issued a proclamation that said act was in full force and effect. Thereafter the respondent, the State Treasurer, having prepared suitable bonds of the state of California, in accordance with the provisions of the said act, the petitioners, constituting the board of state harbor commissioners, as authorized by said act to do, adopted a resolution requesting the sale of 250 of said bonds, and the Governor of the state, as the act provided he should, directed in writing the said respondent to sell at public auction to the highest bidder, for cash, 250 of the said bonds in one parcel, and that he give due notice of the time and place of the sale thereof, as provided in the act. The respondent having refused to take any steps towards the sale of said bonds, as requested by the state board of harbor commissioners, and as directed by the Governor of the state, petitioners make this application for a writ of mandate to compel him to do so, and the matter is now before us on demurrer to the petition. The demurrer is general, and but one point is made under it, which is that the alleged "San Francisco Sea Wall Act" has never been legally published. In support of this contention it is claimed by respondent that, while the constitutional provision requires such an act to be published, no provision has in fact been made by law for such publication; that there is no statutory provision authorizing the Secretary of State, or any other officer or person, to make the publication provided for in the constitutional provision; and that the act of the Secretary of State in publishing the statute in question was unauthorized and nugatory in as far as it purported to be a step towards its legal enactment. In the same line it is further claimed that, assuming the act could have been legally published by the Secretary of State at the direction of the Governor, still the publication as made (a copy of which appears in the petition for this writ) should have been accompanied by some certificate or attestation showing that the Secretary of State was causing or directing the act to be published.

Neither of these points impress us as having any merit, and require but brief notice. It is true, as claimed by respondent, that the constitutional provision referred to is silent as to who shall make the required publication, and there is no general law upon the subject. The Legislature assumed, without making express provision in the act itself therefor, that some executive officer of the state was charged with the duty of making the publication in conformity to the constitutional requirement. Petitioners contend that this assumption was well founded, and that the Governor of the state, as its chief executive, in the absence of any direction to the contrary, was charged with this duty, and we think this position is sound. It is ordained by the Constitution (section 1, art. 5) that the supreme executive power should be vested in a chief magistrate, who shall be styled the "Governor" of the state of California, whose duty it shall be, among other things, to see (section 7, art. 5) that the laws are faithfully executed. This duty of enforcing or executing the laws enjoined on the Governor applies not only to legislative enactments, but to constitutional provisions which are equally laws —the organic law of the state—and it is his duty to see that all are faithfully executed. Now, the constitutional provision authorizing the Legislature to pass the act here in question conferred no power on that body to do anything relative to the publication of the act as far as the time or manner of its publication was concerned. The constitutional provision itself definitely fixed when and how that should be done, and the Legislature could not interfere in the matter at all. All that the Legislature could do, conceding it could do that, would be to make provision for the publication of the act. Such publication was made essential by the Constitution in order to render the ratification of the act by the people effectual. Any direction which the Legislature might have given in the act as to such publication would have had the effect only of investing the officer, designated for that purpose, with the discharge of a mere executive duty—the duty of seeing that the law, the provision of the Constitution, as to publication was carried out. But it by no means followed that, because the Legislature in the act itself failed to expressly designate some particular officer to make the publication, the duty of doing so was not otherwise fully provided for. On the contrary, as the Constitution in another provision had made the Governor the chief executive officer of the state, to see that the laws were faithfully executed, and as this constitutional provision is one of the laws required by him to be so executed, it is quite obvious that, assuming the Legislature could have designated some other officer, still, in the absence of such designation, it was the duty of the Governor, in seeing that the laws were executed, to provide for the publication of the act, and, having done so, the constitutional mandate was legally carried out. In discharging his duty in this respect, it was not necessary that the Governor should personally attend to the publication. It was sufficient that he provided for its publication, and this was accomplished when he directed the Secretary of State to make it. As the original act of the Legislature was in the official custody of the Secretary of State, he was eminently a proper person to be designated to see that its correct publication was had.

Other reasons are urged by petitioners why the publication of this particular act, made by the Secretary of State under the direction of the Governor, should be sustained. It is insisted that as the act in question provided, in terms, for its submission to the people for ratification, and that the Governor should include the submission of it to the people in his proclamation calling for the general election of November 8, 1904, such requirements impliedly directed the Governor to take all necessary measures for a legal submission of it, including its publication, for the time and in the manner as directed by the constitutional provision.

It is further insisted that, when the Legislature at the session subsequent to the publication of the act (St. 1905, p. 111, c. 115) appropriated money to pay the advertising done by the Secretary of State in making such publication, this operated as a ratification of the action of the Governor and Secretary of the State in that regard, or, at least, was a recognition that their act in publishing it was valid, and within the scope of their executive duty—a recognition on the part of the legislative department of the state that the construction of the Constitution by the Governor in that particular was proper, and in accordance with the intention of the Legislature. While these suggestions have much persuasive force, we do not discuss or indorse them, preferring to rest our conclusion upon the constitutional provision relative to the duties of the Governor as chief executive, and which, in our judgment, authorized and required him to direct the publication of the act as it was done.

As to respondent's claim that the act as published by the Secretary of State should have been accompanied by some certificate or attestation of that officer as to its authenticity: The demurrer concedes that a true copy of the act had been published for the required time and in the manner required by the Constitution. This was all that that provision required. It was the act as passed by the Legislature which was to be published. If it was contemplated that the act as published should be attested, the Constitution would have said so. Being silent upon the subject, it must be assumed that it did not so intend.

This disposes of the only points made by respondent upon the demurrer, neither of which in our judgment are tenable. As this application is for a peremptory writ after notice, and the matter is submitted on the pleadings, it is ordered that the peremptory writ of mandate issue as prayed for.

We concur: BEATTY, C. J.; SHAW, J.; McFARLAND, J.; ANGELLOTTI, J.; HENSHAW, J.

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148 Cal. 397

HARDING v. HARDING. (L. A. 1,170.)

(Supreme Court of California. Jan. 2, 1906.)

1. Courts—Writ of Error—Federal Supreme Court—Reversal—Effect.

Where a judgment of the state Supreme Court, affirming a divorce decree, was reversed on a writ of error to the federal Supreme Court, on the coming down of the remittitur from the federal court and the filing thereof in the state Supreme Court, the appeal from the decree was then pending in the state court for such further disposition as the court deemed proper, not inconsistent with the opinion of the federal court.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4666.]

2. Judgment—Estoppel—Waiver.

Where, in an action for divorce, defendant pleaded the proceedings and decree of the court of another state, in an action between the parties for maintenance, as a bar to and estoppel of the suit in question, she did not waive her right to rely on such judgment as an estoppel by failing to interpose any objection to plaintiff's evidence in support of the merits of his main case, and by cross-examining plaintiff's witnesses on such subject and introducing evidence on her own behalf tending to disprove the grounds for divorce alleged.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1149, 1282.]

3. Pleading—Defenses—Denial—Operation of Law.

The defense of former adjudication pleaded by defendant, like other defenses, is deemed denied by operation of law, as provided by Code Civ. Proc. § 607, and is available only on proof thereof.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 321.]

On Rehearing.

4. Appeal—Reversal—Effect.

Where, on appeal, the judgment was reversed, and the court held that on the facts presented a foreign decree was a complete defense to the action, but, the findings being insufficient to sustain a judgment for defendant, the case was remanded for a new trial, such determination did not preclude plaintiff on the new trial from showing, if possible, that there was no such foreign decree, or any other fact inconsistent with those alleged in support of the defense of estoppel by judgment, or anything legally avoiding such estoppel.

In Bank. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by George F. Harding against Adelaide M. Harding. From a judgment in favor of plaintiff, defendant appeals. After a remittitur of the United States Supreme Court had been filed, reversing the judgment of the California Supreme Court, defendant moved that the remittitur in the action be forthwith issued to the superior court of San Diego county, and plaintiff moved that the California Supreme Court proceed to hear and determine matters in the appeal not decided by the federal court. Defendant's motion denied. Plaintiff's motion granted. Judgment reversed. Modification of opinion denied.

T. W. Hubbard (Henry G. Tardy, of counsel), for appellant. M. L. Ward and Hunsaker & Britt, for respondent.

ANGELLOTTI, J. This case, after decision by this court, whereby the judgment of the superior court of San Diego county granting plaintiff a divorce from defendant on the ground of desertion was affirmed (140 Cal. 690, 74 Pac. 284), was carried to the United States Supreme Court by a writ of error. That court, upon the ground that this court, in affirming such judgment, had failed to give to a decree of the courts of the state of Illinois, rendered therein in an action for maintenance theretofore prosecuted by defendant against plaintiff, the due faith and credit to which it was entitled under the Constitution of the United States, reversed the judgment of this court, and remanded the cause to this court "for further proceedings not inconsistent" with the opinion filed by said Supreme Court. 198 U. S. 317, 25 Sup. Ct. 679, 49 L. Ed. 1066. Upon the coming down of the remittitur of the United States Supreme Court, a motion was made herein by defendant that "the remittitur in said action issue forthwith to the superior court in and for the county of San Diego, state of California." This motion was met by a counter motion on the part of plaintiff to proceed to hear and determine such matters involved in the appeal as have not been decided by the United States Supreme Court, and to take such further proceedings in accordance with the mandate of said court as are necessary for the proper disposition of the appeal of this court.

These motions have been submitted together.

It is apparent that, under the judgment of the United States Supreme Court, the appeal in this cause is now pending in this court, for such disposition as this court may deem proper, provided, always, that such disposition must not be inconsistent with the opinion filed by the federal court. The reversal of the judgment of this court was not a reversal of the judgment of the superior court. To effect such a reversal there must, under the circumstances here existing, be a judgment of this court reversing such judgment. Whether such a judgment of reversal must follow the action of the United States Supreme Court depends upon the answer to the question as to whether any other course would be inconsistent with the opinion of that court. That opinion admittedly finally established the fact that the final decree of the Illinois court, pleaded and established by evidence in this action, constituted a full and complete defense to the sole cause of action for divorce asserted by the plaintiff herein. Plaintiff, however, urged on the original hearing of this appeal that, if such Illinois judgment had this effect, the defendant had, by defending on the merits, waived the benefits of the estoppel arising on such decree. This contention was not noticed by this court in its former decision; the court putting its decision on the ground that the Illinois judgment could not have the effect attributed to it by defendant, even if the benefits of the estoppel arising on such decree had not been waived. It is now contended by plaintiff that this question of waiver has not been foreclosed by the decision of the United States Supreme Court, and that this court may and should consider it, and, if it finds upon the record that defendant has waived her rights under the Illinois judgment, it should affirm the judgment of the superior court. No other reason is suggested by plaintiff why the decision of the United States Supreme Court does not require a reversal of the judgment of the superior court.

We do not consider it necessary to here discuss the elaborate argument of counsel as to whether this question of waiver is now open to consideration by us, for, if we should conclude that it is so open, we are satisfied that it could not be held upon the record before us that defendant had waived the benefit of the Illinois judgment. The facts alleged to constitute such a waiver are few and simple. In her answer to the complaint for desertion, defendant, in addition to specially pleading with great minuteness the proceedings and decree of the Illinois court, and the judgment of the Supreme Court of that state on appeal, "as a bar to and estoppel of the said suit and supposed cause of action set up by the plaintiff herein," also denied plaintiff's residence in California (a thing essential to his right to maintain the action) and the charge of desertion. Upon the trial in the superior court she did not object to evidence offered by plaintiff to sustain the allegations of his complaint, and she, through her attorneys, both cross-examined plaintiff's witnesses and offered certain evidence in response to the evidence adduced by him upon the merits of his cause. She at all times, however, insisted upon her claim that the Illinois judgment constituted a full defense, and introduced the record of the Illinois proceedings in evidence, and relied upon the same as a complete defense, and there is nothing to indicate any intention to waive the benefit of the Illinois judgment, unless such intention was manifested by defendant's failure to interpose any objection to such evidence as was offered by plaintiff upon the question of residence and desertion, her cross-examination of plaintiff's witnesses upon the subject, and the introduction by her of evidence tending to disprove the allegation of desertion. It is manifest that, under the circumstances, these facts indicated no intention on the part of defendant to waive the benefit of the Illinois judgment. Her failure to object to evidence offered by plaintiff to support the allegations of his complaint certainly indicated no such intent. It is apparent that any objection must necessarily have been overruled. The defense of a former adjudication pleaded by defendant was, like any other defense, deemed denied, and was available only upon proof thereof, which, in the natural order prescribed by our Code (Code Civ. Proc. § 607), would be made only after the plaintiff had produced the evidence on his part. In receiving the evidence offered by plaintiff, the trial court could not be called upon to anticipate the evidence of defendant. Any legal evidence offered by plaintiff in support of the allegations of his complaint was admissible, and any objection that might have been interposed thereto must necessarily have been overruled. Defendant, to save her right under the defense of former adjudication, was not compelled to make such untenable objections. It is equally clear that her cross-examination of plaintiff's witnesses, and the introduction of evidence tending to disprove their statements, indicated no intention of abandoning her other defense of former adjudication. She still affirmatively insisted upon that defense and introduced her evidence in support thereof. Under our system, she had the right to set forth, prove, and rely upon as many defenses as she had (section 441, Code Civ. Proc.; Banta v. Siller, 121 Cal. 414, 417, 53 Pac. 935; Miles v. Woodward, 115 Cal. 308, 315, 46 Pac. 1076), and we know of no rule of law that required her to elect between her two defenses, even had the plaintiff asked the court to compel her so to do, which he did not.

Plaintiff contends that it is otherwise established in this state, and cites the case of

Megerle v. Ashe, 33 Cal. 74, wherein it was said: "A party cannot rely upon a judicial determination of an issue by way of an estoppel, and also upon proof of the facts upon which the determination is based. The necessary effect of the estoppel is to preclude all inquiry as to the truth of the matter determined, and when a party who is entitled to set up the estoppel does open the inquiry into the truth of the matter, he cannot complain that the other party pursues it without regard to the estoppel." This language was used by a majority of the court in relation to a plaintiff who had endeavored to show that he had a valid pre-emption claim as a matter of fact, and also that it had been adjudicated by the Land Department, between him and defendant's grantor, that he had such a valid claim. The question was not important in that case, in view of the fact that the court held that defendant's grantor was not really a party to the other proceeding and that the record of the former adjudication was therefore not binding on him. We are at a loss to understand how the statement quoted, if it goes to the extent contended for by plaintiff, could be true under our system. In the later case of San Francisco v. S. V. W. W., 39 Cal. 473, it was squarely held that a plaintiff, by attempting to plead the facts upon which an adjudication was based, and also pleading the adjudication, did not waive the benefit of the adjudication, and that, although the facts pleaded did not state a cause of action, the allegations of prior adjudication did, and that a demurrer interposed to the complaint should have been overruled. It was said of Megerle v. Ashe, supra, in the opinion, that such case "only decides that a party may waive the benefit of an estoppel to which he is entitled, and that he does so when he does not rely upon it, but takes issue upon the facts upon which the adjudication is based." The court further said: "The most usual manner in which it has been held that an estoppel is waived is by omitting to plead it. In this case the plaintiff has certainly not waived the benefit of the estoppel." It is somewhat difficult to see any distinction in principle between the case of one who asserts both claims in his pleadings and one who does the same thing by his evidence. If one is a waiver of the estoppel, the other would appear to be the same. But whatever construction may be put upon Megerle v. Ashe, supra, and the later case of Hicks v. Lovell, 64 Cal. 14, 22, 27 Pac. 942, 49 Am. Rep. 679, where something is said that might be construed as an approval of the statement quoted from the former case, we are satisfied that, under our system, a defendant does not waive his rights under a judgment pleaded in bar, by the mere act of also contesting the claim of the plaintiff upon the merits. We can see no valid reason in such a case for any exception to the general rule applicable in this state, to the effect that a defendant may plead any and all of the defenses that he may have, that he may pursue and rely upon all of his defenses so pleaded to the end, and that, if any defense so pleaded is found to be good, he is entitled to prevail. If there be anything inconsistent with this in the two California cases relied upon by plaintiff, it must be considered as overruled.

The contention made as to waiver not being tenable, there can be no doubt that, under the decision of the United States Supreme Court, the judgment and order of the superior court must be reversed.

The following order is therefore made: The remittitur from the United States Supreme Court, reversing the judgment of this court and remanding the cause to this court for further proceedings not inconsistent with the opinion filed by said United States Supreme Court, having been produced and filed, and it appearing to this court that thereunder the judgment and order of the superior court in said cause must be reversed, it is ordered that the judgment and order denying the motion for a new trial be, and the same are hereby, reversed, and the cause remanded to the superior court of San Diego county for further proceedings not inconsistent with the opinion of the United States Supreme Court and this opinion; further ordered, in accordance with the mandate of the United States Supreme Court, that defendant have execution from said superior court for her costs expended in said United States Supreme Court, amounting to $629.75, and also that she recover her costs on this appeal.

We concur: BEATTY, C. J.; McFARLAND, J.; LORIGAN, J.; SHAW, J.; VAN DYKE, J.; HENSHAW, J.

On Rehearing.

ANGELLOTTI, J. The application for a rehearing on modification of opinion is denied. What was said in the opinion to the effect that the opinion of the United States Supreme Court "admittedly finally established the fact that the final decree of the Illinois court, pleaded and established by evidence in this action, constituted a full and complete defense to the sole cause of action of divorce asserted by the plaintiff herein," was said solely with reference to the conditions shown by the record on appeal. Upon that record, there was absolutely no defense to the estoppel in the slightest degree intimated, other than the alleged waiver urged in this court and disposed of by our opinion. If the findings of the trial court had been such as to justify that course, this court would have ordered judgment entered thereon in favor of defendant. There was, however, no finding broad enough to warrant this, and for that reason the cause was remanded for further proceedings not inconsistent with the opinions of the Supreme Court of the United

States and this court. 25 Sup. Ct. 679, 49 L. Ed. 1066; 74 Pac. 284. Upon the new trial which must necessarily follow, plaintiff may undoubtedly urge any defense that he may have to the alleged estoppel. What was finally established by the opinion of the United States Supreme Court is that the allegations of the answer, and the evidence in the record in support thereof, showed an estoppel, constituting a full defense to the sole cause of action for divorce asserted by plaintiff.

We have determined that the benefit of the estoppel was not waived by the acts of the defendant on the trial in the superior court. So much is the law of the case. If, on a new trial, defendant can show that there was no judgment of the Illinois court, or any other fact inconsistent with those alleged in the answer in support thereof, or anything which legally avoids the estoppel, he will doubtless be allowed to do so, and there is nothing in the opinion already rendered which would preclude such showing.

We concur: BEATTY, C. J.; SHAW, J.; HENSHAW, J.; McFARLAND, J.

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148 Cal. 418

PEOPLE v. McCLURE. (Cr. 1,268.)

(Supreme Court of California. Jan. 8, 1906.)

1. CRIMINAL LAW — OTHER OFFENSES — EVIDENCE OF OFFENSE CHARGED.

Where defendant shot Z. immediately before he shot deceased and as a part of the same transaction, so that it would be difficult to give an intelligent description of the occurrences resulting in decedent's death without referring to the shooting of Z., and the motive for the killing of both was the same, it was not error to admit evidence concerning the shooting of Z. in a prosecution for the killing of deceased.

2. SAME—BURDEN OF PROOF—INSTRUCTIONS.

Where, in a prosecution for homicide, the evidence disclosed a willful murder of deceased, it was not error to charge Pen. Code, § 1105, declaring that on a trial for murder, the commission of the homicide by defendant being proven, the burden of proof of circumstances in mitigation, justification, or excuse is on defendant, unless the proof on the part of the prosecution tends to show that the crime only amounts to manslaughter or that defendant was justified or excusable.

3. SAME—INSTRUCTIONS.

In a prosecution for homicide, the court charged that evidence had been admitted relating to the shooting of Z. at the time it was claimed defendant shot deceased; that the only relation of such testimony was to illustrate or establish the intent or motive with which the shooting of deceased was done, if any; that before the jury could consider the shooting of Z. they must be satisfied beyond a reasonable doubt that defendant shot Z. willfully, unlawfully, and intentionally; and that if they had a reasonable doubt they should disregard all of the testimony on such question. *Held*, that such instruction was not prejudicial to defendant.

In Bank. Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

John McClure was convicted of murder, and he appeals. Affirmed.

W. F. McLaughlin, for appellant. U. S. Webb, Atty. Gen., and C. N. Post, Asst. Atty. Gen., for the People.

McFARLAND, J. Defendant was charged with the murder of one Jerry O'Shea, and the jury found him guilty of murder in the first degree and imposed the death penalty. He appeals from the judgment, and from an order denying his motion for a new trial.

There is no foundation for the contention that there was not sufficient evidence to justify the verdict of murder in the first degree; and the only point which calls for special notice arises out of the contention that the court erred in allowing evidence that appellant, in addition to killing O'Shea, also shot another man named Zodikoff. Of course, the general rule is that upon the trial of a defendant on an indictment charging him with one offense, it is not admissible to introduce proof of another and entirely distinct offense merely for the purpose of prejudicing the jury against the defendant. But where the evidence objected to is pertinent to the main issues in the case, and is, in itself, competent, relevant, and admissible, it cannot be excluded simply because it happens incidentally to include the commission of another offense; nor where the facts touching the other offense are so intimately connected with facts constituting the offense charged as to make both parts of one transaction—so that there could not well be an intelligent statement of the one which did not allude to the other.

The main features of the case are these: The homicide—that is, the killing of O'Shea—occurred about a quarter past 6 o'clock in the morning of Monday, the 12th day of December, 1904, in a livery stable on San Pedro street, in the city of Los Angeles, kept by two men named Bennett and Zodikoff, and known as the "Exchange Livery & Feed Stable." About three days before said December 12th the defendant had sold to Bennett and Zodikoff a horse and wagon. The sale of the property was consummated in front of the livery stable, and defendant drove the horse and wagon into the stable to be delivered to the purchasers. He went with Bennett into the office of the stable to make a bill of sale and received the purchase money, and took with him a certain halter which he claimed was reserved from the sale, but which Zodikoff claimed to be included in the property sold. After defendant and Bennett concluded their business, defendant discovered that his halter had disappeared, and Bennett told him that Zodikoff had taken it. Defendant was persistent in his demands for the halter and showed anger about the matter. Bennett told him to come the next day and he would tell Zodikoff to give it to him, as it was a small matter. After that defendant made several visits to the stable to get the halter; sometimes he saw O'Shea, who was employed in the stable as a hostler, and sometimes Zodikoff, both of whom refused to give him the halter, and he had warm words about the matter with both O'Shea and Zodikoff. On Monday morning, about 5:30 o'clock, defendant was seen by a witness looking into the Exchange Stable through a ventilating hole, and when asked what he was doing answered that he was "looking for somebody." About a quarter past 6 o'clock on the same morning there were in the Exchange Stable the defendant, Zodikoff, O'Shea, and a man named McAfee, who was a witness for the prosecution. Defendant and Zodikoff were near each other, and O'Shea was a little further toward the rear of the stable shaking up some straw in one of the horse stalls. McAfee testified that he heard one voice say, "I come to get the halter," and another voice said, "You don't get it." Then came the reply, "I am a son of a bitch if I don't get it," and another answer, "I am God damned if you do." The witness testified that then "defendant pulled a revolver and fired. He fired at Zodikoff." The bullet struck Zodikoff, who ran past McAfee towards the street. McAfee testified that "then the defendant stepped about three feet in that direction and fired three times toward the back of the stable. I did not see what he was firing at. Immediately before I saw him fire in the rear of the stable three times, I saw him shoot at the man Zodikoff. * * * Immediately after he fired these three shots, I saw a man fall immediately after those three shots were fired." He further testified that "defendant stepped across the body, and used a large knife upon it," and the defendant stabbed the knife into the body six times. The witness then went into the street, but returned in about 10 minutes and found the dead body of O'Shea "lying in the same place where I saw the defendant plunging the knife into him." In another part of his testimony he stated that "one minute would take the whole time that it took to stand there and watch it all and start to the street." Other winesses who were in the vicinity, some of them being in another livery stable called the "Ascott," just across the street opposite the Exchange Stable, testified to hearing the shots. One witness said that "it was seemingly no time after I heard the first shot until I heard the others." Other witnesses speak of the time between the first and second shots as "less than half a minute." These witnesses testified that immediately after hearing the first shot Zodikoff came running out into the street crying: "I am shot! Help!" One of these witnesses, after hearing the first shot, went to the stable and was there in time to see defendant plunging the knife into the body of O'Shea. Another witness who was in the Ascott stable testified that after hearing the first shot, he saw the defendant stab O'Shea. It is quite clear, therefore, that the shooting of Zodikoff so immediately preceded the shooting and stabbing of O'Shea as to form part of the same transaction, and it also appears that the motive for killing both was the same. It is, indeed, difficult to see how the witnesses could have given an intelligent statement of the occurrences which resulted in the death of O'Shea, without reference to the shooting of Zodikoff. As was said in People v. Linares, 142 Cal. 17, 75 Pac. 308: "No matter at what point the narrative had commenced, it in the end would almost necessarily have reached these connecting facts." Our conclusion is that appellant's objections to the said evidence touching the shooting of Zodikoff are not maintainable, and that the court did not err in the ruling complained of. See People v. Walters, 98 Cal. 138, 32 Pac. 864; People v. Suesser, 142 Cal. 362, 75 Pac. 1093; People v. Linares, 142 Cal. 17, 75 Pac. 308.

Appellant, in his briefs, objects to two of the instructions given to the jury. The first is a mere copy of section 1105 of the Penal Code; and we see nothing in the case at bar which made the giving of that section improper. The other instruction is as follows: "Gentlemen of the jury, there has been offered and admitted some testimony in this case relating to the shooting of one Zodikoff at the time it is claimed the defendant shot Jerry O'Shea. The only relation or object in considering such testimony was to illustrate or establish the intent or motive with which the shooting of Jerry O'Shea was done, if any, and before you can consider the question of the shooting of said Zodikoff you must be satisfied beyond a reasonable doubt that the defendant shot said Zodikoff willfully, unlawfully, and intentionally; and if you have such reasonable doubt you are instructed to entirely disregard all the testimony you heard on that question." Whatever grounds of objection this instruction might have presented to the prosecution, it could in no way have been prejudicial to appellant.

There are no other points calling for notice.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.; LORIGAN, J.; HENSHAW, J.

148 Cal. 426

WEISSER v. SOUTHERN PAC. RY. CO.

(L. A. 1,413.)

(Supreme Court of California. Jan. 13, 1906.)

1. APPEAL—RECORD—ORDER GRANTING NEW TRIAL.

A copy of a letter written by the judge to appellant's counsel, stating the grounds upon which he granted the new trial, which grounds were not shown in the order for new trial, constituted no part of the record on appeal.

2. NEW TRIAL — ORDER — STATEMENT OF GROUNDS.

A general order granting a new trial entered on the minutes of the court cannot be limited by an independent writing stating the grounds on which the new trial is granted.

3. APPEAL—REVIEW—GROUNDS OF ORDER FOR NEW TRIAL.

Though an order for new trial specifies the grounds upon which it was granted, the action of the court in stating such grounds cannot restrict the Supreme Court to the grounds so specified for the purposes of ascertaining whether or not a new trial should have been granted, except upon the single question as to the sufficiency of conflicting evidence.

4. SAME—REVIEW OF DISCRETION—GRANTING NEW TRIAL.

Though there may be some conflict in the testimony, it is the duty of the trial court to grant a new trial on the ground of the insufficiency of the evidence whenever the judge is convinced that the verdict is clearly against the weight of the evidence, and his action in that regard will not be disturbed on appeal, unless it is apparent that there has been an abuse of discretion.

5. MASTER AND SERVANT—FELLOW SERVANTS —PERSONS SERVING APPRENTICESHIP.

A student brakeman, on freight trains of defendant at his own request and by permission of defendant, for the purpose of gaining experience to render him competent to act as a regular brakeman, and who was entirely subject to defendant's orders, and was required to perform such ordinary duties of brakeman as were allotted to him, was a fellow servant of the other trainmen, although he was receiving no pecuniary compensation.

Department 1. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by Lawrence Weisser against the Southern Pacific Railway Company. From an order granting defendant's motion for a new trial, plaintiff appeals. Affirmed.

S. V. Landt and M. E. C. Munday, for appellant. Bicknell, Gibson & Trask, for respondent.

ANGELLOTTI, J. This is an action for damages for personal injuries alleged to have been suffered by plaintiff through the negligence of defendant while he was engaged in the service of said defendant. The jury impaneled to try the cause rendered a verdict in favor of plaintiff for $9,000, and judgment was entered accordingly. Defendant regularly made a motion for new trial on practically all the grounds authorized by statute, including that of insufficiency of the evidence to justify the verdict, and in its statement on motion for new trial specified with great particularity the particulars wherein it was claimed that the evidence was insufficient. The trial court disposed of such motion by making a general order granting the same, the minute order being as follows, viz.: "Defendant's motion for new trial ordered to be and the same is hereby granted." Plaintiff appeals from such order granting defendant's motion for new trial.

It is suggested by plaintiff that the order of the trial court was based upon two grounds only, viz., error in admitting certain evidence, and insufficiency of the evidence to sustain a conclusion that the plaintiff was not guilty of contributory negligence, and that this court is limited to a consideration of these questions upon this appeal. In support of his claim that the order was made for these reasons alone, he sets forth in his brief a copy of a letter written to his counsel by the judge of the trial court, some months after the granting of the new trial. This letter, of course, constitutes no part of the record on appeal, and could not be made a part thereof. Hanna v. De Garmo, 140 Cal. 172, 174, 73 Pac. 830. Even if the same had been written and filed at the time of the granting of the new trial, it could not have operated to limit the effect of the general order entered on the minutes of the court, which order so entered is, under the decisions, the only record of the court's action. Any limitation, to be effectual, must be specified in the order. Ben Lomond Wine Co. v. Sladky, 141 Cal. 619, 621, 75 Pac. 332; Newman v. Overland Pac. Ry. Co., 132 Cal. 73, 64 Pac. 110. Furthermore, even if the trial court in this case had effectually specified in its order the grounds upon which it granted the new trial, its action in this regard could not have restricted this court to the grounds so specified in its examination of the record, for the purposes of ascertaining whether or not a new trial should have been granted, except upon the single question as to the sufficiency of the evidence where it was conflicting. Thompson v. Cal., etc., Co. (Cal. Sup.) 82 Pac. 367; Kauffman v. Maier, 94 Cal. 269, 276, 29 Pac. 481, 18 L. R. A. 124. As it is admitted that one of the grounds upon which the trial court based its action in granting a new trial was that the evidence was insufficient to sustain a conclusion that plaintiff was not guilty of contributory negligence, what has been said herein as to the questions reviewable upon this appeal is unnecessary for the purposes of the decision, and has only been said in view of the apparent misconception of the rules applicable in such matters.

Upon the question as to whether plaintiff was guilty of contributory negligence, there was apparently some conflict in the testimony. This, however, was not sufficient to prevent the trial court from granting a new trial, on the ground of the insufficiency of the evidence. It is established by numerous decisions in this court that, although there may be some conflict in the testimony, it is the duty of the trial court to grant a new trial on such ground, whenever the judge is convinced that the verdict is clearly against the weight of the evidence, and his action in that regard will not be disturbed, unless it is apparent that there has been an abuse of the discretion confided to him. See Green v. Soule, 145 Cal. 96, 102, 78 Pac. 337; Bates v. Howard, 105 Cal. 173, 178, 38 Pac. 715; Mock v. L. A. Trac. Co., 139 Cal. 616, 73 Pac. 455; Bjorman v. Fort Bragg R. Co., 92 Cal 500, 28 Pac. 591. The record on this appeal affords no basis for any claim that there was any such abuse of discretion in this case. It is therefore manifest that regardless of other reasons that may exist, the order granting a new trial must be affirmed. While it is unnecessary, for the purposes of a decision of this appeal, to consider any of the other points made in support of the order, the question as to whether plaintiff was a "fellow servant" of the employés of defendant on the train upon which he was engaged and by which he was injured, and therefore not entitled to recover from defendant if the injuries were wholly caused by the negligence of any such employé in the operation of the train (section 1970, Civ. Code), has been discussed by counsel, and its determination may be necessary for the purposes of a new trial.

From the evidence of plaintiff it appears that, at the time of the accident, and for some time prior thereto, he was acting as a "student brakeman" on freight trains of defendant, at his own request and by permission of defendant, for the purpose of gaining such experience and knowledge of the work on defendant's road as would, in the opinion of the defendant, render him fit and competent to act as a regular brakeman thereon, and to receive for his work a regular brakeman's pay. As such "student brakeman" he was entirely subject to the orders of defendant, and was required to perform such ordinary duties of brakeman as were allotted to him, just as fully as if he had been assigned regular employment for a pecuniary compensation by defendant. It is difficult to conceive of any reason why one, situated as these circumstances show plaintiff to have been, should be held to be other than an employé of the defendant, subject to all the obligations imposed by that relation. He was certainly in the service of defendant, regularly engaged in the doing of the defendant's business. The simple fact that he was not to be paid any money for his services cannot affect the question. It was perfectly competent for him to agree to serve an apprenticeship without pecuniary consideration. The important thing is that he voluntarily entered and was engaged in the service of the defendant upon such terms as he had seen fit to agree to. While so engaged in such service, there was no distinction, material to the question under discussion, between his situation and that of the other employés on the train. They were all regularly engaged in the service of defendant, in the common employment of operating a train for defendant. In other words, they were fellow servants. Plaintiff had the same right as the other employés to be indemnified for all injuries caused by the defendant's negligence, but his rights in this regard were no greater than those of the other employés and, as in the case of such other employés, the defendant could not be held liable to him for injuries caused solely by the negligence of his fellow employés in the same general business, except in the cases specified in section 1970, Civ. Code. No case has been cited by plaintiff on this point which is contrary to the views here expressed. On the other hand, the case of Millsaps v. Louisville, etc., Ry. Co., 69 Miss. 423, 13 South. 696, is squarely in point. There, one working as fireman on defendant's engine, with the permission of the defendant, for the purposes of learning the business, was killed in a collision caused by the negligence of a paid employé claimed to be a fellow servant. The Supreme Court held, under these facts, that plaintiff's intestate was the servant of the defendant and the fellow servant of the other employé, and that, consequently, no recovery could be had. The case of Barstow v. Old Colony Railroad Co., 143 Mass. 535, 10 N. E. 255, is also in point. See, also, Ladd v. Brockton St. Ry. Co. (Mass.) 62 N. E. 730; Wischam v. Richards (Pa.) 20 Atl. 532, 10 L. R. A. 97, 20 Am. St. Rep. 900.

Under our views of the law upon this proposition, the trial court erred in the matter of instructions to the jury thereon, and this also is a sufficient reason for affirming the order granting a new trial. We do not consider it necessary, for the purposes of a new trial, to consider any of the other questions discussed.

The order granting a new trial is affirmed.

We concur: SHAW, J.; McFARLAND, J.

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148 Cal. 443

BILTON v. SOUTHERN PAC. CO.

(L. A. 1,437.)

(Supreme Court of California. Jan. 15, 1906.)

1. RAILROADS—OPERATION AT CROSSINGS—MEASURE OF CARE REQUIRED.

Where the view of a railroad track near a street crossing is so obstructed that a person lawfully using the street cannot, before passing from a place of safety to a place of danger, see an approaching train in time to escape it, if it moves at a high rate of speed, it is the duty of the railroad either to moderate the speed of the train accordingly or make the approach of the train reasonably apparent by other methods.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 965, 972–980, 1001, 1008.]

2. SAME—NEGLIGENCE—EXCESSIVE SPEED—QUESTION FOR JURY.

Whether or not the rate of speed of a train at a street crossing is so dangerous or excessive as to constitute negligence depends upon the circumstances there existing, and is a question for the jury, if those circumstances are such that reasonable and impartial men may differ as to the conclusion to be drawn therefrom.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1164½.]

3. SAME—SUFFICIENCY OF EVIDENCE.

In an action against a railroad for the death of a driver of a wagon who was struck by a train at a street crossing, where his view of the train was obstructed, evidence *held* sufficient to show that the train, in running at a rate of speed of 35 miles an hour at the place in question, was negligently operated.

4. SAME—CONTRIBUTORY NEGLIGENCE.

In an action against a railroad for the death of a driver of a wagon, who was struck by a train at a street crossing where his view of the approaching train was obstructed, evidence *held* insufficient to show that the deceased was guilty of contributory negligence as a matter of law.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1166.]

5. SAME—"LOOK AND LISTEN" RULE.

The track of a steam railroad is of itself a sign of danger, and one intending to cross must avail himself of every opportunity to look and listen for approaching trains, and if the view of the track is obstructed he should take greater pains to listen.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1057-1060.]

6. SAME.

It is not essential to the exercise of ordinary care on the part of one crossing the track of a railroad with a team at a crossing that he should stop and listen for any particular length of time; but if he looks and listens attentively, and cannot see or hear an approaching train, he is not guilty of negligence as a matter of law in starting forward to cross the track, and thereby leaving his place of safety and entering upon a place of danger.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1173.]

7. SAME—ACTIONS IN PERILOUS SITUATION.

One who has started to cross the track of a railroad, after having failed to see or hear an approaching train for which he looked and listened, and who is suddenly confronted with imminent peril by the appearance of the train after he has reached a place of danger on or near the track, need not exercise all the presence of mind and carefulness which are required of a prudent man under ordinary circumstances, but is only required to do what is reasonable under the existing circumstances.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1027.]

8. SAME—QUESTION FOR JURY.

In an action against a railroad for the death of the driver of a wagon, who was struck by a train at a street crossing where his view of the train was obstructed, whether the efforts of deceased to escape danger from the approaching train were reasonable, in view of his peril and the other circumstances of the case, *held* a question for the jury.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1177.]

Department 1. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by Leonard Bilton against the Southern Pacific Company. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

Rehearing denied February 13, 1906.

W. H. Spencer, for appellant. William J. Herrin and R. V. Bouldin, for respondent.

ANGELLOTTI, J. This action was brought by plaintiff to recover damages resulting from the death of his minor son, alleged to have been caused by the negligence of defendant. The case was tried by a jury, which rendered a verdict in favor of plaintiff for $3,000, upon which judgment was entered. Defendant appeals from such judgment, and from an order denying its motion for a new trial.

It is earnestly contended that the evidence was insufficient to sustain the verdict, for the reasons, first, that it failed to show any negligence on the part of defendant, and, second, that it showed that the deceased was guilty of contributory negligence precluding a recovery. The deceased, a boy within a few days of his seventeenth birthday, and possessed of all his faculties, was driving, in a light spring wagon, filled with groceries and drawn by one horse, across defendant's railroad track, where the same crosses Twelfth street, in the town of Paso Robles, when the wagon was struck by one of defendant's locomotives, and he was instantly killed. The locomotive was attached to a southbound passenger train, which was coming into the town several minutes late, and there was evidence to the effect that it was running at an unusually high rate of speed for that place; some of the witnesses testifying to 35 miles an hour, and the evidence as to the space within which the train was brought to a stop tending to corroborate this. The Twelfth street crossing was about 1,200 feet north of the railroad station. The town was, according to the census of 1900, a place of 1,224 inhabitants. There was some testimony to the effect that the whistle of the locomotive was not sounded at the customary place, some blocks north of Twelfth street, and that the bell upon the locomotive was not rung. The evidence indicated that at the time of the accident, by reason of an embankment and a curve in the railroad track, one approaching the crossing on Twelfth street from the west, as was deceased, could not obtain a view of the track to the north of Twelfth street until within 30 or 40 feet of the crossing, and that from that point to a point 8 or 10 feet from the track one could see the track to the north only for a distance of about 120 feet. Changes have since been made, making the crossing less dangerous, but there appears to be no serious contention that at the time of the accident the situation was not as already stated. Fronting on the west side of the railroad right of way, and within 200 feet of the south side of Twelfth street, was a flour mill, the machinery of which was in operation at the time of the accident. There was evidence to the effect that the grade of Twelfth street from a point about 125 feet west of the crossing to the track is a downgrade of about 8 to 8½ feet to the hundred. The railroad track approaches this crossing from the north on a very slight upgrade. The accident occurred on the westerly one of the three tracks of the defendant crossing Twelfth street. The deceased had resided in Paso Robles for many years, and had been driving this wagon (a grocery delivery wagon) for several months, and was well acquainted with the crossing. There was evidence introduced on behalf of the plaintiff to the effect that the deceased drove his wagon down Twelfth street toward the track at a slow trot, until he came within about 8 or 10 feet thereof, when he brought his horse to a walk, momentarily paused, looked up the track, and apparently listened, and then proceeded on a walk across the track. The evidence of plaintiff's principal witness showed that after the train reached a place where it could be seen from within a few feet of the track, which must have been within 120 feet of the crossing, two or three short sharp blasts of the whistle were sounded as an alarm, and this is also the evidence of the engineer of defendant's train. If the train was traveling at the rate of 35 miles an hour, as we must assume it was in view of the verdict and the order of the trial court denying the motion for a new trial, it took only the merest fraction over two seconds to reach the crossing after the giving of such blasts.

There was a sharp conflict in evidence upon some of the points stated above, but, in view of the verdict and the order of the trial court denying the motion for a new trial, we must here assume the truth of the evidence most favorable to plaintiff. Upon these facts we have no doubt that the evidence was sufficient to support a finding that defendant was guilty of negligence. The crossing at Twelfth street was, in view of the facts already stated, an exceedingly dangerous one. The curve in the track and the embankment obstructing the view at a point 120 feet north of such crossing made it incumbent on defendant to exercise more care in approaching the crossing than could have been reasonably expected at a crossing where the view was unobstructed for a long distance. The obligation rested upon it of taking such care to prevent injury by its trains to those passing over the crossing as would, under the existing circumstances, be reasonable, and if the view of its track was so obstructed that a person lawfully using the street could not, before passing from a place of safety to a place of danger, see an approaching train just beyond the obstruction, in time to escape it, if it moved at a high rate of speed, it was its duty to moderate the speed accordingly, or make the approach of the train reasonably apparent by other methods to the user of the street. It is true that, in the absence of any statute or ordinance on the subject, no rate of speed is negligence per se. When taken in connection with other circumstances, however, the situation is very different. We can conceive of cases where, independent of any statute or ordinance, a speed of 35 miles an hour in approaching a crossing would, under the circumstances there existing, be so dangerous as at once to force all sensible and impartial men to the conclusion that those operating the train were not using reasonable care to avoid injury to others, and thus constitute negligence per se. However this may be, there can be no doubt that the question as to whether or not a rate of speed at a crossing is so dangerous or excessive as to constitute negligence must depend upon the particular circumstances there existing, and, if the circumstances are such that reasonable and impartial men may well differ as to whether the speed maintained at the particular place showed a want of reasonable care, the question as to whether the railroad company was guilty of negligence in maintaining such speed is one for the jury. See Elliott on Railroads, §§ 1160, 1161; Cooper v. Los Angeles, etc., Co., 137 Cal. 229, 232, 70 Pac. 11.

Assuming that no warning was given of the approach of the train before it came into sight around the embankment, except such warning as was caused by the mere operation of the train over the track, and this, as already stated, must be here assumed in view of the evidence and the verdict, the jury were amply warranted in concluding that the situation at this crossing was such as to render the maintenance of this rate of speed negligence on the part of the company. Not more than the merest fraction over two seconds would elapse between the coming into sight of the train and the moment when it would reach the crossing, an interval so slight as to give one incumbered with a horse and vehicle very little opportunity to cross in safety, or withdraw, if, after stopping and listening, he had commenced to move forward and was already practically in a place of danger. In our opinion, the evidence was not such that it can be held as a matter of law that the deceased was guilty of contributory negligence.

Defendant relies upon the rule to the effect that, where a person about to cross a railroad track fails to take such precautions as the courts declare are as a matter of law essential to the exercise of ordinary care on the part of one so situated, the courts will hold as a matter of law that such person has been guilty of negligence. Those precautions, as stated by this court in Herbert v. Southern Pacific Co., 121 Cal. 227, 230, 53 Pac. 651, are as follows, viz.: "The railroad track of a steam railway must itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and listen for approaching trains. What he must do in such a case will depend upon circumstances. If the view of the track is obstructed, he should take greater pains to listen. If, taking those precautions, he would have seen or heard the approaching train, the very fact of injury will raise a presumption that he did not take the required precautions." The rule here laid down must be considered the settled rule of this state (see Green v. Los Angeles, etc., Co., 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68), and, if the evidence compelled the conclusion that the deceased failed to observe its requirements, there could be no escape from the conclusion that he was guilty of contributory negligence as a matter of law.

There was, however, evidence tending to prove that deceased took every precaution required by this rule. If he had not done this, but had continued on a trot across the track, without stopping, although he would have been guilty of negligence, he probably would have escaped injury. As, because of the obstruction to the view, he could not see up the track any considerable distance, it was doubtless his duty, on approaching the crossing, to reduce the speed of his horse and take greater pains to listen, and, perhaps, to stop, so that his hearing might not also be obstructed by any noises under his own control. Pepper v. S. P. Co., 105 Cal. 389, 399, 38 Pac. 974; Fleming v. W. P. R. R. Co., 49 Cal. 253; Blackburn v. S. P. Co., 34 Or. 215, 221, 55 Pac. 225. There was evidence tending to show that he did all this at as late an opportunity as was given him, viz., within 8 or 10 feet of the track. According to that evidence, he there brought his horse to a walk, and then momentarily paused, facing partially in the direction from which the train was coming. The evidence warranted the conclusion that he could not then see the train. Unless we can say as a matter of law that the noise of the approaching train must necessarily have been apparent to him, if, while pausing, he had listened for it, we cannot assume that he was not listening. Apparently he was taking every precaution to observe whether or not a train was approaching. There was no evidence as to whether there was any wind. The train, it must be assumed, was behind a high embankment, which might have obstructed the sound of its movement on the rails, and did not indicate its approach by the ringing of bell or sounding of whistle. The machinery of a flourmill was in operation within a few hundred feet. Under all these circumstances we do not feel warranted in saying that the mere operation of the train over the rails must have been apparent to one listening from a point 8 or 10 feet west of the crossing. It was not essential to the exercise of ordinary care on the part of deceased that he should stop and listen for any particular length of time. If he looked and listened attentively, and could not see or hear the train, and proceeded to leave his place of safety and enter upon a place of danger only after so doing, it cannot be held that he was guilty of negligence as a matter of law in starting forward to cross the track.

Having once started, although not at once upon the track, he was already in a place of danger. It must be borne in mind that we are not considering the case of a pedestrian who is not in any danger until he has stepped within the reach of the train, and who, up to the very moment of so doing, has a sure and certain mode of escape clearly open to him, but the case of one on a loaded grocery wagon, driving a horse attached thereto, who has commenced to move down a grade toward a railroad track, and is already within a very few feet thereof. Probably the locomotive flashed into view of the deceased and gave its sharp alarm blasts before his horse was actually on the track, but it does not follow that he was guilty of negligence in attempting to escape the threatened danger by crossing in front of the train. The evidence warranted the conclusion that at this time the deceased was, without any negligence on his part, already in a position of great peril, and that immediate action on his part was necessary to avoid injury. Bewildered as he must have been by the sudden appearance of the train and the threatened peril, he was not required to exercise all that presence of mind and carefulness which are required of a careful and prudent man under ordinary circumstances. Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 521, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85. He was only required to do what was reasonable under the existing circumstances. It is possible that he might still have been able to so stop, back, and turn his horse and wagon as to entirely escape injury, although the evidence is not such as to make this clearly appear. The case was undoubtedly one where the reasonableness of the effort to escape injury after discovery of the danger was a question for the jury, to be determined by them in view of all the circumstances shown by the evidence. See Harrington v. L. A., etc., supra; Liverpool, etc., Ins. Co. v. S. P. Co., 125 Cal. 434, 439, 58 Pac. 55. The evidence is such as to preclude us from disturbing their finding thereon.

In the matter of instructions to the jury there was no prejudicial error. The first instruction complained of, wherein the court stated the nature of the action, cannot reasonably be construed as assuming any wrongful act or negligence on the part of defendant. It may be conceded that the second instruction complained of stated a proposition of law that was "purely abstract as far as this case is concerned," but it was of such a nature that it could not have operated to the prejudice of defendant. The requested instruction as to the duty of one approaching a railroad crossing, taken from the opinion in Herbert v. S. P. Co., supra, was fully covered by other instructions given.

The judgment and order denying the motion for a new trial are affirmed.

We concur: SHAW, J.; HENSHAW, J.

148 Cal. 422

CARPENTER v. ASHLEY. (Sac. 1,236.)

(Supreme Court of California. Jan. 13, 1906.)

1. SLANDER — PRIVILEGE — QUESTION FOR COURT.

Where the facts and circumstances under which alleged slanderous words were spoken are undisputed, the question whether they were privileged or not is a question of law for the court.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 362.]

2. SAME—COMMUNICATIONS IN JUDICIAL PROCEEDINGS—IRRELEVANT MATTER.

Under Civ. Code, § 47, providing, inter alia, that a privileged communication is one made in any legislative or judicial proceeding, but irrelevant or immaterial matter voluntarily or maliciously published in the course of judicial proceedings is not privileged, a district attorney conducting a criminal case in a justice's court is not privileged to charge opposing counsel with perjury or subornation of perjury.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 117-123.]

3. SAME—EVIDENCE.

In an action for slander, newspaper articles with which defendant had no connection, but which purported to narrate what he said, were not admissible in evidence against him.

Department 2. Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Action by A. H. Carpenter against A. H. Ashley. From a judgment for defendant, plaintiff appeals. Reversed.

A. H. Carpenter, in pro. per. R. C. Minor and Nicol & Orr, for respondent.

McFARLAND, J. Action of slander. The verdict and judgment were for defendant; and from the judgment, plaintiff appeals.

It was averred in the complaint: That on January 23, 1901, at the city of Stockton, in the presence and hearing of divers persons, defendant spoke and published concerning plaintiff the following words: "You have committed perjury." "You have committed subornation of perjury." "You are guilty of subornation of perjury." "I charge you with subornation of perjury." "I will have your case presented to the grand jury." That on the next day, January 24, 1901, he spoke and published said words in the presence of divers persons. That said words were false, etc. Defendant, in his answer, denies that he spoke the words, and upon that issue the evidence was conflicting, so that if the only question in the case was whether the words were spoken as charged, the verdict and judgment could not be disturbed. There are, however, other questions in the case. The record presents numerous exceptions to rulings of the court in passing upon the admissibility of evidence, and instructing the jury; but the only point made by appellant which calls for much consideration arises out of the instructions to the jury on the subject of "privileged publications." Respondent set up as a defense that whatever words were spoken by him at the time stated in the complaint were privileged publications, because made in the "proper discharge of official duty," and in a "judicial proceeding," within the meaning of the provisions of section 47 of the Civil Code. The jury may have found that the words were spoken, as alleged, but were privileged; and therefore the instructions as to the privilege are important.

The facts and circumstances under which the words were spoken were undisputed; and therefore the question whether they were privileged was a question of law for the court to determine. The words were spoken by respondent, if at all, while, as district attorney, he was conducting in a justice's court the trial of the criminal case of the People against Arthur Ennis, charged with petit larceny; and the plaintiff Carpenter, who is an attorney at law, was conducting the defense of said Ennis. He was not a witness in the case. During the progress of that trial the defendant herein directed the sheriff to arrest one Stennett for an alleged crime, and plaintiff herein characterized the act of ordering the arrest as going beyond legitimate means and "bulldozing"; and thereupon—if the averments of the complaint herein and the testimony of plaintiff are true—defendant herein used the words above quoted. Sometimes the question of privilege is one of mixed fact and law, and in such case it is proper for the court to submit it to the jury with proper instructions; but where, as in the case at bar, the facts touching the circumstances under which the alleged defamatory words are spoken are not in dispute, the question is for the court. In Townsend on Slander & Libel (3d Ed. p. 332) the rule is correctly stated as follows: "The facts being uncontroverted, the court is to determine whether or not the publication is privileged." But in the case at bar the court refused to determine whether the publication was privileged, and left that question to the jury; and in so doing the court erred. This ruling was made in various forms. In the first place, defendant asked for several instructions which should have been given as presented; but the court, against the objections of plaintiff, inserted in them the qualifications "that said words were not privileged," and "unless the jury find the publication thereof was privileged." The court refused to instruct, at plaintiff's written request, that if the alleged words were spoken during the trial of People v. Ennis, as hereinbefore stated, they were not privileged. The following instruction asked by plaintiff was refused: "The jury are instructed that the question of whether the plaintiff had committed perjury or subornation of perjury was not under consideration in the case of People v. Arthur Ennis, wherein the slanderous words are alleged to have been spoken by the defendant herein, and therefore anything that the defendant in this case may have said at that trial, in the presence of others in relation to whether the plaintiff had committed perjury or subornation of perjury would not be privileged." The court also instructed the jury, at the request of defendant, as follows: "No action will lie against a public officer for any words spoken or published by him in the proper discharge of his official duty. No action will lie against a district attorney for any words spoken or published by him during the proper discharge of his official duties as district attorney and in the course of a judicial proceeding in which he in his official capacity is engaged." There were other instructions and refusals to instruct on the same lines as the above; but the foregoing references are sufficient to show that the court left to the jury the whole question whether or not the alleged defamatory words were privileged.

There is some authority to the point that the privilege of counsel when trying a case to speak defamatory words is unqualified and absolute; that is, that he has free unbridled license to defame whomsoever he pleases, whether or not the person defamed be a witness or party in the pending action or a stranger, and whether or not the defamatory matter be in any way pertinent or relevant to the subject-matter of inquiry in the action or has any reference thereto. This doctrine would work intolerable wrong to innocent persons who would be without any remedy, or, as said in Hastings v. Lusk, 22 Wend. 410, 34 Am. Dec. 330, it would be to furnish counsel "with a shield of Zeus, and thereby to enable them with impunity to destroy the character of whomsoever they please." The great weight of authority, however, is that this privilege is not absolute, but is limited to words which have some reasonable pertinency, or relevancy, or reference to the matter involved as the subject-matter of the pending action. Blackstone (book 3, p. 29) says: "A counsel is not answerable for any matter by him spoken, relative to the cause in hand, and suggested in his client's instructions, although it should reflect upon the reputation of another, and even prove absolutely groundless; but if he mentions an untruth of his own invention, or even upon instructions, if it be impertinent to the cause in hand, he is then liable to an action from the party injured." In Hastings v. Lusk, supra, Chancellor Walworth said: "Upon a full consideration of all the authorities on the subject, I think that the privilege of counsel in advocating the causes of their clients, and of parties who are conducting their own causes, belongs to the same class where they have confined themselves to what was relevant and pertinent to the question before the court." There are numerous authorities to the same point; but as they are nearly all referred to and collated in the leading case on the subject of Maulsby v. Reissnider, 69 Md. 143, 14 Atl. 505, we will content ourselves with referring to that case, and the authorities there cited; and we agree with the court in that case in holding that "the privilege of counsel in the trial of a cause is not absolute and unqualified, and slanderous words spoken by him having no relation or reference to the cause in hand or to any subject-matter involved therein are actionable." And it is quite clear that in the case at bar the defamatory words alleged to have been spoken by the defendant of plaintiff, who was simply an opposing attorney in the case at hand, had no pertinency, relevancy, or reference, to the charge of larceny in the pending action of People v. Ennis, which was the subject-matter of inquiry in that action; he had no more privilege to use the defamatory words alleged than he would have had to charge plaintiff with robbery, rape, or murder.

There are no other points calling for much special notice. The record contains a great deal of irrelevant matter. The court was right in excluding certain newspaper articles purporting to state what the defendant had said; he was not responsible for those articles, and they were not admissible evidence against him. We see no errors in the other instruction, at least none of any consequence, except, of course, those which come within the rule above stated as to privileged publications. And if there should be another trial, no doubt, much of the matter which appears in the present transcript will be left out of the evidence. There were no rulings on the admissibility of evidence which seem to be important or material, at least, as the case was presented; but, of course, on another trial the case might assume a different phase, and the rulings have more significance.

The judgment appealed from is reversed.

We concur: LORIGAN, J.; HENSHAW, J.

148 Cal. 480

SOUTHERN PAC. R. CO. v. LIPMAN.

(L. A. 1,482.)

(Supreme Court of California. Jan. 17, 1906.)

1. APPEAL—FINDINGS—SUFFICIENCY OF EVIDENCE — SPECIFICATIONS OF ERROR — REVIEW.

Where, on appeal from an order denying a new trial, the questions presented by assignments that the findings of the trial court were not sustained by the evidence were available to appellant under its exception to the ruling of the trial court in the admission of evidence and to the denial of plaintiff's motion for a judgment of nonsuit on appellee's counterclaims, it was immaterial that such assignments of error did not sufficiently specify wherein the evidence was insufficient to sustain the findings.

2. PUBLIC LANDS—RAILROAD GRANTS—CONGRESSIONAL ACTS—EFFECT.

Grants under Act. Cong. 1866 authorizing the Atlantic & Pacific Railroad Company and the Southern Pacific Railroad Company to each construct a railroad in the state of California, and granting public lands in aid of the construction of each of such roads, were grants in præsenti, which, when maps of definite location were filed and approved, took effect by relation as of the date of the act.

3. COURTS—DECISIONS—CONCLUSIVENESS.

Where, on an issue involving a railroad company's rights in certain public land under a congressional grant, the court based a finding that the railroad company had no rights in the land on certain federal decisions, a decision of the Supreme Court of the United States, though rendered subsequent to the decision in question, holding that the railroad company and the United States were tenants in common in a large tract, including the land in question, was available on appeal as a conclusive authority that the finding of the trial court was erroneous.

4. EVIDENCE—JUDICIAL NOTICE.

A letter of the commissioner of the General Land Office with reference to lands within the limits of a railroad grant is a public document of which the courts will take judicial notice.

5. PUBLIC LANDS—RAILROAD GRANTS—PURCHASERS FROM RAILROAD.

In a suit to cancel the rights of vendees in certain lands within an alleged railroad grant, sold before the issuance of a patent, findings that it had been finally determined that the railroad company had no interest in the land and should not receive a patent therefor *held* not sustained by the evidence.

6. SAME.

Where a contract for the sale of railroad lands, prior to the issuance of a patent, required the railroad company to exercise reasonable diligence to obtain patents for the land, and the delay which intervened was occasioned by the failure of the Land Department prior to 1897 to approve the report of commissioners appointed to inspect the railroad constructed, on which approval alone patents could be issued, and by litigation arising in the federal courts relating to plaintiff's right to patents, which was prosecuted by the railroad company as diligently as possible, a finding that the railroad company did not use ordinary diligence to procure patents for the land was erroneous.

Department 2. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Suit by the Southern Pacific Railroad Company against Louis Lipman. From an order denying plaintiff's motion for a new trial, it appeals. Reversed.

Rehearing denied February 15, 1906.

William Singer, Jr., H. V. Reardan, and Guy Shoup, for appellant. Bigelow, Dorsey & Titus, for respondent.

LORIGAN, J. This is an appeal from an order denying the motion of plaintiff for a new trial.

On September 6, 1888, plaintiff and defendant entered into six contracts for the sale and purchase of real property situated in Los Angeles county, this state. Each contract related to a separate quarter section of land and the first four—Nos. 9,886, 9,887, 9,888, and 9,889—embraced all of section 27, township 6 N., range 10 W., San Bernardino base and meridian. The other two—Nos. 9,890 and 9,891—embraced the N. ½ of section 27, township 8 N., range 10 W., same base and meridian. All these contracts were identical in terms, save as to the property described in each. The purchase price fixed was $400 per quarter section, part—$80—payable on the execution of each contract, and the balance—$320—on or before September 6, 1893, with interest thereon payable annually in advance until paid. Defendant paid interest under each of the contracts up to September 6, 1895, but paid no further interest, or any part of the purchase price, save the original payment of $80. Each of these contracts provided that upon payment of interest and the full purchase price by defendant plaintiff would execute to him a deed of conveyance of the premises described therein, after receipt by it of a patent therefor from the United States, and relative to the procuring of such patent each contract contained the following covenants: "It is further agreed between the parties hereto that the party of the first part claims all the tracts hereinbefore described as part of a grant of lands to it by the Congress of the United States; that patent has not yet issued to it for said tracts; that it will use ordinary diligence to procure patents for them; that as, in consequence of circumstances beyond its control, it sometimes fails to obtain patent for lands that seem to be legally a portion of its said grant, therefore nothing in this instrument shall be considered a guaranty or assurance that patent or title will be procured; that, in case it be finally determined that patent shall not issue to said party of the first part for all or any of the tracts herein described, it will, upon demand, repay (without interest) to the party of the second part all moneys that may have been paid to it by him on account of any of such tracts as it shall fail to procure patent for, the amount of repayment to be calculated at the rate and price per acre fixed at this date for such tracts by said party of the first part, as per schedule on page 3 hereof. It is further agreed that if the party of the first part shall obtain patents for part of the lands herein described, and shall fail to obtain patent for the remainder of them, this contract shall in all its provisions be and remain in full force and virtue as to the tracts patented, and shall, except as to repayments herein provided for, be null and void as regards those tracts for which it shall be finally determined that patents cannot be obtained."

On February 8, 1899, plaintiff brought this action to obtain a decree foreclosing the rights of defendant to purchase the land described in such contracts, unless all sums due the plaintiff thereunder were paid within such reasonable time as the court might allow, and for general relief, alleging that it had complied with all the conditions of the several contracts, and that defendant had failed and neglected to make the payments provided for therein to be paid on his part. By way of answer and counterclaim, defendant denied that plaintiff had any title or interest whatever to any of said lands, and alleged that it had been finally determined by the Supreme Court of the United States, and by the Land Department of the United States, that patent shall not issue to plaintiff for any part of the land embraced in the contracts, and that plaintiff had failed to use ordinary diligence to procure patents for them; these several allegations being based upon the covenants in the contracts heretofore quoted. He further alleged that he had, on October 18, 1898, notified plaintiff that he had elected to rescind such contracts, and asked for judgment against plaintiff for repayment of the amounts paid it thereunder. The court made its findings in favor of the defendant upon all the issues made by the pleadings, and entered its judgment in his favor for the sum of $1,184, the aggregate amount paid by the defendant to the plaintiff under the terms of the contract. The plaintiff's motion for a new trial was based, among other things, upon alleged insufficiency of the evidence to sustain certain findings made by the court, and on account of errors of law alleged to have been committed during the trial.

The findings particularly attacked, and a consideration of which are involved upon this appeal, were to the effect that when the contracts in suit were entered into—September 6, 1888—plaintiff had no right, title, or interest to the land described therein; that it had not done or performed any or all of the things required by the terms and conditions of the several contracts; and a general finding "that all the allegations of the defendant's answer as to the several counterclaims therein alleged and set forth are true." This general finding necessarily included particular findings in favor of defendant's allegations that it had been finally determined that no patent should be issued to plaintiff for the lands described in the contract, and that plaintiff had failed to use ordinary diligence to procure them. Considering all these findings together, they amount to but the same thing—two findings to the effect, first, that when the contracts were made plaintiff had no interest in the land described, because it had since been finally determined that patent therefor shall not issue to it; and, second, that plaintiff had not complied with the conditions of its contract because it had not used ordinary diligence to procure such patents. Whether these findings are sustained by the evidence is the main and controlling question on this appeal. At the threshold of this inquiry it is insisted that these findings cannot be considered because there are no sufficient specifications of the insufficiency of the evidence to sustain them. We think, however, that under the liberal rule now followed by this court (Bell v. Staacke, 141 Cal. 186, 74 Pac. 774; Jones v. Goldtree, 142 Cal. 383, 77 Pac. 93[illegible] the specifications are sufficient. We do [illegible] dwell on this point, because, even if [illegible] conceded that they were not sufficient, [illegible] the questions which are sought to be raised under them are equally available to the appellant under its exception to the ruling of the court in the admission of evidence, under the agreed statement of facts hereafter referred to and upon which alone the findings can be sustained. It is equally available under the exception of plaintiff to the ruling of the court denying its motion for a judgment of nonsuit upon the counterclaims of defendant, which motion was based on the grounds that there was no evidence showing neglect in an effort to procure patents, and no proof that it had been finally determined that plaintiff was not entitled to them. The commission of error in its rulings by the superior court in both these particulars were grounds upon which appellant moved for a new trial, and are grounds urged for a reversal here. So that, even if the specifications were insufficient, still the legal result which is sought to be accomplished by a successful attack on them—a reversal of the order denying the motion for a new trial—would be as fully secured if the correctness of either of these rulings could not be sustained. But we are satisfied that the specifications are sufficient, and, as the main question in the case is whether the evidence was sufficient to sustain either of the findings, we will address ourselves to a consideration of that point.

The lands described in the several contracts were claimed by the plaintiff as part of the lands to which it was entitled under an act of Congress of 1866. That act authorized the Atlantic & Pacific Railroad Company and the plaintiff—the Southern Pacific Railroad Company—to each construct a railroad in the state of California, and provided a grant of lands for the purpose of aiding in the construction of each of said roads. The grants to both the companies were grants in præsenti, which, when maps of definite location were filed and approved, took effect by relation as of the date of the act. U. S. v. S. P. R. R. Co., 146 U. S. 595, 13 Sup. Ct. 152, 36 L. Ed. 1091. Each of the companies above designated filed in the office of the Commissioner of the General Land Office maps of definite location of the routes of their respective roads; the plaintiff making such filing January 3, 1867, and the Atlantic & Pacific Railroad Company on March 9, 1872. These maps, and the general routes designated thereon, were approved by the United States on the respective dates of filing thereof, and the Commissioner of the General Land Office and the Secretary of the Interior withdrew from sale all odd sections of land within 30 miles on each side of the designated route of each company. The route designated on the map of the Southern Pacific from Mohave to Needles was on the same general course and contiguous to the line adopted by the Atlantic & Pacific Railroad Company. In 1871 Congress, by act of that year, incorporated the Texas Pacific Railroad Company, and granted it public lands to aid in the construction of its road.

This act also authorized the Southern Pacific Railroad Company to construct a road from Tehachapi Pass to meet the Texas Pacific Railroad near the Colorado river, and the act extended to it the same rights, grants, and privileges as were given it under the act of 1866, with a proviso, however, that such rights granted should in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company. The grant of public lands to plaintiff by this later act is known as the branch line grant, and under it plaintiff constructed its branch line road as contemplated in the act from Mohave through Los Angeles to Yuma. Under the act of 1866, known as the "main line grant," plaintiff constructed its main line of road on the general route as designated upon its map filed and approved under that act from Mohave to Needles. The lands described in the several contracts are within the primary or indemnity limits of such main line grant to plaintiff under the act of 1866, and within the limits of the grant to the Atlantic & Pacific Railroad Company under the same act, but none of them are within the limits of the grant under the act of 1871. The plaintiff, as we say, built its main road in California, as contemplated by the act of 1866, but the Atlantic & Pacific Railroad Company, though it filed its map of definite location in 1872, never did in fact construct any road in California, and in 1886 Congress declared forfeited the land grant made to the Atlantic & Pacific Railroad Company in aid of the contemplated construction by it of such road.

We have referred to the matter of these respective grants in a general way, as bearing on the question at bar. A more particular discussion of them will be found in Wilson v. Southern Pacific Railroad Company, 135 Cal. 425, 67 Pac. 688, a case, in its general aspect, similar to the case at bar, and in a letter of Secretary Bliss of the Interior Department (In re Southern Pacific Railroad Company, 25 Land Dec. Dept. Int. 223). Both the Wilson Case and the secretary's letter deal with the history of these grants, the protest of the Atlantic & Pacific Railroad Company to the Land Department against the issuance of patents to the plaintiff for any lands within the conflicting limits of both grants, under either the act of Congress of 1866 or the act of 1871, and the litigation between plaintiff and the United States as to the title of plaintiff to these lands upon the forfeiture by Congress of the grant made to the Atlantic & Pacific Railroad Company.

With this preliminary statement of the general history of these grants we now approach a consideration of the findings. The only evidence in the case in support of the finding that it had been finally determined that patent should not issue to plaintiff for the lands described in the contracts, and a portion of the evidence offered in support of the finding that plaintiff had not used ordinary diligence to procure such patents, is contained in the following agreed statement of facts offered by defendant upon the trial and admitted in evidence over plaintiff's objection and exception reserved: "It is hereby stipulated by the parties to the said action that all of the land mentioned and described in the pleadings herein is situated within the primary limits of the grant made by the United States by act of Congress approved July, 1866, to the Atlantic & Pacific Railroad Company; and that the land described in contracts Nos. 9,890 and 9,891 is within the indemnity limits, and the rest thereof within the primary limits of the grant made to the plaintiff herein by the act of Congress above mentioned, as the lines of railroads of said respective companies were definitely located, as shown by the records and maps of the United States Land Department; and that the plaintiff had no other title or claim to said lands save that derived from such grant under said act. It is further stipulated that plaintiff selected the land described in contracts Nos. 9,890 and 9,891 for patent in its main line list No. 80 on May 15, 1893, and not prior thereto; and said selection was approved by the register and receiver of the United States land office at Los Angeles on August 11, 1893; and that plaintiff selected all the rest of the land described in this action for patent in its main line indemnity list No. 50 on August 31, 1894, but that plaintiff has never received any patent from the United States for any part of said lands. It is further stipulated that the allegations in the answer that it has been finally decided that patent for said lands should not issue to the plaintiff herein has no support other than the decisions rendered by the Supreme Court of the United States in the cases of United States v. Southern Pacific Railroad Company, 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091, United States v. Colton Marble & Lime Company, and United States v. Southern Pacific Railroad Company, 146 U. S. 615, 13 Sup. Ct. 163, 36 L. Ed. 1104, and Southern Pacific Railroad Company v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355; and that no part of any of the lands in this suit was involved in either or any of said cases. It is further stipulated that none of the land involved in the first three cases above mentioned as being found in 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091, was situated within either the primary or indemnity limits of the above-mentioned grant to the Southern Pacific Railroad Company made by act of Congress of July 27, 1866, but was situated within the limits of its branch line grant made by act of Congress approved on March 3, 1871; but that in said last-mentioned case of Southern Pacific Railroad Company v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355, about six sections of the land involved were situated within the primary limits of said grant of July 27, 1866, to the plaintiff, as well as within the limits of the said branch line grant of March 3, 1871, to the plaintiff, but that in the pleadings in said action no mention was made of said grant, nor did the plaintiff herein in its answer in said case assert any right to any of the land therein involved under its said grant of 1866, nor was any evidence introduced by either party tending to show any part of said six sections within the limits of the plaintiff's said grant by the act of July 27, 1866."

It will be observed (as this stipulation contains the only evidence on the point) that the finding that it had been finally determined that patents for these lands shall not issue to plaintiff, is rested entirely upon the conclusion of the lower court that the several decisions of the Supreme Court of the United States, referred to therein, so held. But, as is pointed out in Wilson v. S. P. R. R. Co., supra, the only question presented for determination in those cases was the right of the plaintiff to the lands there involved under the branch line grant act of 1871. In those cases it was simply held that upon the filing of its map of definite location by the Atlantic & Pacific Railroad Company, and the approval thereof by the United States government, the grant in præsenti took effect by relation as of the date of the passage of that act; that as the title had thus vested in the Atlantic & Pacific Railroad Company in 1866, the act of 1871 could not operate upon any land within the limits of the grant under the act of 1866; that under the act of 1886 forfeiting the grant of the Atlantic & Pacific Railroad Company, these lands became restored to the public domain unaffected by any claim of the Southern Pacific Railroad to them under the act of 1871. None of these cases involved any question as to the claim or right of plaintiff to lands (including those described in the contracts here under consideration) under the main line grant in the act of 1866, and as that point was not involved in those cases, they necessarily did not determine that plaintiff was not entitled to patents for those lands under that act, but only that it was not entitled to them under the branch line grant act of 1871.

While the motion for a new trial in the case at bar was pending before the lower court, disposition of it was held in abeyance pending the decision of the Supreme Court of the United States in the case of Southern Pacific Railroad Co. v. United States, on appeal from the Circuit Court of the United States for the Ninth District, which involved the right of the plaintiff to these lands under the main line grant act of 1866. That suit was brought by the United States to quiet title of the government against the Southern Pacific Railroad Company to all the odd-numbered sections of land in California, within the conflicting primary and indemnity limits of the grant made by Congress to the Atlantic & Pacific Railroad Company and the Southern Pacific Railroad Company under the act of 1866. It included the lands in the case at bar. The Southern Pacific Railroad Company in that action asserted title to all the lands involved under the act. A statement of the different classes of land claimed will be found in 98 Fed. 27. The Supreme Court of the United States decided the appeal from the Circuit Court January 6, 1902, and the case is reported in 183 U. S. 519, 22 Sup. Ct. 154, 46 L. Ed. 307. In its decision that court held that as to the lands within the conflicting primary limits of the grant (which includes section 27, township 6 N., range 10 W., described in the first four contracts numerically mentioned above) the United States and the Southern Pacific Railroad Company each owned an undivided moiety of such lands and dismissed the complaint as to all other lands involved in the action (including those within the indemnity limits of the grant) without prejudice to further action or suit. In that decision the Supreme Court of the United States referred to the cases cited in the agreed statement of facts and expressly held that none of those cases adjudged that plaintiff had no title to any land by virtue of the act of 1866.

Subsequent to this decision the trial court in the case at bar denied the motion for a new trial, and in a short opinion which embraced the order of denial stated that as to this latest decision of the Supreme Court: "In so far as it related to equal moiety in the lands it amounted to a confirmation of the original decision that no patent should issue for the whole of the land, and that it is not sufficient that by any decree or construction of a grant they were awarded a lesser amount." In reaching this conclusion, however, the lower court inadvertently overlooked the provision in each contract that if "the party of the first part shall obtain patent for part of the lands herein described, and shall fail to obtain patent for the remainder of them, this contract shall in its provision be and remain in full force * * * as to the tracts patented and shall be void * * * as regards those tracts for which it shall be finally determined that patent cannot be obtained." As the decision of the Supreme Court was to the effect that the United States and the plaintiff took each an undivided moiety of the lands within the conflicting primary limits, it could not be determined what particular portion of the lands the plaintiff would be awarded until a partition was had. So that if the decision proceeded no further than to declare that the plaintiff and the United States were tenants in common in equal undivided moieties of these lands within the primary limits of the grant, it would still leave the question undetermined as to the particular tracts to which plaintiff would ultimately be entitled to a patent within those primary limits and to which the contracts would apply. The decision, however, did not rest with adjudging the respective interests of the parties. In addition to that, the court said: "The United States and the Southern Pacific being, therefore, tenants in common for a large body of lands a partition is necessary, it was suggested by Secretary Lamar * * * that the Southern Pacific take only every other alternate odd-numbered section. We see no impropriety in such mode of partition, though under the case as it stands we can make no order to that effect. In whatever way partition may be had, equity requires that the lands which the Southern Pacific has assumed to sell and which were excepted by the Circuit Court from the decree in favor of the United States, to which they took their cross-appeal, must be among those set off to the Southern Pacific, and thus the title to the purchasers be perfected," and that the adjustment of the grant is properly to be had in the Land Department. In conformity with this equitable requirement, it appears from a certified copy of a letter of the Commissioner of the General Land Office to the register and receiver of the land office at Los Angeles, dated February 28, 1903 (filed in this court upon the oral argument), that the lands in the case at bar which are within the conflicting primary limits—all of section 27, township 6 N., range 10 W.—have been selected by plaintiff and will be set off to it in due course of time, and patents therefor will be issued to the plaintiff.

It is insisted by counsel for respondent that neither the decision of the Supreme Court in 183 U. S. 519, 22 Sup. Ct. 154, 46 L. Ed. 307, nor the commissioner's letter can be taken into consideration as evidence because the decision of the Supreme Court of the United States was rendered and the letter written subsequent to the decision in the case at bar, and, as counsel say, have "no legal significance in the determination of the motion for a new trial." But they are not considered as evidence at all. The decision is taken as conclusive authority that the conclusion reached by the trial court that it had been finally determined by the prior decisions of the Supreme Court, cited in the agreed statement of facts, that patent shall not issue to plaintiff for these lands within its main line grant, was wrong. And the letter of the Commissioner of which we take judicial notice (S. P. R. R. Co. v. Wood, 124 Cal. 475, 57 Pac. 388) is considered in connection with that decision, as showing that the government has conformed to the equitable requirement declared therein and partitioned between itself and plaintiff the lands within the conflicting primary limits of the grant, so as to set off to the plaintiff the lands in the case at bar within such limits which it had assumed to sell, in order that, as the court said: "Thus the title to the purchasers be perfected."

So far we have considered only the right of plaintiff under the decision of the Supreme Court of the United States relative to the lands described in the contracts in question which lie within the conflicting primary limits of the grant made by the act of Congress of 1866. Now, as to the indemnity lands. These consist of the lands described in the contracts numbered 9,890, 9,891, as the N. ½ of section 27, township 8 N., range 10 W. It is insisted by respondent that, as these lands are within the primary or place limits of the forfeited grant to the Atlantic & Pacific Railroad Company, they cannot be selected by plaintiff as indemnity land within said forfeited limits. We do not deem it necessary to discuss this point to any extent, or refer to the authorities cited by counsel. The right of plaintiff to these lands under the act of 1866 was not involved in any of the cases cited in the agreed statement of facts, nor was the right to them, asserted under the act of 1866 by the plaintiff, determined one way or another by the Supreme Court of the United States in the decision in 183 U. S. 519, 22 Sup. Ct. 154, 46 L. Ed. 307. That decision dealt with the primary lands only. As to the right of plaintiff to the lands within the indemnity limits of the grant under the act of 1866, presented for consideration in that case, the court declined to pass upon it, but dismissed the complaint without prejudice to any suit or action relative to them. As far, then, as the decision of any court is concerned, there has been no final determination that patent shall not issue to plaintiff for these lands. Neither has the government determined that plaintiff is not entitled to patent for them. On the contrary, such action as the government has taken would indicate that plaintiff is entitled to a patent for them. It is admitted in the agreed statement of facts that as to these indemnity lands in the case at bar the plaintiff made the selection of them for a patent in its main line list numbered 80 on May 15, 1893, and that the register and receiver of the United States land office at Los Angeles approved such selection on May 11, 1893. In the case of Wilson v. Southern Pacific R. R. Co., 135 Cal. 421, 425, 67 Pac. 688, 689, this court said, in speaking of an approval by the local land officers of a selection similar to the one under consideration here: "The acceptance and approval by the land officers and the selection thus made on April 23, 1885, was the recognition by the government officers having the power and jurisdiction to dispose of the question of the right of the defendant to a patent. It was in the nature of a judgment determining their right to a patent, and conclusive in their favor until set aside by some higher authority." The record in this case does not disclose that the approval of the selection of these indemnity lands in the case at bar has ever been set aside by any higher authority, and such approval, as it stands undisturbed, is, upon the record here presented, conclusive evidence of the right of the plaintiff to a patent for such indemnity lands. As it appears, then, that as to the primary lands described in the contracts at bar it has been judicially determined that plaintiff is entitled to an undivided moiety thereof as tenant in common with the United States, and that in the general partition between these co-tenants of the large body of land within the conflicting primary limits of the grant under the act of 1866, the plaintiff has selected all the primary lands described in such contracts, and that the same will be set off and patented to it, and as it further appears that as to the indemnity lands described in such contracts the local land officers have, by their approval of plaintiff's selection, recognized its right to a patent therefor, it necessarily follows that the finding of the trial court that it had been finally determined that plaintiff shall not receive a patent for said lands is not sustained by the evidence.

As to the finding of the court that the plaintiff had not used ordinary diligence to procure patents for such lands, less need be said. There is no evidence in the case to sustain this finding, but, on the contrary, what evidence was introduced on the subject (and it was all introduced by the plaintiff) shows that for several years prior to the execution of these contracts, and continuously thereafter, plaintiff at all times vigorously asserted its claim for all the lands, primary and indemnity, to which it claimed title under the act of 1866, and as early as 1888 it made application to the Land Department under the act of 1866 for patents to lands of similar character, and similarly situated to those described in the contracts here. These applications were based upon a favorable report on the construction of plaintiff's road from Mojave to Needles, made to the Interior Department about 1885 by the commissioners appointed by the President to examine it. Upon the filing of the report, a protest against the acceptance or approval of it was filed by the Atlantic & Pacific Railroad Company, and thereupon action on the report of the commissioners was suspended. Until such report was accepted and approved by the Secretary of the Interior, patents could not be issued, and hence the application of 1888 for them was refused. It was not until September, 1897, that the Interior Department finally accepted the commissioners' report and approved the construction of the road. It was only then that it became possible for the plaintiff to obtain patents for such lands, and any application for them prior to that time would have been futile. While it appears that the plaintiff in fact filed its lists of selections of the lands described in the contract here in question in 1893 and 1894, the ordinary diligence to procure them which it contracted for would have been fully discharged had the application not been filed until the acceptance and approval by the Secretary of the Interior of the commissioners' report, which was the earliest possible time an application could have been effective and a patent procured upon it. Aside from the proceedings before the Interior Department, involving plaintiff's right to patents for these lands, we have seen that its rights thereto were also a matter of litigation in the federal courts, culminating in the decision found in 183 U. S. 519, 22 Sup. Ct. 154, 46 L. Ed. 307, which we have heretofore referred to and discussed.

It will be thus observed that whatever delay in the procurement of patents for these lands occurred was occasioned, not by any want of ordinary diligence on the part of plaintiff, but from the failure of the Land Department, until 1897, to approve the report of the commissioners, upon which approval alone patents could be issued, and on account of the litigation arising in the federal courts relative to plaintiff's right to patents. Wilson v. S. P. R. R. Co., supra. From these considerations it is obvious that the finding that the plaintiff did not use ordinary diligence, as provided in the contracts, to procure patents for these lands also finds no support in the evidence.

Several other points are made in the briefs of counsel, but, as the controlling one on this appeal is the sufficiency of the evidence to sustain the findings, we perceive no reason for discussing the others.

As the point that the evidence does not sustain the findings is well taken, the order denying the motion for a new trial is reversed, and the cause remanded that a new trial may be had.

We concur: McFARLAND, J; HENSHAW, J.

SOUTHERN PAC. R. CO. v. STRAUSS et al.

(L. A. 1,481.)

(Supreme Court of California. Jan. 17, 1906.)

Department 2. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Suit by the Southern Pacific Railroad Company against Max Strauss and others. From an order denying plaintiff's motion for a new trial, it appeals. Reversed.

Rehearing denied February 15, 1906.

William Singer, Jr., H. V. Reardan, and Guy Shoup, for appellant. Bigelow, Dorsey & Titus, for respondents.

PER CURIAM. There is no substantial difference between the appeal in this case and that in the case of Southern Pacific Railroad Company v. Louis Lipman (L. A. 1,482, this day decided) 83 Pac. 445. It only involves different land. The appeal in this case was submitted on the briefs and argument in the Lipman Case, and on the authority of that case the order denying the motion of plaintiff for a new trial is reversed, and the cause remanded, that a new trial may be had.

SOUTHERN PAC. R. CO. v. GOLDMAN et al. (L. A. 1,480.)

(Supreme Court of California. Jan. 17, 1906.)

Department 2. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by the Southern Pacific Railroad Company against Max Goldman and others. From an order denying plaintiff's motion for a new trial, it appeals. Reversed.

Rehearing denied February 15, 1906.

William Singer, Jr., H. V. Reardan, and Guy Shoup, for appellant. Bigelow, Dorsey & Titus, for respondents.

PER CURIAM. There is no substantial difference between the appeal in this case and that in the case of Southern Pacific Railroad Company v. Louis Lipman (L. A. 1,482, this day decided) 83 Pac. 445. It only involves different land. The appeal in this case was submitted on the briefs and argument in the Lipman Case, and on the authority of that case the order denying the motion of plaintiff for a new trial is reversed, and the cause remanded, that a new trial may be had.

SOUTHERN PAC. R. CO. v. WILLARD et al. (L. A. 1,479.)

(Supreme Court of California. Jan. 17, 1906.)

Department 2. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by the Southern Pacific Railroad Company against M. Willard and others. From an order denying plaintiff's motion for a new trial, it appeals. Reversed.

Rehearing denied February 15, 1906.

William Singer, Jr., H. V. Reardan, and Guy Shoup, for appellant. Bigelow, Dorsey & Titus, for respondents.

PER CURIAM. There is no substantial difference between the appeal in this case and that in the case of Southern Pacific Railroad Company v. Louis Lipman (L. A. 1,482, this day decided) 83 Pac. 445. It only involves different land. The appeal in this case was submitted on the briefs and argument in the Lipman Case, and on the authority of that case the order denying the motion of plaintiff for a new trial is reversed, and the cause remanded, that a new trial may be had.

148 Cal. 495

ROBINSON v. EBERHART et al. (L. A. 1,462.)

(Supreme Court of California. Jan. 17, 1906.)

1. Appeal—Time for Taking Proceedings.

Under Code Civ Proc. § 939, subd. 1, allowing six months for an appeal from a judgment, an appeal taken after that time must be dismissed.

2. Same — Question Considered — Appeal from Order Denying New Trial.

The insufficiency of the evidence to sustain the findings is available on an appeal from an order denying a new trial.

3. Public Lands—Disposal of Lands of State.

Pol. Code, § 3495, defining land suitable for cultivation, is invalid as affecting Const. art. 17, § 3, providing that lands belonging to the state which are suitable for cultivation shall be granted to actual settlers in quantities not exceeding 320 acres to each, since the Legislature has no power to limit the effect of the Constitutional provision.

4. Same.

A section of land absolutely unfit for cultivation, unless by the boring of artesian wells water may in the future be developed in such quantities as to render it possible to artificially irrigate it, is land not suitable for cultivation, within Const. art. 17, § 3, providing that lands belonging to the state, suitable for cultivation, shall be granted only to actual settlers in quantities not exceeding 320 acres to each, and Pol. Code, § 3495, providing that land suitable for cultivation may be sold in quantities not exceeding 640 acres to any one person.

Department 1. Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by M. H. Robinson against O. C. Eberhart and another. From a judgment in favor of defendants, and an order denying a new trial, plaintiff appeals. Appeal from judgment dismissed, and order denying a new trial affirmed.

Collier & Carnahan, Withington & Carter, and Victor E. Shaw, for appellant. E. A. Meserve, E. E. Powers, C. F. Holland, Powers & Holland, and D. M. Hammack, for respondents.

ANGELLOTTI, J. This is an action instituted in the superior court of Riverside county, under an order of reference made by the surveyor general, to determine the conflicting claims of plaintiff and defendant Eberhart, as to their respective rights to purchase from the state a half section of state school land, the E. ½ of section 36, T. 6 S., R. 7 E., S. B. M. Johnson has some claim under Eberhart, arising from a contract of sale. The judgment was in favor of defendant, and plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The appeal from the judgment was taken more than six months after the entry thereof, and must therefore be dismissed. Code Civ. Proc. § 939, subd. 1. The point made by appellant against the judgment, insufficiency of evidence to sustain certain findings, is, however, available on the appeal from the order denying the motion for new trial. Eberhart's application to purchase was for the whole of said section 36, and was first in point of time. It was made upon the theory that the land was not "suitable for cultivation," his affidavit stating that it was not suitable for cultivation, and failing to show that he was an actual settler thereon, and the application being for 640 acres; and he in all respects complied with the law applicable to the sale of lands not suitable for cultivation. Section 3495, Pol. Code. If the land was not "suitable for cultivation," within the meaning of those words as used in section 3 of article 17 of the Constitution, which section provides that "lands belonging to this state, which are suitable for cultivation, shall be granted only to actual settlers, and in quantities not exceeding 320 acres to each settler, under such conditions as shall be prescribed by law," it is conceded that Eberhart's application and showing were such as to entitle him to purchase the whole section. Section 3495, Pol. Code, provides that: "Land unsuitable for cultivation may be sold in quantities not exceeding 640 acres to any one person, under the restriction other than as to actual settlement prescribed for the sale of cultivable lands." If, on the other hand, the land was "suitable for cultivation," within the meaning of the constitutional provision, the proceedings taken by him were ineffectual for any purpose. The finding of the trial court was that the whole of said section was, at the time of Eberhart's application, and ever since has been, land "unsuitable for cultivation." If this conclusion of the trial court is sufficiently sustained by the evidence, it is conceded that the order denying a new trial cannot be disturbed.

The land in question is a portion of what is known as the "Colorado and Salton Desert," and is generally known and designated as "desert land." It is situated 90 feet below the level of the sea. It is conceded that the evidence conclusively shows that the land is not suitable for cultivation, save and except by artificial irrigation, the supply of water for which can only be obtained by means of artesian wells, tapping water-bearing strata underlying the land at a depth varying from 300 to 500 feet. The average annual rainfall is so small as to be of no practical value for agricultural purposes. At the time of the making of Eberhart's application, there was no available water on said land, or in the vicinity thereof, except such as might be obtained in the future by the boring of artesian wells. No experiments in that direction had then been made on this land, and whether or not sufficient water-bearing strata could be found thereunder to enable this land, or any considerable portion of it, to be successfully cultivated, was necessarily uncertain. Without such a supply of water, it was clear to any one that the land was absolutely uncultivable. Even if water could be so obtained, much of the land was of such a character, owing to the presence in the soil of large quantities of alkali, that it was valueless for purposes of agriculture. Under these circumstances Eberhart made his application in the year 1900 to purchase this land, as land not suitable for cultivation. The most that he then knew of the possibility of obtaining water was that, by artesian well-boring, some water had been discovered in the vicinity, and that some attempts in the vicinity to thus obtain water had failed, and that, if he could obtain a sufficient quantity by the same method, he might successfully cultivate portions of the land. He had one well bored at a cost of $300, and at a depth of 340 feet found some water. Five other wells were subsequently bored, varying in depth from 300 to 600 feet, and four of these produced water. There was evidence to the effect that at the time of the trial, July, 1902, the wells were producing about 21½ inches of water, and there were two parcels of the section, aggregating 20 to 24 acres in area, situated in different legal subdivisions thereof, under cultivation. In no legal subdivision of the section was half of the acreage under cultivation. The wells produced not more than sufficient water to irrigate the land under cultivation. Other land, to the extent of about 85 acres, had been cleared and an attempt made to cultivate the same, but the attempts had been unsuccessful. Much of the land was found to contain alkali in such quantities as to make it valueless for agricultural purposes, even if sufficient water could be obtained. There was evidence to the effect that the flow of water from the wells had decreased to some extent, and whether or not additional water, in any sufficient quantity, could be obtained by the boring of other wells, is a question that can only be answered after the boring of such wells.

It is apparent that this land was not suitable for cultivation, when tested by the requirements of section 3495, Pol. Code, which provides: "That any smallest legal subdivision of school lands shall be deemed suitable for cultivation if any part not less than one-half of its area will, without artificial irrigation, but with or without the clearing of timber or other growth therefrom, by the ordinary processes of tillage, produce ordinary agricultural crops in average quantity." It is, however, contended, and the contention appears to be fully supported by the decisions, that the Legislature has no power to limit the effect of the constitutional provision, by prescribing requisites not included therein. It is settled that no narrow construction of the only words in the constitutional provision open to construction, "suitable for cultivation," should limit the general policy evidenced by the Constitution that lands should be held in small tracts and constitute homes for the owners. It was said by this court, in Albert v. Hobler, 111 Cal. 398, 400, 43 Pac. 1104, 1105: "The Constitution classifies all lands as suitable or not suitable for cultivation. For the purposes of this section, neither the Legislature nor the courts can classify them otherwise, and it must follow that whether a particular tract belongs to the one class or the other must always be a question of fact." See, also, Jacobs v. Walker, 90 Cal. 43, 48, 27 Pac. 48; Fulton v. Brannan, 88 Cal. 454, 456, 26 Pac. 506; Manley v. Cunningham, 72 Cal. 236, 13 Pac. 622. The words "suitable for cultivation," contained in the constitutional provision, have been construed by this court to include "all lands ready for occupation, and which by ordinary farming processes are fit for agricultural purposes." Manley v. Cunningham, supra; Fulton v. Brannan, supra. This, in view of the general policy of the state already referred to, appears to be a reasonable construction of the words used. It could never have been intended by the framers of the Constitution to have included, within the class of lands open in small subdivisions only to actual settlers, lands that may in the future be made available for successful cultivation only by an extensive system of reclamation, in which the co-operation of the owners of other lands is essential, or by some costly system of artificial irrigation, not ordinarily within the reach of the actual settler seeking to make a home on which he may reasonably expect to obtain a living.

If it be conceded that sufficient water could in the future be obtained on the land in question, by artesian well-boring, which, if used in irrigating the same, would render any considerable part of it fit for agricultural purposes, and this the evidence utterly fails to show, the question would then remain as to whether the development of water in this way could be considered an ordinary farming process. We have no hesitation in answering this question in the negative. An attempt to so develop water has nothing whatever to do, like the clearing land of timber, or even surface water, with the preparation of the soil for agricultural purposes. It is in no proper sense of the word "farming." It is more in the nature of a speculative and very costly effort to discover an element which, when discovered, and, by artificial methods, combined with the soil, will render it amenable to ordinary farming processes. The question as to whether water in sufficient quantities will be found several hundred feet below the surface of any particular land, and, if found, whether the supply will continue, must always be more or less uncertain of determination, and especially uncertain in land of the character of, and situated as, the land in controversy. However liberally the words "ordinary farming processes" may be construed, we are satisfied that they cannot be held to include such a method for the development of water.

There is no analogy between this case and that of Fulton v. Brannan, supra, strongly relied on by plaintiff. The question in that case was whether land which had been ceded to this state as swamp land, could, under any circumstances, be held to be land "suitable for cultivation," within the meaning of our constitutional provision. It was found that the land there in question had already been reclaimed by natural causes, and by ordinary farming processes could be made suitable for cultivation, and that it was, therefore, as matter of fact, land "suitable for cultivation," within the meaning of the Constitution, and could be disposed of only as therein provided. It was further declared in the opinion, in effect, that the mere drainage of land, so as to render it fit for the plow, where the same could be accomplished without the co-operation of others, and without an expenditure greater than could reasonably be expected from a settler upon a tract of 320 acres, was an ordinary farming process, just as was the clearing the land of timber (Manley v. Cunningham, supra; Jacobs v. Walker, supra), or the grubbing up of trees and brush. We have no disposition to question the correctness of this statement. There is, however, a clear distinction between the removal from the surface of the land of things interfering with the cultivation thereof, such as timber, brush, and water, and the attempted development, by artesian well-boring, of a sufficient supply of water with which to irrigate land absolutely unfit for agricultural purposes unless artificial irrigation can be had. The former is well recognized as an ordinary incident of the work of the farmer, and the effect of the proposed work can be foreseen with certainty. As was said in Fulton v. Brannan, supra: "Probably there are few farms in this state thoroughly cultivated, some portion of which has not been drained. And the drains must be constantly looked after." The latter is simply a speculative attempt involving a very considerable expenditure to obtain an element essential to render the land at all suitable for cultivation.

We are satisfied that land, absolutely unfit for cultivation, unless, by the boring of artesian wells, water may, in the future, be developed in such quantities as to render it possible to artificially irrigate the same, is land not suitable for cultivation, within the meaning of our constitutional provision. This was the situation as to the land in controversy at the time that Eberhart made his application to purchase, and went upon the land and commenced to improve it.

Our conclusion upon this question makes it unnecessary to consider any other question presented.

The appeal from the judgment is dismissed, and the order denying a new trial is affirmed.

We concur: SHAW, J.; McFARLAND, J.

LITLAND v. EBERHART et al. (L. A. 1,461.)

(Supreme Court of California. Jan. 17, 1906.)

Department 1. Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by T. T. Litland against O. C. Eberhart and another. From a judgment in favor of defendants, and an order denying a new trial, the plaintiff appeals. Appeal from judgment dismissed, and order denying a new trial affirmed.

Collier & Carnahan, Withington & Carter, and Victor E. Shaw, for appellant. E. A. Meserve, E. E. Powers, C. F. Holland, Powers & Holland, and D. M. Hammack, for respondents.

PER CURIAM. This case is in all material respects the same as that of Robinson v. Eberhart et al. (L. A. 1,462, this day decided) 83 Pac. 452. For the reasons stated in the opinion filed in that case, the appeal from the judgment is dismissed, and the order denying a new trial is affirmed.

2 Cal. App. 351

DANERI v. GAZZOLA et al.

(Court of Appeal, Third District, California, Dec. 6, 1905. On Rehearing, Jan. 3, 1906.)

1. Deeds — Delivery—Presumptions—Statute.

The presumption of law stated in Civ Code, § 1055, that a grant duly executed is presumed to have been delivered at its date, not being expressly made conclusive, it may by the express provisions of Code Civ. Proc., § 1961, be controverted by other evidence direct or indirect.

2. Attorney and Client — Stipulations — Entry on Minutes of Court.

Code Civ. Proc. § 283, gives an attorney authority to bind his client by his agreement filed with the clerk or entered on the minutes of the court. *Held*, that the statute refers to executory agreements, and where by a verbal stipulation one party has received an advantage for which he entered into it, or another party has at his instance given up some right or lost some advantage, so that it would be inequitable for him to insist that the stipulation was invalid, he will not be permitted to repudiate it on the ground that it was not entered on the minutes of the court.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, §§ 155–158; vol. 44, Cent. Dig. Stipulations, §§ 16–21.]

3. Same—Effect—Relief from Admission.

In an action by an administrator on a note payable to the intestate, the denials of the answer raised an issue as to ownership of the note, and a separate defense was that during his lifetime the intestate had by deed conveyed all his personal property to his wife. For the purpose of such defense plaintiff's attorney admitted that the deed was "duly executed and delivered," and the court erroneously sustained a demurrer to the separate defense. Plaintiff's attorney at the time was ignorant of the facts in regard to the deed, and before the next trial served a notice that he would not renew any admission previously made as to evidence. *Held*, that it was not an abuse of discretion for the court on the second trial to relieve plaintiff from the admission and to admit evidence of persons who were present at the deathbed of intestate, where the deed was drawn, showing that the deed was never completed or delivered in the lifetime of intestate, though, presumably owing to the admission, defendant had not called the scrivener on the first trial, and he had since died.

4. Deeds—Partial Execution—Delivery.

A deed to the grantor's wife having been signed and acknowledged by the grantor and witnessed, the grantor directed the scrivener to get the description of the property and then to return the deed to him, but the grantor died before the deed was returned, and after his death the scrivener inserted the description in the deed and caused it to be recorded, and it was then sent to a son of the grantee, who retained it. *Held*, that there was no conveyance of the property to the grantee; it not having been completed nor delivered in the lifetime of the grantor.

5. Deeds—Partial Execution—Delivery.

A deed to the grantor's wife having been signed and acknowledged by the grantor and witnessed, the grantor directed the scrivener to get the description of the property and then to return the deed to him, but the grantor died before the deed was returned, and after his death the scrivener inserted the description in the deed and caused it to be recorded, and it was then sent to a son of the wife. The son testified that the grantor told the scrivener that the wife was to have that property, and it appeared that the members of the family supposed that the property had been conveyed to the wife, and it appeared that the son acted as the wife's agent and received rent for the land, and that he had been in possession of the deed ever since delivered to him by the scrivener. *Held* that, notwithstanding the agency of the son, there was no conveyance as the deed was not completed or delivered in the lifetime of the grantor.

6. Bills and Notes—Assignment.

Where a husband undertook to convey all his property to his wife, but the deed was neither completed nor delivered within his lifetime, a note constituting a part of his property did not pass thereby to the wife as by an assignment.

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Action by Ambrose Daneri, as administrator of the estate of John Daneri, against James S. Gazzola, as administrator of the estate of John B. Gazzola, deceased, and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Rehearing denied by Supreme Court February 2, 1906.

J. L. Maddux and John A. Wall, for appellants. Congdon & Congdon, for respondent.

CHIPMAN, P. J. Action on a promissory note executed by John B. Gazzola in his lifetime as principal, and defendants as sureties, and delivered to plaintiff's intestate as payee. Defendant Cuneo died before service of summons, and his representative was not made a party. The action was originally commenced in the name of John Daneri, but before the trial he died, and plaintiff was substituted in his stead. Defendant John B. Gazzola died pending an appeal to the Supreme Court from the judgment given at the first trial, and by supplemental complaint his administrator was substituted in his stead. At the first trial the court sustained a demurrer to certain defenses interposed by answer of defendants. This was held error and a new trial ordered. 139 Cal. 416, 73 Pac. 179. At the second trial plaintiff had judgment, from which, and from the order denying their motion for new trial, defendants appeal.

The principal defense made and now urged is that plaintiff's intestate had, before his death, conveyed all his property, including the note in question, to his wife, Angella, and that the administrator could not maintain the action, as the note did not belong to the estate, but was the property of Angella Daneri. This contention rests upon the presumption that the deed of conveyance was deemed executed and delivered (Civ. Code, § 1055), and on the admissions made by plaintiff's attorneys at the first trial that the deed was duly executed and delivered. It appears that some 20 days before his death plaintiff's intestate, being then mortally ill, was informed by the attending physician, Dr. Wheeler, that he could not recover, and was by him advised to make such disposition of his business as he thought proper. Deceased accordingly told Dr. Wheeler to send for one Murphy, a justice of the peace, who came the same day (December 5, 1899), and at the request of deceased Murphy prepared the deed in question; it being entirely in his handwriting, except the signature. Ambrose Daneri, son of deceased, testified: "Mr. Murphy came December 5, 1899. At the direction of my father Mr. Murphy prepared the deed you have shown me and the deed was all completed before Murphy went away, excepting the description (describing certain land). Before Murphy left my father signed his name to the deed and acknowledged the same. The witnesses also signed at the same time. My father told Murphy to get the description in the deed, and then Murphy was to return the deed to my father—my father never saw the deed again. * * * Shortly after his death I obtained the description I have designated and gave it to Mr. Murphy, who inserted the same in the deed, put the necessary stamps on the paper, and also his acknowledgment, and sent the deed to Mr. Bondshu the recorder of Mariposa county. A few weeks afterwards I received the deed by mail from Mr. Murphy." The widow of deceased testified that the deed was not delivered to her, that she never saw it until shown her at the trial, and that she knew nothing about the note. Deceased died December 25, 1899, and the deed was indorsed: "Filed for record at the request of J. S. Murphy, Jan. 29th, A. D. 1900." It was understood by the family of deceased that he had deeded all his property to his wife Angella.

The statement on motion for new trial made on the first appeal was offered in evidence by defendants for the "particular purpose of showing that at the former trial the plaintiff admitted in open court that the deed dated December 5, 1899, by John Daneri to Angella Daneri, was duly made, executed, and delivered by said John Daneri." By this statement it appears that, when defendants offered the deed in evidence, plaintiff objected as irrelevant, incompetent, and immaterial, which objection was sustained. The record then shows that before the ruling of the court "it was admitted that the instrument was duly executed and delivered by the said John Daneri, and that there was no objection to the introduction of the instrument on the ground that the proper foundation was not laid." Before the second trial was commenced plaintiff gave notice of a motion for leave to file a second supplemental complaint, and the notice stated as follows: "The plaintiff hereby gives notice that the plaintiff will not make any admission or renew any admission heretofore made as to evidence." When the statement on motion for new trial on the first appeal was offered, counsel for plaintiff asked and obtained permission to state the facts as to the admission made at the first trial. Attention was called to the above notice given 22 days before the second trial, and counsel testified that the admission was made "to enable appellants to present the question of law fairly, and not otherwise. We consented out of good nature, and not believing it any way material. We knew nothing of the facts about the matter, it was wholly immaterial, as the court had ruled against the allegations of the answer on that subject on the demurrer, and had wholly rejected the evidence when offered. I thought the deed all right—it came to plaintiff's attorneys from plaintiff himself. I never investigated any of the facts concerning the making, executing, and delivering of the deed until after the decision of the Supreme Court reversing the judgment in the former trial." The court found as follows: "The facts covered by such admission had been offered and ruled out by the court under previous rulings of the court, and that the admission itself was made under ignorance of the real facts, was wholly irrelevant and immaterial, was wholly unnecessary, was improvidently and carelessly made, and subserved no useful purpose whatever, and that the plaintiff gave due and timely notice of withdrawal." On the evidence the court found that the deed in question was never completed or delivered to the grantee named therein during the lifetime of the grantor and never took effect as a conveyance.

1. The presumption of law stated in section 1055, Civil Code, that "a grant duly executed is presumed to have been delivered at its date," is not expressly made conclusive, and, unless so made, "may be controverted by other evidence, direct or indirect." Code Civ.

Proc. § 1961; McDougall v. McDougall, 135 Cal. 316, 67 Pac. 778.

2. Appellants contend that the admission made at the first trial was on a material question, namely, the ownership of the note sued upon, and that, if the ownership was in Angella Daneri, the plaintiff was not entitled to maintain the action, for to do so he must be the legal owner with right of possession of the instrument; citing Kiel v. Reay, 50 Cal. 62; Woodsum v. Cole, 69 Cal. 145, 10 Pac. 331. We think the denials of the answer, apart from the special defense set up as to the execution and delivery of the deed to which the demurrer was sustained (erroneously, as was decided by the Supreme Court), raised an issue of ownership. Defendants had a right to rebut the presumption of ownership and possession of the estate of John Daneri, deceased, which arose from the possession of the note by the administrator; and we think the deed on its face, its delivery admitted, tended to rebut that presumption. While this is true, it is manifest that the admission was made with reference to the special defense pleaded, and to which a demurrer was sustained. As the court refused to admit the deed as evidence for any purpose, though erroneously, we cannot see that the admission by counsel that the deed was duly executed and delivered should now, under the circumstances disclosed, estop plaintiff from showing the truth concerning the fact. The deed was admitted in evidence at the last trial, and the only question now is, did the court err in permitting plaintiff's counsel to withdraw the admission made at the first trial and to show the true facts in the case? Section 283, Code Civ. Proc., provides: "An attorney and counsellor shall have authority: 1, to bind his client in any steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise." In this case, no question arises as to the making of the admission, for it appears in the record. It has been held, under this section, that it refers to the executory agreements, and not to those which have been, wholly or in part, executed, and that the section does not require a construction that in no instance shall the attorney's agreement made in behalf of his client be binding, unless entered in the minutes of the court or filed with the clerk. But where by a verbal stipulation one party has received the advantage for which he entered into it, or the party has, at his instance, given up some right or lost some advantage, so that it would be inequitable for him to insist that the stipulation was invalid, he will not be permitted to repudiate the obligation of his own agreement upon the ground that it had not been entered in the minutes of the court. Reclamation District v. Hamilton, 112 Cal. 603, 609, 44 Pac. 1074; Hearne v. De Young, 111 Cal. 373, 43 Pac. 1108; Smith v. Whittier, 95 Cal. 279, 287, 30 Pac. 529. The only suggested advantage which defendants have suffered is that since the first trial Murphy had died, and that he was not called at the first trial presumably because of the admission, and his testimony has thus been lost to defendants. It is not claimed that Murphy would have testified to the undisputed facts different from those narrated by three sons of deceased as to what occurred when the deed was executed. The admission was not of the character referred to in the above cases, and did not partake of the nature of mutual contract, as in some cases; nor does it fall under another class mentioned in the cases where the attempted withdrawal is manifestly to inconvenience the other party or would tend to defeat the ends of justice.

There is a still further class of admissions mentioned in the cases, a general admission in the course of the trial which obviously could not have been intended to hold good at a second trial—admissions made to facilitate the trial. It was said in Weisbrod v. Chicago, etc., R. Company, 20 Wis. 421: "Such admissions are frequently made for the purpose of saving time where counsel are confident of success upon some other point; and when so made they are always understood to have reference to the trial then pending, and not as stipulations which shall bind at any future trial." There was nothing connected with the circumstances or reasons for making the admission which indicated that plaintiff's attorneys made it with knowledge of the facts, and the uncontradicted testimony is that plaintiff's attorneys were then ignorant of the very important facts subsequently brought to their knowledge. If defendants' attorneys were also ignorant of the facts, which is altogether probable, there would be injustice in allowing them to profit by the mutual ignorance of counsel for both parties. If they knew the facts and concealed them from plaintiff's counsel (which we are unwilling to believe), it would be equally unjust to hold the admission to be irrevocable. It cannot be assumed that Murphy, if alive, would have testified directly opposite to the witnesses who were present at the bedside of John Daneri, or would dispute the testimony of his widow, the grantee of the deed, whose statements were against her interest. The grantor lived for 20 days after the date of the acknowledgment (December 5th), and it is altogether probable that the deed was not completed and delivered during this time, or it would have been sooner recorded than January 29th following. There can be little doubt that the deed was not completed prior to the grantor's death, that it was never shown him after December 5th, and that it was never, in fact, delivered to the grantee, nor to any person for her. Certainly the trial court was fully warranted from the evidence in finding the facts as it did. A deed has no validity without delivery. Gould v. Wise, 97 Cal. 532, 32 Pac. 576, 33 Pac. 323; Black v. Sharkey, 104 Cal. 279, 37 Pac. 939;

Whitney v. Am. Ins. Co., 127 Cal. 464, 59 Pac. 897. There not only is evidence of delivery wanting, but positive evidence that there was no delivery, and evidence, also, that the deed was to have been returned to the grantor when completed. He, in fact, never lost control of it.

In Scaife v. Western M. C. L. Co., 90 Fed. 238, 33 C. C. A. 47, a bill of exceptions, in which the agency of one Flemming was admitted, the bill was admitted at the second trial to show this admission. The court said: "Admissions of a party are always competent evidence against him, and there seems to be no reason why a distinct and formal admission signed by an attorney of record upon a former trial, and not withdrawn or modified, should not be competent evidence." But here the admission was withdrawn some days before the trial. In Voisin v. Commercial Mut. Ins. Co. (Sup.) 22 N. Y. Supp. 348, at a former trial the genuineness of a certain paper was admitted by the defendants' counsel. The court said: "We think that without at least some notice of the withdrawal of this admission the counsel for the plaintiff have a right to rely thereon on any subsequent trial." Mr. Jones says: "Admissions made by parties or their attorneys in their pleadings in the action, or by stipulations as to facts, or by dispensing with certain proofs, may be withdrawn if not true, provided there remains sufficient time for the other party in which to prepare his case, and provided such party has not been injured by relying on such admissions. Such admissions will not be allowed to be withdrawn, however, if the situation of the parties has been substantially changed, as by the death of a party or of a witness." 1 Jones on Ev. § 276. In Franklin v. National Ins. Co., 43 Mo. 491, there was an express agreement by stipulation of counsel for both parties that "appellant might withdraw its answer and interpose a demurrer to the petition; and, should it be overruled, then the appellant was to allow final judgment to be entered thereon, retaining the right to appeal." The demurrer was overruled and final judgment rendered thereon. Afterwards appellant moved the court for leave to withdraw its stipulation and also its demurrer and for leave to answer. The motion was denied. The court, in sustaining the ruling, said: "A party cannot be allowed to make an express agreement and avail himself of its advantages if it resulted in his favor, but not be bound by it if it happens to prove disadvantageous." It is stated in 1 Am. & Eng. Ency. p. 699, that "admissions may be proved even on a subsequent trial of the cause, if, from the language used at the time and the surrounding circumstances, they appear not to have been limited to the former trial." See note 2, citing many cases in support of the text. In a clear case of mistake, or for other good cause, the court may allow a party to recede from his stipulation. 20 Eng. Pl. & Pr. p. 613, and note 6. We think it quite obvious, from the circumstances disclosed here, that the admission was made with reference to the then pending trial, as well, also, as to a particular defense then made which the court at the time held not to be good. Furthermore, the admission was made under mistake of fact, from which, we think, the court could relieve plaintiff, and in doing so did not abuse its discretion.

Appellants claim that nothing in the record shows any order of the court allowing the withdrawal of the admission. It was so treated at the trial, and, besides, we do not think an order was necessary in view of all the facts.

The judgment and order are affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

Petition for Rehearing.

CHIPMAN, J. In the application to have the evidence re-examined our attention is called to certain facts which were not mentioned in the opinion. But they do not change the fact, found by the court on sufficient evidence, that the deed was not completed nor delivered in the lifetime of deceased, Daneri. Whatever claim the widow had to the note, or the chose in action (the suit on the note at Daneri's death), came through the deed. The testimony of Frank Daneri that his father told Murphy he wished his mother to have all the property was no doubt true, but that is precisely what Murphy undertook to bring about by the deed conveying all the property, but failed. Mrs. Daneri testified that all the property belonged to her "and family." But it was because it was supposed that the deed conveyed the property that she claimed it. At the same time she testified that she knew nothing about the note. It is true, also, that the members of the family supposed that the property had been deeded, and it is true that the validity of the deed was not questioned until after Murphy's death. There was evidence that Ambrose Daneri had acted as his mother's agent, and had received rent for the land and paid it to her, and that he had been in possession of the deed ever since Murphy delivered it to him, and that his mother had received payments on the note. There was no evidence as to the scope of the agency referred to above. But if it be assumed that it was an agency to manage the property for his mother, and if the other facts above narrated be admitted, still the controlling fact remains that the attempt to convey the property to Mrs. Daneri was abortive.

The point is now made for the first time that the deed was sufficient to carry an assignment of the chose in action, and it is immaterial that it was incomplete as to the land, and that manual delivery of the note was not essential; citing Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. 471. This case is instructive and covers some of the features of the present case. If the deed in question had been completed and delivered, we would have the case discussed in Driscoll v. Driscoll. But the grantor here told the notary to complete it and return it to him, presumably for his examination, and thereafter to be delivered, should he determine to so dispose of it. He never saw it afterwards, and it was not completed or delivered until after his death, and was then delivered to the son, and never was delivered to the grantee. We are unable to discover any legal ground upon which the deed can be held to have conveyed the note or the chose in action. Upon the other point in the case we also adhere to our former decision.

Rehearing denied.

We concur: McLAUGHLIN, J.; BUCKLES, J.

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2 Cal. App. 515

PACIFIC PAVING CO. v. VIZELICH et al.

(Court of Appeal, Third District, California. Dec. 20, 1905.)

1. Attorney and Client—Authority of Attorney—Evidence.

Evidence examined, and *held* to justify the court in finding that a defendant knew that he was represented by a firm of attorneys, that they had filed a stipulation for judgment, and that he had made no objection to their action, so that he was bound thereby.

2. Trial—Findings—Sufficiency.

Where the trial court properly found, on motion to set aside a stipulation for judgment filed on behalf of a defendant, that the attorneys filing the stipulation had authority from him and that the stipulation was binding, it was not necessary to make findings on issues raised by pleadings filed by him.

Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Action by the Pacific Paving Company against Nicholas Vizelich and George Finkbohner. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendant Finkbohner appeals. Affirmed.

See 74 Pac. 352; 82 Pac. 82.

J. B. Webster and C. H. Fairall, for appellant. W. J. Bartnett and Loutitt & Loutitt, for respondent.

CHIPMAN, P. J. Appeal by defendant George Finkbohner from a judgment and order denying motion for a new trial in an action upon a street assessment. The judgment was entered on a stipulation of attorneys assuming to represent defendants, including Finkbohner. The authority of attorneys so to act is disputed by Finkbohner. His motion to vacate and set aside the stipulation under which judgment was entered against him was denied. He appeals from the judgment; also from the order denying his motion for a new trial, and the principal question is, did the court err in refusing to vacate and set aside the stipulation?

There was an appeal to the Supreme Court from the judgment; the purpose being to cause the reversal of the order of March 12, 1900, refusing to vacate and set aside as void the stipulation on which judgment was entered, and also to cause the reversal of the order dismissing the action as to Finkbohner. The court reversed the judgment of dismissal, but did not set aside the stipulation. The court, however, on the facts there presented, held that the trial court "was not warranted in finding, upon his [Finkbohner's] motion, that there was no appearance made by said defendant, even although the attorneys had not been authorized to appear for him." But the court said: "We see no reason why said defendant may not renew his motion to set aside the stipulation." 141 Cal. 4, 74 Pac. 352. At the retrial the court, on July 29, 1904, made findings and entered judgment. The court found: "That the above-named parties on the 28th day of April, 1897, signed and filed herein a stipulation in the words and figures following, to wit: 'It is stipulated and agreed: That the defendants in the above-entitled action need not file an answer in said actions, but that the said actions shall abide by the result of the action of the Pacific Paving Company v. J. L. Mowbray, 5,163, and whatever judgment may be finally entered in said action shall be also entered in each of the above-entitled cases, whether the same be in favor of the plaintiff or defendant; and if in favor of the plaintiff, then in each case according to the prayer of the complaint. Dated April 23, 1897. James A. Loutitt, Attorney for Plaintiff. F. H. Gould and James H. Budd, Attorneys for Defendants.' That the judgment was finally entered in said action of Pacific Paving Company v. J. L. Mowbray, Number 5,163, in favor of the above-named plaintiff. That thereafter, to wit, on the 12th day of September, 1900, judgment herein was duly given, made, and entered according to said stipulation in favor of plaintiff and against said Nicholas Vizelich * * * and for the foreclosure of the lien mentioned in the complaint." As conclusions of law "from the foregoing facts the court decides that plaintiff is entitled to judgment herein against said defendant Geo. Finkbohner, on said stipulation," etc. Judgment followed accordingly. The second appeal from the judgment was heard in this court and the judgment was affirmed July 6, 1905. Pacific Paving Co. v. Vizelich, 82 Pac. 82. The appeal from the order denying new trial comes up on a separate transcript, and is the matter now before us.

Respondent makes the point that under section 951, Code of Civil Procedure, and rule 29, the bill of exceptions is insufficient. The view we have taken of the case makes it unnecessary to consider the point. The complaint was filed December 2, 1903, and summons issued January 6, 1894. The return of the summons was made December 19, 1899, by affidavit of the person who served it. It stated that service was made "by delivering to said George Finkbohner personally on said 13th day of January, 1894, in said county of San Joaquin, a copy of said summons, to which was attached a copy of the complaint filed in the said action." There were several landowners, defendants in numerous similar actions, who under a written agreement formed a committee to conduct the defense. This agreement was signed by all of the defendants, including defendant Vizelich, but defendant Finkbohner did not sign the agreement. Messrs. James H. & J. E. Budd appeared for all the defendants, and in this action, on January 22, 1894, filed a demurrer to the complaint, which was on January 29, 1894, overruled, and defendants given 20 days to answer, which was extended 20 days by stipulation. Lis pendens was recorded on January 28, 1896. The stipulation in this action and 18 other actions hereinbefore set forth, dated April 23, 1897, was filed in this action on April 28, 1897, signed by James A. Loutitt, attorney for plaintiff, and F. H. Gould and James H. & J. E. Budd, attorneys for defendants. It appears that Vizelich was the owner of the property involved when the action was commenced, and on April 11, 1896, deeded it to Finkbohner, who "held a mortgage before this suit was brought and until he got the deed." Defendant Finkbohner made affidavit in support of his motion in which he deposed that he never employed or authorized the employment of F. H. Gould, James H. & J. E. Budd, or either of them, or any other attorney or person, to appear for him in this action or to file a demurrer or to enter into or file any stipulation whatever, until the 29th of November, 1899, when he employed J. B. Webster, an attorney of the court, to appear for him therein; that he did not know that any demurrer or any stipulation had been made or filed or any appearance entered for him prior to said date, and, on being informed on that day by said Webster that said stipulation had been entered into, he instructed said Webster to take immediate steps to set the same aside. The first step taken, so far as the record shows, was the motion of March 12, 1900, on that day denied, and it was this motion that was renewed by service of notice March 16, 1904, heard on the ——— day of March, 1904, and denied on June 13, 1904. The affidavit of Finkbohner used at that hearing is dated in November, 1899. John E. Budd testified at a former hearing that he never had any conversation with Finkbohner touching the agreement signed by Vizelich and the other defendants, parties to it. James A. Loutitt made affidavit that he was a member of the law firm having charge of the action for plaintiff until January 1, 1894, when the firm was dissolved, and that thereafter he had and now has exclusive charge of the action for plaintiff as one of his attorneys. He sets forth certain proceedings in the case heretofore stated, including service of summons and other steps taken, and that the firm of Budd & Budd were duly licensed attorneys at law of good standing and repute. His affidavit made at the first hearing of the motion and on its renewal is dated December 13, 1899, and states that during the pendency of the action and since the service of summons he "has had no less than half a dozen interviews with said George Finkbohner in regard to said litigation and the status of said Finkbohner to the same, and in such interviews had from time to time, as the same arose and occurred, stated the facts concerning the same to said Finkbohner, and informed him of the fact in particular that the said litigation in which the said Finkbohner was interested as a party was by stipulation and agreement continued and held in abeyance until, and was to be governed by and depended upon, the final determination of that certain action pending in the same court by the same plaintiff against one J. L. Mowbray, No. 5,163, and like disposition to be made herein as by the terms of said stipulation provided, and that affiant now for the first time learned or had any intimation from any source that the said Finkbohner had given no authority to the said attorneys who appeared for him as attorney to so appear or to represent him in said action; that, although this said action had been pending for more than five years, said defendant, after being regularly and duly served with summons herein on January 13, 1894, made no appearance in said cause, except as made by and through the said attorneys, but has at all times up to ——— day of November, 1899, led plaintiff and this affiant to believe, and they have believed, that said defendant was duly and regularly represented by said attorneys, with full power and authority from him, said defendant, as to the same, and so believing and relying plaintiff and this affiant as attorney for said plaintiff have acted thereon, and entered no default against defendant for his alleged nonappearance, as they otherwise would have done." C. K. McMurray, an attorney at law, deposed that on the former hearing of the motion to dismiss this action he appeared for the attorneys associated with Mr. Loutitt and was present at the hearing, and that at the hearing defendant Finkbohner testified, among other things, "that he did know the above-entitled suit was pending and that said defendant Vizelich was fighting said case; that he further knew of the case because he found a copy of the summons and complaint left at his house over five years ago during his absence; that he did not think he received the same personally; but, if any one swears that he served him personally, he would not say that it was not so, as it is so long ago." It was admitted that Finkbohner had formerly testified, among other things, denying that he ever had any conversation with Attorney Loutitt in which he was informed that any one had appeared for him or acted for him, and that he talked with said Loutitt but once about said action, and that was in November, 1899, and just before he had employed Webster as his attorney; and it was admitted that he further testified at that time substantially as stated by Attorney McMurray. Upon these facts the court denied the motion, and we think there was evidence sufficient to support the order. See opinion in same case on first appeal (141 Cal. 4, 74 Pac. 352), where on much the same facts the Supreme Court seems to have been similarly impressed, though not called upon to decide the point.

Appellant's counsel in their brief have, with much industry and clearness, stated the rules as laid down by the authorities governing the power and duty of the courts concerning the acts of attorneys assuming to represent clients without authority to do so. It is not necessary in this case to review the authorities. We had occasion recently to discuss the question to some extent in the case of Daneri v. Gazzola, 83 Pac. 455, where some of the rules are stated. In the present case it must be admitted that the appearance for Finkbohner and the stipulation to which he was made a party were without his previous authority. The only question before us concerns the effect of his conduct after he was served with summons and after he knew of the appearance and the stipulation. That the court had the power to determine whether he had knowledge or was charged with the means of knowledge that the stipulation had been entered into, and had discretion to relieve him from its effect, although he had such knowledge, we think the authorities cited by appellant fully establish. The evidence does not seem to call for extended comment. Appellant knew the action was pending against him as early as January 13, 1894, when summons was served. A demurrer had been filed in his behalf on January 22, and overruled on January 29, 1894. He took a deed to the property on April 11, 1896, with knowledge of the pendency of the action, and must be presumed to have known that his title was affected by this action. Attorney Loutitt testified on December 13, 1899, that he had frequent conversations prior thereto with appellant, and informed him particularly as to the stipulation. Appellant suggests as to this fact that this information may have been imparted after November 29, 1899, when appellant testified he first learned of the stipulation. But it must not be overlooked that the trial court may have disbelieved appellant, in view of all the facts disclosed, or determined that his memory was at fault. The stipulation was on file in the case April 28, 1897, and yet he took no action to have it set aside for 18 months. The court probably took into view the fact that he was in default all this time, and that, having knowledge of the action, he would have answered if he were not acquiescing in the stipulation. We think the evidence justified the court in concluding that appellant knew of the stipulation many months before he moved to set it aside, and was content to let it stand. We cannot say that the court abused its discretion in refusing to relieve appellant from the stipulation. Plaintiff had relied upon it in good faith, and had acted upon it in omitting to take the default of appellant, and in moving forward with this case and other cases in reliance upon it. Appellant's knowledge of the stipulation and apparent acquiescence exclude the idea of fraud or mistake. He does not attempt to show wherein he has suffered by the ruling of the court. His contention is that he never entered into the stipulation. He attempts no excuse for his neglect for over five years to answer after summons was served, and gives no reason for his not having moved promptly to set aside the stipulation, except want of knowledge, as to which the court found against him.

Error is claimed because the court failed to find on all the issues. The issues referred to are presented in appellant's answer and cross-complaint. In this pleading the same defense is set up as was involved in the motion to set aside the stipulation, and the matter was fully heard and was disposed of in denying the motion. We do not think the defense set up in this pleading could be entertained until after the stipulation was set aside; and, as this was refused, there was no necessity for findings on this pleading. In short, the stipulation standing, it was the duty of the court to enter judgment in accordance with its provisions. See opinion in second appeal. Pacific Paving Co. v. Vizelich, 82 Pac. 82.

The order denying motion for a new trial is affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

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2 Cal. App. 314

WIESTNER et al. v. CALIFORNIA COKE & GAS CO.

(Court of Appeal, Second District, California. Dec. 1, 1905.)

SALES—ACTION FOR PRICE—FINDINGS.

In an action for the price of goods sold, the complaint alleged that plaintiff sold to defendant goods of the value of $999.65, which, with interest, amounted to $1,015.70, and that no part thereof had been paid, except the sum of $300, leaving a balance of $715.70. The findings were that plaintiff sold to defendant "goods, wares, and merchandise of the value of $715.95," and that by reason of the defective character of the goods "defendant is entitled to an abatement in the sum of $178.25, leaving a balance due to plaintiff of $537.70." *Held*, that the finding as to the value of goods sold must be construed as referring to the amount alleged to be due after the payment of the $300.

Appeal from Superior Court, Los Angeles County; E. W. Britt, Judge pro tem.

Action by W. C. Wiestner and another against the California Coke & Gas Company to recover the price of goods sold and delivered. From a judgment for plaintiffs, defendant appeals. Affirmed.

Porter & Sutton, for appellant. A. D. Laughlin and Henry J. Stevens, for respondents.

SMITH, J. Appeal from a judgment for the plaintiffs. The only question involved is as to the construction of the pleadings and findings. The complaint alleges, in effect, that the plaintiffs sold and delivered to defendant goods of the value of $999.65, on which there has accrued as interest the sum of $16.05, making in all the sum of $1,015.70, and that no part of the same has been paid, except the sum of $300, leaving a balance of $715.70. The answer denies the purchase of the goods as alleged of the value of $999.65, or of any value in excess of $300, which it is alleged defendant has paid; and it is denied, also, that there is a balance of $715.70, or any other sum, due to the plaintiffs from the said defendant. Facts are also alleged showing damage in the sum of $48 on account of defects in the goods sold, and the return of certain of the goods of the value of $150. The findings are, in effect, that "within two years next preceding the commencement of this action the plaintiffs sold and delivered to the defendant, at the instance and request of the latter, and the defendant received of the plaintiffs, goods, wares, and merchandise of the value of $715.95"; that by reason of the defective character of the goods sold defendant suffered damage in the sum of $28.25; and that goods were returned to plaintiffs of the value alleged, $150—and as conclusions of law "that defendant is entitled to an abatement of the sum of $178.25 from the sum demanded by the plaintiffs in this action, leaving a balance due the plaintiffs of $537.70," with legal interest from April 1, 1904, for which sum judgment was entered.

The only point urged by appellant is, in effect, that the payment of $300 on plaintiffs' account is admitted, and that the finding of the court as to the amount due was in conflict with this admission and must be disregarded, and hence that the judgment should be reduced by the amount of $300 and corresponding interest. But the findings of the court are to be considered, if susceptible of such construction, so as to be consistent with each other; and this will require us to understand the finding of the goods sold as referring to the amount alleged to be due after the payment of the $300.

The judgment is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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2 Cal. App. 302

WALBRIDGE et al. v. COUSINS.

(Court of Appeal, Third District, California. Nov. 27, 1905.)

APPEAL — JURISDICTION — STATUTORY TIME LIMIT—NECESSITY FOR COMPLIANCE.

Under Code Civ. Proc. § 939, subd. 3, providing that an appeal may be taken from an order granting or refusing a new trial within 60 days after the order is made and entered, jurisdiction is conferred on the appellate court only by compliance with the statute.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1926.]

Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by J. H. Walbridge and others against L. W. Cousins. From an order denying his motion for a new trial, defendant appeals. Appeal dismissed.

R. S. Taylor and J. H. Magaffey, for appellant. Jas. F. Farraher and Chas. J. Luttrell, for respondents.

CHIPMAN, P. J. In this case a notice of intention to move for a new trial was served and filed on May 8, 1903. The statement was settled August 16, 1904, and filed September 14, 1904, and on this last-named date the motion for a new trial was submitted to and denied by the court. On January 6, 1905, the notice of appeal from the order was served and filed. There is no appeal from the judgment.

Respondents make the point that this court is without jurisdiction to hear the appeal; citing subdivision 3, § 939, Code Civ. Proc. This section provides that an appeal may be taken: "3. From an order granting or refusing a new trial * * * within sixty days after the order * * * is made and entered in the minutes of the court or filed with the clerk." Appellant filed no reply brief, but at the argument claimed that the record would show a stipulation in effect, waiving the objection raised by respondent. It is not necessary to decide whether the requirements of the statute may be waived. We fail to discover anything in the record by way of stipulation or otherwise in effect waiving the objection. The right of appeal from the order as from a judgment depends upon the statute, and jurisdiction is conferred upon the appellate court by compliance with the statute. An appeal from an order denying a new trial must be taken within 60 days from the time the order is made and entered. Turner v. Reynolds, 81 Cal. 214, 22 Pac. 546. So held as to an order made after final judgment (Doyle v. Republic Life Ins. Co., 125 Cal. 15, 57 Pac. 667); also as to an appeal from the judgment when taken too late (Hunter v. Milam, 133 Cal. 601, 65 Pac. 1079; Michelson v. Fish [Cal. App.] 81 Pac. 661).

The appeal is dismissed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

2 Cal. App. 468

MURPHY v. BOARD OF POLICE PENSION FUND COM'RS.

(Court of Appeal, First District, California. Dec. 14, 1905.)

1. EVIDENCE—RES GESTÆ.

Where in mandamus to compel the granting of a pension to the applicant as the widow of a deceased police officer, alleged to have been killed while in the performance of his duties, a witness who testified that he heard the call of a police whistle and walked a distance of over 300 feet, where he saw the deceased officer supported by two men, could not testify as to what the deceased officer stated as to what was the matter with him; the statement not being a part of the res gestæ.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 351.]

2. WITNESSES — INFORMATION ACQUIRED BY PHYSICIAN—COMMUNICATIONS IN PRESENCE OF OTHERS.

Under Code Civ. Proc. § 1881, subd. 4, providing that a physician cannot be examined as a witness in a civil action without the consent of his patient as to any information acquired in attending the patient, an objection to a question asked a physician, testifying as a witness after the patient's death, as to what statements the patient made to him during the period of treatment, was properly sustained, because not confining the question to statements made in the hearing of a third person, who was present at one of the physician's visits.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 768–777.]

Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Application for writ of mandate by Mary Murphy against the board of police pension fund commissioners of the city and county of San Francisco to compel defendant to grant a pension to the applicant. From a judgment for defendant, plaintiff appeals. Affirmed.

A. P. Black, for appellant. Franklin K. Lane, City Atty., for respondent.

COOPER, J. Application for writ of mandate to compel the defendant, board of police pension fund commissioners, to order and direct that a monthly pension of $50 per month be paid to plaintiff from the date of the death of her deceased husband, Joseph F. Murphy, as long as she shall remain unmarried. The case was tried in the court below upon issues raised by the answer, and findings were filed, upon which judgment was ordered and entered in favor of defendant. Plaintiff made a motion for a new trial, which was denied, and this appeal is from the order denying the plaintiff's motion.

Error is claimed in respect to the rulings of the court in sustaining two objections to questions asked by plaintiff of her own witnesses during the trial. The theory and claim of plaintiff was that her deceased husband was killed while in the actual performance of his duties as a member of the police department, by receiving severe internal injuries while arresting an offender against the laws. Harry Seguin, a witness called by plaintiff, testified that he was standing near Ninth street when he heard the call of a police whistle; that he walked down Harrison street, past Eighth street, past Chesley street, until he came near to Langdon street, a distance of over 300 feet, when he saw Murphy, plaintiff's husband, bending over, holding his side, and supported by two men; that while walking down Harrison street from Ninth street he saw three men run down Harrison street from Ninth street; that when he arrived at the point on Harrison street where Murphy was standing the three men he saw running had passed out of sight. The witness was then asked to state what Murphy said to him at that time as to what was the matter with him. The question was objected to upon the ground that it was hearsay and no part of the res gestæ, and the court sustained the objection. The ruling was not erroneous. The evidence sought to be elicited was purely hearsay. It could not, under well-settled principles of evidence, be binding upon defendant. If Murphy had received injuries from the men who were seen running away, it would seem that plaintiff could have proven it without the evidence of Murphy's statement of a transaction that had ended and been completed. Murphy was not under oath. The defendant was not present. The statement was made, if made at all, after Murphy had been injured, if he had been injured. People v. Ah Lee, 60 Cal. 85; People v. Wong Ark, 96 Cal. 125, 30 Pac. 1115.

It is next claimed that the court erred in sustaining defendant's objection to a question asked of the witness Dr. Buckley, for the purpose of showing statements or information given by deceased to the physician at the time he attended deceased after his alleged injury. It seems to be conceded in the briefs that the object of the question was to obtain information acquired by Dr. Buckley in attending Murphy, which was necessary to enable him to prescribe or act for the patient. The Code expressly provides that a physician cannot be examined in such cases (Code Civ. Proc. subd. 4, § 1881), and the court has so held. In re Flint, 100 Cal. 391, 34 Pac. 863; Estate of Nelson, 132 Cal. 182, 64 Pac. 294. Appellant insists that this information and statements were given in the presence and hearing of plaintiff, and hence that they were not privileged because made in the presence of a third person. The question was not confined to what was said at the first visit of the physician and in the presence of plaintiff at and during that visit. Dr. Buckley attended deceased from September 10, 1899, to the end of October, 1899, and made in all about 20 visits. No one was present at any of the visits after the first one, except the doctor and the deceased. The question asked included all the time during which deceased was under the care of the doctor, and hence the question does not come within the exception claimed by appellant. This disposes of all the questions argued in the briefs.

The order is affirmed.

We concur: HARRISON, P. J.; HALL, J.

2 Cal. App. 451

GURWELL v. MORRIS.

(Court of Appeal, Second District, California. Dec. 13, 1905.)

1. FRAUDS, STATUTE OF—CONTRACT NOT TO BE PERFORMED WITHIN A YEAR.

Where defendant agreed on May 1, 1902, that if plaintiff would purchase certain stock in a corporation, and was dissatisfied with the investment, defendant at the end of a year would repurchase the stock at the price paid, etc., and plaintiff, relying on the promise, purchased five shares on June 16, 1902, for which he paid $500, the latter date was the date of the contract, which was therefore not within the statute of frauds as a contract not to be performed within a year.

2. SAME—PURCHASE OF GOODS, WARES, AND MERCHANDISE.

The consideration of defendant's promise being, not the sale of the stock, but its purchase by plaintiff, which was executed, the transfer of the stock contemplated became a mere condition incidental to defendant's promise, and hence the contract was not within the statute of frauds as a contract for the purchase of goods, wares, and merchandise of greater value than $200, etc.

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by S. Gurwell against A. J. Morris. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Patterson Sprigg, for appellant. Mills & Hizar, for respondent.

SMITH, J. The case as presented by the complaint is as follows: The defendant, on or about May 1, 1902, was president and general manager of the San Diego Packing Company, a corporation, and "as an inducement and as the consideration for plaintiff to take five shares of the stock of said company, defendant promised and agreed to and with the plaintiff that if he would subscribe for and purchase from said company five shares of said stock at its par value, * * * and was not satisfied with said investment at the end of a year, that he (defendant) would repurchase said five shares of stock from plaintiff and pay him on demand, one year from said date of purchase of said stock, the full sum of money paid out and expended by him for and on account of the purchase of said stock, and any and all moneys paid by plaintiff on account of assessments," etc. The plaintiff, relying upon the promise of the defendant, on June 16, 1902, purchased five shares of stock of the company, and paid therefor the sum of $500, and afterwards, about March 23, 1903, paid the further sum of $50 for assessments, and thereafter, on June 16, 1903, he tendered to the defendant said five shares of stock, and demanded of him the said sum of $550, etc. These and other allegations were denied. and the case went to trial, but on objection of the defendant, oral evidence in proof of the alleged agreement was excluded by the court and a nonsuit granted. In support of this ruling, it is contended by the respondent that the contract was void under the statute of frauds, for the reasons: (1) That it was "not to be performed within a year from the making thereof"; and (2) that the contract was to purchase goods, wares, and merchandise of greater value than $200. And in support of these positions section 1973 of the Code of Civil Procedure, and section 1739 of the Civil Code, are cited.

But as to the first contention, it is clear that it cannot be sustained. The time for the performance of defendant's promise was within a year from the 16th day of June, 1903, which is to be taken as the date of the contract. Prior to that time there was no contract, but a pollicitation only from the defendant. Holland's Jur. 196. The second point we think is also untenable. The consideration of the defendant's promise was not the sale of the stock, but its purchase by the plaintiff, which was carried into execution; and the transfer of the stock contemplated was a mere condition of the defendant's promise, and therefore merely incidental. The case is therefore in principle the same as that of Kilbride v. Moss, 113 Cal. 432, 45 Pac. 812, 54 Am. St. Rep. 361, and no substantial distinction can be made between the two cases. This conclusion is also supported by the decision in Green v. Brookins, 23 Mich. 48, 9 Am. Rep. 74, which seems to be directly in point, and with the reasoning of which we are entirely satisfied.

The judgment is reversed, and the cause remanded for further proceedings.

We concur: GRAY, P. J.; ALLEN, J.

2 Cal. App. 283

PEOPLE v. FRANK.

(Court of Appeal, Third District, California. Nov. 27, 1905.)

1. CRIMINAL LAW—RECORD—BILL OF EXCEPTIONS—NECESSITY—COURT RULES.

A motion for a new trial in a criminal case, the denial thereof by the court, and the exception to the ruling, are not sufficiently authenticated within court rule 29 (78 Pac. xii), providing that in cases of appeals from orders the papers and evidence used on the hearing must be authenticated by incorporating the same in a bill of exceptions, where the facts appear only in the minutes of the court.

2. CRIMINAL LAW — CONFESSIONS — EFFECT — CORROBORATION.

A person cannot be convicted of murder on his extrajudicial admissions alone; but the corpus delicti, the death as the result, and the criminal agency of another, must be proved by evidence independent of such admissions.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1225.]

3. HOMICIDE — EVIDENCE — SUFFICIENCY — CORPUS DELICTI.

Evidence on a trial for murder examined, and *held* insufficient to prove the corpus delicti, independent of accused's extrajudicial admissions essential to a conviction.

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

George C. Frank was convicted of murder in the first degree, and he appeals. Reversed.

R. P. Stalder and E. D. McCabe, for appellant. U. S. Webb, Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was convicted of murder in the first degree and sentenced to imprisonment for life. He appeals from the judgment of conviction, and from the order denying his motion for a new trial.

The Attorney General makes the point that the appeal from the order is ineffectual, because the bill of exceptions does not show that the motion for a new trial was made, nor does it show what action, if any, was taken by the court thereon. The record shows that at the time the defendant was called for sentence he moved for a new trial upon the statutory grounds, the motion was denied, and defendant excepted. These facts appear only in the minutes of the court and do not appear in the bill of exceptions. Under the decision in People v. Ruiz, 144 Cal. 251, 77 Pac. 907, the above matters were not sufficiently authenticated, as required by rule 29 of the Supreme Court (78 Pac. xii). See People v. Durand (Cal.) 81 Pac. 672. The objection, however, has been cured under rule 14 (78 Pac. x).

It is the settled law in this state that no person can be convicted of a crime upon his extrajudicial admissions alone. The corpus delicti must be proved by evidence independent of the extrajudicial confessions or admissions. People v. Jones, 31 Cal. 565; People v. Thrall, 50 Cal. 416; People v. Simonsen, 107 Cal. 345, 40 Pac. 440; People v. Jones, 123 Cal. 65, 55 Pac. 698; People v. Tapia, 131 Cal. 647, 63 Pac. 1001; People v. Ward (Cal.) 79 Pac. 448. See, also, State v. Williams, 78 Am. Dec. 254, 258; Daniels v. State, 6 Am. St. Rep. 251. It was said in People v. Simonsen, supra: "The term corpus delicti means exactly what it says. It involves the element of crime. Upon a charge of homicide, producing the dead body does not establish the corpus delicti. It would simply establish the corpus; and proof of the dead body alone, joined with a confession by the defendant of his guilt, would not be sufficient to convict. For there must be some evidence tending to show the commission of a homicide, before a defendant's confession would be admissible for any purpose." The corpus delicti in murder has two components: Death as the result, and the criminal agency of another as the means. Ruloff v. People, 18 N. Y. 179, 182. The extrajudicial confession or admission alone is not sufficient proof to establish the crime.

It would be difficult to find a case in the books where the rule has been applied with stronger reason than is its application demanded in the present case. Murder is defined to be: "The unlawful killing of a human being with malice aforethought." Pen. Code, § 187. 'Such malice may be expressed or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."

Apart from the admission of the defendant that he shot the deceased in self-defense (which will be noticed later), there is not a single fact nor a single circumstance disclosed by the evidence that in any way, even remotely, connects the defendant with the death of the deceased, and defendant's confession was far from an admission that he murdered the deceased. They lived a mile or more apart in a sparsely settled region, they had but a passing acquaintance, no business, social, or other relations between them appeared, no disagreement of any kind existed, no motive whatever for committing the crime was shown, and nothing connected with the appearance of the body when found pointed to murder by any one. So far as the evidence showed, the deceased may have come to his death from the accidental shot of some one hunting in the vicinity. The body of deceased was found on Tuesday, May 31, 1904, at what is called Heinhold's place, 1½ miles from defendant's home, between which and Heinhold's deceased lived, a half a mile from the latter place. There was evidence that slight decomposition of the body had ensued, and that the bullet which caused his death entered under the left shoulder blade and came out at the left breast of deceased. The only examination of the body or of the wound was by neighbors who assisted at the inquest or funeral. No expert testimony was offered as to length of time he had been dead, and the witnesses were uncertain in their opinions on the subject. There was evidence that he was last seen alive on the afternoon of Sunday, May 29, 1904, and it was the opinion of witnesses that he met his death on that day.

There was testimony of defendant's whereabouts on Sunday and Monday, given by his mother and sister and brother and other persons. No one saw him in the vicinity of the Heinhold place on Sunday or Monday. The uncontradicted testimony was that he was hunting cattle with his brother and a neighbor all day Monday; that he remained at home on Sunday until half past 1 in the afternoon, when he and his sister and brother left home on horseback, having started for Mariposa. About half past 2 they parted company, defendant going towards Whitlock, in an opposite direction from deceased's cabin. Defendant was next seen at Whitlock; some of the witnesses fixing the time between 3 and 4 p. m. of Sunday, where he remained until evening, and reached home about 7 p. m. that day. He left home unarmed. Defendant assisted at the burial of deceased, and nothing unusual was observed in his manner. Several witnesses testified that the general reputation of defendant for peace and quietness in the community was good. About the 10th of June, 1904, defendant went to San Francisco, having sold some or all of his cattle, and went to work there. In September, Deputy Sheriff Walters, of Mariposa county, having for some reason suspected that defendant was connected with the death of the deceased, went to San Francisco and, without difficulty, found defendant and made appointment to meet him, at a place named, that evening. Defendant met him and was brought into conversation with detective Thomas Gibson, who made an appointment with defendant to meet him next morning at the Hall of Justice. Sheriff Walters called for him the next morning and they went to the Hall of Justice. Gibson testified that he took him into a room and asked him some questions about his family, where he was stopping, etc. "Then I told him that there was a deputy sheriff down here wanted him for the murder of a man by the name of Dewey. Now, I says, 'I don't want you to convict yourself with your own words from your mouth, but' I says, 'if you have killed this man in self-defense, why' I says, 'you can tell me about it. But,' I says, 'if you have not, why I don't wish you to say anything to me in regards to the matter at all unless you would see your attorney.' So then he stated that he had had some words with this man, and this man came at him with a hoe, and he shot him with a rifle. So I didn't question him any further." Gibson brought him back into the main office, and defendant repeated in the presence of Capt. Martin and the deputy sheriff what he had told Gibson. None of the circumstances attending the killing were explained or called out at this time. At the trial, defendant testified that he did not kill Dewey, and was not cross-examined by the district attorney. It seems to us that there was absolutely no evidence, aside from this confession, pointing to defendant's guilt, and there was no evidence establishing the corpus delicti.

The judgment and order are reversed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

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2 Cal. App. 453

COFFEY v. SUPERIOR COURT OF SACRAMENTO COUNTY et al.

(Court of Appeal, Third District, California. Dec. 13, 1905.)

1. Action — Nature and Form — Civil or Criminal — Accusations Against Officers.

A proceeding under Pen. Code, § 758, providing that an accusation against a municipal officer for misconduct in office may be presented by the grand jury; section 760, requiring the foreman to deliver the accusation to the district attorney, who must serve a copy on accused, together with a notice requiring him to appear and answer; sections 762, 763, authorizing the accused to file objections or answer; section 767, giving him a trial by jury; section 769, requiring the court on his conviction to remove him from office; and section 770, authorizing an appeal to the Supreme Court —is criminal in its nature, and in presenting the accusation the grand jury acts as in finding an indictment.

2. Indictment — Finding of Grand Jury — Number Concurring in Charge.

Accusation against a municipal officer authorized by Pen. Code, § 758, providing that accusations against municipal officers for misconduct may be presented by the grand jury, may be presented by 12 members of the jury, for the common law governs; the statute being silent as to the number that may present the accusation.

Petition for writ of review by M. Coffey against the superior court of the county of Sacramento and another. Writ denied.

J. B. Devine and Devlin & Devlin, for petitioner. A. M. Seymour, Dist. Atty., for respondents.

CHIPMAN, P. J. It appears from the petition that petitioner is chief of police of the city of Sacramento, and has been such officer since January 27, 1904, and that his term of office will expire January 27, 1906; that the grand jury in and for the county of Sacramento, claiming to act under sections 758 to 771, both inclusive, of the Penal Code, did on August 27, 1904, "purport to present an accusation in writing against the said petitioner for alleged willful misconduct in office as such chief of police," the alleged misconduct being willful neglect and refusal to prosecute persons, who, with his knowledge, were engaged in conducting illegal games; that on the ——— day of September, 1905, petitioner duly made and filed in the superior court of said county written objections to the legal sufficiency of the said accusation, alleging as grounds therefor that it was not presented by all of the 19 members composing said grand jury, but that only 14 members thereof "participated in the hearing of the said matter before the said grand jury, and in the presentation and filing of said document purporting to be an accusation," and therefore the said court "has no jurisdiction of the defendant or of the subject-matter"; that petitioner on September 16, 1905, presented the said objections to said court, and moved to quash and set aside said accusation, and on that day said motion was argued and submitted and was taken under advisement by his honor, Judge E. C. Hart, judge of said court, respondent herein, and said motion was, on November 25, 1905, denied. The district attorney interposed a general demurrer to the petition, and also demurred on the ground of uncertainty. It was conceded at the argument that the petition is sufficient to present the principal question, and as we have reached the conclusion that the general demurrer must be sustained we will not consider the points made on the special demurrer.

It is admitted that the grand jury was duly impaneled and consisted of 19 members, the full number as provided by law (Code Civ. Proc. § 192), and that 14 of their number participated in the hearing of the matter and voted in favor of presenting the said accusation, the remaining number presumably present. The question presented and argued before us was this: Can a less number than the full panel of the grand jury authorize the presentation of an accusation under the sections of the Penal Code above cited? Section 758, Pen. Code, is as follows: "An accusation in writing against a district, county, township, or municipal officer, for willful or corrupt misconduct in office, may be presented by the grand jury of the county for or in which the officer accused is elected or appointed." Subsequent sections require the foreman of the grand jury to deliver the accusation to the district attorney, who must serve a copy on the accused and also serve a notice requiring him to appear in the superior court and answer the accusation. Section 760. The accused may file objections or answer. Sections 762, 763. He is given a trial by jury. Section 767. Upon conviction the court must pronounce judgment removing him from office. Section 769. The accused may appeal to the Supreme Court from the judgment. Section 770. Section 772 provides for the removal of certain officers upon the accusation in writing "of any person" charging them with the matters mentioned in the section.

Counsel for the petitioner contend: That as the statute provides expressly that 12 members of the grand jury may present an indictment, while section 758 is silent as to the number that must vote for the accusation, any less than the entire panel cannot present a legal accusation. They argue that the provisions relating to accusations are distinct from the proceedings relating to indictments and presentments; that no just inference can be drawn from these latter that, because an indictment may be found by 12 members of the grand jury, a like number may present an accusation. On the contrary, it is claimed that because the Legislature has in the one case prescribed the number, and omitted to do so in the other, furnishes strong reason for giving section 758 the construction contended for; and, furthermore, apart from these considerations, that when the Legislature said that the accusation "may be presented by the grand jury" it meant the body in its entirety, and that the general rule by which a majority of the members of legislative, administrative, and other like bodies may express their will does not and should not apply to a body like a grand jury. We agree with petitioner that the proceedings under sections 758 et seq. seem to be complete in themselves, as far as they go, and are separate from and independent of the proceedings provided in the Penal Code as to indictments. But that they are criminal in their nature cannot be doubted, and we think must be regarded as pertaining to crimes and offenses against the state. Speaking more particularly of section 772, the court in Thurston v. Clark, 107 Cal. 285, 40 Pac. 435, said: "The proceeding is a nondescript, but resembles somewhat a qui tam action. But whatever its garb it is in body and spirit, in its aim and object, a process for the punishment of crime." See Wheeler v. Donnell, 110 Cal. 655, 43 Pac. 1; Pen. Code, § 15, subd. 4; Id. § 692. In presenting the accusation the grand jury acts under legislative authority precisely as in finding an indictment, the only difference being that the law is silent in the former case as to the number that may present the accusation. It seems to us that the statute being silent we may look to the common law to discover what number may act rather than adopt a construction of section 758 which would violate the time-honored rule governing grand juries. There never has been a time since the grand jury was instituted in England when 12 might not present the indictment. The common law required that 24 should be summoned to attend on the grand jury; but not more than 23 were sworn, because of the inconvenience which might arise in case 12, who were sufficient to find a true bill, were opposed by the other 12, who should be against finding. State v. Davis, 24 N. C. 157, cited in People v. Roberts, 6 Cal. 214; Anderson's Law Dictionary; State v. Miller, 3 Ala. 344; State v. Brainerd, 56 Vt. 532, 48 Am. Rep. 818; State v. Ostrander, 18 Iowa, 435; 4 Black. Com. 302; 17 Am. & Eng. Ency. of Law, p. 1290. In nearly all of the states of the Union the Constitution or statute prescribes the number that shall constitute the grand jury, as well as the number that may find an indictment, and it is well settled that in such cases the common law is superseded. In the state of Virginia the law provides for no limitation. The precise question as related to an indictment arose in Commonwealth v. Sayers, 35 Va. 722. The question was, can less than 16 members of a grand jury make a presentment or find a bill of indictment in any case? The court said: "Our act of Assembly points out the mode of summoning grand juries, and declares that the 24 grand jurors, or any 16 of them, shall be a grand jury. But there is nothing said as to the number who must concur in finding a presentment or indictment, and the same reasoning which goes to prove that because the act declares that 24, or any 16, shall be a grand jury, the number of 16 should concur in a finding, would also establish that if more than 16 are sworn, they should all concur; for the whole number, at last, form the grand jury. In 2 Hale's P. C. 161, it is stated that 'if there be 13 or more of the grand inquest, a presentment by less than 12 ought not to be; but if there be 12 assenting, though some of the rest of their number dissent, it is a good presentment; for if 12 agree, it is not necessary for the rest to agree.' "

It is not to be presumed that our Legislature, in providing that 12 may find an indictment for the gravest felony known to the law, intended, by failing to name any number who should concur in finding an accusation, involving a misdemeanor, that all must concur. If any intention on the question can be surmised it would more probably be that the rule as to indictments would be followed. But aside from all presumed intention we think the common-law rule as to the number who may act in such a case should be applied. If our statute were entirely silent in all matters of presentment for crimes by the grand jury as to the number who must vote for the accusation, it is altogether probable that we would follow the rule of the common law as laid down in the Virginia case, supra. Fixing the number in the matter of indictments and omitting to do so as to accusations should not give rise to a rule at variance with the common law, as well as the generally accepted rule in this country. In support of their contention that when the Code speaks of "the grand jury" it means the entire body, counsel for petitioner cite cases holding that where the statute fixes the number composing the grand jury a less number is not a grand jury. That is, if the law requires 15 qualified persons (as was the case in Doyle v. State, 17 Ohio, 222) to compose the grand jury and one or more of those sworn are disqualified, it would not be a legal grand jury, and no valid indictment could be found by them. These cases do not hold, where the grand jury is once legally impaneled, that less than the full number may not find an indictment if the statute provides that a less number may do so; nor do they decide that all must vote to present the indictment where the law is silent as to the number who must do so.

Counsel cite, among other cases, Rainey v. State, 19 Tex. App. 479. The Texas Constitution provides that "grand and petit juries in the district courts shall be composed of twelve men; but nine members of a grand jury shall be a quorum to transact business and present bills." The grand jury was formed of 13 qualified members, but it was held an illegal body because not formed in compliance with the Constitution. Substantially the same view was taken in People v. Thurston, 5 Cal. 69; but while section 192, Code of Civil Procedure, declares that "a grand jury is a body of men, nineteen in number, returned in pursuance of law," in People v. Simmons, 119 Cal. 1, 50 Pac. 844, it was said: "If any 12 concur an indictment may be found, though the remainder of the jury vote against it," which would be equally true if the remainder did not vote at all. The cases cited by petitioner do not support his contention. They hold that the grand jury must be formed in accordance with the Constitution or statute creating it and that it would not be a legal grand jury unless so formed. But as to the number that shall be required to make an accusation provision is sometimes made in the law and sometimes not. No case has been cited, and we have found none, holding that all the members of the grand jury must concur before an indictment can be found where the grand jury was composed of more than 12 and the law was silent as to the number necessary to make the accusation.

There is a further reason which is urged in support of the accusation. Section 7, subd. 17, of the Penal Code reads: "Words giving a joint authority to three or more public officers or other persons, are construed as giving such authority to a majority of them, unless it be otherwise expressed in the act giving the authority." See, also, Civ. Code, § 12, and Code Civ. Proc. § 15. See People v. Hecht, 105 Cal. 621, 38 Pac. 941, 27 L. R. A. 203, 45 Am. St. Rep. 96. It is the rule generally that a private trust or agency must be executed by all, as in the case of arbitrators chosen to settle a private controversy, but Mr. Mechem also says, in his work on Public Offices and Officers, § 572: "Where, however, a trust or agency is created by law, or is public in its nature and requires the exercise of deliberation, discretion, or judgment, whether it be judicial or quasi judicial in its character, the rule is otherwise, and while all of the trustees, agents, or officers, except where the law makes a less number a quorum, must be present to deliberate or, what is the same thing, must be duly notified and have an opportunity to be present, yet, except where the law clearly requires the joint action of them all, it is well settled that a majority of them, where the number is such as to admit of a majority, if present, may act and that their act will be deemed the act of the body."

The Supreme Court by the Constitution of 1849 was composed of a chief justice and two associate justices, and it was provided that any two should constitute a quorum; but there was no provision as to the number necessary to pronounce a judgment, as was done by the amendments of 1862, when the number was increased to five, and by the Constitution of 1879. Two justices, however, pronounced judgments, being a majority of the three. See discussions of the power of the court by a majority to pronounce judgments in certain matters in Estate of Jessup, 81 Cal. at page 459, 22 Pac. at page 1028, 6 L. R. A. 594. There have been many boards and commissions created by statute whose functions were judicial or quasi judicial. These bodies have uniformly acted through the vote of a majority. The board of railroad commissioners is a notable example. The Constitution created the board to be composed of three members. Its powers are judicial as well as administrative and executive. A majority has many times, in most important matters, such as determining rates to be charged for freight and the like, expressed the will of the board. While this view of the law would seem to safely lead us to the conclusion that a majority of the grand jury may present an accusation under the provisions of Pen. Code, § 758 et seq., and hence the present accusation was legally presented, we prefer to place our decision on the ground first above stated, and that upon the concurrence of 12 or more of the grand jury legally formed a valid accusation may be presented.

The writ is denied.

We concur: **McLAUGHLIN, J.; BUCKLES, J.**

148 Cal. 552

WHITE v. BANK OF HANFORD et al.

(Sac. 1,251.)

(Supreme Court of California. Jan. 27, 1906.)

1. VENDOR AND PURCHASER—CONTRACTS—OPTIONS.

An instrument reciting that plaintiff has an option to purchase certain land with all growing crops for $10,200, to be paid $250 cash and the balance on or before August 15, 1903, otherwise the cash payment was to be forfeited, and declaring that the $250 was a part payment on the land, etc., constituted a mere option to purchase; there being no mutuality of obligation on the part of plaintiff.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 3723.]

2. ESCROWS—ACTION AGAINST DEPOSITORY.

Plaintiff had an option to purchase certain land for a price specified, to be paid on or before August 15, 1903. On July 28th plaintiff entered into a formal agreement with S. for the purchase of the land; he paying the earnest money which had been paid by plaintiff for the option and agreeing to pay the remainder on or before the date specified. On July 29th the grantors of the option deposited a deed with defendant bank in escrow, to be delivered on terms strictly complying with the option; but neither plaintiff nor S. ever tendered the balance of the purchase price of the land. *Held*, that plaintiff, being in default, was not entitled to enforce a delivery of the deed, either against the bank or the vendors.

Department 2. Appeal from Superior Court Kings County; M. L. Short, Judge.

Action by S. J. White against the Bank of Hanford and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

F. B. Brown and Dixon L. Phillips, for appellant. Frank McGowan and E. Westlake, for respondents.

HENSHAW, J. Defendants Johannsen and Battenfeldt entered into an agreement with plaintiff, White, in the following language: "Armona, July 24, 1903. This is to certify that Sandy J. White has an option of purchase of our half section of land, being the south half of section 29, township 19 south, of range 21, containing 320 acres, together with all the growing crops of every kind, for the sum of $10,200 to be paid as follows, to wit: $250 cash down, the balance of $9,950 to be paid on or before August the 15th, 1903, and if said sum is not paid at said date then the above sum to be forfeited. We agree to pay S. J. White $1,000 as his commission, and when sale is made said White is to buy one stack of hay at $175, said $175 to be taken out of said commission. We agree to give an abstract of title and also to give possession within thirty days from date if sale is made. Said $250 is receipted as part payment upon said land, also one and one-half share of McCrary Side Ditch stock to go with said place when said sale is completed." That this agreement amounted to an option to purchase, and no more, the simple reading of it demonstrates. Two hundred and fifty dollars was the consideration for the option, which was to be forfeited in case a purchase was not made, but which was to be applied as part of the purchase price in case of sale. Commission in the sum of $1,000 was provided for, as in the ordinary real estate broker's contract. There was no mutuality of obligation, in that the agreement nowhere imposed any liability upon White to make the purchase. The rights of White under this contract are precisely as appear upon the face of it—the right to complete the purchase and compel the execution of a deed by Johannsen and Battenfeldt upon performance of the terms of the agreement, within the time limited by it. Upon the other hand, the correlative duties of Johannsen and Battenfeldt were no other than appear upon the face of the agreement—to make the deed upon demand of White and a tender by him within the time specified in the contract. Duffy v. Hobson, 40 Cal. 240, 6 Am. Rep. 617; Treat v. De Celis, 41 Cal. 202; Armstrong v. Lowe, 76 Cal. 616, 18 Pac. 758; Grant v. Ede, 85 Cal. 418, 24 Pac. 890, 20 Am. St. Rep. 237.

Upon the 28th of July of the same year plaintiff, White, entered into a formal agreement with defendant W. A. Sage for the purchase and sale of the Johannsen and Battenfeldt land; Sage paying $250, and agreeing to pay the remainder of the purchase price on or before August 15th, the same date fixed for performance in White's agreement with Johannsen and Battenfeldt. The contract provided that, in the event of Sage's failure to comply with the terms of his agreement, White was released from all obligations to convey the property, and Sage forfeited all right thereto. This agreement, as has been said, was entered into between Sage and White. It was not pretended that this contract was executed in the name of, or on behalf of, Johannsen and Battenfeldt. Johannsen and Battenfeldt, on the 29th of July, made their deed of grant, bargain, and sale to W. A. Sage and J. W. Sage, grantees, conveying the property covered by the agreement, and deposited the deed with the defendant the National Bank of Hanford, with written instructions as follows: "Herewith we hand you deed from ourselves to J. W. Sage and A. W. Sage of Humboldt County, California, for all of the south half of section 29, Tp. 19 S., range 21 E., Mt. D. B. & M., and a bill of sale of the live stock, and other personal property now on the premises. Upon the payment to you of the sum of $14,175.00 in cash and the assumption of the mortgage held by you of $9,000.00 on or before the 15th day of August, 1903, and not otherwise, and the said cash payment to be made for our account, you are hereby authorized to deliver all such papers to S. J. White or order." It will be noticed by the terms of these instructions that the escrow papers were to be delivered to plaintiff, White, and it is not disputed that the terms of delivery prescribed by Johannsen and Battenfeldt in their written instructions to the bank were strictly conformable to their agreement with White. At this point the proceedings seem to have lagged. Sage did not tender the money to White, nor demand the deed, and White, upon the other hand, never tendered the purchase price of the land to Johannsen and Battenfeldt, and is irremediably in default in that regard.

In his complaint plaintiff sets up all these matters, and conceives that he is entitled to the following relief, which he prays for: "That the defendant First National Bank of Hanford be enjoined and required to deliver unto said W. A. Sage the said bill of sale, the said deed, and the said release of mortgage, and that at the same time the said W. A. Sage be enjoined and required to pay unto the said First National Bank of Hanford the sum of $28,550, together with interest thereon at the rate of 7 per cent. per annum, from the 15th day of August, 1903, until judgment and decree is duly had and rendered herein for and on behalf of this plaintiff, the said Bank of Hanford, the said L. L. Johannsen, and W. H. Battenfeldt; and the said First National Bank of Hanford, upon the payment of said last-mentioned sum do pay immediately out of said fund unto this plaintiff the sum of $6,875, and interest thereon from the 15th day of August 1903, at the rate of 7 per cent. per annum, the said Bank of Hanford the sum of $9,000, and the remainder unto said L. L. Johannsen and W. H. Battenfeldt." The court sustained a demurrer to this complaint, and plaintiff declining to amend, judgment passed for defendants, and this appeal is taken.

The mere statement of the case, as above given, proves the soundness of the court's ruling. Plaintiff being in default, under the terms of his argument with Johannsen and Battenfeldt, which agreement, as we have seen, gave him a mere option of purchase until August 15th, had no right or claim of any kind whatsoever against defendants Johannsen and Battenfeldt. As plaintiff had no right to compel a conveyance of the land by Johannsen and Battenfeldt, he had equally no right in equity to compel Sage to pay money for land to which Sage never could get title. If plaintiff has in any way been injured by any default of Sage (a matter which in no sense do we decide), there is open to him a legal action for damages.

The judgment appealed from is affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

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148 Cal. 511

STEWART v. DOUGLASS et al.

(L. A. 1,485.)

(Supreme Court of California. Jan. 19, 1906.)

1. PLEADING — SUSTAINING DEMURRER — AMENDMENT—DISCRETION.

When a demurrer is sustained to a complaint, it is within the discretion of the trial court either to allow an amended complaint to be filed, or to give judgment forthwith in favor of the defendant.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 575–583.]

2. APPEAL — PLEADING — AMENDMENT —DISCRETION—REVIEW.

An order denying plaintiff's motion for leave to amend his complaint after the sustaining of a demurrer thereto will not be interfered with on appeal, unless an abuse of discretion is shown by the record.

3. PLEADING—AMENDMENT AS OF RIGHT.

The right to amend after the filing of a demurrer is absolute only when it is exercised before the demurrer is argued and submitted to the court for decision, as provided by Code Civ. Proc. § 472.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 656.]

4. TRUSTS — CONSTRUCTIVE TRUST — MINING CLAIMS—LOCATION.

Where plaintiff by his own labor and expense discovered a mine, but before making a location thereon under the mining laws disclosed the location to defendant in consideration of and reliance on an agreement or understanding between them that the mine, when located, should be their joint property, and defendant, in pursuance of such understanding and the agreement to locate the mine in the joint names of plaintiff and himself, subsequently located it in his own name and that of another without plaintiff's consent, such facts were sufficient to raise a resulting trust in favor of plaintiff with respect to a half interest in the mine.

5. SAME—ENFORCEMENT—PLEADING.

In an action to enforce an alleged resulting trust of a half interest in mining claims, the complaint alleged that in an interview plaintiff said that, if the claims were taken up, plaintiff would be entitled to a half interest therein, to which defendant agreed, and that plaintiff relied on such statements and representations, and in consequence of such reliance conducted defendant to the mines, showed him their situation, and in pursuance thereof defendant wrongfully located the mines in the name of himself and another, and refused to allow plaintiff any interest therein. *Held*, that the complaint sufficiently alleged that the disclosure of the mines was procured by means of a previous agreement, to which defendant was a party, to the effect that, if the mines were located, they should be so located that plaintiff should be entitled to a half interest therein.

Department 1. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by John Stewart against Nelson G. Douglass and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

E. Edgar Galbreth and Barstow & Variel, for appellant. Titus & Shaw, Valentine & Newby, Patterson Sprigg, and Henderson, Wright & Schoonover, for respondents.

SHAW, J. The court below sustained a demurrer to the fourth amended complaint, denied the application of the plaintiff to file a fifth amended complaint, and thereupon rendered judgment dismissing the action. From this judgment the plaintiff appeals.

It was not error for the court to refuse to allow further amendments to the complaint. When a demurrer is sustained to a complaint, it is within the discretion of the court either to allow an amended complaint to be filed, or to give judgment forthwith in favor of the defendant. The appellate court will in every such case sustain the action of the court below, whatever course it may take, unless it is made to appear by the record that there has been an abuse of discretion. The plaintiff merely asked leave to file an amended complaint, and, so far as the record discloses, did not show that there were any allegations of fact omitted from the complaint to which the demurrer had been sustained, which, if inserted therein, would in any respect change its legal effect, nor make any statement whatever of the grounds or reasons for making the application for leave to amend. There was clearly no abuse of discretion shown. Kleinclause v. Dutard (Cal. Sup.) 81 Pac. 516, 518. The right to amend after the filing of a demurrer is absolute only when it is exercised before the demurrer is argued and submitted to the court for decision. Code Civ. Proc. § 472.

The principal question in the case is the sufficiency of the facts stated in the fourth amended complaint to constitute a cause of action to enforce a resulting or constructive trust. The plaintiff, by his own exertions and explorations, discovered, upon vacant government land in the county of San Diego, a valuable mine of certain mineral known as "lepidolite," a variety of mica, and sent samples thereof to a glass manufacturing company in New Jersey to be tested. The defendant Douglass was the secretary of said company, and, so far as appears, a stranger to the plaintiff. He immediately wrote to plaintiff, saying that he expected to be in California in the then ensuing month of February, 1898, asking plaintiff to be silent about the discovery until he, Douglass, could get to California, and stating that there might be something to their mutual advantage in said mineral deposits. In April, 1898, Douglass called on plaintiff in Los Angeles, and plaintiff then informed him of the discovery and of the nature and extent, but not the location, of said deposits. Douglass said that, if the mineral proved valuable for glass manufacture, his company would build a glass plant in Los Angeles, but that "it would be better for plaintiff and Douglass if they would retain the ownership of the mines themselves and sell the mineral to the glass company." The circumstances which it is claimed are sufficient to create the trust in favor of plaintiff are then alleged as follows: "That said defendant was informed at said time, that he (plaintiff) had a stone location on a part of said mineral property, being the property known as the 'Mission' claim, but plaintiff stated to said defendant that, if the claims were taken up as mining claims, that he (plaintiff) would be entitled to an undivided half interest therein, and to this the defendant then agreed, and stated that he understood that, and that that was satisfactory to him. The plaintiff believed the statements and representations made to him by said defendant Douglass, and relied on said statements and representations and had full confidence in said Douglass and his said representations, and in consequence of such reliance he (plaintiff), on April 6, 1898, told said defendant of, and went with him to, and showed to him, said defendant, said ledges or lodes of lepidolite mineral herein described, and it was then and there concluded, understood, and agreed by and between said defendant Douglass and plaintiff, in consideration of the premises, and in accordance therewith, and of the consent of plaintiff then given thereto, that said defendant Douglass would without unnecessary delay, locate, or cause to be located, both of said ledges or lodes of lepidolite mineral as mining locations or mining claims, in the names of plaintiff and said defendant, Douglass"—so that plaintiff would appear to be the owner of an undivided half thereof. It is further alleged that Douglass did locate the deposits as mining claims, but that, instead of locating them in their joint names as he agreed to do, he located one in his own name and the other in the name of the defendant Rosalind O. Butterfield, who it is averred, had full knowledge of the agreement. Defendants realized some $30,000 from the proceeds of minerals mined therefrom, and upon due demand have refused to convey to plaintiff any interest in the mining claims, or to account for the moneys received. It is not alleged that the plaintiff furnished any money or paid any of the expenses of surveying the claims, marking the boundaries, making the locations, or of working the mines, nor that he in any way whatever assisted therein.

We are of the opinion that where one who has, by his own labor and at his own expense, discovered a mine, but has not made a location thereof under the mining laws, afterwards discloses to another the location of such mine, in consideration of, and in reliance upon, an agreement or understanding between them to the effect that the mine, when located, shall be the joint property of both, and where, in pursuance of such understanding, the further agreement is then made that the latter will locate the mine in their joint names, or for the benefit of both, so that each shall appear to be a half owner thereof, the subsequent location of such mine by the latter in the name of himself alone, without the consent of the discoverer, will raise a resulting trust in favor of the discoverer, with respect to the half interest which was to belong to him, under the agreement. The time and labor expended in making the discovery, coupled with the information given as to the situation of the mine, would be a sufficient consideration to support the agreement to make the location in their joint names, and to satisfy the demands of equity that there shall be an adequate and substantial consideration in order to raise a resulting trust. The manner of the pleading in the present case, it must be admitted, is crude and informal, but we think in substance it meets the propositions we have just stated. It is not expressly alleged that the plaintiff was induced to show the location of the mine by the promise of the defendant that, if he would do so, the defendant would make the location for plaintiff's benefit. This, however, is substantially stated. The averment that the plaintiff said that, if the claims were taken up, the plaintiff would be entitled to a half interest therein, that defendant agreed to this, said he understood it, and that it was satisfactory to him, must be understood to mean that it was agreed that, if either party made the location, the plaintiff was to have a half interest in the claims. On the principle that the greater includes the less, this would be, in effect, an agreement by defendant that, if he located the mines, the plaintiff should have a half interest therein. The allegation following this, to the effect that the plaintiff "relied on said statements and representations," and "in consequence of such reliance" conducted the defendant to the mines and showed him their situation, may reasonably be understood, and, in view of the immediate context and other general averments, should be construed as the equivalent of an allegation that the disclosure thus made to the defendant was made by the plaintiff on the faith of, and in consequence of, the agreement previously stated to the effect that, if either party located it, plaintiff was to be a half owner therein. The words "statements and representations" are not technically the same as the word "agreement," but, in view of the connection in which the words appear and the previous and subsequent allegations of the complaint, we think it is clear that they were intended to refer to the previously alleged agreement, and that they should be so understood. The complaint, therefore, sufficiently shows that the disclosure was made and procured by means of the previous agreement, to which the defendant was a party, to the effect that, if he located the mines, they should be so located that the plaintiff should have a half interest therein. It is then alleged that at this juncture the parties made a formal agreement that the defendant should locate the mines in the names of both, and in such a manner that the plaintiff should appear of record to be a half owner thereof, but that, instead of doing so, he located them in the name of himself and another, and afterwards repudiated all interest of the plaintiff therein. Upon these facts a resulting trust would be created in favor of the plaintiff against the defendant Douglass and any third person taking with notice of plaintiff's rights, and such parties would be declared in equity to be trustees for the plaintiff, and would be compelled to hold such half interest in trust for him and for his benefit.

Upon the construction we have thus given to the language of the complaint, it is sufficiently certain with respect to the terms of the trust and the description of the property. The consideration is substantial and adequate. It is not claimed that the complaint is defective in other respects. Notwithstanding the informal character of the pleading, we think the complaint states a cause of action to enforce a resulting trust and for an accounting of the proceeds of the property embraced in the trust, and that the demurrer should have been overruled.

The judgment is reversed.

We concur: ANGELLOTTI, J.; McFARLAND, J.

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148 Cal. 521

McDOUGAL et al. v. FULLER et al. (L. A. 1,447).

(Supreme Court of California. Jan. 24, 1906.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS—DEED OF TRUST—MODIFICATION BY COURT—BINDING EFFECT ON CREDITORS.

A complaint, in a suit by trustees in a deed for the benefit of creditors to settle their final accounts, which alleged that the conditions of the deed were duly modified by decree made in the superior court in a certain action, showed that the creditors were parties to such action; for the conditions of the deed could not be changed unless they were parties, and the modifications must bind them.

2. SAME — CLAIMS — PAYMENT — PROPORTIONAL SHARE OF ASSETS.

A deed to trustees for the benefit of creditors provided that all claims against the grantor not bearing interest by agreement should bear 7 per cent. interest from a specified date, and all claims bearing interest by agreement should continue to bear the interest agreed on. The principal of each claim was paid in full. The amount remaining was insufficient to pay all the accrued interest. *Held*, that each creditor was entitled to his share of the amount remaining, ascertained by determining the amount of interest due each under the agreement.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assignments for Benefit of Creditors, § 927.]

3. SAME — COMPENSATION OF TRUSTEES — AUTHORITY OF COURT—TERMS IN TRUST DEED—EFFECT.

A deed to trustees for the benefit of creditors authorized the trustees to sell the property on it being found impracticable to use it at a profit, and directed that the proceeds should be devoted "to the expenses of executing this trust, if any portion of the expenses may then remain unpaid, including reasonable counsel fees and also the sum of $500 to the trustees collectively in full for all services," etc. The services rendered by the trustees were different in extent and character from the services contemplated at the execution of the deed. *Held*, that the provision for the compensation of the trustees did not prevent the court from allowing a greater compensation for their services.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assignments for Benefit of Creditors, §§ 1153, 1157.]

4. SAME—JUDGMENT—SETTLING ACCOUNTS OF TRUSTEES—FORM.

The court in settling the final accounts of trustees in a deed of trust for the benefit of grantors has authority to make an allowance to the trustees for further expenses in complying with the judgment.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assignments for Benefit of Creditors, §§ 1153, 1157.]

5. Same — Setting Aside Final Settlement —Error—Sufficiency.

An error in the settlement of the accounts of trustees in a deed for the benefit of creditors, whereby a creditor is deprived of less than $12, is not sufficient to set aside the judgment, where the trustees had received and disbursed over $500,000 among many creditors.

Department 1. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by William McDougal, as successor to James Spiers, deceased, and others, against Thomas S. Fuller and others. From a judgment for plaintiffs, defendant Thomas Johnson appeals. Affirmed.

Kendrick & Knott, for appellant. A. Heynemann, W. J. Hunsaker, and Graves, O'Melveny & Shankland, for respondents.

ANGELLOTTI, J. This action was brought by plaintiffs to obtain a decree settling their final accounts as trustees for the benefit of the creditors of the Golden Cross Mining & Milling Company, a corporation, awarding them compensation for their services, and distributing the trust property to those entitled thereto. The defendants are the many creditors of said corporation. The lower court made the desired decree, distributing the residue of property, consisting of $37,785.73 in money, to the parties deemed entitled thereto. This is an appeal from the judgment upon the judgment roll; defendant Johnson being the sole appellant. Johnson filed his written appearance in the court below, and therein stated that he submitted "to the court, without further answer, all questions relating to the allowance of the account of the plaintiffs, all questions relating to the allowance of attorney's fees, and all questions relating to the compensation of the trustees." He denied none of the allegations of the complaint, and set up no new matter, resting entirely upon the allegations of the complaint. As to him, therefore, the only question is as to whether the complaint warrants the decree, so far as it affects him.

From the complaint the following facts substantially appear, viz.: On January 4 and 9, 1896, the corporation made deeds of its mining property to the trustees, in trust for the benefit of all its creditors, both those named in a schedule annexed thereto and such others as might be found to be creditors and whose claims were duly approved. Under the terms of the deeds of trust the trustees were to superintend the working of the property receive all money accruing from the same, and pay all expenses, and from the net proceeds make equal pro rata distributions to the claimants. By the terms of the deeds the trust was to continue for 15 months, unless the claims were paid in full before, or the profitable working of the mine found to be impracticable. If, at the end of 15 months, any part of the indebtedness remained unpaid, or sooner, if it was found impracticable to work the mine at a profit, the trustees were empowered to sell the property at public auction, after notice, and devote the proceeds, first, to "the expenses of executing this trust, if any portion of the expense may then remain unpaid, including reasonable counsel fees, and also, the sum of five hundred dollars to the trustees collectively, in full for all services"; second, the remaining indebtedness; and, third, the surplus to the grantor. It was provided that all claims against the corporation not bearing interest by agreement should bear interest from April 1, 1896, at the rate of 7 per cent. per annum, "and all claims and demands secured hereby that bear interest by agreement shall continue to bear the same rate of interest as may have been agreed upon by the grantor." Upon the execution of these deeds the trustees entered into possession and operation of said mining property, and continued therein until they were compelled to deliver such possession to a receiver appointed by the superior court of San Diego county, in an action brought by the Free Gold Mining Company against them and others; the names of the persons other than the trustees, who were parties defendant, not appearing in the action. It is alleged in the complaint herein "that numerous clauses, terms, conditions and provisions of the several trust deeds hereinbefore set forth were modified, superseded, and in whole or in part abrogated in and by those certain orders, judgments, or decrees, duly given and made in and by the superior court of the county of San Diego, state of California, in an action pending therein, entitled 'No. 10,215, Free Gold Mining Company, Plaintiff, v. James Spiers et al., Defendants,' of date November 28, 1897, and also the 13th day of April, 1898, of which the following are copies, respectively, to wit." Then follow copies of the stipulations and orders referred to.

This allegation must, of course, be here taken as admitted, and it must be assumed in support thereof that the creditors were parties defendants in that action; such assumption being the only one consistent with the allegation, and there being absolutely nothing in the record inconsistent therewith. Terms, conditions, and provisions of the trust deeds affecting the rights of the creditors among themselves and against the trustees could not be changed in an action to which the creditors were not parties, and the allegation that such terms, etc., were changed in certain respects by orders, etc., duly given and made in a certain proceeding, necessarily implies a proceeding in which such changes could be made, viz., one to which they were parties, where there is nothing to indicate that they were not parties. Appellant's assumption that the creditors were not parties to the San Diego action finds absolutely no support in the complaint, upon which alone the questions here must be determined. So far, therefore, as the stipulations and orders purport to change the conditions and provisions of the trust deeds as to the relative rights of the creditors as against the trustees and among themselves, such stipulations and orders must here be taken as binding on the creditors. The exact nature of the San Diego action is not shown, except so far as it appears that it was effectual to prevent the further working of the mine by the trustees, and the receipt of any proceeds therefrom for the benefit of the creditors of their grantor, except to such extent as allowance might be made therefor by the courts in that action.

It is apparent that the trustees claimed in such action that the rights of such creditors were paramount to those of the plaintiff in that action, and that, as a result of their efforts, there was ordered to be paid by the receiver from the proceeds of the mine obtained by him such amounts as would, in the judgment of the court, pay the creditors in full; the amount of such total indebtedness being determined, for the purposes of that action, by the court in that action. Under the authorization of the superior court large amounts of money were paid by the receiver to the trustees, and by them distributed to the creditors, until, at the commencement of this action, the great bulk of the creditors had received the full face amounts of their claims, exclusive of interest, and the remainder had received 80 per cent. of their claims, exclusive of interest. Over $500,000 had been received and disbursed by the trustees. At that time the trustees had on hand certain money and a claim against the receiver adjudged by the superior court in the hereinbefore referred to action to amount to $19,800, which was subsequently paid, the two aggregating $37,785.73, and this constituted all of the trust property.

Defendant Johnson was one of the creditors of the corporation, holding its note for $7,000, dated June 18, 1894, bearing interest at the rate of 8 per cent. per annum from February 15, 1894, on which there had been paid, prior to the execution of the deed of trust, the sum of $2,785, leaving a balance of $4,215, bearing interest. The company was further indebted to him in the sum of $75 on an open account. At the time of the commencement of this action he had been paid the full amount of his claims, exclusive of any interest. The complaint showed that the trustees had been involved in much expensive litigation presenting questions as to the validity of the trust, and their right to the property for the benefit of creditors. There can be no question that the showing made was sufficient to warrant such allowance of compensation as was made to them for their services, unless the court was limited to an aggregate of $500 by the terms of the trust deed. The trial court, by its decree, adjudged that the $37,785.73 remaining be distributed as follows, viz: (1) $4,968 to the trustees as and for their compensation. (2) $4,638.09 to the creditors who had received only 80 per cent. of their claim; the same being the remaining 20 per cent., exclusive of any interest. Compliance with this provision would satisfy every claim so far as principal is concerned, leaving due to each claimant the interest to which he was entitled. (3) The amount remaining being insufficient to pay the interest in full to each creditor, a sum equal to 14 per cent. of the original face amount of his claim, exclusive of interest, by way of interest thereon. (4) The balance, $604.25, was allowed to plaintiffs to cover the further expenses and disbursements to be incurred in complying with the judgment.

Appellant insists that he was entitled to a larger portion of the amount available to creditors than was awarded to him; and in one respect his claim is justified by the record. The allowance of 14 per cent. of the principal of his claim put him, as far as interest was concerned, on the same footing with all the other creditors; while, under the terms of the trust deeds, he was entitled to a higher rate of interest than the great bulk of the creditors. We have already set forth the provision of the deeds in this regard, and as to this provision no change or modification was attempted to be made by the superior court in the Free Gold Mining Case. The allegations of the complaint show that all of the indebtedness, except $43,546.40, which was less than one-sixth of the total indebtedness, bore not exceeding 7 per cent. interest, and a small portion only 6 per cent.; and that the $43,546.40 bore interest at the rate of 8 per cent., and the remainder bore interest at 7 and 6 per cent., was recognized and stated in the stipulations and orders filed and made in such action. Whatever amount of assets was available for the payment of creditors, each creditor was entitled to the same proportion of the exact amount due him. This proportion could be ascertained only by determining the amount of interest due him under the terms of the agreement. The sum total of the amount due all the creditors would show the total remaining indebtedness, and this divided by the amount available for the creditors would give the amount of dividend. Each creditor would thus receive his proportionate share. This appears too plain to require further discussion. If, as to all the claims, interest commenced at the same date, the method followed in the lower court would have been correct if all the claims bore the same rate of interest, but, as they did not, it was in disregard of the terms of the agreement, and in view of the comparatively small number of creditors entitled to 8 per cent. interest operated to deprive such creditors of some portion of the assets to which they were entitled.

There is nothing in the contention that under the allegations of the complaint appellant was entitled to only 7 per cent. interest. A mere addition of the amounts of the claims specified as carrying 8 per cent. interest will demonstrate that the amount of the note was included in the $43,546.40 alleged to bear interest at the rate of 8 per cent. per annum, and in the specific allegation as to the note it is declared to bear interest at the rate of 8 per cent. The allegation as to 7 per cent. manifestly has reference only to the balance due on the open account, $75. This is the only respect in which appellant was not awarded the proper proportion of the available residue. Under the stipulations and orders in the San Diego action, interest on various claims was to be paid to the creditors only from November 1, 1897. On the record before us this must be held conclusive, so that, whatever may have been the original agreement as to interest, all creditors were thereby placed in the same position as to the time from which interest should be paid.

As to the other points made by appellant, we find no error in the action of the lower court. The services rendered by the trustees were entirely different, both in extent and character, from the services contemplated by the parties at the time of the execution of the trust deeds, and there is no such explicit provision in such deeds as would make the stipulation as to $500 compensation conclusive under the changed conditions. Under the circumstances here appearing we have no doubt as to the power of a court of equity to grant such compensation as would be reasonable. We cannot say that the amount allowed was at all excessive.

In passing, it may be said that the complaint alleged that 5 per cent. upon the full amount accounted for by the trustees, which would give them more than five times the amount allowed, would be a reasonable allowance, and expressly asked that the court fix the compensation, and the appellant nowhere objected to this being done, or contested the claim of plaintiffs in this respect. Nor was it improper for the court to make such allowance as was necessary for such further expenses and disbursements as might be incurred in closing the trust, by complying with the terms of the judgment. Such an allowance was a necessary incident of the settlement of the account and the closing of the trust, and was fully authorized by the allegations of the complaint. We cannot say, upon the record before us, that the allowance was excessive.

Appellant sets forth a long list of persons, firms, and corporations, to whom, as creditors, portions of the residue were ordered paid by the decree, who, he urges, were not specified in the statement of claimants contained in the complaint. Many of these apparently claimed under and as a part of the claim of one W. W. Stewart, receiver, for $10,576.63, which claim, the complaint shows, was a part of the indebtedness secured. Others will be found specified in the list of claimants for the exact amount stated in the decree. We have examined the list, and find no warrant for holding that the complaint did not justify the inclusion of all the specified parties. There is no other point requiring notice.

The amount of which appellant was improperly deprived by reason of the failure to fix his dividend upon the basis of 8 per cent. interest, instead of 7 per cent. interest, could not exceed the sum of $12. This amount is altogether too small to justify the reopening of the matter of the distribution of this fund among the very many creditors affected, and we are satisfied that under the circumstances the de minimis rule should be held to apply.

The judgment is affirmed.

We concur: SHAW, J.; McFARLAND, J.

(148 Cal. 437)

COUNTY BANK OF SAN LUIS OBISPO v. JACK. (L. A. 1,521.)

(Supreme Court of California. Jan. 15, 1906.)

1. APPEAL—TIME OF TAKING.

Where a judgment was entered in the trial court on June 20, 1903, and the notice of appeal therefrom was not served and filed until December 23, 1903, the appeal was not taken within six months, and was ineffectual.

2. SAME — SUFFICIENCY OF COMPLAINT OR FINDINGS—REVIEW.

The sufficiency of the complaint or findings to support the judgment cannot be considered on plaintiff's appeal from an order denying its motion for a new trial, where the judgment was for the defendant after trial on the merits, and the defendant insists that the judgment should be affirmed because the complaint states no cause of action.

3. SAME—AMENDMENT.

An erroneous judgment in favor of defendant will not be sustained, on plaintiff's appeal from an order denying its motion for a new trial, because the complaint did not state a cause of action, where the alleged defect was merely technical, and could be remedied, if necessary, by amendment.

4. JUDGMENT — COLLATERAL ATTACK — SERVICE.

Where a judgment recited that it appeared to the court's satisfaction that defendants had been duly summoned, etc., and had made default, it would be presumed, on collateral attack, that proof of valid service was regularly made, apart from an alleged defective affidavit of service.

5. SAME.

Where there was no affirmative statement, in an affidavit of service on two defendants, that but one copy of the complaint and summons was delivered to the two, it would be presumed, on a collateral attack on a judgment reciting that proof of a valid service had been made, that a copy was properly delivered to each of the defendants.

6. TAXATION — TAX DEEDS — RECITALS — EVIDENCE.

Pol. Code, § 3897, provides that whenever the state has become the owner of any property sold for taxes, and the deed to the state has been filed with the controller, he may thereupon authorize the tax collector to sell the property, etc., and section 3898 declares that on receiving the amount of the sale the collector may execute a deed to the purchaser reciting the "facts necessary to authorize such sale and conveyance," which deed shall convey all the interest of the state in the property, and shall be prima facie evidence of all the facts recited therein. *Held*, that the requirement that the deed shall recite the facts necessary to authorize the sale does not authorize a recital of the chain of title or of the facts and proceedings by which the state obtained title to the property, and hence a deed from the state, reciting a conveyance of the land in question to the state, was insufficient to show the vesting of the title of the original owner in the state and a conveyance of such title to the state's grantee.

Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the County Bank of San Luis Obispo against J. F. Jack. From a judgment in favor of defendant, and from an order denying plaintiff's motion for a new trial, it appeals. Reversed.

Smith & Allen, for appellant. Stearns & Sweet, for respondent.

SHAW, J. The record purports to present appeals from the judgment and from the order denying the plaintiff's motion for a new trial. The judgment was entered in the court below on June 20, 1903, and the notice of appeal from the judgment was served and filed on December 23, 1903, which was more than six months after the entry of the judgment, and consequently after the time within which such appeal could be taken had expired. This court, therefore, has no jurisdiction of that appeal, and the questions arising upon the judgment roll cannot be considered. The objection of the respondent, that the complaint does not state facts sufficient to constitute a cause of action, is no answer to an appeal by the plaintiff from an order denying a motion for a new trial, and cannot be considered. Hall v. Susskind, 120 Cal. 559, 53 Pac. 46; Tompkins v. Montgomery, 123 Cal. 219, 55 Pac. 997; Swift v. Occidental Co., 141 Cal. 165, 74 Pac. 700; Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661. These cases all go to the point that the sufficiency of the complaint or findings to support the judgment cannot be considered upon an appeal by the defendant from an order denying his motion for a new trial. The principle, however, is equally applicable upon an appeal of the plaintiff from an order denying plaintiff's motion for a new trial, where the judgment below was for the defendant after a trial upon the merits, and the defendant claims that the judgment should be affirmed because the complaint states no cause of action. At all events, this is true in cases like the present, where the alleged defect in the complaint is merely technical, and can be remedied by an amendment, if necessary. Pacific Paving Co. v. Vizelich, 141 Cal. 4, 10, 74 Pac. 352.

The complaint states a cause of action to quiet title. Both parties claim title to the land in controversy under one Henry J. Symonds, the plaintiff by virtue of a foreclosure sale, the defendant by a sale for taxes to the state, and a subsequent sale from the state to the defendant. The defendant claims that the evidence of plaintiff was insufficient to show a valid transfer under the foreclosure sale; the objection thereto being that the judgment of foreclosure under which the plaintiff claims is void for lack of jurisdiction over the persons of the defendants. The mortgage was executed by Henry J. Symonds and his wife, Eliza Symonds. The foreclosure judgment was rendered on default. The first objection is that the proof of service of summons in the judgment roll in the action was made by affidavit, and that the affidavit is defective because no venue is stated therein. The other objection is that the proof does not show a legal service.

We are of the opinion that neither of the objections can be sustained upon the record, upon a collateral attack such as that here made upon the validity of the judgment. The affidavit is not the only evidence in the record in regard to the service of summons. The judgment recites that, the court having heard all the evidence and proofs, it appeared therefrom to the satisfaction of the court "that Henry Symons and Eliza Symons, his wife, the above named defendants, have been duly and regularly summoned to answer unto the plaintiff's complaint herein, and that the default of each defendant for not appearing and answering unto plaintiff's complaint has been duly and regularly entered herein." The case comes within the rule that in all particulars wherein the record is silent or noncommittal the presumption is in favor of the validity and regularity of the action of the court; that unless the record shows affirmatively that something necessary to the jurisdiction of the court was not done, or that something which was required was done in a manner so irregular as to make it void, the presumption is that the thing concerning which the record does not speak, was properly done. Thus in Drake v. Duvenick, 45 Cal. 465, it is said: "The record fails to show by direct assertion that the copy of the summons was delivered to Dorland, but as it fails to show the contrary, and as the court must have found from the return or other evidence before it that it was so delivered —for upon that its jurisdiction depended, and it necessarily decided that it had jurisdiction, as the first point in the case—we think it one of the cases where presumption will now come to the aid of the judgment." With regard to the venue, the affidavit does not affirmatively show that the oath of the person making the affidavit of service was administered by the notary public in the county for which he was appointed as such notary, but neither does it show that it was not administered within that county. It is silent as to the place where the oath was taken. The court affirmatively finds from the evidence that the defendants were duly and regularly summoned. This it may have found either from evidence that the oath was administered in the proper county, or from other evidence of service which is not in the record. The alleged defect in the proof, as set forth in the affidavit, is that the affiant therein states that he personally served the summons on the defendants "by delivering to and leaving with said Henry Symons and Eliza Symons, said defendants, personally, a copy of said summons attached to a copy of the complaint in said action," and that this statement does not show that he delivered to each of the defendants a copy of the complaint and summons, but that, for aught that appears therefrom, he may have delivered but one copy to the two of them for their joint behoof, and that this latter form of service would not be a legal service. It must be admitted that the affidavit of service is ambiguous on this point. But here again there is no affirmative statement that but one copy was delivered to the two defendants, and proof that each received a separate copy would not be contradictory of the affidavit, but would be in harmony therewith. The recital in the judgment and the presumption of law come to the aid of the specific proof appearing in the record, and it is to be presumed from the recital and from other evidence satisfactory to the court that it appeared that each of the defendants at the time of the service received a copy of the summons and complaint. Sacramento Bank v. Montgomery, 146 Cal. 751, 81 Pac. 138; People v. Davis, 143 Cal. 678, 77 Pac. 651; Freeman on Judgments, § 130. It may be added that in Reavis v. Cowell, 56 Cal. 588, it was held that a statement of the venue therein is not necessary to the validity of an affidavit. The citation of authority holding that the sufficiency of such proof of service may be inquired into upon a direct appeal from the judgment does not detract from the force of the principles above stated. They have no application to cases where the attack is collateral.

The next question is whether or not the deed to the defendant from the state of California is valid and sufficient to show the vesting of Symond's title in the defendant. There was no other evidence tending to show that the title of Symonds had been transferred to the defendant, no deed to the state having been introduced, and the sufficiency of this deed as evidence of such transfer must depend on the sufficiency of the recitals in the deed to prove a previous transfer of the title from Symonds to the state. The deed introduced did not purport to transfer title from Symonds to the state. Its purport and its only efficacy as a conveyance was to transfer the title of the state, such as it had, to the defendant. It contained a great many recitals of matters of fact, and among other things stated that in the year 1894 the land was the property of Symonds, and was regularly assessed to him for the taxes of that year, which he failed to pay when due; that the land was then advertised and sold for the payment of such taxes, then delinquent, on July 3, 1895, and was on that day in pursuance of said proceedings sold to the state of California for the nonpayment of said taxes; and that afterwards, on August 1, 1901, in pursuance of said sale, there having been no redemption therefrom, the tax collector of the county duly executed a deed conveying to the state all the said property, which deed was duly recorded and thereupon filed in the office of the state controller. Further recitals were made to the effect that the controller thereafter authorized the tax collector of Kern county to sell said land at public auction, in the manner provided by law; that the tax collector had accordingly advertised it for sale, and, the defendant being the highest bidder, had sold it to him for the sum of $12. The contention of the respondent is that these recitals, contained in the deed from the tax collector to the defendant, are sufficient evidence of the previous sale of the interest of Symonds to the state at the sale for delinquent taxes, and of the deed of the tax collector to the state in pursuance thereof.

This claim cannot be sustained. The only authority for such a proposition is found in sections 3897 and 3898 of the Political Code. Section 3897 provides that whenever the state has become the owner of any property sold for taxes, and the deed to the state has been filed with the controller, as provided in section 3785, the controller may thereupon in writing authorize the tax collector of the county to sell the property or any part thereof, as he may deem advisable, at public auction, for cash after certain prescribed notice of the sale, and that the tax collector may thereupon sell the same in the manner prescribed. Section 3898 provides what shall be done with the money received at such sale, and thereupon proceeds as follows: "On receiving the amount bid, as prescribed by the preceding section, the tax collector must execute a deed to the purchaser, reciting the facts necessary to authorize such sale and conveyance, which deed shall convey all the interest of the state in and to such property, and shall be prima facie evidence of all the facts recited therein." This does not go so far as the respondent contends. It cannot be allowed to have the effect of operating as proof of the execution of a previous deed whereby the title of the taxpayer had been transferred from him to the state. It would be most extraordinary if it had been intended to provide that proof of such divestiture of title to property could be made by the mere ex parte recital of an executive officer set forth in a subsequent conveyance to which the owner was not a party. No such purpose was contemplated by the Legislature. The statement that the deed should be prima facie evidence of all facts recited therein cannot enlarge the office of such recitals so as to make them evidence of facts not required to be recited therein. The requirement that the deed shall recite the facts necessary to authorize the sale and conveyance refers only to the facts necessary to authorize the tax collector to sell the title of the state, the title which the state had previously acquired. It does not authorize or require the recital of the chain of title, or of the facts and proceedings whereby the state obtained title to the property. Evidence of those facts is provided for by section 3787, referring to the deed of the tax collector to the state when the tax sale is not redeemed. It declares such deed to be "conclusive evidence of the regularity of all other proceedings from the assessment by the assessor, inclusive, up to the execution of the deed." The recitals required by the provisions of section 3898, above quoted, refer to the authorization of the sale by the controller, and the proceedings for the sale made in pursuance of such authority, and, perhaps, of the fact of the filing of the deed in the office of the controller, those being acts occurring subsequent to the vesting of title in the state, and the latter being necessary to give the controller authority to act in the matter. So far as it recites other matters, it is ineffectual as evidence, and the proof of the defendant was therefore not sufficient to show that he had acquired the title of the original owner, Symonds.

Other questions are presented and argued which are not necessary to the decision of this appeal, but which may arise upon a new trial in the lower court. As we cannot perceive with certainty precisely what questions will arise, nor the particular phase of them that may be presented, we cannot discuss them intelligently, and we therefore refrain from expressing any opinion thereon. The findings that the defendant is the owner of the land and that the plaintiff is not the owner thereof are not sustained by the evidence and the motion for a new trial should have been granted.

The order denying a new trial is reversed.

We concur: ANGELLOTTI, J.; McFARLAND, J.

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148 Cal. 507

PEOPLE v. GRAY. (Cr. 1,289.)

(Supreme Court of California. Jan. 18, 1906.)

1. WITNESSES — IMPEACHMENT — INCONSISTENT STATEMENTS.

In homicide, where a witness testified to a vague description given by deceased of his assailant, evidence of the arrest of another person, prior to defendant's arrest, on the description given to the authorities by the witness, was not admissible to impeach the witness, in the absence of a showing that the person previously arrested did not answer the vague description testified to by the witness as well as did defendant.

2. CRIMINAL LAW — EVIDENCE — ARREST OF OTHER PERSONS.

The previous arrest of another person than defendant on suspicion of having committed the crime is inadmissible on the issue of defendant's guilt.

3. SAME—OPINIONS—PERSONAL IDENTITY.

In homicide, the opinion of a witness as to whether another person arrested prior to defendant's arrest answered the description given by deceased of his assailant was incompetent.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1043.]

4. WITNESSES — IMPEACHMENT — INCONSISTENT STATEMENTS—FOUNDATION.

Under the express provisions of Code Civ. Proc. § 2052, a witness cannot be impeached by evidence of statements made by him until the statements are related to him, with the circumstances of time, place, and persons present, and he is asked whether he made the statements, and, if so, he must be allowed to explain them.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1233–1242.]

5. HOMICIDE — EVIDENCE — DESCRIPTIONS OF ASSAILANT.

In homicide, a description of the assailant given to the authorities by a witness as the description given the witness by deceased was inadmissible for any purpose other than in impeachment of the witness.

6. WITNESSES—CROSS-EXAMINATION.

In homicide, an attempt to prove that a person arrested before defendant for the crime wore clothes answering the description given to witness by deceased, as testified to by the witness, was not proper cross-examination of the witness.

7. SAME—IMPEACHMENT—ARREST FOR DRUNKENNESS.

Under Code Civ. Proc. § 2051, providing that a witness may be impeached by contradictory evidence or by evidence of bad reputation for honesty, but not by evidence of particular wrongful acts, except that it may be shown that he has been convicted of a felony, evidence that a witness has been arrested for being drunk is not admissible in impeachment of the witness.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1117, 1126.]

In Bank. Appeal from Superior Court, Sacramento County; E. C. Hart, Judge.

W. M. Gray was convicted of murder, and appeals. Affirmed.

Charles B. Harris and J. L. Copeland, for appellant. U. S. Webb, Atty. Gen., and C. N. Post, Asst. Atty. Gen., for the People.

ANGELLOTTI, J. The defendant was convicted of murder in the first degree in the superior court of Sacramento county, upon an information filed by the district attorney of that county, charging him with the killing of Wong Koung, a Chinaman. His motion for a new trial was denied, and he was sentenced to suffer the penalty of death. From the judgment and from an order denying his motion for a new trial the defendant prosecutes this appeal.

The killing of deceased was done in the perpetration of the crime of robbery. There was no claim that the evidence was insufficient to justify the verdict. The only points made in behalf of the defendant on this appeal are as to alleged errors in the rulings of the trial court in reference to the admission and rejection of evidence. There was no eyewitness of the commission of the crime which resulted in the death of the deceased. The deceased, under a sense of impending death, gave to his friend, Chin Coy, and another Chinaman, a partial description of his assailant, which, as testified to by Chin Coy, was as follows, viz.: A "nigger" man, big like Chin Coy, with a light hat and light sweater, a vest, and no coat. This was the extent of the description given by deceased, as testified to by Chin Coy, and Chin Coy had no other knowledge as to the description or identity of the assailant. The defendant is a negro, and there is nothing in the record showing how he, in other respects, answered the description testified to.

1. It was attempted by defendant to show that, upon the description given by Chin Coy to the authorities, another negro was arrested prior to defendant's arrest, on suspicion of having committed this murder. The court refused to admit this evidence. In this there was no error. There was no pretense that the negro so arrested did not answer the vague and uncertain description testified to by Chin Coy as well as did the defendant, so that, even if a proper foundation for the impeachment of Chin Coy had been laid, which was not the case, the proposed testimony could not have tended to show, so far as appears, anything inconsistent with the testimony of Chin Coy in regard to the description given by the deceased. We can conceive of no other ground upon which such evidence would have been admissible. Certainly, it cannot be held that the mere arrest of one person on suspicion of having committed a crime is material upon the question as to whether or not another person committed that crime.

2. Defendant sought to show by cross-examination of Chin Coy that in his opinion another negro, arrested prior to defendant's arrest, answered the description given by deceased, and also, by such negro, that Chin Coy stated that he (said negro) answered the description given by the deceased. It is apparent that the opinion of Chin Coy as to whether the man arrested measured up to the description testified by him to have been given by the deceased was immaterial and incompetent. An opinion as to the identity of a person, based solely upon the statement of another, is not admissible to prove identity. Such an opinion, to be admissible, must be based upon personal knowledge of the person identified, and be the result of the witness' recollection of the person and the facts connected with his seeing or hearing him, and not be entirely the result of information derived from others. Lawson on Expert and Opinion Evidence, pp. 323, 324. Where the opinion of the witness is based solely on a description given by another, that description being given, all persons are as able to judge as to whether one answers the description as is the witness himself, and opinion evidence upon the proposition is not admissible. (See Wigmore on Ev. § 557; and Whittier v. Town, 46 N. H. 23, 88 Am. Dec. 185, for discussion of rule.) Any prior statement by Chin Coy to another, to the effect that another than defendant answered the description given by deceased, could therefore be admissible only for the purpose of impeaching him in the matter of the evidence given by him as to the description furnished him by deceased. If he had previously stated that another, who did not in fact answer the description testified to, did answer the description given by deceased, it would be a statement inconsistent with his testi-

mony as to the description given by deceased. As already said, however, there was no claim that the other negro arrested did not answer the description testified to as fully as did the defendant, and the evidence was not offered for the purposes of impeachment, but simply to show the opinion of Chin Coy as to identity. No foundation for any such impeachment was laid, or sought to be laid, upon the cross-examination of Chin Coy, which was an essential prerequisite to the proof of inconsistent statements by him. Code Civ. Proc. § 2052.

3. A police officer was asked by deant to detail the description of the assailant given to him by Chin Coy, as the description given by the deceased, and an objection to the question was sustained. Such evidence could have been admissible only by way of impeachment of Chin Coy, and, no foundation for any such impeachment having been laid, the objection made on that ground was properly sustained. It is proper to say that defendant's counsel expressly disavowed any purpose of impeachment.

4. We cannot see that the attempt to prove, on the cross-examination of Chin Coy, that the other person arrested wore clothes answering the description given by the deceased, as testified by him, was legitimate cross-examination. The objection on that ground was properly sustained.

5. The court properly sustained an objection to a question asked a witness, as to whether he knew that the witness Mrs. Wilkes, or Chick Dorsey, as she was called, had been arrested for being drunk. The question involved in the case was as to her character for truth, honesty, and integrity, and the proposed evidence did not go to any of these traits, nor could she be impeached by evidence of particular wrongful acts not amounting to a felony. Code Civ. Proc. § 2051. Under the provisions of our Code, a person cannot be impeached by evidence of particular wrongful acts, except that it can be shown that he has been convicted of a felony. People v. Silva, 121 Cal. 668, 54 Pac. 146; People v. Warren, 134 Cal. 202, 66 Pac. 212; People v. White, 142 Cal. 292, 75 Pac. 828.

6. The witness Plunkett, called for the defense for the purpose of impeaching the witnesses Mrs. Wilkes and Grubbs, was asked on cross-examination concerning his feelings towards the members of the police force and the administration of police affairs of the city of Sacramento. As to this, it is sufficient to say that there was nothing in the answers given that was in any way prejudicial to the defendant. This disposes of all the points made for reversal.

The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; SHAW, J.; HENSHAW, J.; LORIGAN, J.

148 Cal. 528

ELLIS et al. v. WITMER et al.

(L. A. 1,487, 1,488.)

(Supreme Court of California. Jan. 24, 1906.)

1. Appeal — Remanding Case for New Trial — Allowance of Amendments to Pleadings—Authority of Lower Court.

Where the Supreme Court, on remanding a cause, merely directs the superior court to allow designated amendments to the complaint, the superior court has authority to allow other amendments as justice demands.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4677–4683.]

2. Same — Subsequent Trial—Former Decision as Law of the Case.

The decision of the Supreme Court on appeal, in a suit to quiet title, that the certificate of sale on default in the payment of a bond issued on a street assessment is void, is the law of the case on a subsequent trial of the suit.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4661–4665.]

3. Same—Conclusiveness.

The decision of the Supreme Court on appeal, in a suit to quiet title, that a bond issued on a street assessment is valid, is the law of the case on a subsequent trial, so far as the objections set up at the former trial are concerned, but not with respect to objections made for the first time on the subsequent trial.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4661–4665.]

4. Municipal Corporations—Enforcement of Assessments — Right of Holder of Certificate of Sale—Equitable Right to Assessment Bond.

A street assessment bond was a lien on a tract of 17½ acres, of which five-eighths was owned by a corporation and three-eighths by a third person. The corporation subsequently obtained 11 acres and the third person 6½ acres. Thereafter a purchaser of the 6½ acres deposited a specified sum in a bank, pursuant to an agreement with the corporation and the third person to the effect that on the bond being adjudged valid the deposit should pay three-eighths thereof, and on it being held invalid the same should be paid to the third person. The entire tract was sold to pay the bond, and the certificate of sale was purchased by the managing officer of the corporation out of his own funds and with knowledge of the facts. *Held* that, as the certificate of sale was void, the managing officer became in equity the holder of the bond, entitled to insist on full payment, and not bound to accept three-eighths thereof in discharge of the lien on the 6½ acres.

5. Same—Personal Liability.

The remedy of an owner of a part of a tract of land subject to a street assessment bond is to pay the full amount of the bond and compel contribution from the owner of the other part.

6. Same — Enforcement of Assessment — Agreement of Parties—Effect.

A street assessment bond was a lien on a tract of land of which five-eighths was owned by a corporation and three-eighths by a third person. The corporation subsequently obtained 11 acres and the third person 6½. Thereafter a purchaser of the 6½ acres, who conveyed his rights to plaintiff, deposited a specified sum in a bank under an agreement with the third person and the corporation that if the bond was void the same should be paid to the third person, and if the bond was valid the sum should pay three-eighths thereof. The whole tract was sold, and defendant purchased the certificate of sale, and procured an assignment from the third person of his right to the deposit. The deposit was paid to defendant. *Held*, that plaintiff, claiming the 6½ acres, was entitled to have his title thereto quieted against the claim of defendant by reason of holding the certificate of sale.

Department 1. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by Frank Ellis and others against H. C. Witmer and another. From a conditional judgment for plaintiffs, both parties appeal. Modified.

A. B. McCutchen, for appellants. Lynn Helm, for respondents.

SHAW, J. The complaint in this action, in legal effect, states a cause of action against the defendants to quiet title to a tract of land. The defendant, Donegan, was made a party to answer as to a possible interest, which it appears he did not have, and no further reference need be made to him in his character as a party. The action was tried by the court upon an agreed statement of facts, which stands in lieu of findings, judgment was given declaring that the plaintiffs were the owners in fee of the land, and that, upon the payment by plaintiffs to the defendant, Witmer, or into court for him, of the sum of $251, there should be a final judgment in favor of plaintiffs against the defendants quieting the plaintiffs' title against all claims of the defendants. From this judgment both parties appeal.

The claim of the defendants to the land was based solely on a bond issued upon a street assessment levied for an improvement of the street under the Vrooman act and its amendments, and a sale made in pursuance of such assessment and bond. The case was before this court heretofore on an appeal by the then defendants, H. C. Witmer and W. A. Hartwell, city treasurer of the city of Los Angeles. Upon that appeal certain alleged defects in the proceedings on which the street assessment was based were declared by this court to be insufficient to invalidate the assessment, the sale in pursuance of the provisions of the bond act was declared invalid because the notice of sale was defective, the complaint was held insufficient for want of an averment of an offer to pay such sum as should be found justly due on the bond from the plaintiffs to Witmer, the judgment was reversed and "the cause remanded for further proceedings in accordance with this opinion." Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301. In the opinion the court says, respecting the defect in the complaint: "On this account the judgment must be reversed. But, on the case being remanded, the plaintiffs may, if so advised, amend their complaint by offering to pay into the court such portion of the tax as may be determined by the court to be due upon their land, which, as the case is now presented to us, would seem to be three-eighths of the whole, though we are not to be understood as definitely determining this point. * * * If the complaint be not amended, judgment should be entered for the defendants." When the case was remanded the plaintiff filed in the superior court an amended complaint, to which the city treasurer, Hartwell, was not made a party. The amendments consisted of certain allegations relating to a possible interest in the defendant, Donegan, the making Donegan a party defendant, and the addition of allegations relating to a defect in the proceedings for the street improvement, occurring prior to the assessment but not previously alleged, and which, it is claimed, render the assessment void, and the averment of facts upon which, it is claimed, the defendant Witmer is estopped from asserting any lien upon the land. (It should be remarked that in the former opinion it was expressly stated that Donegan should be made a party, and there is no objection to the amendment making him a party.)

The defendant Witmer contends that the effect of the judgment and opinion of this court, upon the former appeal, is such that the superior court in the subsequent proceedings had no power to allow any amendment to the complaint, other than those expressly allowed as aforesaid in the opinion of the Supreme Court. Upon this theory he moved the court below to strike out the other amendments, the denial of which motion he assigns as error. This would be carrying the doctrine of the law of the case entirely beyond its proper limits, and further than is warranted by any decision of this court. When on appeal the Supreme Court remands a case for a new trial, or for further proceedings, the law, as laid down in its opinion, becomes the law of the case and cannot afterwards be disputed by either of the parties, nor disregarded, even by this court, although it may subsequently appear that it was erroneous. But this rule applies to the case in its subsequent course, only so far as the case then presents the same facts and involves the same principles of law. The former judgment and opinion of this court do not constitute an adjudication of the rights of the parties, controlling the subsequent proceedings in the case, to the same extent as a final judgment in another action would be an adjudication, so that parties are thereby estopped as to their rights to the things determined, although they may discover, or be able to present to the court below, new facts or evidence, which may affect their rights, or make a case different from that which was presented on the former appeal. They do not in the least limit the power of the superior court, in its discretion, to permit further amendments of the pleadings, by either party, presenting additional facts which may entitle such party to relief which the facts originally alleged did not warrant. No express leave to permit such further amendments need be given by the Supreme Court, in order that the superior court shall have power to allow them. It would require, at least, an express decision in the case by the Supreme Court to the effect that an amendment, which would otherwise be proper, should not be made in the court below, to take from that court its ordinary powers to allow such amendments as appear to be in furtherance of justice, and necessary or proper, to enable the parties to present their whole case on the merits. The opinion in question contains no such declaration. It merely directs the superior court to allow certain designated amendments. This made it obligatory on that court, in the absence of any showing of any new facts which might have justified a refusal to do so, to give leave to the plaintiff to make the amendments mentioned, but did not in any respect affect its power, which exists after the granting of a new trial as well as before issue joined, to allow such amendments as justice demands. The motion to strike out the additional amendments to the complaint was properly denied.

To give a clear understanding of the points arising on the merits of the case it is necessary to make a statement of facts. The street assessment was made in 1892, and the bond was issued thereon in January, 1893. The proceedings were taken under the street assessment act of 1885, and amendments thereto and the street bond act of 1891. St. 1891, p. 116. At that time the 6½ acres of land here involved was part of a larger tract of 17½ acres, which was owned in common by the predecessors of plaintiff and of Witmer Bros. Company, a corporation, respectively, those of the plaintiffs owning three-eighths and those of Witmer Bros. Company owning five-eighths thereof. In March, 1893, the land was divided, and the 6½ acres set off in severalty to plaintiffs' predecessors, and the remaining 11 acres to the other tenants in common. In June, 1893, Witmer Bros. Company, having become the owner of the 11 acres, began a suit in the superior court against the city treasurer and Donegan, the contractor, who held the street improvement bond, to test the validity of the assessment and bond. One Labory acquired title to the 6½ acres, and on November 19, 1894, was about to sell the same to one Nelson, who demanded some protection or security against the lien of the assessment and bond. For this purpose Nelson deposited $1,390, as part of the price he was to pay to Labory, in the California Bank, and Nelson, Labory, Witmer Bros. Company, and the bank executed the following written agreement concerning the deposit.

"California Bank—Gentlemen: We herewith hand you $1,390.00 to be held by you in escrow to abide the result of the contest now going on as to the validity of bond for $3,168.10 issued in payment for street assessment affecting devision B of lot 1 of block 26 of Canal and Reservoir lands of the city of Los Angeles, for grading, graveling and curbing First street under Los Angeles City Ordinance No. 1,063. It being the intention of this deposit that it shall pay three-eighths of such bond, if the same is determined to be valid and a lien upon said division B of lot 1, block 26, aforesaid, the other five-eighths of such bond to be paid by Witmer Bros. Company. In the event that it is finally determined by the courts that such bond creates no lien upon such property, then the money deposited is to be paid to Leonard Labory, less three-eighths of costs and attorney's fees in contesting the validity of such bond, which amount of costs and attorney's fees are to be retained by the California Bank to satisfy such portion of costs and attorney's fees."

Labory thereupon conveyed the 6½-acre tract to Nelson. The "contest now going on as to the validity of the bond," referred to in this agreement, was the aforesaid suit of Witmer Bros. Company against the city treasurer and Donegan. On December 31, 1897, default having been made in the payment of the bond, the city treasurer, in manner as prescribed by law, and to enforce payment of the bond, sold the entire tract of 17½ acres to D. F. Donegan for $4,435.34, that being the full sum then due on the bond, and issued to Donegan a certificate of said sale, purporting to entitle Donegan, or his assigns, to a deed at the expiration of one year if no redemption was made from the sale. On June 28, 1898, the defendant H. C. Witmer obtained from Labory an assignment of all the interest of Labory in the said deposit of $1,390 in the California Bank, and on July 11, 1898, he purchased from Donegan for the sum of $4,000 the certificate of sale issued to Donegan under the street assessment bond. These purchases were made by Witmer with full knowledge of all the facts affecting the rights of Nelson and of the plaintiffs, who on July 2, 1898, purchased of Nelson the 6½ acres, and succeeded to his interest in the deposit of $1,390, and to his rights under the agreement concerning the same. On August 1, 1898, the plaintiffs offered to pay Witmer, in satisfaction of his claim on their land by virtue of the certificate, three-eighths of the sum paid for the same, with interest, which payment he refused to accept. They then offered him three-eighths of the full amount of the bond and interest, and met with a like refusal. A few days thereafter, he began an action against the plaintiffs to enjoin them from committing waste on the land, grounding his action on the proposition that the bond and the sale thereunder were valid. While that action, and also the action of Witmer Bros. Company to test the validity of the bond and sale were pending and undetermined, the plaintiffs began the present action to declare the sale and bond invalid as against their land. The original complaint was filed herein on December 23, 1898. Thereafter, on May 2, 1899, Witmer, as manager of the Witmer Bros. Company, a corporation, dismissed the suit of that company against Donegan and the city treasurer to test the validity of the bond and assessment, and on August 2, 1899, as an individual, and as assignee of Labory, he demanded and received from the California Bank the deposit of $1,390 made by Nelson, subject to the agreement of November 19, 1894. The decision of this court on the former appeal, that the certificate of sale to Donegan upon default in the payment of the bond was void and the sale invalid, is now the law of the case. The sale must therefore be considered as void. The decision also declares that the bond and assessment is valid, and this also is the law of the case so far as the objections there set up to their validity are concerned, although it does not conclude us with respect to objections thereto, made for the first time in the subsequent amendment to the complaint.

Assuming the validity of the bond, the rights of the parties at the time the action was begun are obvious enough. Witmer was the holder of the certificate and, as the sale was void, he became, in equity, the holder of the bond. The bond was subject to payment by any party interested. In the absence of any facts which would make it inequitable, however, he had the legal right to insist on full payment, and was not bound to accept a payment of three-eighths of the amount he had paid, nor even three-eighths of the face of the bond, in discharge of the lien on three-eighths of the land. The remedy of the owner of a part of the land would be to pay the full amount of the bond and compel contribution from the owners of the other parts with, perhaps, a lien in equity on the other land as security. Nor would the fact that Witmer Bros. Company was a party to the agreement of November 19, 1894, and thereby agreed that the deposit should pay three-eighths of the bond and that it would pay the other five-eighths thereof, operate to bind Witmer, individually, as holder of the bond, to accept part payment from plaintiffs and look to Witmer Bros. Company for the balance. And we do not perceive that the facts, shown in the agreed statement, that he was a large stockholder in, and the managing officer of, Witmer Bros. Company, and had control of its funds, change his position or rights in this respect. As purchaser of the bond with his own funds, he had the same right as any other purchaser would have to the benefit of any discount he obtained, and to insist on payment of the whole sum due thereon, certainly, as against the plaintiffs, and possibly, as against Witmer Bros. Company.

It is contended, however, that Witmer Bros. Company, by the agreement of November 19, 1894, was in duty bound to prosecute to final judgment the action to test the validity of the bond, for the benefit of Nelson and his successors in interest, and that Witmer, in his capacity as manager of that corporation, was charged, personally, with this duty of the corporation towards plaintiffs, and that under these circumstances, as he could not separate his personality as manager of the corporation from his personality in other respects, and thus become a dual person, he was, in effect, a trustee of plaintiffs as well as of Witmer Bros. Company as to the subject-matter of the suit, and cannot be allowed to gain any advantage by any personal bargain in buying the bond or certificate, and would not be entitled to demand the full face of the bond, but only the sum he actually paid for it, with interest. This presents an interesting question, but, in view of the matters occurring after the beginning of the action, and the manner in which the case was presented to the court below on the last trial, presently to be noticed, we find it unnecessary to decide it. In the agreed statement of facts, on which the case was submitted to the court below for decision, it was stipulated that no objection should be made to any of the facts stated, on the ground of variance between the proof and the pleadings, but that the lower court, and this court on appeal, should hear and determine the cause the same as if the pleadings had been, by leave, properly amended so as to make the facts come within the issues made by the pleadings. This must be understood to include any facts which could properly have been stated in a supplemental complaint, and, in effect, it presents the case upon all the stipulated facts including those occurring after the beginning of the action.

By his subsequent conduct Witmer has put himself in a position substantially different from that occupied by him when the action was begun. The $1,390, deposited in the California Bank, was a trust fund which, by the terms of the trust, could only be devoted to certain specified purposes. According to the agreement, if the bond was valid, the fund was to be used to pay three-eighths of the amount due thereby, and Witmer Bros. Company was to pay five-eighths thereof. Labory was not to have any interest in this fund, except in the contingency that the bond should be declared invalid, in which event it was to be paid to him, less three-eighths of the cost of the litigation pending. If Labory had purchased the bond and had then obtained possession of the $1,390, deposited by his grantee, Nelson, to pay three-eighths of the bond and protect the land against the lien, it seems clear that Labory could not enforce payment of the bond against the land of Nelson, while at the same time retaining the money, which had been set apart out of the purchase price Nelson was to pay, in trust to pay three-eighths of such lien. It is apparent that by the terms of the sale from Labory to Nelson the land was to go to Nelson free from this lien. If valid, the money was to be used to discharge it; if invalid, the money was to be paid to Labory, as for the remainder of the purchase price, which, in that case, would be due to him. Donegan was not a party to the agreement concerning the money, and, as holder of the bond, he had no right to this specific fund. Hence, if Labory had purchased the bond he would not, as holder thereof, have acquired any right to the money. He could have no right to the money except under the agreement, which gave him the right to it only upon the condition that the bond proved invalid. Consequently, if, after buying the bond, he had also demanded and received the money, he would be bound to stand by the condition upon which alone he could become entitled to it, and would be forced to admit, for the benefit of Nelson and his successors, that the bond was invalid. If Labory could not do otherwise than this, it is equally clear that it could not be done by his assignee. He could not, by selling his contingent right to the money, enable his assignee to do what he could not do himself—to buy the bond, receive and keep the money, and hold the bond as a valid lien. It should be stated, in this connection, that Witmer demanded and received the money from the bank, upon the statement that he was the assignee of Labory, that the superior court had held that the bond was not a lien on the land and that, in consequence thereof, he, as assignee of

Labory, was entitled to receive the money. He has, therefore, by this purchase of the right of Labory, and by the receipt of the money in that right and insisting on his right to keep it, put himself in the place of Labory, and is consequently estopped from holding the bond as lien on this land. Having no right to the specific money as bondholder and no right to it as assignee of Labory, except on the condition that the bond has proved to be invalid, he cannot keep it on any other condition, and having elected to keep it, he must admit the invalidity of the bond. If he chooses to found his right to the money on the fact of his holding of the bond, he can keep it in that capacity only on the condition named in the agreement whereby it was deposited, that is, in effect, that it was to pay three-eighths of the bond and discharge the lien thereof upon this land. In either case he has no claim or lien upon the land of plaintiffs. It follows that the plaintiffs have the right to a judgment against the defendants quieting their title to the land against all claims of the defendants, and that the judgment should not have required them, as a condition precedent, to pay to or for Witmer the sum of $251, or any other sum. The theory on which this condition was inserted in the judgment seems to have been that Witmer was entitled, as bondholder, to demand this fund as part payment on the three-eighths of the bond, and that he stood in a fiduciary relation to the plaintiffs and for that reason could not demand from them more than three-eighths of the $4,000 which he paid for the transfer of the bond to himself. The first branch of this proposition, is, as we have stated, incorrect, and as he received the money as successor of Labory and is thereby estopped, we think the latter part of the proposition is immaterial. We do not think that the complaint states two causes of action, nor that Witmer Bros. Company was a necessary party.

It is unnecessary to consider the effect of the newly alleged defect in the street improvement proceedings upon the validity thereof. The $1,390 deposited under the agreement of November 19, 1894, was the money of Labory, part of the price of the land sold by him to Nelson, deposited to await the determination of the validity of the proceedings and to discharge the lien if the bond was valid. In no event was it to be returned to Nelson. If the bond was declared invalid the money was to be paid to Labory, less expenses. Witmer is therefore now entitled to the money, either as the successor of Labory, on the theory that the bond is invalid, or as successor of Donegan and holder of the bond, on the theory that it is valid. Under the conclusion we have reached, that the plaintiffs are entitled to the land free from any lien of the street assessment and bond, it is a matter of indifference to the plaintiffs, who are not entitled to the fund in either case, whether the bond and assessment are declared valid or invalid.

It is ordered that the judgment of the superior court be modified by striking therefrom all that part of the first clause or paragraph beginning with the words, "And upon paying into court the sum of $110," and ending with the words, "Two hundred and fifty-one dollars ($251)," at the close of said paragraph, and also by striking therefrom the following part of the last clause or paragraph thereof, to wit: "Upon paying into court the sum of two hundred and fifty-one dollars ($251), with interest thereon from the date hereof at the rate of 7 per cent. per annum for said H. C. Witmer, or upon payment of such sum, with interest, to said H. C. Witmer," and that, as so modified, the judgment be affirmed.

We concur: ANGELLOTTI, J.; McFARLAND, J.

148 Cal. 470

LYON v. UNITED MODERNS.

(L. A. 1,500.)

(Supreme Court of California. Jan. 17, 1906.)

1. Trial—Denial of Motion of Nonsuit—Waiver of Error.

Where, after the denial of a motion for a nonsuit made at the close of plaintiff's case, defendant introduced evidence which supplied defects in plaintiff's proof, the error in denying the motion was waived.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 982.]

2. Insurance — Mutual Benefit Association—Proofs of Death and Claimant's Right—Sufficiency.

A mutual benefit certificate, which bound the association to pay a specified sum to the beneficiary after satisfactory proof of the death of the member, and of the identity and right of claimant, and of the validity of the claim, only required proof of death and proof of claimant's right and identity; and the fact that the proof showed facts of which the association might avail itself as a defense to an action on the certificate did not derogate from the sufficiency of the proofs or bar the bringing of an action.

3. Same — Action for Benefit—Evidence—Findings.

In an action on a mutual benefit certificate, the evidence considered, and *held* to justify a finding that the member did not have pleurisy, within the meaning of the question in the application as to whether he had had pleurisy, and to which the answer was, "No."

4. Same—False Answers in Application—Assertion of Falsity—Estoppel.

Where an insured in good faith made truthful answers to the questions in the application, but the answers, owing to the fraud or mistake of the medical examiner, were not correctly transcribed, the insurer was estopped from asserting the falsity of the answers as a defense to the policy.

5. Same—Action on Certificate—Evidence—Assertion of Falsity of Answers in Application.

In an action on a mutual benefit certificate, plaintiff was permitted to testify that all the medical examiner asked the member at the time of his examination for membership as to disease was whether he had ever been sick, that the member answered that he had had smallpox, typhoid fever, the "grippe," and a slight attack of pleurisy. The application showed that the member had answered "No" to the question as to whether he had had pleurisy. *Held*, that the evidence was admissible, as showing that the association was estopped from asserting the falsity of the answer written by the medical examiner.

6. SAME—ASSERTION OF FALSE ANSWERS IN APPLICATION — ESTOPPEL RULE — APLICABILITY TO BENEFIT ASSOCIATIONS.

The rule that where the insured in good faith makes truthful answers to the questions in the application, and the answers, owing to the fraud or mistake of the agent filling out the application, are not correctly transcribed, the insurer is estopped from asserting their falsity as a defense, is applicable to mutual fraternal societies, where the applicant is not a member until after the making of his application.

7. SAME — APPLICATION FOR CERTIFICATE — QUESTIONS—CONSTRUCTION.

The word "company," in an application for a mutual benefit certificate containing the question, "Has any * * * application to insure your life ever been made to any company * * * upon which a policy has not been issued," refers only to regular insurance companies, and excludes fraternal associations; Civ. Code, § 451, declaring that benefit associations are not insurance companies within the insurance laws, recognizing a distinction between regular insurance companies and benefit associations.

8. TRIAL—INSTRUCTIONS—ASSUMPTION AS TO FACTS.

Where, in an action on a mutual benefit certificate, the evidence warranted a conclusion that the deceased member had not had a certain disease mentioned in the application, an instruction that plaintiff had the burden of proving that the fact that the member had had such disease had been communicated to the association was properly refused, because assuming a fact which was for the jury.

Department 1. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by Laura C. Lyon against the Unitted Moderns. From a judgment for plaintiff, defendant appeals. Affirmed.

Rehearing denied Februrary 15, 1906.

J. W. McKinley, for appellant. Frank James and Bernard Potter, for respondent.

ANGELLOTTI, J. This is an appeal from an order denying defendant's motion for a new trial, in an action brought by plaintiff to recover on a benefit certificate of membership of her deceased husband, issued by defendant corporation. Defendant is one of the many fraternal mutual beneficial associations existing in this country which pay benefits to the beneficiaries named in the certificate of membership, upon the death of a member, in such amount as may be set forth in the certificate. Deceased became a member of one of the subordinate lodges of defendant in September, 1901, when a certificate of membership was issued, under the terms of which it was agreed that $3,000 should be paid plaintiff within 90 days after "satisfactory proof of the death of said member, and of the identity and right of claimant and of the validity of the claim," provided, of course, that such certificate remained in force at the time of his death. Deceased died December 29, 1901 It was in effect admitted on the trial that the certificate was in full force at the date of his death, if it was not void in its inception by reason of alleged misrepresentations made by the deceased in his application for membership.

1. The first point made by defendant for a reversal of the order is that the court erred in denying its motion for a nonsuit, made at the close of plaintiff's evidence, upon the ground that plaintiff had not shown that satisfactory proof had been made to defendant of her right, or the validity of her claim. Without considering the question as to whether the admissions made by defendant in its answer, and its stipulation at the commencement of the trial, sufficiently showed such compliance with this requirement as was necessary to make a prima facie case for plaintiff, we think there is nothing in the point made. Defendant did not rest its case upon the denial of the motion for nonsuit, but introduced evidence in its own behalf. So far as the evidence introduced by defendant supplied any defects in plaintiff's proof, any error in denying the motion for nonsuit was waived. Scrivani v. Dondero. 128 Cal. 31, 32, 60 Pac. 463; Russell v. Pac. Can. Co., 116 Cal. 527, 530, 48 Pac. 616; Schlessinger v. Mallard, 70 Cal. 326, 334, 11 Pac. 728.

Defendant introduced in evidence the proofs of death which were in fact made. These proofs were made on blanks furnished by the defendant, and, in accordance with the laws of defendant, by officers of the subordinate lodge of which deceased was a member, and, concededly, prima facie fully established the right of plaintiff to payment, except for one reason. The proofs were written on forms prepared by the defendant for that purpose, and in answer to certain questions propounded thereon the claimant and physician stated that deceased had, nearly one year before making his application for membership, been treated by a physician "for cold and a slight touch of pleurisy," while in the medical examiner's report, which was made a part of his application for membership, in answer to a question as to whether he had ever had any of 45 enumerated "diseases," including "pleurisy," the answer, "No," had been written after each named disease. Concededly, by virtue of certain provisions of the contract, the certificate was void, if the deceased had, on his application, made material misrepresentations in his answers to the questions propounded on the application blank. It is now claimed that the blank showed such a misrepresentation, and that hence the proofs furnished as to the validity of the claim were not "satisfactory." The real point thus appears to be that under the terms of the certificate no action could be maintained by plaintiff on this certificate until she made to the company such a showing as ought reasonably to satisfy defendant's officers that the defendant had no good defense against the claim on the ground of misrepresentation made in the application for membership. We are satisfied that the contract required no such proof on the part of the claimant as a prerequisite to the maintenance of an action. The words "and of the identity and right of claimant and of the validity of the claim" all have reference solely to her claim that she is the beneficiary named in the certificate, and entitled to recover thereon if the certificate was in force at the death of the insured, and cannot reasonably be construed as requiring a showing as to the validity of the certificate issued to the deceased. Proof of death and proof of the claimant's right and identity to such benefit as was stipulated by the certificate were the only requisites. If the proof showed facts of which defendant might avail itself as a defense to an action on the certificate, this would not derogate from the sufficiency of the proofs in either respect, or bar the bringing of an action. Ins. Co. v. Rodel, 95 U. S. 232–237, 24 L. Ed. 433.

2. The medical examiner's report showed, as already indicated, the answer, "No," to the question: "(3) Have you ever had any of the following diseases? Answer yes or no in each space, and give particulars under the head of remarks: * * * Pleurisy." Some 45 so-called diseases were here enumerated. It further showed the following question and answer, viz.: "(6) Have you consulted or been advised by any physician regarding your health within the last five years? If so, whom, when, and for what ailment? A. Grippe, 1900. Dr. La Doux." It appeared from the evidence that all the answers in this very lengthy report were written by the medical examiner of defendant in the presence of the applicant, and as the result of his inquiry of the applicant, and that the applicant was then called upon to sign, and did sign, a statement at the end, to the effect that he warranted the "answers as written to the above questions put by the medical examiner are full, complete, and true, and the same shall be made a part of the herein referred to application for membership." In the application proper was a similar warranty followed by this statement: "And I do hereby acknowledge and consent and agree that any untrue statement made herein by me or on my behalf, or to any medical examiner, whether written by my own hand or not, or any concealments of facts by me or any one else, shall forfeit and cancel all rights to any benefit under the above-named application." The certificate recited that it was issued "in consideration of the statement made in the application for beneficiary certificate, and in answer to questions asked in the medical blank (the truth of which said member guaranties)." There was evidence tending to show that during, or while convalescing from, the attack of "grippe" referred to in the medical report, the deceased had a pleural pain "not so very, very severe." The attending physician testified, "but a little touch of pleurisy." The physician further testified that there was not much inflammation, hardly any fever, that it was not "regular pleurisy," just "the very first symptoms of pleurisy," and "it terminated there" at once. The evidence in regard to the matter is such that a jury might well have been warranted in concluding that the applicant had never had the "disease" of "pleurisy," within the meaning of the question relative thereto, and that the written answer was therefore not false. But, in view of evidence admitted and instructions of the trial court, we are not able to determine that they so concluded. The plaintiff was allowed, over defendant's objection, to show what took place between the medical examiner and the applicant at the time the medical report was written. Under this ruling plaintiff testified that all the medical examiner asked the applicant as to diseases was whether "he had ever been sick any," and that the applicant answered that he had never had anything but smallpox and typhoid fever, "until January, 1901, he had the grippe and a slight attack of pleurisy," and that the examiner did not say anything, but simply apparently wrote down the answers. The only other testimony regarding this interview was that of the examiner, who admitted that plaintiff was present during at least a portion of the interview, and who said he had no recollection of the applicant saying anything about pleurisy, and that he could not say as to whether he asked the applicant as to each of the diseases enumerated on the blank; that it was his custom so to do, and always to write down the full reply.

Upon this matter the court instructed the jury in effect that if the applicant had, prior to the application, been afflicted with the disease of "pleurisy," and that, when asked whether he had ever had such disease, answered, "No," his statement would be a misrepresentation of a material fact, which would avoid the policy, and that if, on the other hand, he told the examiner that he had "an attack, slight or otherwise, of pleurisy, and the medical examiner either neglected or omitted to write the answer in his report," the insured was not responsible for such omission or neglect, unless he had actual knowledge of the fact that the answer had been imperfectly or incorrectly written. There was no pretense that he had any actual knowledge of the contents of said report, or that he had been asked to read the same, or to do anything but sign his name to the statement at the end thereof. There was no error in the action of the court in admitting this evidence, or in giving this instruction. In volume 3, Cooley's Briefs on the Law of Insurance, p. 2594, it is said: "From an examination of the cases the following propositions may be regarded as established by the weight of authority: Where the insured, in good faith, makes truthful answers to the questions contained in the application, but his answers, owing to the fraud, mistake, or negligence of the agent filling out the application, are incorrectly transcribed, the company is estopped to assert their falsity as a defense to the policy. The acts of the agent, whether he is a general agent with power to issue policies, a soliciting agent, or merely medical examiner for the company, are in this respect the acts of the company, and he cannot be regarded as the agent of the insured, though it is so stipulated in the application or policy."

An examination of many of the authorities satisfies us that, while there is some conflict in the cases on some of the matters included in this statement, the great weight of authority is with the statement, as a whole, where the insured acts in good faith, and is himself without fault. This court has already indicated its support of the rule enunciated. In Menk v. Home Ins. Co., 76 Cal. 50, 53, 14 Pac. 837, 18 Pac. 117, 9 Am. St. Rep. 158, a fire insurance case, it said: "The only point in the offered testimony was that if the agent, knowing all the essential facts, made out the application for plaintiff, the company cannot take advantage of defective statements contained in it as not complying with the requirements of the company, nor would misstatements be fatal to the claim of plaintiff which the agent well knew to be false when he made out the application, received the money of the applicant, and issued the policy. The tendency of the decisions is plainly to hold all those conditions waived which, to the knowledge of the agent, would make the policy void as soon as delivered. Otherwise the company would knowingly receive the money of the applicant without value returned, and the whole transaction would be a palpable fraud." See, also, Wheaton v. North British, etc., Co., 76 Cal. 415, 419–421, 18 Pac. 758, 9 Am. St. Rep. 216; Maxson v. Llewelyn, 122 Cal. 195, 199, 54 Pac. 732; Bayley v. Employers', etc., Corp., 125 Cal. 345, 349, 58 Pac. 7; Parrish v. Rosebud M. & M. Co., 140 Cal. 635, 645, 74 Pac. 312. In Maxson v. Llewelyn, supra, it is pointed out, quoting approvingly from Union, etc., Co. v. Wilkinson, 13 Wall. 222, 20 L. Ed. 617, that this principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing was procured under such circumstances by the other side as estops that side from using it, or relying on its contents—not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it. The rule is as applicable to life and accident insurance as it is to fire insurance, and, where the applicant is not a member until after the making of his application, to mutual fraternal societies as it is to what is known as "regular insurance."

3. On the application proper the answers to the printed questions were written by an officer of defendant, and the paper, when so completed, was handed to the applicant for signature and signed by him. The following question was contained thereon, viz.: "(7) Has any proposal or application to insure your life ever been made to any company, or agent, or medical examiner, upon which a policy has not been issued? If so, state full particulars." The written answer was, "No." The defendant sought to show that in December, 1900, deceased had applied for membership in, and a death benefit certificate from, the "Woodmen of the World," a well-known fraternal association, which, as a part of its plan, issued death benefit certificates similar, in all particulars material to the question here presented, to those of this defendant, and that his application had been disapproved by the "head physician" of the order, and no certificate had ever been issued thereon. The trial court sustained the objection made to all such testimony, and this ruling is assigned as error. We are of the opinion that the "Woodmen of the World" was not a "company," within the meaning of the question on the application blank, and that therefore the offered evidence was not material. There is some conflict in the cases as to whether a question of the general character of the one under consideration should be held to refer to any organization other than regular insurance companies, or whether it also includes fraternal associations organized for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money on the death of the members; but, where the question stated on the application blank is as uncertain in its terms as the one under consideration, the better reasoning appears to be in favor of excluding all except regular insurance companies.

It must be recognized that the rule applicable in the construction of insurance contracts of construing the contract in favor of the assured and against the insurer, where it is reasonably susceptible of such construction, is applicable in such cases, and therefore, as said in one of the cases, "where an insurance company or association seeks to avoid a policy or certificate of membership on the ground of falsity in an answer to a question which is, by the terms of the contract made material, the court will construe the question and answer strictly as against the company, and liberally with reference to the insured," and, "if any construction can reasonably be put on the question and the answer such as will avoid a forfeiture of the policy on the ground of falsity of the answer, that construction will be given, and the policy will be sustained." Newton v. S. W. M. L. Ass'n, 116 Iowa, 311, 90 N. W. 73. The law of this state recognizes a distinction between regular insurance companies and such associations, which are not conducted for profit, by declaring the associations "not to be insurance companies in the sense and meaning of the insurance laws of this state," and exempting them from the provisions of such insurance laws (Civ. Code, § 451; Marshall v. Grand Lodge, 133 Cal. 686, 691, 66 Pac. 25); and there is such a difference between the two classes as to reasonably justify one in concluding that an association or order of the class mentioned is not an "insurance company" within the general acceptation of that term. If this be so, the applicant here was justified in concluding that only regular insurance companies were meant by the question, and we must construe the question as calling for nothing more. If the association wanted anything more, it would have been a simple matter for it to have framed the question, on its carefully prepared blank, in terms so precise and definite as to have left no room for doubt. Again, quoting from Newton v. S. W. Mutual Life Ass'n, supra: "When an applicant for insurance answers categorically the questions asked, and his answers are correct in any view of the question which can be reasonably taken, then the insurance company or association, as the case may be, ought not to be allowed to escape its liability on the ground that the answer is false." See, also, Mutual Life Ass'n v. Miller, 92 Fed. 63, 34 C. C. A. 211; Penn. Mutual L., etc., Co. v. Trust Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 70; 3 Cooley's Briefs on the law of Insurance, p. 2079.

A contrary view of this matter has been taken by the New York Court of Appeals in Alden v. Supreme Tent, 178 N. Y. 535, 71 N. E. 104, where the question was: "Have you ever been rejected by any life insurance company or association?" and also by the supreme court of that state. McCollum v. Mutual, etc., Co., 55 Hun, 103, 8 N. Y. Supp. 249. It will be observed that the question in the New York Court of Appeals case included the word "association," as well as "company," which might reasonably be held to indicate more to the applicant. In Bruce v. Conn. Mut. Life Ins. Co., 74 Minn. 310, 77 N. W. 210, the question was: "Has any company or association ever declined or postponed granting or receiving insurance on your life, either for any particular amount, or in any particular form" and it was held that the question included fraternal associations issuing death benefit certificates. Here, again, the question was so unlike the one involved in this case as to present an entirely different question. We are of the opinion that, where the question asked is materially the same as the one we are considering, the other line of authorities is supported by the better reasoning.

4. Complaint is made that the trial court refused to give to the jury the following instruction, viz.: "The burden rests upon each party to establish by preponderance of evidence affirmative allegations of its pleading. In this case the plaintiff claims that the fact that James B. Lyon had had pleurisy was communicated to defendant, and the burden rests upon plaintiff to show that such fact was communicated to defendant." Regardless of the question as to where the burden lay to show the facts constituting an estoppel, we are of the opinion that the court was justified in refusing the requested instruction, for the reason that it assumed a fact that, under the evidence, was in issue and for the jury to decide, viz., that the applicant had suffered from the disease of "pleurisy." As we have already shown, the evidence was such as to warrant a conclusion that he had not had such disease, within the meaning of the printed question, but had had only the first symptoms thereof—had only been threatened with the same. The question as to whether he had the disease was one of the questions submitted to the jury for decision by the charge of the court. The requested instruction in effect declared it to be a fact that the deceased had the disease, and that the answer, as written on the medical examiner's report, was false. We are also satisfied that, under the circumstances shown by the record, the defendant could not have been prejudicially affected by the absence of any specific instruction as to where the burden of proof rested to show an estoppel in the respect designated.

5. Various other rulings of the trial court in the matter of instructions are complained of, but we find none that require special mention. As to defendant's other requested instructions, so far as proper, they appear to have been fully covered by other instructions given, and those portions of the charge of the court that are complained of were in accord with the views we have already expressed in discussing the question as to the right of the plaintiff to show that the answers given by the applicant to the medical examiner were correct, and the question as to whether the "Woodmen of the World" was an insurance company, within the meaning of the phrase used in the printed application.

The order appealed from is affirmed.

We concur: SHAW, J.; McFARLAND, J.

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148 Cal. 516

STONER v. ZUCKER et al. (L. A. 1,436.)

(Supreme Court of California. Jan. 22, 1906.)

LICENSES—REVOCATION.

Where plaintiff granted defendant a parol license to construct an irrigation ditch over plaintiff's land, and defendant entered under such license and expended over $7,000 in the construction of the ditch, the license became irrevocable, and defendant was entitled to a right of way over plaintiff's lands for the purpose of maintaining the ditch.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Licenses, §§ 120, 121.]

Department 2. Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by Jacob Stoner against Fred Zucker and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Rehearing denied February 20, 1906.

Collier & Carnahan, for appellant. E. W. Freeman and Henry J. Stevens, for respondents.

HENSHAW, J. Plaintiff pleaded that defendants had entered upon his land in 1899, under license, and had constructed thereon and thereover a ditch for the carrying of water; that he never conveyed or agreed to convey to the defendants any right of way, easement, or interest in the land for the purpose, and their right to construct and maintain the ditch rested wholly upon this license; that in 1900 he served notice upon them that the license to construct and operate the ditch had been revoked and abrogated by him. Notwithstanding this notice of revocation and abrogation, the defendants, disregarding it, have continuously entered upon plaintiff's land, making repairs upon the ditch and restoring the same where it was broken and washed away, and defendants threaten to continue this trespass upon the lands of the plaintiff. Plaintiff therefore prayed that the defendants be adjudged trespassers and be enjoined from the use of the ditch or from in any manner entering upon the lands of the plaintiff to repair or otherwise maintain it. The evidence established, without controversy, that defendants constructed the ditch for the purpose of carrying water for irrigation to their own and other lands, and had expended upon the ditch the sum of seven thousand and more dollars. The court found that "a right of way for the construction and maintenance of the ditch for the purpose of taking water from Santa Ana river for use in connection with and upon defendants' lands was given and granted by the plaintiff to the defendants, and that the defendants are the owners of a right of way for said ditch for the purpose aforesaid." The court further found that there was a consideration for the "granting of said right of way, in that defendants contracted and agreed with the plaintiff to deliver to and for the use of the plaintiff on his land lying under said canal sufficient water to irrigate the land, and the defendants have at all times delivered said water so agreed to be delivered. This last finding derives no support from the evidence, and the first finding, to the effect that the plaintiff "granted" a right of way, can be supported only upon the understanding that the court by "grant" meant that "permission" was given to defendants for the construction and maintenance of the ditch. So construing the findings, the question is squarely presented as to the revocability or nonrevocability of an executed parol license, whose execution has involved the expenditure of money, and where, from the very nature of the license given, it was to be continuous in use.

Appellant contends that a parol license to do an act upon the land of the licensor, while it justifies anything done by the licensee before revocation, is revocable at the option of the licensor, so that no further acts may be justified under it, and this, although the intention was to confer a continuing right, and money has been expended by the licensor upon the faith of the license, and that such a license cannot be changed into an equitable right on the ground of equitable estoppel. To the support of this proposition is offered authority of great weight and of the highest respectability. The argument in brief is that a license in its very nature is a revocable permission, that whoever accepts that permission does it with knowledge that the permission may be revoked at any time; that the rule cannot be changed, therefore, because the licensee has foolishly or improvidently expended money in the hope of a continuance of a license, upon the permanent continuance of which he has no right in law or in equity to rely; that to convert such a parol license into a grant or easement under the doctrine of estoppel is destructive of the statute of frauds, which was meant to lay down an inflexible rule; and, finally, that there is no room or play for the operation of the doctrine of estoppel, since the licensor has in no way deceived the licensee by revocation, has put no fraud upon him, and has merely asserted a right which had been absolutely reserved to him by the very terms of his permission. No one has stated this argument more clearly and cogently than Judge Cooley, who, holding to this construction of the law, has expressed it in his work on Torts. Cooley, Torts (2d Ed.) 364. But that the same eminent jurist recognized the injustice and the hardship which followed such a conclusion is plainly to be seen from his opinion in Maxwell v. Bay City Bridge Co., 41 Mich. 453, 2 N. W. 639, where, discussing this subject, he says: "But the injustice of a revocation after the licensee, in reliance upon the license, has made large and expensive improvements, is so serious that it seems a reproach to the law that it should fail to provide some adequate protection against it. Some of the courts have been disposed to enforce the license as a parol contract which has been performed on one side." Indeed, the learned jurist, with equal accuracy, might have stated that the majority of courts have so decided, in accordance with the leading case of Rerick v. Kern, 14 Serg. & R. 267, 16 Am. Dec. 497. That case was carefully considered, and it was held that it would be to countenance a fraud upon the part of the licensor if he were allowed, after expenditure of money by the licensees upon the faith of the license, to cut short by revocation the natural term of its continuance and existence, and that under the doctrine of estoppel, the licensor would not be allowed to do this. The decision was that the licensor would be held to have conveyed an easement commensurate in its extent and duration with the right to be enjoyed. In that case there was a parol license without consideration to use the waters of a stream for a sawmill, and it was held it could not be revoked at the grantor's pleasure, where the grantee, in consequence of the license, had erected a mill. The court in that case says, after discussion: "It is to be considered as if there had been a formal conveyance of the right, and nothing remains but to determine its duration and extent. A right under a license, when not specifically restricted, is commensurate with the thing of which the license is an accessory." And the court said further: "Having in view an unlimited enjoyment of the privilege, the grantee has purchased by the expenditure of money, a right indefinite in point of duration, which cannot be forfeited by a nonuser unless for a period sufficient to raise the presumption of a release. The right to rebuild in case of destruction or dilapidation and to continue the business on its original footing may have been in fact as necessary to his safety, and may have been an inducement of the particular investment in the first instance."

It will not be necessary to multiply citations of authority upon this point. It is sufficient to refer to the very instructive comment of Prof. Freeman to the case of Rerick v. Kern, reported in 16 Am. Dec., at page 497. The learned author of the note concludes his review by saying, as he shows, that "it will be seen that the doctrine of the principal case, though not recognized in some of our state courts, is, nevertheless, expressive of the law as administered by the majority of them, and that the preponderance of recent judicial opinions is in harmony with the views of Judge Gibson." This court in the case of Flickinger v. Shaw, 87 Cal. 126, 25 Pac. 268, 11 L. R. A. 134, 22 Am. St. Rep. 234, discussed and approved the case of Rerick v. Kern, supra. It was not called upon there to pass upon the precise question here presented, because in that case defendant had entered and expended money upon a parol agreement to convey a right of way, and the court was called upon merely to decide in consonance with undisputed equitable principles that that parol agreement was enforceable, but in Smith v. Green, 109 Cal. 234, 41 Pac. 1024, the exact principle here announced is distinctly recognized, and it is said: "The general rule, no doubt, is that one who rests his claim to an easement on a verbal contract alone, unexecuted and unaccompanied by any other facts, has no rights thereto which he can enforce. But there are many cases where a mere parol license which has been executed, and where investments have been made upon the faith of it, has been held irrevocable. Gould on Waters, §§ 232, 324." The recognized principle, therefore, is that where a licensee has entered under a parol license and has expended money, or its equivalent in labor, in the execution of the license, the license becomes irrevocable, the licensee will have a right of entry upon the lands of the licensor for the purpose of maintaining his structures or, in general, his rights under his license, and the license will continue for so long a time as the nature of it calls for. Thus, for example, where the license was to erect a lumber mill, the license came to an end when the timber available for use at that mill had been worked up into lumber. The same has been held as to a milldam, the right to maintain the dam continuing so long as there was use for the mill, and the right being lost by abandonment and disuse only when the nonuser had continued for a period sufficient to raise the presumption of release. In the case of irrigating ditches, drains, and the like, the license becomes, in all essentials, an easement, continuing for such length of time, under the indicated conditions, as the use itself may continue.

For these reasons the judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

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148 Cal. 451

PREFUMO v. RUSSELL et al. (L. A. 1,444.)

(Supreme Court of California. Jan. 16, 1906.)

1. Exceptions, Bill of—Time for Settlement.

Code Civ. Proc. § 650, requires a party proposing a bill of exceptions to either present them to the judge for settlement or deliver them to a clerk for the judge within 10 days after service on him of proposed amendments. Section 1012 authorizes the service of papers by mail. Section 1013 provides that in such cases, if the person on whom service is made is given a certain number of days after the service to perform an act, the time is extended one day for every 25 miles distance between the place of deposit and the place of address, the extension, however, not to exceed 90 days. *Held* that, where an attorney who proposed a bill of exceptions acknowledged by letter the receipt of the proposed amendments served by mail, this did not make the service personal, so as to deprive him of the extension of time provided by section 1013.

2. Mortgages — Absolute Deed as Mortgage.

Where defendants gave plaintiff's husband a deed of land to secure the payment of a certain sum to him, and he conveyed the land to his wife while the defendants were in possession of the land so far as it was occupied at all, the conveyance was a mortgage, and the defendants have all the beneficial interest in the land subject to the lien for the sum secured due plaintiff's husband.

Department 1. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by Ada S. Prefumo against C. J. Russell and another. From a judgment in favor of plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

Marcel E. Cerf, for appellants. W. H. Spencer, for respondent.

SHAW, J. The defendants appeal from a judgment in favor of the plaintiff, and from an order denying the defendants' motion for a new trial.

The respondent makes a preliminary objection to the consideration of any of the points arising upon the motion for a new trial, upon the ground that the bill of exceptions was not properly settled, and is not a part of the record. The judgment was rendered on January 24, 1903. The defendants served on the plaintiff's attorney their proposed bill of exceptions, and thereafter, on March 18, 1903, the plaintiff's attorney served on the attorney for the defendants his proposed amendments thereto. The bill and amendments thereto, thus proposed, were not, within 10 days thereafter, presented to the judge for settlement, nor filed with the clerk for the judge. They were filed with the clerk for the judge on March 31, 1903, which was 13 days after the service. Section 650 of the Code of Civil Procedure requires the party proposing the bill to either present them to the judge for settlement or deliver them to the clerk for the judge within 10 days after the service on him of the proposed amendments. The objection made to the settlement of the bill was that the bill and amendments were delivered to the clerk for the judge too late, and that the proceeding for the settlement of the bill consequently lapsed. The facts were that the attorney for the plaintiff, who served the proposed amendments, at that time resided and had his office in San Luis Obispo; that the attorney for the defendants, on whom the service was made, at that time resided and had his office in San Francisco, and the service of the proposed amendments was made by mail, under the provisions of sections 1012 and 1013, Code Civ. Proc.; the distance between the two places, according to the stipulation of the parties, being 250 miles. Section 1013 provides that in such cases the service is complete at the time the paper is deposited in the postoffice at the place of residence of the person making the service, "but if within a given number of days after such service a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done is extended one day for every 25 miles distance between the place of deposit and the place of address, such extension, however, not to exceed 90 days in all." The effect of this provision of section 1013 is to extend this time, in the present case, 10 days, so that the defendant had 20 days in all, after such deposit in the postoffice, within which to make the delivery to the clerk, and consequently the delivery on March 31st was within the time allowed, and was sufficient.

The plaintiff sought to avoid the effect of section 1013 by showing that on March 21, 1903, after he had received the proposed amendments through the mail, the attorney for the defendants wrote a letter to the plaintiff's attorney, inclosing a copy of his notice of appeal from the judgment in the action, and further stating, "I wish to acknowledge due service of your proposed amendments to my proposed bill by receipt thereof yesterday, March 20, 1903." This, counsel claim, was equivalent to personal service of the amendments on March 20th, and had the effect of setting the time running on that date for the delivery of the bill and amendments to the clerk for the judge and of waiving the additional time given by section 1013 in case of service by mail. The claim is that this admission of service had the same effect as if there had been no attempt to serve the paper by mail, and that the time began to run as if there had been personal service on the day the amendments were, according to the admission, actually received by the defendants' attorney in San Francisco. We think the court below correctly held that this claim was untenable. In case of any dispute in regard to the fact or time of service, the admission would, of course, be very satisfactory evidence thereof, but we do not think that, with respect to the question of the time within which the next successive step in the proceeding was to be taken by the adverse party, it should be held to be a waiver of any part of the time given by the statute in case of service by mail. Express words, or the equivalent thereof, should be required to constitute such a waiver. If the plaintiff's position were correct, all that would be necessary, in case of service by mail, would be to show that there had been actual receipt of the paper in the usual course of mail delivery, and thereupon to invoke the rule that actual receipt is equivalent to personal service, and by that means change the character of the service from a mail service to personal service, and, practically, in every case materially shorten the time allowed by law for the doing of an act after such service. An admission by counsel is only a species of evidence of such actual receipt, and conclusive proof thereof could often be made by other means, with the result that the time allowed would be rendered altogether uncertain and dependent on matters not of record.

The plaintiff relies on the cases of Heinlen v. Heilbron, 94 Cal. 636, 30 Pac. 8, and Shearman v. Jorgensen, 106 Cal. 483, 39 Pac 863, as establishing the contrary. We do not think they have that effect. Neither of those cases presented any such question. In the first case there was a dispute concerning the fact of the service of a notice of appeal. An attempt had been made to serve it by mail, but the attempt was abortive, so far as such service was authorized by the statute, because the statutory method had not been followed, in that the notice had not been addressed to the place of residence, or location of the office, of the party on whom it was to be served. As a statutory service by mail the mere deposit in the postoffice, without the proper address, was void. But it appeared that the notice was forwarded from the place to which it was addressed to his place of residence, and was actually received by him within the proper time. It was held that under the circumstances, and for the purposes of opposing a motion to dismiss the appeal for want of service of the notice of appeal, the actual receipt of the notice by the party to whom it was addressed and upon whom it was to be served, within the time allowed, was a personal service thereof, regardless of the question of there having been a sufficient substituted service by mail, and that this was sufficient to give the court jurisdiction of the appeal. The question of the effect of such actual delivery upon the time allowed, in case of a good service by mail, or in any case, did not arise, and was not discussed. In the Shearman Case, the question arose with respect to the service by mail of a notice of the overruling of a demurrer to the complaint. The notice was actually received by the attorney for the defendants, and the service was also good as a substituted service by mail under sections 1012 and 1013, Code Civ. Proc. The defendants failed to file any answer to the complaint, and long after his time for so doing had expired under either method of service, his default was taken and judgment entered against him. Following Heinlen v. Heilbron, supra, the court said that the actual receipt of the notice was equivalent to personal service. Owing to the short distance between the counties of San Francisco and Alameda, the time for answering was the same under either method. There was no question concerning the time. The only dispute was in regard to the question whether or not the negligence of the party was sufficiently excusable to justify the vacation of the default and judgment, and it was held that there was no sufficient excuse. Neither case is authority on the question arising in this case. The bill was properly settled.

Upon the merits of the case it is clear that the findings and judgment in favor of the plaintiff are erroneous and that the judgment and order must be reversed. The complaint states a cause of action to quiet the plaintiff's alleged title to certain tracts of land. The defense stated in the answer is, in substance, that both plaintiff and defendants claim under D. W. Grover, and Hannah F. Grover, that the defendants had, by assignment from Kramer, a contract to purchase the lands from the Grovers upon which there was due about $600; that by an agreement then made between the defendants, the Grovers and P. B. Prefumo (plaintiff's husband), said Prefumo advanced for and on behalf of the defendants the said sum of $600, and therewith paid the balance due under the contract, upon the promise of defendants that they would repay him the said sum; that it was also agreed at the time that the Grovers should convey the lands to said Prefumo, and that Prefumo should hold title thereto for the benefit of defendants and as security for the repayment of said sum of $600, and also the sum of about $985 due him from them on account of another lien on or claim against said land; that in accordance with this agreement, the Grovers conveyed the lands to said P. B. Prefumo, who thereupon held the same under the agreement as trustee for the defendants; that said Prefumo thereafter, and without consideration, conveyed said lands to the plaintiff, Ada S. Prefumo, and that a part of the indebtedness due said P. B. Prefumo, for which he held the land as security, has been paid and the balance remains unpaid. The court found that each and every of these allegations of the answer were untrue, except that P. B. Prefumo had conveyed the lands to the plaintiff without a valuable consideration. By proper assignments of the insufficiency of the evidence the defendants challenge these findings. Although there are some particular details in which the evidence varies slightly from the facts alleged in the answer, yet in all substantial respects the averments are supported by uncontradicted evidence. Under the facts alleged and the evidence given, it is clear that the defendants had all the beneficial interest in the lands subject to the claim and lien thereon in favor of P. B. Prefumo for the payment of the sums advanced by him and due under the agreement made by him with the defendants. The defendants were in possession of the lands, so far as they can be said to have been occupied at all, and the plaintiff's right thereto is, in effect, no more than a mortgage to secure the money due under the agreement. Walton v. Karnes, 67 Cal. 255, 7 Pac. 676; Millard v. Hathaway, 27 Cal. 119, 140; Hellman v. Messmer, 75 Cal. 170, 16 Pac. 766; Thomas v. Jameson, 77 Cal. 93, 19 Pac. 177. The only legal method of enforcing such a claim is by foreclosure suit. The plaintiff being a voluntary purchaser, is in no better position than was her grantor at the time she purchased. The findings are unsupported by the evidence.

The judgment and order are reversed.

We concur: ANGELLOTTI, J., McFARLAND, J.

2 Cal. App. 335

FLINN v. CROOKS.

(Court of Appeal, First District, California. Dec. 5, 1905.)

1. Appeal—Harmless Error—Nonsuit—Denial—Abandonment of Issues.

There was no prejudicial error in denying a nonsuit on a count of the complaint, where it was eliminated by statements of plaintiff's counsel and the instructions.

2. SAME — PRESUMPTIONS—FACTS TO SUSTAIN INSTRUCTIONS.

When error is claimed as to an instruction given, and the evidence might have justified it, appellant must show affirmatively that it did not.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3690.]

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by William D. Flinn against Samuel R. Crooks. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Sullivan & Sullivan, for appellant. William J. Gleason, for respondent.

COOPER, J. Action to recover $1,500 attorney's fees alleged to have become due from defendant to plaintiff's assignor. The case was tried with a jury, and a verdict rendered for plaintiff for $1,100. This appeal is from the judgment and order denying defendant's motion for a new trial.

The appellant relies upon two points for a reversal of the judgment and order. The first is that the court erred in denying the defendant's motion for a nonsuit as to the second count of the complaint. The complaint contains two counts; the first being for the reasonable value of the attorney's services, the second being upon an express contract. At the close of plaintiff's testimony the defendant made the motion for a nonsuit as to the second count, whereupon counsel for plaintiff stated in open court that he did not rely upon the second count, and intended to ask the court to instruct the jury that plaintiff could only recover for the reasonable value of the services rendered. The court, upon said statement, denied the motion. The instructions of the court to the jury were all given upon the theory that the second count was abandoned, as no reference is made to such count in the instructions. The court instructed the jury as follows: "The sole question to be determined by you from the evidence is the reasonable value of the services rendered by the said M. C. Hassett, as attorney at law for the said defendant in the estate of Susan Crooks, deceased," and, further: "If you find in this case that M. C. Hassett, at the request of the defendant, rendered legal services which he knew of, though the compensation was not agreed upon, and which he accepted of, then and in that event I instruct you that there was an implied contract that the defendant should pay the reasonable value of the legal services rendered by said M. C. Hassett as his attorney, the amount of the services and the full value thereof to be determined by you as a question of fact." We think it plain from the above that the ruling of the court in denying the nonsuit as to the second count was, if erroneous, not prejudicial. If the nonsuit had been granted, the second count would have been eliminated from the case. It was in fact eliminated by the statement of counsel for plaintiff and the instructions of the court. The jury certainly understood that they were to pass upon the question as to the reasonable value of the legal services. The verdict shows that they intended to find the reasonable value of the services, because there is not a word in the evidence as to any conversation or agreement in which $1,100 was mentioned. We will presume, for the sake of upholding the verdict and the judgment, that they were based upon the first count, which is supported by the evidence, and to which the instructions were directed.

The second objection urged is that the court erred in giving to the jury the following instruction: "I further instruct you that if you find from the evidence that plaintiff's assignor, M. C. Hassett, on or about the 9th day of February, 1896, received from the defendant in this action the sum of $300, and at that time the defendant made no specific request nor gave said Hassett any directions how to apply said payment, then I instruct you that the said Hassett had the right to apply said payment upon any obligation due said Hassett from the defendant, and, if said Hassett applied the said $300 to the payment of a fee charged by him against said defendant for the procurement of a loan of $5,000 for the said defendant from Christina Strobel, then I charge you that the said Hassett had the right so to do." The defendant's objection to the above instruction is that it took from the jury the question as to whether or not the charge of $300 made by Hassett against defendant for negotiating the loan referred to was a reasonable charge for such services. The defendant has not seen fit to object to the instruction, as not based upon and applicable to the evidence given on the trial, nor has he brought up the evidence on which the instruction was predicated. We must therefore presume that the evidence showed that the fee of $300 was agreed upon, and that it was a reasonable charge. It is a settled rule in this court that when error is claimed as to an instruction given to a jury, and the evidence might have justified the instruction, the party alleging such error must show affirmatively that the evidence did not justify the instruction. In this case we must presume that there was no issue as to the reasonableness of the charge of $300. If appellant had brought up the evidence, and it had shown a conflict as to the reasonable value of the services for which $300 was charged, and that there was no agreement as to the payment of this sum as a fee, then there would be much force in defendant's contention.

This disposes of the only errors urged on this appeal. The judgment and order are affirmed.

We concur: HARRISON, P. J.; HALL, J.

7 Cal. Unrep. 243

In re TUCKER.

(Court of Appeal, Third District, California. Oct. 23, 1905.)

APPEAL—SUBMISSION OF CAUSE—SUBSEQUENT SETTLEMENT—DISMISSAL.

Where, after the submission of an appeal, the subject-matter of the action was settled by the parties, the appeal will be dismissed on respondent's motion suggesting such settlement.

Application by W. E. Tucker for mandamus against F. L. Caughey, as county auditor of Mendocino county. On motion to dismiss appeal. Granted.

McNabb & Hirsch, for appellant. W. E. Tucker, in pro per.

CHIPMAN, P. J. This cause was submitted when reached upon the calendar upon the written statement of attorneys for appellant that they understood that respondent was willing to submit the case upon the authority of Humiston v. Shaffer, 145 Cal. 195, 78 Pac. 651, and asked that it be so submitted.

The court ordered the case submitted upon that statement. Subsequently the respondent served and filed a motion for dismissal of the appeal, supported by an affidavit in which it appears that the subject-matter of the action has been settled by the parties and that the respondent has been paid by the county auditor the amount involved in the controversy and the judgment therein satisfied. The order heretofore submitting the cause is vacated and the motion of respondent is granted.

The appeal is dismissed, each party to pay his own costs.

We concur: McLAUGHLIN, J.; BUCKLES, J.

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2 Cal. App. 338

BELL et al. v. BELL et al.

(Court of Appeal, First District, California. Dec. 5, 1905.)

EXECUTORS AND ADMINISTRATORS — FAMILY ALLOWANCE—RIGHTS OF WIDOW AND CHILDREN.

Code Civ. Proc. § 1468, provides that, when property is "set apart" to the use of the family of a decedent, one-half shall belong to the widow and the remainder to the children. The statute also provides for an allowance for the family, which by section 1467 is made a charge against the estate. *Held*, that a widow to whom a family allowance has been paid is not accountable to the children after their majority for shares not expended for their support; section 1468 applying to tangible property, such as exempt property or a homestead, and not to a family allowance.

Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Action by Muriel Bell and others against Teresa Bell and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Charles J. Pence and Bart Burke, for appellants. T. Z. Blakeman, for respondents.

HARRISON, P. J. Letters testamentary upon the estate of Thomas Bell, deceased, were granted by the superior court for San Francisco November 7, 1892, and on November 22, 1892, Teresa Bell, one of the defendants herein, presented to the court her petition setting forth that the decedent had left her as his surviving widow with six minor children, and praying that the court would make an allowance out of said estate for the support of said family. January 12, 1893, the court made an order awarding to her "as and for a family allowance out of said estate" the sum of $2,000 per month, and directing the executors to pay the same to her each month until the further order of the court. October 14, 1895, the court made an order reducing the said monthly allowance to $1,500 per month, and in May, 1898, made another order reducing it to $100 per month. The plaintiffs herein, are four of the children of the decedent who have reached their majority, and by the present action they seek judgment for an accounting by their mother (the said Teresa Bell) of the moneys received by her under the aforesaid order and disbursed for their support, and for judgment in their favor for the several amounts found due them upon such accounting, claiming that the said moneys were received and held by her in trust for the several members of the family, and that they are entitled to the respective shares which have not been expended for their support. The court sustained a demurrer to the complaint, and from the judgment entered thereon the plaintiffs have appealed.

It is manifest that the plaintiffs cannot maintain their action unless they have some interest in the moneys paid to the defendant, for the said family allowance; and for the purpose of showing such interest they rely upon section 1468, Code Civ. Proc. which provides that when property is set apart to the use of the family the one-half of such property shall belong to the widow, and the remainder in equal shares to the children, if there be more than one. By the very terms of this section, however, its provisions are applicable only when some specific or tangible property has been "set apart" for the use of the family; e. g., property that is exempt from execution, or a homestead when one has not been selected in the lifetime of the decedent (section 1465), or the entire estate when its value is less than $1,500 (section 1469). In these cases the property set apart is withdrawn from the administration of the estate and is no longer under the control or supervision of the court. The provision for a family allowance does not direct the court to "set apart" any particular property, but requires it to "make a reasonable allowance" out of the estate, which, by section 1467, is made a "charge" against the estate, which must be "paid" in preference to all others except funeral charges and expenses of administration, and for which, by section 1536, other property of the estate may be sold for the purpose of raising the money with which to pay the charge. The limitation of title declared in section 1468 for the property which is "set apart," and the omission to prescribe such limitation for the money directed to be paid for the family allowance, clearly indicates that the Legislature did not intend that the latter should be subject to such restriction.

Neither is this allowance made "for the use of the family," but, by the terms of the statute is for its "maintenance" while the estate is in progress of settlement, and its property is in the custody of the administrator or executor; and this includes the duty of keeping its members under the same roof with the common interests of a home as well as the expense incurred for food and raiment or for education and health. Upon the death of the father the maintenance of the family devolves upon the mother, and it is for the purpose of enabling her to discharge this duty that the court is authorized to appropriate a portion of the property of the estate. The allowance is not made merely for the purpose of enabling her to defray the several expenses incurred for each member of the family, but that she may also provide a means whereby she and the minor children may be kept together, and the family may be maintained as a whole. See Keyes v. Cyrus, 100 Cal. 322, 34 Pac. 722, 38 Am. St. Rep. 296. The provision in section 1466 that the court "must make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family according to their circumstances" implies that before making the order, the court will ascertain the circumstances of the family and of the estate out of which the allowance is to be made. This will involve an inquiry, among other matters, into their habits and mode of life during the lifetime of the decedent; the requirements of the several members of the family—depending upon their age and condition—whether for education, physical support, or health, and also the condition and extent of the property belonging to the estate. The amount which, upon such consideration, the court determines will be reasonable is properly directed to be paid to the widow as the person charged with the maintenance of the family, and it then becomes a judgment in her favor for that amount. Estate of Bell, 131 Cal. 1, 63 Pac. 81, 668.

The minor children have no claim to any portion of the allowance thus made to her, nor is it held by her in trust for them. Certainly the Legislature did not intend that one-half of the allowance should belong to her out of which should be paid the cost of her maintenance, and that an equal part of the other half should belong to each child, out of which should be paid only the cost of supporting that child. The amount of the allowance is fixed, with the view that it will be entirely consumed in maintaining the family; and if in this respect the court errs, whether by making the allowance too large or too small, it is an error in its judgment, which can be corrected only upon a further application, setting forth the grounds upon which the amount of the allowance should be modified. Until such change, if there be any portion which is not expended, it is the property of the widow, and if the expenses are greater than the allowance the loss must be borne by her. In determining the amount to be paid, the court does not attempt to fix the amounts which will be consumed for each member of the family, but aggregates the needs of the family as a whole, and makes an allowance which it considers to be reasonable for those needs. It is of universal experience that the same expense is not incurred for each child, and that there are many expenses which do not appertain to either child, but which are incurred for the family as a whole; and there are also many duties of the mother which are not susceptible of pecuniary measurement. The expenses incurred for the infant which requires the mother's care, the child at school, or the youth preparing for the duties of manhood or womanhood in the years before majority, are not the same; and the rent of the home, its furniture, the expense of reparation, wages of sevants, cost of equipage, and numerous other items are a charge upon the family as a whole, and are not to be apportioned against the individual members thereof. Upon these considerations it must be held that the widow, to whom the court directs a family allowance to be paid, is not required to account to her children for the manner in which such allowance has been expended, and that the demurrer to the complaint herein was properly sustained.

The judgment is affirmed.

We concur: HALL, J.; COOPER, J.

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2 Cal. App. 342

CROSS v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO.

(Court of Appeal, First District, California. Dec. 5, 1905.)

PROHIBITION — ADEQUATE REMEDY IN ORDINARY COURSE OF LAW—RIGHT OF APPEAL.

Under Code Civ. Proc. §§ 1102, 1103, authorizing the issuance of a writ of prohibition to arrest the proceedings of any tribunal when such proceedings are without or in excess of the jurisdiction of such tribunal, and there is no plain, speedy, and adequate remedy in the ordinary course of law, a writ will not be issued on petition of an heir at law to prohibit a superior court from making an order directing the payment of an inheritance tax from the estate of the decedent, on the ground that the statute under which the court is proceeding has been repealed, since such an order, if made, is reviewable by appeal under Code Civ. Proc. § 963, subd. 3, as well as on appeal from a decree of final distribution, and an appeal is a plain, speedy, and adequate remedy within the meaning of the statute.

Petition by Alexander Cross against the superior court of the city and county of San Francisco, department No. 10, Hon. James M. Troutt, presiding, for a writ of prohibition. On demurrer to petition. Demurrer sustained.

Rehearing denied by Supreme Court, February 1, 1906.

Garoutte & Goodwin, for petitioner. A. L. Levinsky, Wilson & Wilson, S. F. Leib, and Oscar A. Trippett, amici curiæ. U. S. Webb, Atty. Gen., Percy V. Long, City Atty., John S. Partridge, Asst. City Atty., and Solinsky & Wehe, for respondent.

COOPER, J. This is an application for a writ of prohibition to be directed to the superior court of the city and county of San Francisco and to the presiding judge of department 10 thereof. The petition alleges: That James T. Cross died in January, 1905, being at the time of his death a resident of the city and county of San Francisco, and leaving a large estate, both real and personal, therein. That one Hynes was appointed administrator of the said estate, qualified, and letters of administration were duly issued to him, and that petitioner is the brother and sole heir at law of deceased. That under the collateral inheritance tax act of the state of California, enacted in 1893, and the amendments thereto, if said act is still in force, the petitioner would be required to pay a collateral inheritance tax to the state of California upon the estate coming to him from the estate of deceased at the rate of 5 per cent. upon the market value of said estate. That by an act of the Legislature enacted at the session of 1905, which took effect July 1, 1905, another and different collateral inheritance tax act was passed, which expressly repealed the inheritance tax act of 1893. That, notwithstanding such repeal, the said superior court is about to and threatens to appoint an appraiser and proceed to have the said estate appraised, and the market value fixed under the method prescribed in the act of 1893, for the purpose of enforcing the collection of the collateral inheritance tax as fixed by the act of 1893, in accordance with the procedure therein laid down. The respondent filed a demurrer to the petition upon the ground that it does not state facts sufficient to authorize the writ of prohibition prayed for, and now claims that petitioner has a plain, speedy, and adequate remedy by appeal in the ordinary course of law. The evident object of the proceeding is to obtain the opinion of this court as to whether or not a collateral inheritance tax can be collected under the act of 1893, after its repeal; but the conclusion which we have reached makes it unnecessary to decide that question.

The writ of prohibition arrests the proceedings of any tribunal when such proceedings are without or in excess of the jurisdiction of such tribunal, and there is no plain, speedy, and adequate remedy in the ordinary course of law. Code Civ. Proc. §§ 1102, 1103. If there be a plain, speedy, and adequate remedy in the ordinary course of law, the writ will be denied. There are cases on the border line, in which it is a matter of some difficulty, and generally, in this state, a matter of discretion, as to whether or not there is a plain, speedy, and adequate remedy in the ordinary course of law. It is the general rule that, where there exists an opportunity for a review and correction of the wrong complained of in a higher court on appeal, prohibition will not lie. Spelling on Injunctions and Other Extraordinary Remedies, § 1729; High on Extraordinary Legal Remedies, § 780; Huguley Mfg. Co. v. Galeton Cotton Mills, 184 U. S. 301, 22 Sup. Ct. 452, 46 L. Ed. 546; Lindley v. Superior Court, 141 Cal. 220, 74 Pac. 765; Agassiz v. Superior Court, 90 Cal. 103, 27 Pac. 49. In the latter case the court said; "Petitioners had the right to appeal from the order refusing to dissolve the attachment, and would have an appeal from any final judgment in the case; and such appeal being a plain, speedy, and adequate remedy in the ordinary course of law, within the meaning of section 1103, Code Civ. Proc., prohibition does not lie. A remedy does not fail to be speedy and adequate because by pursuing it through the ordinary course of law more time would probably be consumed than in the proceeding here sought to be used. And it makes no difference that in this instance a question of jurisdiction incidentally depends upon the validity of an attachment. If that were so, then in every ordinary civil action, whenever a defendant chose to raise a point of jurisdiction, either of the person or of the subject-matter, he could by prohibition stop the ordinary progress of the action toward a judgment until this court had passed upon the intermediate question; and thus this tribunal would, in innumerable cases, be converted from an appellate to a nisi prius court."

Let us, then, examine the question as to whether or not the petitioner has a remedy by appeal. The main thing sought to be prohibited is the making of an order directing the payment of the tax under the act of 1893. In cases where the court makes an order fixing the amount of tax to which an estate is liable, it becomes the duty of the executor to collect or retain such tax, and pay it to the county treasurer for the use of the state. The order would be in substance an order directing the payment of a claim—the claim of the state to the tax—and, as such, would be appealable, Code Civ. Proc. § 963, subd. 3. In Stuttmeister v. Superior Court, 72 Cal. 487, 14 Pac. 35, the word "claim" as used in section 963 was given a broad meaning. It was held to include a demand for attorney's fees, allowed by the court to the administrator for services of his attorney. That case was followed and approved in Leach v. Pierce, 93 Cal. 627, 29 Pac. 239. In Estate of Stanford, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462, 45 L. R. A. 788, an appeal was taken, and never questioned, from the order directing the executrix to pay the collateral inheritance tax. Not only would the petitioner have the right to appeal from the order directing the payment of the tax, but he would have the right to appeal from the decree of final distribution, if the decree should direct the deduction of the amount of the tax. That was the course taken in Estate of Mahoney, 133 Cal. 180, 65 Pac. 389, 85 Am. St. Rep. 155, and in Estate of Campbell, 143 Cal. 623, 77 Pac. 674, both of which involved questions as to the collateral inheritance tax law.

We are aware of no case where an order such as the contemplated order here has been stopped by the extraordinary writ of prohibition. If the attention of the lower court is called to the matter, we must presume that no illegal claim or demand will be allowed or ordered paid. If the ruling should be against petitioner, he has his remedy in the ordinary course of law by appeal, and can thus obtain the judgment of this court upon the question. In Ophir Silver Mining Co. v. Superior Court of San Francisco (Cal.) 82 Pac. 70, the superior court was proceeding to try a case involving the issuance of an injunction enjoining a threatened injury to land in another state, and of which the courts of the sister state had jurisdiction. While it was held that the petitioner would have had a remedy by appeal, the writ was issued upon the ground that such remedy "would be wholly inadequate for the reason that much of the greater part of the expenses (of transporting witnesses, etc.) could not be recovered as legal costs."

The demurrer is sustained, and the petition dismissed.

We concur: HARRISON, P. J.; HALL, J.

148 Cal. 564

PEOPLE v. LAMAR. (Cr. 1,218.)

(Supreme Court of California. Jan. 29, 1906.)

1. HOMICIDE — EVIDENCE—CHARACTER OF DECEASED—FOUNDATION.

Where, in a prosecution for homicide, it was proved that defendant and deceased had been well acquainted with each other for several years, that they lived in a small town and both frequented the same places, and that defendant, on the night of the homicide, knew that deceased had been drinking freely, a sufficient foundation was laid for the introduction of evidence of deceased's reputation for quarrelsomeness under such conditions.

2. WITNESSES — CROSS-EXAMINATION — CHARACTER OF DECEASED.

Where, in a prosecution for homicide, a witness testified on cross-examination by defendant, that deceased's general reputation for peace and quiet in the community where he lived was good, defendant was not thereby concluded from proving, on further cross-examination, if possible, that such reputation was not the same under all circumstances, and that deceased was violent and dangerous when intoxicated.

3. HOMICIDE — SELF-DEFENSE — EVIDENCE —CHARACTER OF DECEASED.

Where, in a prosecution for homicide, there was evidence to support defendant's claim that he acted in self-defense and the circumstances of the fatal encounter were equivocal, defendant was entitled to prove deceased's reputation as a quarrelsome and dangerous man when intoxicated, as he was on the occasion of his death, of which reputation defendant had knowledge.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 391-397.]

4. CRIMINAL LAW—EVIDENCE—OBJECTIONS — FOUNDATION.

An objection to an offer of evidence in a criminal case, because no proper foundation had been laid, without pointing out wherein the foundation was insufficient, was too general.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1636.]

In Bank. Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Charles H. Lamar was convicted of manslaughter, and he appeals. Reversed.

Smith & Allen, for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Deputy Atty. Gen., for the People.

LORIGAN, J. The justices of the District Court of Appeal for the Second District, before whom this appeal was originally pending, being unable to agree on a judgment therein, the matter has been transferred to this court for disposition. The defendant was prosecuted for murder, convicted of manslaughter, and sentenced to imprisonment in the state prison for a term of 10 years. Upon the trial the killing by defendant was admitted, and he sought to justify it on the ground that it was done in necessary self-defense. Upon this appeal defendant presents several grounds for a reversal, only one of which, we think, requires discussion, and in order that this point may be clearly understood it will be necessary to give a general outline of the evidence in the case as it stood when it is claimed the trial court committed error in rejecting testimony offered on behalf of defendant.

The defendant and the deceased, Tom Delaney, were both young men residing at Mojave, Kern county. Delaney was a barkeeper in one of the saloons of that town, and the defendant had occasionally tended bar in the same locality, though not so employed at the time of the homicide. They had been acquainted with each other for some time, and met frequently about the various saloons in Mojave, to which both were in the habit of resorting. For some two months prior to the homicide ill feeling had existed between them, springing from an altercation in the saloon where defendant was then employed, during which Delaney had fired a shot at him, for which defendant had had him arrested and prosecuted. The killing of Delaney occurred in a house of ill fame in the town of Mojave, a little after 3 o'clock in the morning of the 29th of January, 1904. It appears that both the defendant and deceased were familiar with this house and with its inmates. About 2 o'clock that morning defendant and Rose Givens, one of the inmates of the place, had retired to her room in the house for the night. Shortly before 3 o'clock Delaney, with several companions, visited the house. A little while after his arrival, Delaney left the room in which he and his companions and the mistress of the house were, for the declared purpose of calling some of the women from their rooms to join them in a drink. As to what subsequently occurred, the evidence is in radical conflict. Two of Delaney's companions, who followed him from the room, testified that when he went out into the hallway the first room he came to was that occupied by defendant and Rose Givens, and that he rapped on the door, called her by name, and said he wanted to see her. She declined to open the door or see him, saying she would see him in the morning. He insisted, however, on seeing her then—for what purpose he did not declare. After some parleying she at last consented to open the door, and immediately some one was heard to approach it from the inside and apparently endeavor to open it. At that moment Delaney, who had his hand on the knob, shook the door and it opened. As it did, shooting commenced from the inside and Delaney fell to the floor inside the room, just as the Givens woman rushed screaming past him into the hall. These witnesses testified that only three shots were fired, all by defendant in rapid succession; that there was no light in the room occupied by defendant and the woman, but a lantern in the hallway was lighted; that by it they could distinctly see Delaney as he stood at the door waiting for it to be opened, and that he had no weapon in his hand; that immediately after the shooting defendant hurried from the house, pistol in hand, attired only in his pantaloons; that they went into the room where Delaney had fallen and found him breathing, but apparently unconscious, and he soon expired. He had received three wounds, a fatal one through the heart. They testified that no weapon was found on Delaney's person or in the room where he had fallen. This was the testimony on the part of the prosecution as to the immediate circumstances attending the killing.

The testimony on the part of the defense, as to what occurred at the time of the homicide, consisted of the testimony of Rose Givens and the defendant. The woman testified that when Delaney came to the door and knocked he called out that he wanted to come in—that he wanted to see her; that she told him he could not do so as she had company, but that she would see him in the morning; that he insisted on coming in and seeing her then, and upon her still refusing to open the door or see him he declared that if she did not he would kick the door in; that when he declared this intention she answered that she would come out into the hall and talk to him, and got out of bed for that purpose; that as she approached the door and had almost reached it, Delaney kicked it open with such force that it struck her in the head, staggering her back into the room, that when she recovered herself she ran out of the room past Delaney, who was standing in the hallway opposite the doorway with two others, and into the street; that when she reached the street, some 40 feet from the building, she heard the shooting.

The testimony of the defendant, as to what occurred up to the time Rose Givens ran out of the room, coincided with her testimony as to those occurrences. He testified, further, that, when Delaney came to the door and asked that it be opened, he recognized his voice, got out of bed and put on his pants, and took a position at the foot of the bed, where he was standing with his pistol in hand when Delaney kicked open the door; that after Rose Givens rushed out, Delaney walked into the room towards the defendant, saying, "You son of a bitch, what are you going to do now?" that as he spoke, Delaney drew his pistol, and each fired almost simultaneously; that as they fired the door swung around so as to leave them in the dark; that they then grappled with each other, and during the struggle two or three more shots were fired, one by Delaney; that in the struggle they fell to the floor, and while down the defendant pressed his pistol against Delaney's body and fired again; that upon this shot, as Delaney immediately ceased struggling, defendant arose from the floor and left the house. He had received no injury in the contest.

In addition to this evidence on both sides as to the circumstances immediately attending the killing of deceased, there was evidence in the case of other facts; that defendant had on several occasions, even on the evening of the homicide, declared his intention of killing Delaney; and there was evidence from which the jury might also have found that Delaney on the same evening had expressed a similar intention toward defendant. There was also evidence from which the jury might have reasonably inferred that Delaney knew, or had strong reasons to believe, that the defendant and Rose Givens were together in her room when he approached it. As to the possession by Delaney of a pistol when he came to the house, there was evidence showing that he had one at 11 o'clock that night, and nothing to show that he had laid it aside before his appearance at the door of the room where he lost his life, and there was evidence in the case to the effect that one of the men who had accompanied Delaney to the scene of the tragedy, and who testified on the trial, had stated, upon the day of the shooting, that when he entered the room where the killing took place, immediately after the defendant left, he found Delaney's pistol on the floor of the room and had secreted it. It further appeared from the evidence that Delaney had spent the night, from 8 o'clock in the evening until he went to this house of ill fame, at about 3 o'clock in the morning, visiting various saloons in different parts of the town of Mojave and drinking therein, and that defendant, who had spent the earlier part of the night on which the homicide occurred in a saloon and dance hall in company with Rose Givens and others of her class, into which saloon Delaney came during the night, knew that he was drinking. As indicating the extent to which Delaney was drinking, one of his companions, who was with him all that night up to the time of his death, testified: "We did not visit any place except saloons that evening or night. We both had money and treated quite often. We spent the entire evening going about from saloon to saloon, having frequent drinks and a general good time. It was rather a convivial evening." It was also shown that on the night of the homicide, and some three hours prior to it, defendant was several times warned against remaining in the presence of, or meeting, Delaney, as he was drinking; that, if he did, trouble would probably ensue, a warning which defendant heeded by immediately leaving the saloon and dance hall where Delaney was drinking, and repairing with Rose Givens to her room.

The foregoing constitutes all the evidence adduced at the time (and was practically all the evidence in the case) when the defendant sought to introduce the testimony which the court struck out or refused to admit, and the rulings concerning which present the principle assignments of error that we shall now consider. That testimony was with reference to the general reputation of the deceased in Mojave for peace and quiet. One J. H. Underhill, having qualified himself to speak on the subject, on inquiry as to the reputation of the deceased for those traits, stated that it was good. He was then asked if this was true of deceased under all circumstances, and replied that it was not. He was asked to explain what he meant by that answer, but under objection of the prosecution, sustained by the court, he was not permitted to do so, and the answer of the witness that under all circumstances his reputation for these traits was not good, was, on motion, and on the ground that the answer was irrelevant, immaterial, and incompetent, stricken out; the defendant excepting to the ruling. In granting the motion the reason assigned by the court for granting it is contained in its declaration made at the time. The court said: "I do not think you had a right to an answer to the question at all after he answered that his reputation was good. I think you should stop right there. The motion is granted. Let it be stricken out." Upon further discussion between the court and counsel for defendant, the court held that the answer of the witness that the reputation of deceased for peace and quiet in Mojave was good utterly precluded defendant from asking the witness any further questions in the line that he was pursuing on the subject of that reputation. Notwithstanding the view expressed by the court, counsel for defendant further asked the witness (indicating by the inquiry the circumstances under which he was endeavoring to show that the reputation of deceased for peace and quiet was not good) whether he knew the reputation of deceased in the town of Mojave for peace and quiet when he was drunk; but on objection of the prosecution that no proper foundation had been laid for this inquiry, and on the further ground that the question was irrelevant, immaterial, and incompetent, the objection was sustained. The error complained of is predicated on these rulings.

While it is insisted by respondent that the defendant, under the circumstances of the case, had no right at all to prove the reputation of deceased for peace and quiet, it is further contended that, if he had, no proper foundation was laid to warrant its introduction, and that the ruling of the court should be sustained here on that ground. It is quite clear, however, that the ruling of the court striking out the answer of the witness relative to the circumstances under which the reputation of deceased for the traits involved was not good, was based on no such ground, as none such was urged by the people. It was stricken out solely upon the ground that the court was of the opinion that the general answer of the witness that the reputation of deceased was good absolutely precluded defendant from further particular inquiry upon the subject. It is quite evident, too, that the subsequent ruling was prompted by this view of the court as to the law. Waiving for a moment consideration of the question whether the evidence sought to be introduced was at all material or competent in the case, and assuming that it would be our duty to sustain the general ruling of the court rejecting the same, if the particular objection that no proper foundation for its admission was well taken, even though the ruling of the court was evidently not based on that ground, we are, nevertheless, satisfied from the evidence that, if the ruling could be considered as predicated upon that objection, it cannot be sustained. It will be observed that the objection does not specify any particular foundation which defendant failed to lay; but it is now argued, dealing more directly with the last question asked the witness and sustained, that it was essential, before the defendant could be allowed to show what the reputation of deceased for peace and quiet was when he was drunk, that there should be evidence before the jury that the deceased was in fact drunk on the night of the homicide, that defendant knew it, and knew, further, what the reputation of deceased for those traits was when in that condition. But this particular objection, we think, has no force as, in our opinion, there was sufficient evidence before the jury not only tending to prove that defendant knew the reputation of deceased, but further tending to prove the other facts which, it is claimed by respondent, should have been proven in order to establish a proper foundation upon which to permit evidence to be introduced of the reputation of deceased for the traits involved. The obvious purpose of the testimony which defendant was endeavoring to elicit at this stage of the case was to prove that the deceased had the reputation of being a quarrelsome, violent, and dangerous man when intoxicated.

From the uncontradicted evidence in the case that deceased had spent at least seven hours of the night immediately preceding his death in visiting the various saloons in Mojave and frequently drinking therein, the jury had a right to infer, as a matter of common knowledge, that the deceased was intoxicated to such an extent as to have lost the normal control of his physical and mental faculties, and if, when intoxicated he was, as defendant was endeavoring to prove, a violent, quarrelsome, and dangerous man, that he was, when he entered the house of ill fame referred to, in such condition from liquor that these traits predominated him. As to defendant's knowledge that deceased was intoxicated, and that when in that condition he was a dangerous man, the evidence of the defendant himself, and the warnings given him of the danger of meeting Delaney that night because he was drinking, tend to support both facts. As to the knowledge of defendant of the reputation of deceased, it is further to be observed that the evidence tends to show defendant was well acquainted with deceased, had lived in the little town of Mojave several years, was familiar with the places—the saloons—which they both frequented, and generally with the persons who owned or resorted to them. It would be in such places, and among such people, that the reputation of the deceased would be best known, and if the deceased had the general reputation which defendant sought to prove, it would naturally be matter of public notoriety there. And, under the circumstances, it must be presumed that defendant had knowledge of it. Trabune v. Comm. (Ky.) 17 S. W. 186; Harrison v. Comm., 79 Va. 380, 52 Am. Rep. 634; Reynolds v. People, 17 Abb. Prac. (N. Y.) 417; Horigan & Thompson, Cases of Self-Defense, p. 696. From these considerations we are satisfied that when the excluded testimony was offered there was sufficient evidence tending to establish a foundation for its admission. And, if it were admissible, it was certainly no ground for striking out the first answer and sustaining an objection to the second, that the witness had preliminarily stated that the general reputation for peace and quiet of the deceased was good. The defendant was not concluded by that answer from showing, if he could, that this favorable reputation was not the same under all circumstances and conditions. A man may possess different characters, or different reputations, adapted to different localities, or different conditions of mind, and as applied to the inquiry at hand, the deceased may have had one reputation for peace and quiet when sober, and quite another for these same traits when drunk. The existence of these different reputations under different conditions of mind was what the defendant sought to show—the reputation of deceased for violence when intoxicated, as contradistinguished from his reputation for peace when sober—and the reason assigned by the court afforded no warrant of itself for rejecting it.

Neither can we accord with the further contention of respondent that upon no principle of law was the evidence admissible. On the contrary, under the circumstances of the case as presented to the jury, we think that the offer to show that the general reputation of deceased was that of a quarrelsome, violent, dangerous man when intoxicated was both proper and pertinent. We say, under the circumstances of the case, because it is undoubtedly true that, as an abstract proposition, the good or bad character of the deceased cannot be taken into consideration as an element influencing the jury in determining the guilt of a defendant. All men, independent of their character or reputation, are under the equal protection of the law, and it in no degree excuses or palliates the taking of human life that the person slain was of bad character or reputation; the offense is as great whether the life maliciously taken be that of a man of bad or of good character. But, while the general rule is that evidence of the bad reputation of deceased for peace and quiet cannot be given in evidence, still this rule has its exceptions applicable to cases where the facts and circumstances surrounding them are peculiar. Such an exception applies in cases of homicide where the plea of self-defense is interposed, and the evidence before the jury leaves it in doubt whether the deceased was the aggressor, or where the circumstances attending the homicide render it doubtful or equivocal whether the defendant was justified in believing himself in imminent danger at the hands of deceased. The conflicting evidence in the case at bar brought the case within the exception stated, as presenting a situation where the sufficiency of the plea of self-defense, made by the defendant, in the essential elements necessary to constitute it, was enveloped in doubt.

It was early laid down as the rule in this state, that under such circumstances, evidence of the reputation of the deceased for violence is admissible. In People v. Murray, 10 Cal. 310, this court says: "The other point is, the exclusion of evidence of the character of the deceased for turbulence, recklessness, and violence. The rule is well settled that the reputation of the deceased cannot be given in evidence, unless, at the least, the circumstances of the case raise a doubt in regard to the question whether the prisoner acted in self-defense. It is no excuse for a murder that the person murdered was a bad man; but it has been held that the reputation of the deceased may sometimes be given in proof to show that the defendant was justified in believing himself in danger, when the circumstances of the contest are equivocal." The case of People v. Anderson, 39 Cal. 704, also confirms this doctrine. These cases lay down the broad rule that in all cases of homicide, where the other evidence introduced raises a doubt whether defendant acted in self-defense, evidence of the reputation of the deceased is admissible, and this rule applies as to every essential issue in the case upon which that plea is founded. It is always a vital issue before the jury, when such a plea is interposed, as to who was the aggressor in the contest. In the case at bar this issue, under the evidence, was involved in doubt, and any fact which would, under such circumstances, serve to illustrate who was the assailant in the encounter, where the death of one of the parties ensued, would be admissible. In such equivocal condition of the evidence the reputation of the deceased as a violent, turbulent, dangerous man would be a legitimate subject of inquiry, illustrating the animus with which he encountered the defendant. It would be a circumstance immediately connected with the quarrel tending to illustrate the true intent or motive which characterized the conduct of deceased therein, to be taken into consideration by the jury, in connection with the other facts and circumstances in the case, in determining who was the aggressor in the fatal contest.

It is the rule in this state that threats of hostile intention made by a deceased, whether communicated or uncommunicated, are admissible evidence for the said purpose when the evidence is equivocal. People v. Scoggins, 37 Cal. 686; People v. Travis, 56 Cal. 251; People v. Tamkin, 62 Cal. 468; People v. Thomson, 92 Cal. 506, 28 Pac. 589. The philosophy which supports this rule as to the admissibility of evidence of such threats, where it is otherwise in doubt from the evidence who was the assailant, is that it is more probable that one who has made threats of hostile intention towards another would, when opportunity permits, attempt to carry such threats into execution and become the assailant, than would one who has made no such threats, or declared no such intention. So, too, with reference to the admissibility of evidence of the reputation of deceased as being a violent, turbulent, dangerous man, such proof, when the evidence as to who was the assailant is in doubt, for a similar philosophic reason should be permitted; it being more probable that one bearing such a reputation would precipitate a deadly contest than would one having no such reputation. Hence we think the rule should be that whenever the circumstances of a case permit of the admission of evidence of threats made by the deceased against the defendant, either communicated or uncommunicated, evidence of the reputation of the deceased as being a violent, quarrelsome, dangerous man, either known or unknown to the defendant, is equally admissible, the consideration of the jury to be limited by proper instructions of the court, where the reputation is unknown to defendant, to the same extent that the law limits the consideration by them of uncommunicated threats—to the question solely as to who was the assailant in the fatal encounter. The rule as to such limitation when applied to uncommunicated threats is declared in People v. Scoggins, 37 Cal. 686.

Our consideration has thus far been addressed to the admissibility of the offered testimony as bearing upon the question of who was the aggressor in the contest, and which the evidence left in doubt. The evidence was, however, not only equivocal on this point, but as to all the other circumstances immediately attending the fatal encounter. In such state of the evidence there can be no doubt, under the authorities heretofore cited (People v. Murray, supra; People v. Anderson, supra; and People v. Tamkin, supra), that evidence of the reputation of deceased, known to defendant at the time of the contest, was admissible as bearing on the question whether defendant was justified in believing himself in imminent danger from deceased; whether his knowledge of the reputation of deceased, taken into consideration with all the other circumstances in the case, was sufficient to excite the fears of defendant, as a reasonable man, that deceased intended to inflict great bodily harm upon him, or to slay him. The general rule on this point is already clearly stated in the foregoing authorities, and any extended discussion of it is unnecessary. The purpose of allowing such evidence when the plea is self-defense is to put the jury in possession, as nearly as possible, of all the facts attending the homicide, and upon a knowledge or observation of which the defendant acted. It is familiar law that where a defendant claims to have acted in self-defense, a danger which is apparently imminent, and which a reasonable man, situated as the defendant was, knowing what he knew and seeing what he saw, would deem so, is to be considered, for the purposes of supporting such plea, as actually and really imminent. In this view of the law it is quite evident that, where a defendant has knowledge of the reputation of his adversary as a violent and dangerous man, the apparent peril in which he is placed must necessarily appear to him more imminent than if he possessed no such knowledge. Hence, when there is evidence in a case tending to support the claim of a defendant that he acted upon an honest apprehension of imminent peril from some overt act on the part of the deceased, and the circumstances of the fatal contest are equivocal, the reputation of the deceased as a violent and dangerous man is proper and competent evidence to present to the jury for consideration in determining whether defendant acted upon a reasonable apprehension that he was in imminent peril. It is obvious that under such circumstances, as the known reputation of the deceased for the traits involved would necessarily operate upon the mind of the defendant, such reputation is a matter of proper and legitimate consideration for the jury. In the case at bar we are satisfied that in the doubtful state of the evidence as it stood when the testimony to prove the reputation of the deceased as a violent, quarrelsome, and dangerous man when intoxicated was offered, the testimony, for the reasons we have indicated, should have been permitted to go before the jury.

Some other points are made for a reversal. It is claimed that no sufficient preliminary proof was made to warrant the admission in evidence of the deposition of a witness taken at the preliminary examination in the justice's court, and who was absent from the state at the time of the trial. The objection of defendant was that no proper foundation was laid. This objection was too general. It should have pointed out wherein there was a failure to lay a proper foundation. There are several matters necessary to be proven to warrant the admission in evidence of a deposition taken at a preliminary examination, and counsel should have specified the particular deficiency in the proof which he claimed existed. As the particular proof, which for the first time it is urged here that the prosecution should have made, can be readily supplied on a new trial, it is unnecessary to pursue the matter further. None of the other points urged by defendant have any merit.

The order denying the motion of defendant for a new trial and the judgment are reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; HENSHAW, J.; SHAW, J.; ANGELLOTTI, J.; McFARLAND, J.

148 Cal. 555

WEBB et al. v. CARLON et al. (Sac. 1,208.)

(Supreme Court of California. Jan. 27, 1906.)

MINES AND MINERALS—CLAIMS—LOCATION—NOTICE—DATE.

Where the location of a mining claim in controversy by defendant's grantor was in fact made before plaintiff's entry on the land, the location notice being there visible and the boundaries of the claim properly marked, defendants were not bound by an erroneous date in the location notice; Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], providing that all records of mining claims shall contain the name or names of the locators, the date of the location, etc., and the date recited in the location being only prima facie evidence of the actual date of the location.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, § 37.]

Department 2. Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by T. W. Webb and another against Sylvester Carlon, as administrator, and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

F. W. Street, for appellants. J. B. Curtin and J. F. Rooney, for respondents.

HENSHAW, J. Plaintiffs' action was to quiet their title to a piece of mining ground to which defendants claim the possessory right by prior location of one Cleveland. The court found that Cleveland, in 1899, being duly qualified to locate and hold mineral lands, made a discovery of a lode of quartz carrying gold in sufficient quantities to justify exploration, and duly located his claim, and then, in accordance and in conformity with the mining rules and regulations of Tuolumne county regarding recordation, placed the fee for such recordation ($5 in gold coin) with a copy of his notice, in an envelope, addressed to mining recorder of Tuolumne mining district, in Sonora, Tuolumne county, Cal., with postage prepaid thereon, and deposited the envelope in the United States post office at Groveland. This letter never reached the mining recorder, and consequently no recordation was made of his claim. Cleveland did not discover this fact until shortly before the 20th day of October, 1900. He then went upon the claim, relocated it in all respects as required by the laws of the United States and the mining rules and regulations of Tuolumne county, and caused recordation to be made, as the rules required, within 30 days thereafter. The only irregularity in these proceedings is, as the court finds, that while the location was actually made upon October 20th, the notice of the location was dated October 23d. The court upon this says that Cleveland dated the notice of location as of October 23d, for the reason that one Conwell, whose name is signed to the notice of location as a witness thereof, had previously promised and agreed with Cleveland to be on the land on October 23d and witness the location. Plaintiffs Webb and Curley entered upon the land and made their location upon October 22d, and their location likewise complied with the statutes of the United States and the local mining regulations. The court, upon these facts, found that the Cleveland location of October 20th, being prior in time, was better in right, and rendered judgment accordingly. The single question presented upon this appeal is whether, as apppellant contends, Cleveland is bound by the date which he gave in his notice and is estopped from denying that October 23d was the true date of his relocation. If he is, then plaintiffs' location of October 22d takes precedence.

Section 2324 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1426] provides that all records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, etc. It is upon this language that the appellant insists that the date of location as fixed by the locator upon his notice must absolutely govern and control. Such a rule, however, would deprive an innocent party of any relief for fraud, ignorance, or mistake. The truth is that these rights are defined by the fact of location, of which the written date of the notice, at the most, is but evidence. The error in the notice of location, however caused, must give way to the proved fact. The Land Department of the United States has always been liberal in its rulings in these matters, and properly so, since it is not to be supposed that pioneers and settlers upon the government lands, and mineral prospectors following their vocation in mountain wilds, are men either versed in the intricacies of the law or with experience and knowledge sufficient to warrant their being charged with a rigid and technical compliance with all its requirements. Indeed, they may often have lost track of the date, and, as is said by Commissioner McFarland (1 Land Dec. Dep. Int. 453): "The date of settlement is not only a question of fact, but one of mixed law and fact. Many settlers, through ignorance of what constitutes valid settlement, allege a date anterior or subsequent to the actual date, such allegation being on their part to a large extent a conclusion of law, and the uniform practice of this office has been in contested and ex parte cases, to find the date of settlement from the evidence in the case, and that date so found must control the adjudication of their right without regard to the alleged date." In Zinkand v. Brown, 3 Land Dec. Dep. Int. 380, the Secretary of the Interior lays down the same rule. In Campbell v. Rankin, 99 U. S. 264, 25 L. Ed. 435, the Supreme Court, speaking of the rules and customs of a mining community, says: "Such rules and customs no more determine who was the first locator or where he located, than any other competent evidence of that fact." The location of Cleveland having been made before plaintiffs entered upon the land, and the notice being there visible and the boundaries marked, they could not have been misled by the erroneous date. They must have known that a location had been made prior to their own attempted one, and they certainly cannot be heard to say that they were, in any way, injured by Cleveland's error.

The judgment appealed from is therefore affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

148 Cal. 548

SCHOONOVER v. BIRNBAUM.

(L. A. 1,428.)

(Supreme Court of California. Jan. 26, 1906.)

1. Courts—Rules of Decision—Stare Decisis.

Decisions of the Supreme Court construing the homestead statutes, which have stood unquestioned and without legislative change for 10 years, and on the faith of which investments and contracts have presumably been made, will be sustained under the rule of stare decisis.

2. Homestead — Land Subject to Claim — Co-Tenancy.

A homestead may not be selected or created on land to which the claimant has no title otherwise than as tenant in common or joint tenant.

3. Pleading—Conclusions of Law.

An allegation of a complaint that at the time of his qualification as trustee in bankruptcy of the estate of defendant plaintiff succeeded to and became the owner of a half interest in land previously owned by defendant, and has ever since been, and is now, the owner thereof, is a mere conclusion of law.

4. Same—Answer—Denial of Legal Conclusion.

A denial in the answer of a conclusion of law stated in the complaint raises no issue of fact.

5. Same — Motions — Judgment on Pleadings.

Where the pleadings raised no material issue of fact, a motion for judgment on the pleadings is properly granted.

In Bank. Appeal from Superior Court, Santa Barbara County; W. S. Day, Judge.

Action by Ralph W. Schoonover, trustee of the estate of Mary E. Birnbaum, bankrupt, against Mary E. Birnbaum. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

B. F. Thomas, for appellant. Richards & Carrier, for respondent.

SHAW, J. The defendant was the owner of an undivided one-half interest in a lot in Santa Barbara, which in the year 1897 she selected as a homestead by declaration to that effect duly executed and recorded. Subsequently she was adjudged a bankrupt under the provisions of the bankruptcy law of the United States, and the plaintiff was duly appointed as trustee in bankruptcy of her estate. The suit was instituted by the plaintiff to declare the so-called homestead invalid, and is based solely upon the ground that under the laws of this state a valid homestead cannot be selected or created upon land to which the claimant has no title other than as a tenant in common or joint tenant. The court gave judgment in favor of the plaintiff, and the defendant appeals.

In two decisions, In re Carriger, 107 Cal. 618, 40 Pac. 1032, and Rosenthal v. Merced Bank, 110 Cal. 198, 42 Pac. 640, this court, in department, held that lands held by tenancy in common or joint tenancy could not be selected or claimed as a homestead by the owner, or by his or her spouse, in his lifetime, under the provisions of the Civil Code relating to homesteads, nor set off to the widow or surviving husband as a homestead by the court sitting in probate, under the provisions of the Code of Civil Procedure. We are now earnestly requested by the appellant to overrule these decisions. The court in these decisions followed the precedents established on the subject under the law existing prior to the adoption of the Codes, consisting of the original case of Wolf v. Fleischacker, 5 Cal. 244, 63 Am. Dec. 121, and the cases of Giblin v. Jordan, 6 Cal. 416, Seaton v. Son, 32 Cal. 481, Cameto v. Dupuy, 47 Cal. 79, First Nat. Bank v. De La Guerra, 61 Cal. 109, and Fitzgerald v. Fernandez, 71 Cal. 504, 12 Pac. 562, following it. The argument of the appellant is that the original case was made upon a misapprehension of the nature of the homestead claim and a belief that the setting apart of a homestead by the sheriff, which the law at that time required, would in some way interfere with the rights of the co-tenant or deprive him thereof, and hence that the law should not be construed to include such estates; that by subsequent decisions it has been established that the homestead interest, whatever its nature may be, does not affect the rights, interest, or estate of persons holding adversely, or collaterally, but only serves to protect the title or interest of the claimant, of whatever nature, in the land, against the demands of creditors, and to affect the rights of heirs and others as successors of the homestead claimant; that there is nothing in the language of the present provisions of the Code which makes the nature or quantity of the estate or title of the claimant in or to the land claimed as a homestead a test or limit of the right to make the selection and claim the exemption following therefrom; and, therefore, that there is no foundation in reason for the doctrine that the homestead cannot, under the Code, be selected of lands held in co-tenancy.

The cases of In re Carriger and Rosenthal

v. Merced Bank, supra, were decided in 1895. In the former a petition for rehearing was filed and was denied by the court in bank, the Chief Justice dissenting. It must be assumed that these decisions have been, since their rendition, taken as the law of the state upon the subject, and that persons contracting with respect to lands held in co-tenancy, affected or claimed to be affected by such homestead declarations, have acted upon that belief and made investments and contracts accordingly. In the 10 years that have intervened it may be presumed that many such investments and contracts have been made. The rule of stare decisis is consequently applicable. Upon this subject the following language of the opinion in Pioche v. Paul, 22 Cal. 110, a case not as strong in many respects as the case at bar, is peculiarly applicable. "Under such circumstances, none but the strongest reasons would justify the court in taking such action as is asked by the appellant. Fickleness in courts is always to be deprecated, but especially in matters relating to titles to real estate. Stability is required in such cases above all others. One of the greatest evils the people of this state have suffered has been the uncertainty of its land titles, and the greater the precision and certainty of the rules of law upon the subject of titles to real estate, the more security will all classes feel in their transactions and dealings in land. Therefore, no well considered decision ought to be overruled unless it clearly violates some well-established rule of law, and great evils are likely to flow from suffering it to stand as a rule of property. * * * In this case the Legislature has had abundant opportunities, had it so desired, or had they deemed it for the interest of the people, to have enacted a law upon the subject, clear in its terms." The decision which was thus allowed to stand was in regard to the construction of a statute. See, also, Vassault v. Austin, 36 Cal. 691; Smith v. McDonald, 42 Cal. 487; In re Dorris, 93 Cal. 612, 29 Pac. 244.

The decisions under the present and former laws holding that a homestead cannot be created out of lands held in co-tenancy, violate no well-established rule of law. They merely construe statutory provisions conferring upon householders rights of exemption not otherwise enjoyed. Five sessions of the Legislature have been held since the decisions were promulgated. If the legislative department had not been satisfied with the judicial interpretation as to the extent of the right conferred, there has been ample opportunity to amend the statute so as to give in unmistakable language the right withheld by the decisions. In view of these circumstances, and without expressing any opinion concerning the soundness or unsoundness of the decisions in question, we are of the opinion that they should be adhered to, leaving it to the Legislature to extend the right of the homestead to co-tenants if it shall see fit.

The statement in the complaint that at the time of his qualification as trustee in bankruptcy of the estate of the defendant the plaintiff succeeded to and became the owner of the undivided one-half interest in the land in question previously owned by the defendant, and has ever since been and is now the owner thereof, is, in the form in which it is pleaded, a mere conclusion of law arising from the facts previously stated. The denial of this conclusion in the answer raised no issue of fact, and, there being no other material issue of fact made by the answer, the motion for judgment on the pleading was properly granted.

The judgment is affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

148 Cal. 539

McGUE v. ROMMEL et al. (L. A. 1,484.)

(Supreme Court of California. Jan. 26, 1906. Rehearing Denied Feb. 23, 1906.)

1. FRANCHISES—CONSTRUCTION—TRANSFER.

A concession by the republic of Mexico, conferring upon the concessionary the right to construct a railroad "for his account or that of the company or companies which he is at present organizing," and providing that the "contract may not be transferred without previous authority" of the government, prohibits the concessionary from transferring the contract as a whole, but does not preclude him from transferring interests in the concession for the purpose of organizing the company referred to therein.

2. SAME—PROHIBITED TRANSFER.

Although a government concession provided that the same might not be transferred without previous authority of the government, the concessionary could sell an undivided part interest in the concession, subject to the contingency of the government's refusing to recognize the right of the vendee, and such sale would convey a valuable equitable interest, such as to provide a consideration for a promise to pay money as the price thereof.

3. CORPORATIONS—TRANSFER OF STOCK—ABSENCE OF CERTIFICATE—EFFECT.

An interest in the capital stock of a corporation constitutes a property right which may be transferred, and affords a consideration for a contract of sale, although no certificates have been issued.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 463.]

4. SALES—PERFORMANCE BY SELLER—TENDER.

Where a contract of sale binds the seller to transfer his "right, title, and interest" in a corporation which has issued no certificate of stock and in government concessions, he is required only to tender a deed or assignment transferring and conveying all his right, title, and interest in the property in question, and he need not tender a perfect legal title to some specific undivided part of the concession for certificates of stock in the corporation.

5. MORTGAGES—ACTION ON NOTES SECURED.

Code Civ. Proc. § 726, providing that there may be but one action for the recovery of a debt secured by mortgage, and that that must be an action of foreclosure, refers solely to debts secured by mortgages on property situated within the state, and has no application to mortgages of property situated in another state or country, and in such cases a personal action on the note may be maintained, notwithstanding the mortgage.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 568.]

6. Appeal—Review of Facts—Conclusiveness of Verdict.

A verdict supported by substantial evidence is conclusive on appeal.

7. Bills and Notes—Actions—Pleading.

A complaint on a note given in consideration of a sale need not allege the agreement of sale and a compliance with its conditions.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 1477.]

8. Same—Failure of Consideration—Evidence.

In an action on a note given in consideration of a transfer of an interest in government concessions, evidence of a forfeiture of the concessions by the government long after the date fixed in the contract of sale for the transfer, and long after a tender of conveyance by plaintiff to defendants, did not show a partial failure of consideration.

9. Contracts—Rescission—Essentials.

Where a defense is based on a rescission in pais already accomplished, and is not pleaded in the form of an equitable counterclaim asking the court to grant the affirmative relief of adjudging a rescission, as authorized by Civ. Code, §§ 3406–3408, the rules of equity applicable to such an action are without application, but it must be shown, as provided by Civ. Code, § 1691, that the rescission was made promptly upon discovering the facts authorizing such action, and that some kind of notice of the rescission was conveyed to plaintiff.

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by A. L. McGue against John Rommel and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

E. C. Bower, for appellants. Stephens & Stephens, for respondent.

SHAW, J. The defendants appeal from a judgment in favor of the plaintiff, and from an order denying their motion for a new trial.

The action was upon a promissory note for $2,500 executed by the defendants to the plaintiff on March 10, 1900, and due four months after date, the complaint being in the usual form. The answer averred as affirmative defenses that the note was without consideration; that it was secured by mortgage on real estate, which mortgage had not been foreclosed; that the note was executed under a mutual mistake of fact whereby a part of the property for which it was given was believed to be held by a good title, whereas in truth the title was worthless; and that the note was given for the purchase price of certain real and personal property upon a contract that a deed was to be executed upon payment of the note, and that plaintiff had not conveyed and delivered the property in accordance with the contract, or offered so to do. The evidence does not establish either of these defenses. The consideration of the note was the "right, title, and interest" of McGue in the stock of an Arizona corporation known as the Mexican Coast Steamship Company, and in two concessions granted by the republic of Mexico to Alphonso B. Smith, one for the right to construct a railroad in Mexico, and the other an obligation of Mexico to sell a large body of the public lands of that republic. These grants of concessions were made in the latter part of the year 1898, and about the same time Smith in writing assigned or transferred to McGue a one-sixteenth interest therein and in the stock of said steamship company, and a like interest to each of the defendants. By the land concession the republic of Mexico agreed to sell to Smith, "or to the company he may organize," 195,000 hectares of the national lands, at a fixed price to be thereafter paid, and upon certain conditions to be thereafter performed by Smith, or the company he should organize, and it provided that upon a failure to perform the conditions the concession should lapse. The railroad concession was of similar character, and conferred upon Smith the right to construct the road on the conditions stated, "for his account, or that of the company or companies which he is at present organizing"; but it provided that the "contract may not be transferred without previous authority of the Mexican government," and that a lapse would be officially declared upon failure to perform the conditions.

The contention seems to be that the assignment from Smith to McGue was made without the previous authority or subsequent or concurrent consent of the Mexican government, and that it was consequently void, and that at the time of the agreement of sale from McGue to the defendants, which was made March 10, 1900, McGue had no interest, right, or title to the property he thereby agreed to sell. This claim is manifestly untenable. By the terms of the concessions there was implied authority given to Smith to transfer to other persons such interests in the concessions as should be necessary to enable him to form the "company" which it was contemplated he should organize for the purpose of performing the conditions precedent specified in the grant. The only prohibition of an assignment is that contained in the railroad concession which prohibited the transfer of the contract. This, we think, refers to a transfer of the contract as a whole, and not to such transfers of interests in the concessions as might be made for the purpose of organizing the contemplated company which Smith was then organizing in order that such company might build the road for him, or in his stead. And, whether this is the correct interpretation of the grant or not, there can be no doubt that Smith had the right to sell an undivided part interest in the concessions, subject to the contingency that the Mexican government might refuse to recognize the right of the vendee. Such transfer would convey a valuable equitable interest, which would constitute property, sufficient to form the consideration of a promise to pay money as the price of a sale thereof. There was evidence to show that McGue had an interest in the capital stock of the steamship company, although it appears that no certificates therefor had ever been issued to him. Such an interest in corporation stock may be transferred and constitutes a right in property. This alone would be some consideration for the contract of sale, and would be sufficient to defeat the plea of total want of consideration. At the time the agreement of sale and note for the price were executed there had been no forfeiture of the concessions. It does not appear when the breach of the conditions took place. The forfeiture did not take place until the latter part of the year 1901, which was at least 18 months after the defendants bought the plaintiff's interest. It is fairly apparent from the evidence that the sale of the interests by Smith to the plaintiff and defendants was made for the purpose of forming the company or companies referred to in the concessions, and that these parties, with Smith and possibly others, constituted such companies. For some 18 months after the purchase of plaintiff's interest they had the right to proceed with the performance of the conditions prescribed in the concessions and by that means secure the properties thereby granted. There was no want of consideration.

The tender by the plaintiff to the defendants of a deed or assignment purporting to transfer and convey to the defendants "all the right, title, and interest" of the plaintiff in and to the property in question, was a sufficient compliance with the terms of the agreement of sale and entitled the plaintiff to payment of the note and to maintain this action upon nonpayment thereof. It was not necessary to plaintiff's performance of the conditions of the sale that he should have a perfect legal title to some specific undivided part of the concessions. The agreement bound him to transfer only such "right, title and interest" as he then had. An equitable title or right would comply with the agreement. He had such a title, and the instrument tendered was sufficient to transfer it to the defendants.

No tender of certificates of stock was necessary. The evidence showed that no certificates had ever been issued and, in the absence of evidence to the contrary, we must presume that the plaintiff had an interest in the stock as subscriber, or as assignee of Smith, who was a subscriber thereto. The burden was on the defendant to prove that plaintiff had no title. The assignment offered was sufficient to transfer this interest to the defendants and nothing more was required. The interest he sold was the interest he possessed on March 10, 1900, when he made the agreement to sell such interest. His agreement did not require him to obtain or tender a perfect title to the interest he then had.

Conceding that the terms of the agreement of sale made it, in effect, a mortgage from defendants to the plaintiff of the property described as security for the payment of the note sued on, it by no means follows that the plaintiff could not maintain a personal action on the note without foreclosing the mortgage. The real property, which was the subject of the mortgage, was all situated in the republic of Mexico, beyond the jurisdiction of the courts of California. The provisions of section 726 of the Code of Civil Procedure that there can be but one action for the recovery of a debt secured by mortgage, and that that must be an action of foreclosure, refers solely to debts secured by mortgages of property situated in the state of California, and has no application to mortgages of property situated in another state or country. Felton v. West, 102 Cal. 266, 36 Pac. 676. The present action can therefore be maintained notwithstanding such mortgage.

The mutual mistake, under which it is claimed the parties executed the agreement of sale and the note, was a belief, alleged to have existed in the minds of all the parties, that the assignment by Smith to the plaintiff of an interest in the concessions had been recognized by the Mexican government and entered of record in the archives thereof. The evidence on the subject of the existence of the mistake was conflicting. There was evidence of a substantial character to support a finding that all the parties at the time fully understood that there had been no formal consent to, or record of, such assignment. The verdict being for the plaintiff, this evidence is conclusive upon this court.

On the authority of Naftzger v. Gregg, 99 Cal. 83, 33 Pac. 757, 37 Am. St. Rep. 23, it is said that the complaint is defective because it contains no averment of the agreement of sale and tender of a deed in compliance with its conditions. Some expressions in the opinion in that case imply that a complaint upon a promissory note in the usual form, good upon its face, can be rendered defective by reference to affirmative allegations in the answer. If this were correct, the defendant in such a case would logically be entitled to judgment upon the pleadings by reason of allegations in the answer, which by law are deemed controverted (Code Civ. Proc. § 462), and of the truth of which there is no evidence. This would be contrary to long-established rules of pleading and evidence. The decision cannot be given such effect. The course of pleading and procedure in such cases is well established, and it was followed in the case at bar. The defendants in their answer alleged the execution of the agreement showing the concurrent conditions necessary to be performed and alleged nonperformance by plaintiff. Upon the trial plaintiff introduced in evidence the note sued on. This established all the allegations of the complaint upon which issue was taken, and he thereupon rested his case. Without further evidence he would have been clearly entitled to judgment for the amount of the note. The defendant, in support of the affirmative allegations of the answer, then introduced the agreement and proved that the note was given as evidence of the debt for the price of the property. Naftzger v. Gregg is perhaps authority for the proposition that, upon this being shown, the burden lay upon the plaintiff to prove an offer to perform by tendering a conveyance sufficient to transfer the interest agreed to be sold. This we need not determine, for, as above stated, the evidence of such tender was sufficient, and upon this appeal it is immaterial which party introduced it.

There was no error in the refusal of the court, after the evidence was closed, to permit the defendants to amend their answer by averring a partial failure of the consideration of the note. The evidence did not justify or authorize such amendment. The defendants obtained the agreement for the sale of McGue's interest in the concessions in March, 1900, and they were offered a transfer of such interest by McGue in July, 1900. The failure of consideration which they desired to plead was the forfeiture of the concessions of lands and of the right to construct a railroad, referred to in the agreement, and of a certain other concession to operate a line of steamers, which, it is alleged, was the line of steamers which the steamship company intended to operate. It was proposed to plead that these concessions were, by the fault of the plaintiff, forfeited to the Mexican government prior to July 10, 1900, the date fixed in the agreement for the payment of the price and transfer of the plaintiff's interest to the defendants. The evidence failed to show any such forfeiture, but, on the contrary, showed that the forfeitures occurred and were declared in the latter part of the year 1901 and later, which was more than a year after defendants were entitled to a deed under the agreement, during all of which intervening period, by performing the terms and conditions of the concessions, they might have prevented the forfeiture. And there is a total failure to prove that after the tender of a conveyance to defendants in July, 1900, the plaintiff was, so far as the defendants were concerned, under any obligation to perform such conditions to prevent such forfeiture. Under these circumstances, the court properly refused to allow the proposed amendment.

Exceptions were taken on the trial to a number of rulings admitting or rejecting evidence. None of them demands discussion or special notice. The evidence admitted was either properly allowed, or not of an injurious character, and that refused was either inadmissible or substantially allowed in the subsequent course of the trial.

There was no error in instructing the jury that in order to accomplish a rescission of the contract, and thereby evade payment of the note, it must be found that the defendants, properly upon the discovery of the mistake upon which the right to rescind is claimed, notified plaintiff of their election to rescind, and offered to restore to plaintiff everything of value received by them under the contract. The defense was that the defendants had rescinded the contract for a good cause, under section 1691 of the Civil Code. It was not pleaded in the form of an equitable counterclaim, asking the court to give the affirmative relief of compelling and adjudging a rescission as provided in sections 3406 to 3408 of the Civil Code, and the rules of equity applicable to such an action do not apply. While it is true that, where a rescission in pais under section 1691 is relied on, the party rescinding need not show that he has restored that which is worthless, yet he must always show that he has complied with the requirement to "rescind promptly," and this implies some notice to the other party of such determination to extinguish the contract. Collins v. Townsend, 58 Cal. 608, 615; Kelley v. Owens, 120 Cal. 511, 47 Pac. 369, 52 Pac. 797; 24 Am. & Eng. Ency. of Law, 645.

There are no other points which require special mention. We find no error in the record.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; McFARLAND, J.

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148 Cal. 457

RIVERSIDE HEIGHTS WATER CO. et al. v. RIVERSIDE TRUST CO., Limited et al. (L. A. 1,467.)

(Supreme Court of California. Jan. 16, 1906.)

1. Waters—Irrigation—Charges for Water—Evidence.

On an issue as to the amount to which the owner of an irrigation canal was entitled from parties using water therefrom, under contracts that they should pay the proportion of the expense of maintaining and repairing the canal that the amount of water they used bore to the total amount flowing in the canal, evidence *held* to sustain a finding that the canal referred to was the canal originally planned and constructed, and did not include a subsequent extension of it.

2. Same—Extension of Canal.

Where the owner of an irrigation canal between certain points and others using water therefrom agreed to bear their proportionate share of the expense of maintaining and repairing it, and the owner made an extension of the canal, the owner or the persons served by the extension were liable for such proportion of the expense of maintaining the original canal as the water supplied through the extension bore to the whole amount flowing in the canal.

3. Same—Reservation in Contract.

Where the owner of an irrigation canal, in contracts giving the right to use water therefrom, the users to pay a proportionate share of the expense of maintaining the canal, reserved the right to develop and procure, by means of artesian wells and otherwise, waters in addition to the amount provided for, to be conveyed in the canal to his own or other lands, this did not bind them to pay any part of the operating expenses of an extension of the canal.

4. SAME—ESTOPPEL.

Where the users of water from an irrigation canal, under contracts to bear their proportion of the expense of maintaining the canal between certain points, paid certain sums claimed by the owner as their share of the expense of an extension of the canal, this did not estop them from denying that the contract bound them to such payment, nor did it constitute a conclusive construction of the contract.

5. SAME—JUDGMENT.

Where a contract provided that each of the parties should pay a share of the expense of maintaining an irrigation canal in proportion to the amount of water to which he was entitled, a judgment fixing their rights on an extension of the canal was not erroneous because it based the rights on the amount flowing in the canal instead of the amount used.

6. SAME.

A judgment fixing the rights of users of water from an irrigation canal with reference to the amount of water flowing in the canal is not indefinite for failure to fix the place of measurement of the water, but means the amount received at its head for use below.

7. APPEAL—HARMLESS ERROR.

Where a water company agreed to pay its share of the expense of maintaining an irrigation canal, while the contracts of other users from the canal did not call for such payment, any error in a judgment requiring them to pay a share does not injure the water company.

8. SAME — PRESENTATION OF QUESTION IN LOWER COURT.

Where a party appeared to a cross-complaint, filed a demurrer and answer thereto, went to trial without objection to its propriety as a pleading, and stipulated to submit a particular question arising out of its allegations, it is too late to object on appeal that it is not within the provisions of Code Civ. Proc. § 442, providing when a cross-complaint may be filed.

Department 1. Appeal from Superior Court, San Bernardino County; John L. Campbell, Judge.

Action by the Riverside Heights Water Company and another against the Riverside Trust Company, Limited, and another. Cross-complaint by the East Riverside Water Company against the Riverside Trust Company, Limited. From a judgment in favor of the cross-complainant, and from an order denying a new trial, the cross-defendant appeals. Affirmed.

Rehearing denied February 15, 1906.

M. B. Kellogg and Fox, Kellogg & King, for appellant. Collier & Carnahan and Collier & Evans, for respondent.

SHAW, J. The record presents appeals by the defendant Riverside Trust Company, Limited, from the judgment, and from an order denying its motion for a new trial. The only parties to the appeal are the said Riverside Trust Company, Limited, and East Riverside Water Company, both of which corporations were made defendants to the original action. The East Riverside Water Company filed a cross-complaint, which was answered separately by the Riverside Trust Company, Limited. Upon the trial it was stipulated that the court should hear and determine but one question, a question involving only the respective rights of the two last-named corporations. The other parties to the action are not interested in this appeal. The court was asked to determine the amount which the East Riverside Water Company should pay as its proportion of the expenses of maintenance and taxes of a canal managed and controlled by the Riverside Trust Company. For the sake of brevity, the East Riverside Water Company is hereinafter designated as the "Water Company" and the Riverside Trust Company, Limited, as the "Trust Company."

In order to give a clear understanding of the issue and the questions arising thereon, it is necessary to state the history of the case as disclosed in the evidence. In the year 1884 Matthew Gage was the owner of section 30, township 2 S., range 4 W., S. B. M., which lay adjacent to and immediately north of a large ravine known as the "Arroyo Tequesquite," and near the colony which afterwards became the city of Riverside. This land was in need of water for irrigation in order to make it productive. He also owned a supply of water situated some 12 or 15 miles northerly of the aforesaid section, in the valley of the Santa Ana river. A large body of land, also in need of water for irrigation, lay between the aforesaid section and the location of the said water supply. In this condition of affairs Gage conceived the plan of constructing from the water supply to his land a canal of sufficient capacity to carry water for the irrigation of his own land and a large part of the other land of a lower elevation than the line of the proposed canal, and of securing the co-operation and assistance of the owners of such other lands in the building and maintenance of said canal. In pursuance of this plan he made a preliminary survey of the route of the canal from the water supply to the south line of section 30 aforesaid, which bordered upon or close to the said arroyo, and during the years 1884, 1885, and 1886, he made separate contracts with a considerable number of the owners of land lying along the line of the proposed canal. These contracts were of similar form, though varying in some of the details. In general, they contained an agreement upon the part of Gage to build the canal and to deliver therein water for the irrigation of the particular tract of land at the rate of one inch continuous flow under four-inch pressure for each five acres of the land, and an agreement on the part of the landowner that, after the completion of the canal and the delivery of the water therein, he would pay the expense of maintaining and repairing the canal in the same proportion as the amount of water to which he was entitled under the contract would bear to the whole amount of water flowing in the canal. This canal was completed from the source of supply down to the Arroyo Tequesquite some time in the year 1886, and from that time forward water was delivered therein to the several parties who had contracted therefor. About that time the East Riverside Water Company was incorporated, and subsequently, by contract with some of these adjoining landowners, it became a trustee of such owners for the purpose of receiving from the canal the water to which such owners were entitled, making distribution thereof through side canals to such landowners, according to their respective interests and rights in and to the water, and paying to the person in the control and management of the canal the proportion of the expenses of maintaining and repairing the same which should be justly due from such owners by virtue of the contracts aforesaid. Some two years or more after the completion of this canal, as thus laid out, Gage made an addition to the canal by extending the same from its terminus on the north bank of the Arroyo Tequesquite, across said arroyo, southerly for some 10 miles, and thereafter used the original canal and this extension as a conduit to carry water from said source of supply to and upon a large body of other lands several miles below the original terminal point. On March 11, 1890, Gage sold and conveyed to the Trust Company all his rights and interests in the entire canal, including the extension, and in and under the various contracts with the respective landowners along the original canal. It does not appear to be expressly alleged anywhere, but it seems to be true, and it is practically admitted by both parties, that Gage, while he held it, and the Trust Company thereafter, had the control and management of the canal and of the running of the water therein, and paid, in the first instance, all expenses, taxes, and repairs thereon, collecting from the other parties their due proportion, according to the terms of the contracts. The cross-complaint alleges, in general terms, the inception of the enterprise and the original plan of building the canal down to the Arroyo Tequesquite, the terms of the contracts between Gage and the other landowners, the subsequent arrangement by which the Water Company became the agent and trustee for a large number of the owners for the purpose of receiving and distributing the water to which they were entitled, and paying the charges for repairs and maintenance on account thereof, the transfer by Gage to the Trust Company, and that the Trust Company claimed of the Water Company, as its proportion of the expenses, a large sum, more than was actually due under the contracts represented by the Water Company, and that upon this point the parties could not agree, and among other things, asked the court to adjudge and determine the amount and proportion of such expenses that should be paid by the Water Company to the Trust Company. The cause of this dispute was a claim on the part of the Trust Company that the persons making the original contracts with Gage, and represented by the Water Company, were, by the original contracts, bound to contribute to the payment of the expenses of the extension of the canal below the Arroyo Tequesquite. In other words, that the said extension was a part of the canal referred to in the respective contracts of the other parties, and the expense of which they thereby bound themselves to pay in proportion to their interests in the water. The Water Company, on the other hand, contended that the contracts of the parties whom it represented did not refer at all to the extension of the canal below the Arroyo Tequesquite, but contemplated only the building of the canal down to that point, and the contribution on the part of each landowner of his proportionate part of the expenses of this original canal. It further contended that the persons obtaining water through the subsequent extension of the canal were not only bound to pay all expenses of operating the extension, but were also bound to pay their due proportion of the maintenance of the original canal in the same manner as the other landowners; that is, in such proportion as the water taken by them bore to the whole amount of water flowing in the original canal. As before stated, upon the trial all other issues were eliminated, and it was agreed that this was to be the sole question submitted to and decided by the court.

The court made findings covering the allegations of the cross-complaint, and, among other things, found specifically that the Water Company received from the Trust Company through said canal, and distributed and was entitled to receive and distribute, 718.3 inches of water, which was appurtenant to and was distributed for the irrigation of 3,591.50 acres of land, all of which was situated above the said arroyo, except a small portion thereof which, although situated below the arroyo, received its water from a reservoir supplied by a side ditch leading out of said canal above the arroyo. The following paragraphs of the findings show more particularly the facts upon which the rights of the parties depend:

"(8) That the Gage canal, as originally contemplated and constructed by Matthew Gage, * * * extended from the north bank of the Tequesquite arroyo in a northerly direction through the county of Riverside to the water sources supplying the said canal. * * *

"(9) That said canal was so constructed in the year 1886, and preceding years, and was completed to the north bank of said Tequesquite arroyo in 1886.

"(10) That in the years 1888 and 1889 an extension of said canal was constructed by Matthew Gage, extending from the north bank of the Tequesquite arroyo in a southerly direction a distance of about ten miles.

"(11) That the canal mentioned in and referred to in each and every of said contracts set out and mentioned in the schedule hereinabove given, and in all other deeds and contracts in evidence relating to the same water rights, and which contracted or conveyed said 718.3 inches of water, was and is the said canal extending from the north bank of the Tequesquite arroyo northerly through Riverside and San Bernardino counties to the water sources of said canal.

"(12) That by the said contracts and deeds the parties securing said 718.3 inches of water from said canal, and their successors in interest, agreed with Matthew Gage, and his successor in interest, the Riverside Trust Company, Limited, to pay their proportionate share of the taxes and expenses of operating said canal as constructed from the north bank of the Tequesquite arroyo to the water sources in San Bernardino county."

"(14) That the defendant Water Company is not liable to defendant Trust Company under the contracts, deeds or agreements, or any of them, by which such 718.3 inches of water as it distributes is held, for any part or portion of the taxes or operating expenses of said canal as constructed southerly from the north bank of the Tequesquite arroyo.

"(15) That by the contracts, deeds, and agreements, and each of them, under which said 718.3 inches of water is held and distributed, the Water Company is obligated to pay, and should pay, to the Trust Company such proportion of said taxes and expenses of operating said canal, as constructed northerly from the north bank of said arroyo, as the said 718.3 inches of water, so distributed by the Water Company, bears to the whole number of inches of water flowing through that portion of the said canal north of the north bank of said arroyo, whether intended for use either above or below the north bank of said arroyo." The conclusion of law and judgment was to the same effect.

The appellant questions the sufficiency of the evidence to support these findings. A determination of this question requires a construction of the various contracts with the parties now represented by the Water Company. These contracts, though similar in form, and all made apparently for the same purpose and object, do not all express the purposes in the same language. Each one of them is more or less indefinite in the description of the canal to the expense of operating which the particular purchaser of water agreed to contribute. In five of them, executed in 1884 and 1885, the agreement of Gage is said to be to "construct a canal from a point on the Arroyo Tequesquite in sec. 31 Tp. 2, S. R. 4, W. S. B. M. to the west boundary of J. A. Carit, according to a survey by C. C. Miller." Other two described the canal to be built by him as extending "from a point on the Santa Ana river to the mesa land on the east of the colony of Riverside." Some twenty, executed in 1886 and 1887, declare that Gage thereby sells and conveys "a water right in the Gage canal system", and two others omit the word "system" from this form of description. The evidence shows that at the time these several contracts were made, the canal then known as the Gage canal extended, or was proposed to be constructed, only from the source of supply on the Santa Ana river southerly to the said arroyo, and that at that time no further extension had been made, nor was it then generally known or understood that any extension was to be made, or was in contemplation. Many of them were made before the canal was made or begun. For the purpose of aiding in the interpretation of the contracts, and showing what canal was intended by the several descriptions thereof, the court admitted evidence to the effect that the phrase "mesa lands to the east of the colony of Riverside" was understood in that locality, at the time these several contracts were executed, to embrace only the lands lying northerly of the said Arroyo Tequesquite and easterly of the lands then known as the colony of Riverside, and now constituting the city of Riverside, and extending between said colony and the foothills, northerly a distance of several miles towards the Santa Ana river, from which the water in question was obtained; that this tract was not theretofore supplied with water; that the Arroyo Tequesquite was a very large ravine, from 100 to 150 feet deep, and 800 to 1,000 feet across; that in the various negotiations between Gage and the respective parties entering into these contracts, the canal referred to by him, and which he then proposed to build, or was building, was the canal extending from the place of supply down to the said arroyo; that Gage at that time owned section 30, all of which was north of said arroyo; that one of his purposes in building said canal was to obtain water with which to irrigate the said tract of land; and that there was no intimation by him that he expected, intended, or desired to extend the canal below the said arroyo. This testimony was properly admitted for the purpose for which it was offered. The language of the contracts being uncertain in respect to the identity of the canal to be constructed by Gage, it was proper to admit evidence of the circumstances surrounding the parties at the time, the size and length of the canal then made or contemplated by him, and of the physical character of things mentioned in the contract, as well as the names by which they were then generally known. The objections of the appellant to this evidence were properly overruled.

We are of the opinion, also, that in view of the evidence, and of the language of the contracts, the court was justified in finding, as it did, that the canal contemplated by the said contracts, and to the expense of operating which the parties thereto agreed thereby to contribute, was the original canal extending from the Santa Ana river to the north bank of the Arroyo Tequesquite, and that they did not agree thereby to contribute anything to the expenses of the subsequent extension of the canal below that point. In addition to the evidence above mentioned, it was shown that the contract of Gage with Townsend in September, 1886, for building a canal, described it as a canal "to commence at the Santa Ana river at the flume on Orange Grove Homestead, and end on the north bank of the Tesquesquite arroyo in section 31"; that in 1890, after the extension had been made, or at least begun, and prior to his conveyance to the Trust Company, Gage made several agreements with landowners who held contracts made in 1884 and 1885, explaining and modifying the previous contracts, and that each of said explanatory agreements contained the following recital: "Whereas the said Matthew Gage is the owner of a canal known as the 'Gage Canal' constructed for irrigation and other purposes from a point on the Santa Ana river to the mesa on the east of the colony of Riverside, and is now supplying ——— inches of water under" the previous agreement. This, in connection with the other evidence, sufficiently shows the meaning of the contracts to be as found by the court. The rights of the parties being thus fixed by the contracts at the time they were made, Gage could not add to the burdens of the other parties by extending the canal further south so as to irrigate other lands and charging the other parties with the expenses of operating such extension. The parties served by such extension, if by their agreements they acquired any rights in the original canal, would be, to that extent, tenants in common in the original canal, and as such would be bound to contribute their just share of the common expense of maintaining that canal. If they acquired no such right, and the right to use the original canal to carry the additional water to the extension was retained, or acquired and held, by Gage, and the Trust Company as his successor, then the Trust Company would be to that extent a tenant in common in the original canal with the other persons having rights therein, and as such would be bound to contribute a just share of the common expense. This just share obviously is such proportion of the expense of the original canal as the water carried in that canal, for the purpose of serving the use of those obtaining water from the extension, bears to the whole amount of water of right flowing in the original canal. With respect to the expenses of the extension, the Trust Company would stand in the same position as that of each of the other common owners of the original canal with respect to the expense of his own particular canal or conduit; that is, each must bear the expenses of his own canal, and contribute in equal proportion to the common burden of maintaining the common canal. We do not see that there is anything unreasonable in this view of the rights of the respective parties.

Many of the contracts, especially the explanatory contracts of 1890, contain a clause as follows: "The said Matthew Gage reserves the right to develop and procure by means of artesian wells and otherwise, water from the sources above mentioned and elsewhere, in addition to the said ——— inches aforesaid, and to convey the same in said canal for the use of his own and other lands." This provision is not inconsistent with the findings of the court, nor does it bind the parties to such contract to pay any part of the operating expenses of any side canal, or extension of the original canal, that he might find it necessary to make to carry such additional water from the original canal to the lands to be irrigated with the additional water developed by him. In view of the covenant in the same and other contracts to the effect that ultimately, when the final development of the water obtainable from the sources of supply should be completed, the canal should "be held in ownership by the owners of water supplied therefrom," in the same proportion as their interest in the water, it was a proper reservation to make, although, perhaps, he would have had this right without a special reservation to that effect in the contract. It is clearly equitable and just that all persons having the right to use the original canal as a common conduit with others, whether they belong to the class whose rights were obtained prior to the extension, or whether they derive their right from the extension of the canal and the development of additional water by Gage, should each, directly or indirectly, pay his proper share of the expenses of the operation of such original canal. It is claimed that the respondent, by making payments of the amounts claimed by the appellant, and by other acts which are said to show a recognition of, or acquiescence in, the claim of an obligation so to do, has, by estoppel or otherwise, bound itself to a construction of the contracts in accordance with appellant's claims and contrary to the findings. We think this claim is untenable. There are no circumstances from which an estoppel could arise. And while, in the case of an ambiguous contract, the conduct of the parties may be proved to aid in its interpretation, yet it is not conclusive evidence thereof, and it may be disregarded in favor of more satisfactory evidence to the contrary. With the conclusion of the lower court on such conflicting evidence we cannot interfere.

Objection is made to the judgment on the ground that the proportion of expense for which the respondent is adjudged liable is, as to one of its terms, based on the amount of water flowing in the canal, whereas it should have been upon the amount used. It is said that the flow is necessarily larger than the use because in the distribution of water for use to different persons receiving it at different points there must inevitably be some water wasted, and this will form part of the water flowing in the canal. If such waste is inevitable, then it is necessary to the use, and we can perceive no injustice in decreeing payment according to the flow thus made necessary, particularly as the incidental waste will be, so far as appears, in substantially the same proportion to each party. The judgment cannot be interpreted so as to justify a charge for or against either party for expenses caused by water carried through the canal by the other party and purposely or knowingly suffered to run to waste unnecessarily. For the expenses caused by such waste the party responsible therefor would be exclusively liable with respect to the other parties, notwithstanding anything that is said in the judgment. It does not purport to declare the rights or liabilities growing out of such misconduct. It is urged that the place of measurement of the water "flowing" in the canal is not fixed, and that, as there must be considerable loss by evaporation and seepage in the course of the passage of the water through its entire length to the respective places of delivery to the users, the judgment is, for that reason, uncertain. In answer to this it is to be said that the true meaning of the judgment is that the amount of water received in the canal at its head for use below, is to be taken as the amount "flowing" therein, for the purpose of adjusting the shares of the expense, and whatever necessary loss occurs in transmission, by evaporation or otherwise, will then be divided among the parties according to their interests. This is fair and just, and no more practicable method of adjusting such losses seems possible or desirable.

A few of the contracts purport to be grants by Gage of water rights in the "Gage Canal" and to be made for valuable considerations, but contain no covenant by the vendee to pay any part of the operating expenses, or any agreement relating thereto; and it is contended that as to these the findings and judgment are erroneous. The vendee, in such a case, either becomes the owner of some common interest in the canal which entitles him to carry, or have carried for him therein, the water for his use, and as such common owner, liable for his proper share of its operating expenses, or he becomes the owner of the right to receive water from the canal, as an appurtenance to his land, or otherwise, without further contribution to the expenses of operation than that made by the price he paid. In the former alternative the judgment is correct. In the latter, it is too favorable to the appellant, in that it requires payment on behalf of these owners which they are under no obligation to make. But this does not injure the appellant, and it cannot complain.

The appellant appeared to the cross-complaint, filed a demurrer and answer thereto, and afterward went to trial, not only without objection to the propriety of the cross-complaint as a pleading in the action, but in pursuance of a stipulation to submit for decision a particular question arising out of its allegations. It is too late to object in this court for the first time that the cross-complaint was improperly filed and did not come within the scope of the provisions of section 442, Code of Civil Procedure. The court had jurisdiction of the subject-matter, and, by the appearance, obtained personal jurisdiction of the parties. All other objections to the manner in which the issue was brought before the court were waived by this conduct of the parties. Santa Barbara v. Eldred, 95 Cal. 381, 30 Pac. 562; Hart v. Carnall Co., 101 Cal. 163, 35 Pac. 633; Id. 103 Cal. 140, 37 Pac. 196; De Jarnatt v. Marquez, 132 Cal. 702, 64 Pac. 1090; Power v. Fairbanks, 146 Cal. 611, 613, 80 Pac. 1075.

Other objections are made by the appellant, but we do not consider them of sufficient importance to require special mention. They are without substantial merit.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; McFARLAND, J.

148 Cal. 431

BOTSFORD v. EYRAUD et al. (L. A. 1,456.)

(Supreme Court of California. Jan. 13, 1906.)

1. ADVERSE POSSESSION—WHAT CONSTITUTES.

Code Civ. Proc. §§ 318, 319, provide that no action arising out of title to real property can be maintained, unless plaintiff or his predecessor in title was seized or possessed of the property within five years before the commencement of the action. Section 323 provides that for the purpose of constituting an adverse possession by a person claiming title founded upon a written instrument, land is deemed to have been possessed: (1) Where it has been usually cultivated or improved; (2) where it has been protected by a substantial inclosure. In an action to quiet title, brought in 1901, it appeared that defendant and his predecessors had claimed title under a written instrument since 1882, had paid taxes since that time, had inclosed the property with other adjoining property by a substantial fence, had cultivated the same by a lessee for a time, had constructed a dwelling house thereon and lived in it for some years, had held it for sale as town lots, and generally exercised acts of ownership during the whole period. *Held*, that plaintiff's action was barred by limitations.

2. SAME—INCLOSURE OF LAND.

Under Code Civ. Proc. § 323, subd. 2, providing that, for the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, land is deemed to have been possessed where it has been protected by a substantial inclosure, it is not necessary that the particular premises claimed by adverse possession be segregated and protected by a separate fence; but it is sufficient if such premises be included within an inclosure together with other lands held by the claimant under a claim of title.

3. SAME—CONTINUITY OF POSSESSION—INTERRUPTION.

The conveyance of land by one in adverse possession under color of title and the failure of the grantee to enter into physical possession of the land for a year after the conveyance does not constitute an interruption of the continuity of possession, in the absence of any physical abandonment of possession, and where the claim of those in adverse possession is indicated by a substantial inclosure of the land and the withholding of possession from the rest of the world.

Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by G. A. Botsford against A. P. Eyraud and another. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

Charles G. Lamberson, for appellant. Houghton & Houghton and E. J. Emmons, for respondents.

ANGELLOTTI, J. This is an action to quiet title. Defendants had judgment, and plaintiff appeals from such judgment and an order denying his motion for a new trial. The trial court found that plaintiff's cause of action is barred by the provisions of section 318 and 319, Code of Civil Procedure. The only point made by appellant upon this appeal is that the evidence was insufficient to sustain these findings.

The property in controversy is a block of land in the city of Bakersfield, described as block 269, and formerly known as "Block 2 N. R. 5 E." Title thereto has been continuously claimed by defendants and their predecessors ever since April, 1882, under, and by virtue of, a written instrument executed at that time, purporting to convey the premises to Charles Lux. Lux conveyed a half interest therein to Henry Miller. Miller and Lux, in the spring of 1883, inclosed the property, with other adjoining property held by them, constructing a substantial fence on the north, south, and west sides, which, with fences surrounding the remainder of the property held by them, entirely inclosed and protected the property in controversy. Until March 25, 1887, Miller and Lux continued to so hold possession of the property, claiming to own it as aforesaid. The evidence warrants the inference that, during all of said time, it was to some extent used for the cultivation of corn by a Chinaman, under lease from Miller and Lux. On March 25. 1887, Miller and Lux, for the expressed consideration of $1,500, executed a conveyance of this block to one Seidt. Seidt refused to allow the property to be further occupied by the Chinaman, and did not himself personally occupy it or do any work thereon for about a year. During all of this time it continued to be inclosed, with the other property of Miller and Lux, by the fence already spoken of, but, so far as appears, was not used in any way. According to the plan of the city, the block was bounded on the east by O street, which had never been opened. In the spring of the year 1888, Seidt removed the portions of the north and south fences that were on such street, and thus opened the street on the east side of the block. This left the east side of the block open, and he did not construct any fence on the east line. At the same time, however, he cleared some brush and trees from the land, and leveled up a ditch running across it. He then constructed a dwelling house on the block. The land, according to the map of the city, is laid off in eight lots, and this house was built on lot 4. Whether there was any map or plan showing such lots prior to November, 1888, does not appear. In November, 1888, he sold said lot 4 to defendant Smith, who resided thereon until the year 1901, when the house was destroyed by fire. The remainder of the property Seidt continued to use to the extent that town property purchased to hold and sell as town lots is ordinarily used, until he sold the remainder of the land in 1895. He grubbed out the block, cleared off the brush and trees, did something in connection with keeping up the fences, and had a man living on it for over a year. His grantees and their successors continued to treat the property in the same way, until finally several houses were constructed by them on the land. There was never any pretense of interference with such possession as was had by defendants and their predecessors until, in the fall of 1901, this action was commenced. Defendants and their grantors have paid all taxes levied on said property ever since the year 1882. These facts fully warranted the trial court in holding that there was such an adverse possession of the land by defendants' predecessors for five years, commencing in the spring of 1883, as would bar plaintiff's action.

There can be no question that a sufficient adverse possession was initiated by Miller and Lux under a claim of title, founded on a written instrument, in the spring of 1883, and continued by them until March 25, 1887. Not only did the evidence warrant the trial court in holding that the block was cultivated and a crop of corn raised thereon every year by their tenant, during the whole of said period (Code Civ. Proc. § 323, subd. 1); but it was also during the whole of said time protected by a substantial inclosure. Subdivision 2 of same section. There is nothing in the point made by appellant that the particular land in controversy was not so protected, because it was not separately entirely inclosed by a fence, but was contained in an inclosure with other lands on the east also held by Miller and Lux under claim of title. There could be no good reason for requiring the claimant to subdivide the land claimed, and make subinclosures therein, and no such requirement is evidenced by the statute. The precise point appears to have been decided against the contention of appellant, in Hall v. Gittings, 2 Har. & J. (Md.) 380, and was not involved in any of the cases cited by him. It is, of course, true, that the adverse possession must be continuous for the full period of five years, and it is urged that the continuity was broken when Miller and Lux made the conveyance to Seidt on March 25, 1887, and Seidt did not for one year openly do any act indicating that he had taken physical possession of the land. It is said that by the mere making of such conveyance, Miller and Lux entirely abandoned their possession, and that Seidt did not at once take possession, and that the running of the statute was therefore interrupted, and that it follows, under the well-settled rule as to the effect of an interruption of such possession, that the possession of the true owner constructively intervened and rendered all previous possession invalid. It must be borne in mind that during this year there was no visible abandonment of possession. The land in controversy continued to be protected with the lands on the east still claimed by Miller and Lux, by a substantial inclosure. The notice as to an adverse claim to this land, and actual, open, and exclusive possession thereof by such adverse claimant, was the same in effect after as before the deed.

Under the facts of this case we are of the opinion that there was no interruption of the possession. The contention of plaintiff in this regard is based solely upon the execution of the deed by Miller and Lux to Seidt. There was not the slightest evidence of any intention on the part of Miller and Lux to abandon the actual possession held by them for four years, except in so far as their deed indicated their intention to yield that possession to their grantee for a valuable consideration. By such deed they simply transferred their claim of title and whatever right of possession they had to such grantee, and if actual possession of the land was not at once personally taken by Seidt under his deed, it continued to be held by Miller and Lux for him, and as his agents, for the land certainly continued to be openly and notoriously withheld from all others in the same manner that it had previously been withheld, and it is very clear that there was no intention on the part of Seidt to abandon the property he had purchased. No particular formality was necessary for the transfer of possession to Seidt, or the taking of possession by him, and it was not essential to a continuance of the already inaugurated and maintained possession that he should at once personally go upon the land, or perform any act of occupancy thereon. If his subsequent acts in regard to the property, taking into consideration the nature and condition of the property, and the uses to which it was adapted, were such as to indicate a continuously existing intention to retain possession of the property, that fact, coupled with the fact of possession actually and notoriously withheld from all others except his grantors, is sufficient to show a continuance in him of the possession previously held under the claim of title by his grantors. There can be no question that, taking into consideration the nature and condition of this property, the uses to which it was adapted, and the purposes for which Seidt acquired it, the evidence warranted a conclusion that the subsequent conduct of Seidt was such as to show a continued existing intent to retain possession. It is said in 1 Cyc., at page 1021, and the statement is amply sustained by authorities there cited: "Periods of vacancy incident to or occasioned by change of possession, or by the substitution of one tenant for another, and which are not of longer duration than is reasonable, in view of the character of the land and the uses to which it is adapted and devoted, do not constitute interruptions of possession, destroying its continuity in legal contemplation, when there is no intention to abandon the possession. They are but incidents of that continuous possession which the land, inherently, and in relation to the manner of its use, admits of. This rule proceeds upon the theory that notwithstanding such interruptions of actual occupancy, there is in fact no actual interruption of such acts of possession as the land is reasonably susceptible of."

There was ample evidence to warrant the court in holding that the adverse possession continued for the full period of five years. Whatever doubt there may be as to the precise time in the spring of 1888 when Seidt commenced doing work on and about the land, the evidence as to what was done by him in the way of opening O street on the east side, clearing the land of its incumbent growth, leveling the ditch on the same and the construction of a house on a portion thereof, was sufficient to show, considering the nature of the property, a continuous adverse possession of the whole block, extending beyond the five years commencing with the "spring" of 1883.

The judgment and order are affirmed.

We concur: SHAW, J.; McFARLAND, J.

(148 Cal. 741)

SWEM et al. v. MONROE, Judge.

(L. A. 1,855.)

(Supreme Court of California. Feb. 21, 1906.)

1. JUSTICES OF THE PEACE—APPEAL—BONDS—STATUTES—AMENDMENT—IMPLIED REPEAL.

As the amendment in 1880 of Code Civ. Proc. § 978, relative to appeals from justices' courts, did not alter the provisions of that section relative to the filing of an undertaking for $100 to secure the costs on appeal, that part of the section is to be construed as of the date of the original enactment of the section in 1872, and hence the section as amended could not be regarded as repealing section 926, relating to the same subject and enacted in 1878, even though the provisions of the two sections were inconsistent.

2. SAME—APPEAL—BOND—DEPOSIT IN LIEU—STATUTES.

Code Civ. Proc. § 978, providing for the execution of undertakings in the sum of $100 on appeals from a justice of the peace, is not inconsistent with section 926, providing that in all civil cases in justices' courts, wherein an undertaking is required, the plaintiff or defendant may deposit a sum of money equal to the amount required by the undertaking, which sum shall be taken as security in place of the undertaking.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 556.]

3. SAME—AMOUNT OF DEPOSIT.

Under Code Civ. Proc. § 978, providing that an appeal from a justice's court is not effectual unless an undertaking be filed in the sum of $100, and section 926, providing that a deposit in gold coin equal to the amount required in the undertaking may be made in lieu thereof, a deposit of less than $100 is ineffectual, though the judgment and costs do not exceed the sum deposited.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 562.]

In Bank. Petition by Ella Swem and another for a writ of prohibition to restrain Charles Monroe, as judge of the superior court of Los Angeles county, from taking any further proceedings in an action brought by petitioners against Anna Blumberg and pending before respondent on appeal from a justice's judgment in favor of petitioners. Writ granted.

J. Marion Brooks, for petitioners. H. S. Rollins, for respondent.

SHAW, J. This is an original proceeding for a writ of prohibition. The proceeding was begun in the District Court of Appeal for the Second District, and the judges of that court being unable to agree upon a judgment, the cause has been transferred to this court in accordance with section 4, art. 6, of the Constitution. The case was considered on the merits in the district court, although not decided. We therefore disregard all technical objections to the issuance of the preliminary writ.

Ella Swem recovered judgment in a justice's court of Los Angeles county against Anna Blumberg for $86.30, including costs of suit. Thereafter, Anna Blumberg gave due notice of appeal to the superior court, but instead of giving the bond on appeal as the law provides, she endeavored to perfect the appeal by making a deposit of money, and for that purpose deposited with the justice of the peace the said sum of $86.30 for which the judgment was given. The papers were then transferred to the superior court, and assigned to the department over which the respondent presides as judge thereof. A motion was then made to dismiss the appeal on the ground that no bond had been given for costs on appeal, and that the superior court was without jurisdiction to proceed with the case. The motion was denied, whereupon this proceeding was begun to prohibit further proceedings in the superior court in the cause.

This court, in Laws v. Troutt (Cal. Sup.) 81 Pac. 401, decided that, under section 926 of the Code of Civil Procedure, an appeal could be perfected from a judgment of a justice's court, by making a deposit with the justice in the sum of $100, as security "for the payment of the costs on the appeal" instead of giving the undertaking or that purpose required by section 978 of the same Code, and that an appeal so perfected would give the superior court jurisdiction of the case. Section 926 was enacted on February 25, 1878, and section 978 was amended in 1880 by an act amending a number of sections of the Code of Civil Procedure, and concluding with a clause repealing all acts and parts of acts in conflict therewith. The amendment did not, however, make any change in the portions of the section, as originally enacted in 1872, relating to the undertaking for $100 to secure the costs on appeal. Those provisions, therefore, are to be considered as if they were enacted in 1872, and are not to be given effect as if reenacted in 1880, either for purposes of repeal, or any other purpose. Pol. Code, § 325; Sutherland on Stats. § 237. The effect of such repealing clause is no greater than an express declaration of the rules of law concerning a repeal by implication. There is no such inconsistency between sections 926 and 978 as to work a repeal by implication of section 926 by the amendment of 1880 to section 978, even if the re-enactment of the original provisions would have such effect, much less when they are not to be deemed as enacted at the latter date. Hellman v. Shoulters, 114 Cal. 153, 44 Pac. 915, 45 Pac. 1057; 1 Suth. on Stats. §§ 273, 256, 267; 26 Am. & Eng. Enc. Law, 719, 725; People v. Durick, 20 Cal. 95; District of Columbia v. Sisters, 15 App. D. C. 308. There is, however, nothing in either section which authorizes an appeal to be perfected by a deposit of a less sum than $100 as security for the costs on appeal. Neither an undertaking nor a deposit to stay proceedings can be taken in lieu of a deposit or undertaking for the costs on appeal. McConky v. Superior Court, 56 Cal. 83; Coker v. Superior Court, 58 Cal. 177; McCracken v. Superior Court, 86 Cal. 75, 24 Pac. 845. In the present case the deposit of money was less than $100, which was insufficient to perfect the appeal. The superior court was without jurisdiction and should have dismissed the appeal.

Let the writ issue commanding the respondent to refrain from further proceedings in the case, except to dismiss the appeal.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

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148 Cal. 562

CUTLER v. FITZGIBBONS et al.

(Sac. 1,287.)

(Supreme Court of California. Jan. 29, 1906. Rehearing Denied Feb. 28, 1906.)

1. Cancellation of Instruments — Forged Deed—Complaint.

Where a complaint to quiet title and set aside a deed alleged that the deed was not signed or executed by complainant, or any other person authorized by her to execute it, but was forged, it was not objectionable for failure to state with sufficient fullness facts constituting fraud.

2. Same.

Where complainant, having the legal title to land, sued to have her title quieted against a grantee, who claimed title without right under a forged deed, which plaintiff prayed should be canceled, a complaint alleging that the instrument under which defendant claimed title was neither signed nor executed by her, nor by any other person authorized by her to execute it, but was forged, stated sufficient facts to constitute a cause of action.

Department 2. Appeal from Superior Court, Lassen County; F. A. Kelley, Judge.

Action by Mary Cutler against James F. Fitzgibbons and others. From a judgment for plaintiff, defendant J. J. Rauer appeals. Affirmed.

W. M. Boardman, Louis P. Boardman, for appellant. E. V. Spencer and H. D. Burroughs, for respondent.

McFARLAND, J. Judgment went for plaintiff, and from the judgment the defendant J. J. Rauer appeals. There is no bill of exceptions. The record consists of the judgment roll which includes findings; and appellant's contention for a reversal rests upon the asserted insufficiency of the complaint.

It is averred in the complaint that plaintiff is, and ever since May 25, 1895, has been the owner, in possession and entitled to the possession of certain described land; that defendants claim some estate or interest in said land, which claim is without any right whatever. It is then averred, "for a further cause of action," that defendants base their claim to said land upon a certain written instrument purporting to be a deed, signed, acknowledged, and executed by plaintiff to the defendant Fitzgibbons, dated January 14, 1890, conveying to him said land; that plaintiff did not on said day, or at any time, make, sign, acknowledge, or execute said instrument, or any deed conveying said land to Fitzgibbons or to any other person, and did not authorize any other person to execute it for her; that said alleged deed is false, fraudulent, and forged; that said deed has been recorded, and clouds plaintiff's title to said land. The prayer of the complaint is for a judgment quieting plaintiff's title to the land, adjudging that defendants have no estate or interest herein, and decreeing that said deed be canceled, etc. None of the defendants appeared except Rauer. He demurred to the complaint, and also answered, averring, among other things, that plaintiff did duly make, sign, acknowledge, and execute the said deed to Fitzgibbons, and that the same was not forged, and that Fitzgibbons afterwards conveyed the land to Rauer, and that thus the latter is the owner thereof. His demurrer was overruled; and, after the taking of evidence, the court made findings, and found that plaintiff did not execute the alleged deed to Fitzgibbons, or authorize any persons to do so, and that the deed was forged. A judgment was rendered quieting plaintiff's title to the land and canceling said alleged deed.

We see no reason for reversing or disturbing the judgment. Appellant's contention seems to be that respondent is in the position of one who is trying to overturn a legal title on account of fraud, and that the complaint is deficient because it does not state with sufficient fullness the facts constituting the fraud; and he cites in support of his contention Burris v. Adams, 96 Cal. 664, 31 Pac. 565. But the facts in Burris v. Adams are different from those in the case at bar, and the principle applied there is not applicable here. The plaintiff in the case at bar is not trying to set aside a deed which conveyed the legal title, on the ground that the deed was procured through fraud, mistake, undue influence, conspiracy, etc. During all the times mentioned in the complaint the plaintiff had the legal title; it certainly did not pass out of her by a written instrument which she did not execute and which was forged. Having the legal title to the land in contest, she brings this action to have her title thereto quieted against appellant, who asserts and proclaims an estate in the land which is without any right, and to have the forged deed under which he claims, and which was recorded, canceled. Morever, the averments that the instrument under which appellant claims, in form a conveyance of the land by plaintiff, was not signed or executed by her, or by any other person authorized by her to execute it, and was forged, constitute a sufficient statement of the facts, even under appellant's contention. We see nothing in the point that two separate and distinct causes of action are stated in the complaint. There is really only one cause of action; and, under the facts stated, plaintiff was entitled to a judgment quieting her title and canceling the forged deed under which appellant claims.

The judgment appealed from is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

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148 Cal. 558

FIRST NAT. BANK OF MODESTO v. WAKEFIELD et al. (Sac. 1,266.)

(Supreme Court of California. Jan. 27, 1906. Rehearing Denied Feb. 26, 1906.)

1. TRUSTS — INVOLUNTARY TRUSTS—CREATION —MISTAKE.

Where money was deposited in bank under the mistaken belief of the depositor that it belonged to a partnership composed of the depositor and a decedent, and it was subsequently judicially determined that the partnership never existed, and that the money belonged to the estate of the decedent, the bank in which the money was deposited was an involuntary trustee thereof for the benefit of the decedent's estate, under Civ. Code, §§ 2223, 2224, defining an involuntary trustee as one who wrongfully detains a thing or gains the same by fraud, accident, mistake, or other wrongful act.

2. ADMINISTRATORS — POWERS—DISCHARGE OF TRUST.

An administrator has no power to relieve an involuntary trustee of money belonging to the estate from his trust relation to the estate.

Department 2. Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by the First National Bank of Modesto against O. L. Wakefield, administrator of the estate of Joseph Knowles, deceased, and others. From so much of the judgment as is in favor of defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

W. H. Hatton and Dennett & Walthall, for appellant. C. W. Eastin, for respondents.

McFARLAND, J. This is an action to foreclose a mortgage executed in his lifetime by Joseph Knowles, deceased. By the complaint recourse to any of the property of the estate other than the mortgaged premises, and attorneys' fees, are waived. O. L. Wakefield, administrator of the estate of Joseph Knowles, is made a defendant, and other persons are also made defendants, some of whom are heirs of the deceased and others creditors of his estate. The defendants by their answer set up certain alleged defenses to the foreclosure of the mortgage, but the court rendered a judgment of foreclosure; and, as defendants have not appealed, we need not inquire into the correctness of that part of the judgment. But the defendants set up a counterclaim of $1,000 and interest, and pray judgment against plaintiff for that amount; and the court sustained the claim and rendered judgment against plaintiff therefor. From this part of the judgment in favor of defendants, and from an order denying its motion for a new trial, the plaintiff appeals. No point is made by plaintiff as to the propriety of setting up this demand of defendants as a counterclaim in this present action, and the validity of the claim on its merits is the only question presented.

The material facts are these: When Joseph Knowles died, his son, W. H. Knowles, asserted that his father and himself were partners in a certain mill business, and proceeded to conduct that business with the intent of winding it up as the surviving partner. In the progress of thus conducting the alleged partnership business he deposited with the bank, plaintiff herein, various sums of money, amounting in all to $1,893.56, as the property of the partnership, and this money was placed by the bank to the credit of "Knowles & Son." Afterwards it was determined in a judicial proceeding that there never was any such partnership, and therefore the money so deposited by W. H. Knowles was assets of the estate of Joseph Knowles. The bank notified the administrator that it had transferred the money to his account as administrator of Joseph Knowles, deceased. Thereupon the administrator drew his check on the bank for said sum of $1,893.56; but the bank repudiated the check upon the ground that the administrator had no funds there. Thereafter there was a conference between the administrator and the bank on the subject of this money, and the former was informed by the latter that it had credited the whole amount on its mortgage. The administrator objected to this, and claimed that the money belonged to the estate, and that the bank had no right to credit it upon the mortgage; and, upon demand being made by the administrator for the money, the bank informed him "that he could not obtain possession thereof except by suit for the recovery thereof." Thereafter, on the 6th day of February, 1894, the administrator and the bank entered into an agreement that the bank might credit $1,000 of said money in its hands upon the mortgage, and the bank gave to the administrator the remaining $893.56, and the bank agreed not to prosecute its suit for foreclosure, which had been commenced, during the next nine months. The court found that "said estate for some time had been and still is wholly insolvent," and that in addition to the said mortgaged premises has not sufficient property to pay its debts, "or more than a small part thereof." There is no express finding that it was insolvent on February 6, 1894, when the credit of the thousand dollars was made.

The appellant invokes the rule, for which there is undoubtedly a good deal of authority, that when an administrator voluntarily makes a payment to a creditor, and it turns out that he has paid him too much, because, the estate being insolvent, the creditor was entitled to only his pro rata share of the assets with the other creditors, the amount thus paid cannot be recovered back, and the other creditors can look only to the administrator and his bonds. But, assuming the rule to be as contended for by appellant, we do not think that it applies to the case at bar. The administrator did not voluntarily pay the plaintiff the $1,000 within the rule invoked. He never had possession of the money. He tried to get possession of it, but was prevented by appellant from doing so. He drew his check for it, but payment was refused. It is not necessary to determine whether the circumstances constituted a "duress of goods" which made the agreement of the administrator void. See Mayor of Baltimore v. Lefferman, 4 Gill (Md.) 425, and notes to that case in 45 Am. Dec. 145. Appellant came into possession of the money by mere accident and mistake—the accident of W. H. Knowles depositing it with appellant, instead of with some other bank, and the mistake of believing it to belong to a partnership and not to the estate. We think, therefore, that the case comes within the provisions of sections 2223 and 2224 of the Civil Code, which are as follows: "One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner." And "one who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." And, the appellant being thus an involuntary trustee of the money here involved, we do not think that the administrator, even if not under duress, had the power to relieve appellant from its trust relation to the estate. The trust fund still remained in the hands of appellant.

The judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

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2 Cal. App. 432

BILLINGS v. PALMER.

(Court of Appeal, Second District, California. Dec. 12, 1905.)

JUDGMENT—DEFAULT—TIME OF ENTRY.

Under Code Civ. Proc. §§ 432, 472, requiring an amended complaint to be filed, and a copy thereof to be served upon defendant, who must answer the same within 10 days after service thereof, and authorizing judgment by default upon failure to answer as in other cases, an amended complaint cannot be served in such sense as to require defendant to answer the same until it is filed, and a default judgment entered 10 days after the delivery of a copy of an amended complaint to defendant, but less than 10 full days after the filing of the amended complaint, is prematurely entered.

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by Emily A. Billings against Truman G. Palmer. From an order vacating a default judgment, plaintiff appeals. Affirmed.

Russ Avery and W. C. Petchner, for appellant. Herbert Cutler Brown, for respondent.

SMITH, J. The case is: The plaintiff under an order allowing him to file an amended complaint delivered a copy of the proposed complaint to defendant's attorney, who indorsed thereon: "Received copy of the within amended complaint this 12th day of October, 1904," with his signature; and the complaint was filed on October 13th. Counting the time from the latter date, the 10th day would fall on October 23d, which was Sunday, and the defendant would have the whole of the 24th on which to file his answer. But the plaintiff, without awaiting the expiration of the time, caused default and judgment thereon to be entered by the clerk on that day. This judgment and default was afterwards set aside on the motion of the defendant, on the ground that the clerk had no jurisdiction to enter the same; and the contention of appellant is that in this the court erred. But this contention, we think, is obviously untenable. "The service of an amended complaint," as required by sections 432 and 472 of the Code of Civil Procedure, ex vi termini, implies the filing of the pleading; for, until then, there is no amended complaint and there can be no service of it. Regularly, therefore, the service should follow or be contemporaneous with the filing. Galliano v. Kilfoy, 94 Cal. 88, 29 Pac. 416. And though, as is claimed by the appellant, it be the custom among lawyers to deliver the copy prior to the filing, and this may be taken as sufficient where the complaint is afterwards seasonably filed, yet until then there is no service. Coker v. Superior Court, 58 Cal. 178. The default and judgment were therefore prematurely entered.

The order appealed from is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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2 Cal. App. 436

NISBET v. CLIO MIN. CO.

(Court of Appeal, Third District, California. Dec. 13, 1905. Rehearing Denied by Supreme Court Feb. 8, 1906.)

1. PARTIES—MISNOMER—AMENDMENT.

Civ. Code, § 357, provides that the misnomer of a corporation in any written instrument does not invalidate it, if it can be reasonably ascertained what corporation was intended, and by Code Civ. Proc. § 473, the court may, in furtherance of justice, allow a party to amend any pleading by correcting a mistake in the name of a party. The C. Mining Company of the state of Maine and the C. Mining & Milling Company of New Jersey were doing business in the same county; the former owning the C. mine, with which the latter had no connection. An attachment was levied on the mine, the complaint and summons styling the defendant the "C. Mining and Milling Company," but the complaint alleging that defendant was a corporation of the state of Maine engaged in operating the mine, and a copy of the summons was mailed to the "C. Mining and Milling Company," at the residence of the C. Mining Company in Massachusetts. Plaintiff, without leave, amended his complaint so as to omit the words "and Milling," and by the same attorney both corporations appeared "specially" moving to strike the complaint and quash the summons. *Held*. that it was proper to permit plaintiff to amend the complaint by omitting the words "and Milling" so as to make the action one against the C. Mining Company; such company evidently not having been misled, and the appearance by it, though designated as "special," having confessed jurisdiction.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parties, § 164.]

2. ATTACHMENT—KEEPER'S FEES.

Where, in attachment, it appears that the property is portable and of considerable value, it is proper to allow keeper's fees for preserving the property.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attachment, §§ 640, 641.]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by W. G. Nisbet against the Clio Mining Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Eugene S. Watson and J. P. O'Brien, for appellant. F. P. Otis, for respondent.

McLAUGHLIN, J. There are three appeals in this case: (1) From the judgment; (2) from an order refusing to set the judgment aside; (3) from an order refusing to retax the costs. It appears that two companies, the Clio Mining Company, organized and existing under the laws of the state of Maine, and the Clio Mining and Milling Company, organized under the laws of the state of New Jersey, were in existence and had been doing business in Tuolumne county. The former owned and was operating the Clio mine, while the latter had no connection with said mine. When this action was commenced, an attachment was issued and levied on the Clio mine and tools and machinery thereon, and a keeper was placed in charge of the property. In the original complaint the defendant was styled the "Clio Mining and Milling Company," and this error was also made in the summons. It was, however, distinctly alleged that the defendant corporation was organized under the laws of the state of Maine, and that it was engaged in mining at the Clio mine in Tuolumne county. It is obvious that the description did not exactly fit either of the above-mentioned corporations. Under an order for publication of summons, publication thereof was made, and a copy of the summons attached to a copy of the complaint was mailed to the Clio Mining and Milling Company at the last known residence of the defendant, which was 53 State street, Boston, Mass. Similiar copies were also served upon the Secretary of State. Within the time allowed by law, J. P. O'Brien, Esq., appeared for the defendant by filing a demurrer to the complaint. This demurrer was overruled, and on May 6, 1904, an answer signed and verified by him as "Attorney for Defendant" was filed. This answer contained specific denials of all averments of the complaint, including the covenants as to corporate organization and existence under the laws of Maine, and the operation of the Clio mine. Three days later the plaintiff, without leave of the court, filed an amended complaint, reciting that a mistake had been made in the name of the defendant corporation, and omitting the words "and Milling" wherever they appeared in said name. This amended complaint was served on the attorney for defendant, who five days thereafter gave two separate notices of motions to be made for and in behalf of the Clio Mining Company. One of these motions was to strike the amended complaint from the files, the other to quash the summons and service thereof, and the service of the amended complaint, as far as the Clio Mining Company was concerned. These notices recited that the Clio Mining Company appeared specially for the purpose of making the motions, and for no other purpose, and both were signed by Mr. O'Brien, as "Attorney for the Defendant." An affidavit signed by him accompanied the notices, and it is therein recited that he was the attorney for the Clio Mining and Milling Company, and also appeared as the attorney for the Clio Mining Company for the purpose of making the motions above mentioned. Thereupon the plaintiff gave notice of a motion for leave to amend the complaint by striking out the words "and Milling" wherever they appeared in the name of the defendant corporation, and served such notice upon Mr. O'Brien. This motion was supported by the affidavit of the attorney for plaintiff, reciting the mistake, and that the sole purpose of the amendment was to correct the same.

This last-mentioned motion came on for hearing at the same time the motions previously mentioned were heard, A. A. Smith, Esq., appearing for J. P. O'Brien, "Attorney for Defendant." The motion to strike the amended complaint from the files was granted on the ground that the same was filed without notice to defendant and without leave of the court. The motion for leave to file the second amended complaint was then argued by respective counsel and granted by the court; defendant reserving an exception. Notice of the time fixed for trial was served on the attorney for defendant and the Secretary of State, but the defendant was not represented at the trial. Judgment was duly entered in favor of plaintiff on July 5, 1904, and on the same day a memorandum of costs was served on Mr. O'Brien, as attorney for the defendant. Four days later the Clio Mining Company, a defendant in the action, filed its notice of motion to retax the costs and strike certain items from the cost bill. This notice recited that the defendant appeared for the purpose of making said motion, and not otherwise, and was signed by Eugene S. Watson, as "Attorney for said Defendant, for the Purpose of said Motion." On the hearing of this motion, all the papers on file in the action, certified copies of the articles of incorporation of the two corporations, and the certificate of the Secretary of State, that no corporation of either name organized under the laws of Maine had filed a designation of agent in his office, were considered. The plaintiff also testified that tools worth "several hundred dollars" were under attachment. Thereafter the Clio Mining Company gave notice of a motion to vacate the order permitting the plaintiff to file the amended complaint and to quash the service of the same, and also to vacate and set aside the judgment. This notice was signed by Mr. Watson, as attorney for the defendant, and contained a recital that said company appeared specially for the purpose of said motion. The motion was based on all the papers, proceedings, and records on file in the case, including the articles of incorporation of the two companies, and on the affidavit of Mr. O'Brien. This affidavit recites that affiant was at all times the attorney for the Clio Mining and Milling Company; that the amendment was an attempt to commence a new action against the Clio Mining Company without service of summons; that the two corporations were separate and distinct; and that at the time of making the affidavit, and the service of the amended complaint, he was not the atttorney for the Clio Mining Company. The affidavit concludes with a prayer that the relief sought by the motion be granted. It contains no recital that Mr. O'Brien was not the attorney for the last-mentioned corporation at other times than the two particular occasions mentioned. The plaintiff, on the hearing of the motion, introduced a letter from the secretary of the Clio Mining Company, mentioning the new Clio Company, and showing that the office of the secretary was at 53 State street, Boston, Mass. The motions last mentioned were denied by the court, and the facts above recited form the basis of the various appeals.

The appellant makes the point that the court never acquired jurisdiction of the Clio Mining Company. In this connection it is insisted that the Clio Mining and Milling Company was the sole defendant prior to the amendment, and that service of summons was made upon that corporation. If this be correct, then certainly an amendment to the complaint could not operate to substitute the Clio Mining Company for the original defendant, and give the court jurisdiction of that corporation without service of summons in some manner authorized by law. But the contention that the Clio Mining *and Milling* Company was the original party defendant upon which summons was served rests entirely on the fact that the words italicized appeared in the name of the defendant as it appeared in the summons and original complaint. Every other fact and circumstance indicates an intention to sue and serve the Clio Mining Company. That corporation was organized under the laws of Maine, while the other company was organized under the laws of New Jersey. The former owned, and was operating, the property attached, and the latter had no interest in or connection with that property. The causes of action set forth in the complaint were for labor performed and wood furnished at the Clio mine, and it clearly appears that the copy of summons, attached to a copy of the complaint, was mailed to the office of the secretary of the Clio Mining Company, mentioned in the affidavit and order for publication of summons as the last known place of residence of the defendant. These facts certainly do not sustain the premise upon which the argument of appellant is based. True the affidavits recite that the affiant appeared for the New Jersey corporation in filing the demurrer and answer, but their general tenor and the course pursued show that a service of papers on him as attorney for the defendant brought a quick response from the appellant corporation. In any event, the extent and purpose of his appearance must be gathered from the record rather than from affidavits. The notices of special appearance in behalf of appellant, in common with the answer, are signed "J. P. O'Brien, Attorney for Defendant," and the affidavits conclude with a prayer that the relief sought by appellant be granted. There is no pretense that copies of summons or complaint were mailed to any office or residence of the Clio Mining and Milling Company, or that any of its officers or agents ever received such copies. The verified answer clearly demonstrates that the corporation was not misled, and certain it is that no person of ordinary intelligence could inspect the record without knowing which corporation was intended.

There was no necessity for any appearance by the Clio Mining and Milling Company. If such necessity seemed apparent at first blush, a mere inspection of the complaint or other papers would show that there was no occasion for an appearance even by plea in abatement, much less a plea to the merits. The questions arising by reason of the amendment must therefore be determined under rules which would obtain if the Clio Mining and Milling Company had not been injected into the controversy. A mistake in the name of a natural person may be corrected by amendment of a pleading (Allison v. Thomas, 72 Cal. 563, 14 Pac. 309, 1 Am. St. Rep. 89; McDonald v. Swett, 76 Cal. 259, 18 Pac. 324); and the misnomer of a corporation in a pleading has the same legal effect as the misnomer of an individual. Morawetz on Corporations, §§ 354, 355. "The misnomer of a corporation in any written instrument does not invalidate the instrument if it can be reasonably ascertained from it what corporation is intended." Civ. Code, § 357; Underhill v. Santa Barbara, etc., Co., 93 Cal. 314, 28 Pac. 1049; Donohoe-Kelly Banking Co. v. S. P. Co., 138 Cal. 192, 71 Pac. 93, 94 Am. St. Rep. 28; People v. Sierra Buttes, etc., Mining Co., 39 Cal. 514; Rudy's Beach on Corporations, 99, 99a, 1003. The court may, in furtherance of justice, allow a party to amend any pleading by correcting a mistake in the name of a party. Code Civ. Proc. 473. In Chattanooga, Rome & Columbus R. Co. v. Jackson, 86 Ga. 676, 13 S. E. 109, the name of the corporate defendant contained the word "Carrollton," instead of "Columbus," and the plaintiff was permitted to amend by inserting the latter word. In Johnson v. Central Railroad, etc., 74 Ga. 397, in a suit brought against the Central Railroad & Banking Company, the addition of the words "of Georgia" was sanctioned. In Singer, etc., v. Greenleaf (Ala.) 14 South. 109, the defendant corporation was styled the "Singer Sewing Machine Company," and the Supreme Court of Alabama approved the ruling permitting an amendment by inserting "Singer Manufacturing Company," saying: "There was not an entire change of party, but only a correction of part of a corporate name which had been misconceived. We do not think the change was calculated to mislead." And similar amendments were held proper in the following cases: Maher v. Interstate Switch Co. (Kan. Sup.) 51 Pac. 286; Wilcox v. American Sav. Bank (Colo. Sup.) 40 Pac. 881; Anglo-Am. P. & Prov. Co. v. Turner Casing Co. (Kan. Sup.) 8 Pac. 405.

In the case at bar the complaint shows on its face that the defendant corporation was organized under the laws of Maine, and that the causes of action were against the appellant. The affidavit and order for publication of summons are ample to show that it was the Maine, and not the New Jersey, corporation that was meant. The right party was sued, and the only service of summons attempted was upon the Clio Mining Company. The only mistake was in the addition of the words "and Milling," and the fact that it was a mere mistake must have been apparent to every person making any examination of the record, however superficial or casual such examination might be. The mistake could not abridge the rights or privileges of the plaintiff, unless the New Jersey corporation was actually made a party and served with process. Under the circumstances disclosed by this record it would be sticking in the bark, and sacrificing substance for shadow, to lay down the technical rule that the plaintiff was stripped of the privilege or right to amend his pleading by the voluntary appearance of the Clio Mining and Milling Company in an action plainly brought against another corporation of a similar name, but different residence. But, aside from the foregoing considerations, there is another reason why the jurisdiction of the court must be upheld. We think the appellant confessed such jurisdiction by its appearance as a party to the action. "Courts, under the reformed system of procedure, look to the substance of things rather than to form, and to persons and things rather than mere names. This manner of treating things constitutes the life and spirit of the reformed system of procedure." Anglo, etc., v. Turner Casing Co. (Kan. Sup.) 8 Pac. 404. That system was designed to enable courts of justice to brush aside technicalities affecting no substantial right, and decide causes upon the merits. In the case at bar the body of the complaint clearly indicated that the intention was to sue the Clio Mining Company and recover upon its debt, and parties appearing in that action could not close their eyes to substantial facts, and rely upon mere technical omissions in the caption or title of the cause. Wise v. Williams, 72 Cal. 547, 14 Pac. 204; Spear v. Ward, 20 Cal. 676; Lasar v. Johnson, 125 Cal. 555, 58 Pac. 161; Fruit, etc., Co. v. Fresno, etc., Co. (C. C.) 94 Fed. 847. The answer was to the merits, and on its face discloses an intimate knowledge of all the facts and circumstances showing the mistake. Immediately after it was filed the plaintiff took steps to correct the error and served an amended complaint on the attorney who had signed and verified the answer, not as attorney for the Clio Mining and Milling Company, but as attorney for defendant. That attorney, evidently in response to such service, appeared for the Clio Mining Company and made motions, not only to quash the summons and service thereof, but also to quash service of the amended complaint and strike the same from the files, still subscribing himself "Attorney for Defendant." When the motion for leave to file the second amended complaint came on to be heard on the heels of the order striking the first amended complaint from the files, the same attorney, through his representative at the other hearing, resisted the motion and noted an exception for the defendant. When the Clio Mining Company so appeared, it had full knowledge of the mistake and the facts and circumstances connected with the case, for it must be held to have had knowledge of facts known to its chosen attorney. It certainly cannot be pretended that the attorney who had appeared in its behalf changed his allegiance and identity eo instanti, and appeared for the Clio Mining and Milling Company in resisting a motion to amend clearly and unquestionably favorable to that corporation. This would be repugnant to reason, and contrary to the presumptions which aid the action of the trial court. Nothing to the contrary appearing, it must be assumed that the motion to amend was resisted on behalf of the Clio Mining Company, and this appears to be in consonance with the facts. This being true, that corporation could not have the benefit of its resistance and still escape the jurisdictional consequences if the motion was granted. After judgment, seemingly in response to a cost bill served on Mr. O'Brien, the same corporation appeared as a party defendant to contest the accuracy of the bill of costs, and later renewed its attack on the amended pleading and summons and moved to have the judgment set aside. True there was an endeavor to make each appearance special, but if a party appears and asks for any relief which could only be given to a party in a pending case, such as preventing amendment of pleadings, or striking papers from the files, or granting relief from excessive costs, "it is a general appearance no matter how carefully or expressly it may be stated that the appearance is special." In re Clarke, 125 Cal. 392, 58 Pac. 22; Security, etc., Co. v. Boston Fruit Co., 126 Cal. 423, 58 Pac. 941, 59 Pac. 296.

We have seen that the appearance for the purpose of making a motion to retax the costs and strike certain items from the cost bill necessarily admitted that the court had jurisdiction, and hence the only point to be considered in that connection is the power of the court to allow keeper's fees for preserving the property under attachment. Waiving the point that the motion was not made by the attorney of record or an attorney substituted for him, we think that under the facts disclosed the allowance was proper. It clearly appears that property of considerable value under attachment was portable, and we think the expense of the sheriff in caring for and preserving this property was a proper item of cost. If a levy is made on immovable property, no keeper would ordinarily be necessary, but in our opinion when an attachment is levied on movable property, even though it be classed as fixtures, the sheriff must safely keep and preserve such property and is entitled to the necessary cost of doing so.

The judgment and orders are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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2 Cal. App. 418

HARBY v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO et al.

(Court of Appeal, First District, California. Dec. 12, 1905.)

Mandamus—Limitations—Laches—School-Teachers—Discharge.

Pol. Code, § 1793, provides that the holders of certain school-teachers' certificates, when elected to teach, shall be dismissed only for insubordination or other causes, as mentioned in section 1791. *Held*, that a school-teacher's right to mandamus to compel a school board to admit her to the enjoyment of the position of vice principal of a school, to which she had been appointed, and from which she had been summarily removed, was a right created solely by section 1793, and, when not sought to be enforced for more than three years after it accrued, was barred both by laches and by Code Civ. Proc. § 338, subd. 1, requiring an action on a liability created by statute, other than a penalty or forfeiture, to be brought within three years.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Petition by Rosalie Harby against the board of education of the city and county of San Francisco. From a judgment denying the writ, plaintiff appeals. Affirmed.

Arthur H. Barendt, for appellant. Franklin K. Lane and W. I. Brobeck, for respondents.

HALL, J. Plaintiff petitioned for a writ of mandate to compel the defendant to admit plaintiff to the use and enjoyment of the position and employment as vice principal of the Fairmont Intermediate Grammar School of the city and county of San Francisco. A demurrer to the complaint was sustained, and judgment thereupon entered in favor of defendants. The appeal is by plaintiff from said judgment.

It is alleged in the complaint that plaintiff was regularly elected by the board of education of the city and county of San Francisco to the position of vice principal of the Fairmont Intermediate Grammar School on the 28th day of December, 1898. On the 4th day of January, 1899, the said board adopted another resolution removing her from said position, and when on the 8th day of January, 1899, she appeared at the school and demanded the right to enter upon the duties of such position, the right was refused her by the defendants, and she has never been allowed to enter into said position or to enjoy the emoluments thereof. It also appears that before and ever since the dates mentioned she has held a position as teacher in a grammar grade in another school of said city and county. This action was commenced August 23, 1902, more than three years after the accruing of her alleged right. Defendants demurred, pleading insufficiency of facts, and the bar of section 339, subd. 1, and section 338, subd. 1, Code Civ. Proc. We think the action is barred by the provisions of subdivision 1 of section 338, Code Civ. Proc. That the statute runs against applications for writs of mandate cannot be disputed, and it commences to run when the claimant is first deprived of his right. Barnes v. Glide, 117 Cal. 1, 48 Pac. 804, 59 Am. St. Rep. 153; Barber v. Mulford, 117 Cal. 356, 49 Pac. 206; Jones v. Police Com., 141 Cal. 96, 74 Pac. 696.

The liability of the defendants to this action depends upon the provisions of section 1793 of the Political Code. If it were not for such statute the board of education would have the right to transfer or remove teachers, being answerable only in damages for a violation of contract in cases of employment for a fixed period. Kennedy v. Board of Education, 82 Cal. 483, 22 Pac. 1042. It is only by virtue of the provisions of the statute that the teacher has a right to be protected from removal, or that any liability to this action exists against the defendants. The relief demanded by plaintiff is derived from the statute, and would have no existence if it were not for the statute. The action is upon a liability created by statute, and is therefore barred in three years. Similar views were expressed in Barber v. Mulford, 117 Cal. 359, 49 Pac. 206, which was an action for a writ of mandate to enforce the performance by a board of education of a duty enjoined by law, though, as the wrong section was pleaded, the case was not decided on this point. See, also, Higby v. Calaveras Co., 18 Cal. 176; People v. Hulburt, 71 Cal. 72, 12 Pac. 43; Bank of San Luis Obispo v. Pacific C. S. S. Co., 103 Cal. 594, 37 Pac. 499.

We are also of the opinion that plaintiff's right of action is barred by laches. She did not bring this action for more than three and one-half years after she was removed from the position she claims. During one year of this time, as appears by her complaint, some one else filled the position, and during none of the time has the public received the benefit of her services for which, if reinstated, she expects the public to pay. In New York state a similar law exists as to the removal of certain public officers, and in that state it has uniformly been held that a person claiming to have been unlawfully removed is guilty of laches, unless he brings his action for a writ of mandate promptly. In Murphy v. Keller (Sup.) 70 N. Y. Supp. 405, it is said: "In all proceedings of this character, where a person removed from office is entitled to receive from the public compensation for the services he performs, if he intends to insist that this removal was illegal, or that the law entitles him to be reinstated, his application for reinstatement should be promptly made so as to protect the city from the necessity of paying two persons for the same services. To the same effect are People ex rel. v. Justices, etc., 78 Hun, 334, 29 N. Y. Supp. 157; People v. Welde (Sup.) 59 N. Y. Supp. 1030; People ex rel. v. Collis (Sup.) 39 N. Y. Supp. 698; In re Vanderhoff, 15 Misc. Rep. 434, 36 N. Y. Supp. 833; People ex rel. v. Keating (Sup.) 63 N. Y. Supp. 71; People v. York, 53 App. Div. 429, 65 N. Y. Supp. 1074; Murphy v. Keller (Sup.) 70 N. Y. Supp. 405. In several of the New York cases the delay was from four to eight months only, and yet it was held to bar the right to the writ of mandate. A delay of three and one-half years, we think, evinces such laches and acquiescence in the action of the board as precludes plaintiff from now asking to be reinstated by writ of mandate.

The judgment is affirmed.

We concur: HARRISON, P. J.; COOPER, J.

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2 Cal. App. 346

McLEAN v. LLEWELLYN IRON WORKS.

(Court of Appeal, Second District, California. Oct. 25, 1905. On Rehearing, Dec. 5, 1905.)

1. DEDICATION—STREETS—ACCEPTANCE.

There can be no dedication of a street unless there is an acceptance by the public.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, §§ 64, 65.]

2. SAME—OFFER TO PUBLIC.

Where one subdivided a tract of land and recorded a map showing streets, they being reserved and laid out for the use of such persons as might thereafter purchase a part of the tract, it did not amount to an offer of general dedication to the public.

3. APPEAL — ORDER DENYING NEW TRIAL — SCOPE OF REVIEW.

On an appeal from an order denying a new trial, the appellate court is restricted to an examination of the record to determine whether the findings are supported by the evidence, or whether errors of law occurred at the trial, and may not consider the sufficiency of the findings to support the judgment.

4. SAME — REVIEW—FINDINGS—CONFLICTING EVIDENCE.

The findings of the trial court based on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3983–3989.]

5. EVIDENCE—RELEVANCY—SIMILAR FACTS.

Where a landowner sued to abate certain structures erected in a right of way in which he had an easement, there was no error in excluding certain testimony in relation to the occupancy by other persons of the right of way in question, especially where no judgment for damages was rendered and only injunctive relief granted.

On Rehearing.

6. MUNICIPAL CORPORATIONS — REGULATION OF STREETS—PUBLIC NUISANCE—RIGHTS OF PRIVATE PERSON.

Civ. Code, § 3479, defines a nuisance as anything which obstructs the free use of property or free passage or use of any street. Section 3493 provides that a private person may maintain an action for a public nuisance, if it is specially injurious to him. *Held*, that the owner of a lot abutting on a street has such an easement over it that he may maintain an action to abate structures erected in the street opposite his lot.

7. LIMITATION OF ACTIONS — OPERATION OF STATUTES AGAINST CITY.

Civ. Code, § 3490, provides that no lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right; and Code Civ. Proc. § 318, declares that no action for the recovery of real estate or the possession thereof can be maintained unless it appear that plaintiff or his predecessor was seised of the property within five years. *Held*, that the right of the owner of a lot abutting on a street to maintain an action to abate an obstruction of the street opposite his lot cannot be barred by section 318.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Sarah E. McLean against the Llewellyn Iron Works. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Jones & Weller, for appellant. J. W. McKinley and Fred E. Burlew, for respondent.

ALLEN, J. The plaintiff is the owner of five lots of land bounded by and fronting on Railroad, Magdalena, and San Fernando streets in the city of Los Angeles. The defendant is the owner or lessee of lands on the other side of Magdalena street. We would give the directions, but the points of the compass are not shown on the plat in the transcript, and nothing is said upon the subject by the witnesses. The suit was brought to abate certain structures erected in the street by the defendant, and other nuisances thereon, and for an injunction. Judgment was for the plaintiff as prayed for. The appeal is from the judgment, and from an order denying the defendant's motion for a new trial; but the former appeal was not filed in due time and must be disregarded.

The complaint alleges that plaintiff is the owner of certain lots, which originally formed a part of tracts subdivided with reference to recorded maps, upon which maps were delineated certain streets; that after the record of these maps the owners of the tracts proceeded to sell the lots to various parties, with an easement and right of way over these delineated streets, in each of which deeds of conveyance special reference was made to such streets; that defendant entered upon such streets and obstructed the same, and has deprived plaintiff of the easement and right of way over and through the same, and threatens so to continue, thereby damaging plaintiff's premises and depriving her of the rights in the easements so conveyed and held. There is no averment in the answer which can be construed into an allegation that the streets alleged to have been delineated on the maps were ever accepted or used as public streets. On the contrary in paragraph 15 of defendant's answer, it alleges that it has been in the adverse possession of the portion of the tract described in plaintiff's complaint, and being a portion of the alleged streets set forth in the complaint. The court finds that these alleged streets mentioned in plaintiff's complaint, and referred to in the answer, were reserved and laid out for the use of such persons as might thereafter purchase a part or portion of said tracts, and that plaintiff by her deeds acquired an easement over, through, and upon such streets, and was in possession thereof until obstructed by defendant. Thus it will be seen that, while the term "streets" is employed in the pleadings and findings, the court finds them to be only private rights of way for the use of purchasers within the tracts. There is no testimony in the record showing any acceptance of these streets or their use by the public nor any facts from which an acceptance may be implied. "The statement that platting a tract of land, recording the plat, and selling lots by reference to such plat, constitutes a dedication of the streets in favor of the purchasers of these lots, even though a dedication to the public is not perfected and completed, is not correct as a legal principle." Prescott v. Edwards, 117 Cal. 301, 49 Pac. 179, 59 Am. St. Rep. 186. "Dedication is the joint effect of an offer by the owner to dedicate land, and an acceptance of such offer by the public. Only two parties are necessary to a dedication, the owner upon the one side and the public upon the other. There can be no dedication without the participation of both." City of Los Angeles v. Kysor 125 Cal. 466, 58 Pac. 91. It matters not what may have been the intention of the individuals who filed the plat and made the offer of dedication. The dedication was not complete until the public accepted, either in terms or by some affirmative act indicating an acceptance. The finding of the court in this case goes to the extent of negativing even the offer of general dedication, when it finds that the object of laying out the streets was but for the use and benefit of purchasers. If this be true, and there is nothing in the evidence inconsistent therewith, these streets could only have become public by use for such time and under such circumstances as would establish a right by prescription. Nothing in the evidence warrants such finding, and none exists in the record. It follows that the question of public nuisance and the right of an individual to maintain an action in relation thereto is not involved in this case; for the right alleged and found to have been invaded was a private right, in which the public had no concern.

Upon this appeal we are restricted to an examination of the record with a view of determining whether the findings are supported by the evidence, or whether errors of law occurred at the trial. There being no appeal from the judgment, we may not consider the sufficiency of the findings in its support. As we have before stated, the findings are within the issues and have support in the evidence. There is some conflict as to the length of time over which the obstruction of the street extended, and as to the adverse nature of such occupancy; but the court has found that defendant has not for more than five years last past—that is, for the five years preceding June 8, 1903—been in adverse possession of said premises under a claim of right, and under the well-established rule such findings will not be disturbed.

The action of the court in excluding the testimony of John D. Hooker in relation to the occupancy by other persons of the streets is assigned as error. We perceive no error in this ruling. That others were infringing upon the rights of lot-owners was not a justification, nor in any wise mitigating the acts of defendant, and especially in view of the fact that no judgment for damages was rendered and no relief granted, except the injunctive relief.

Order denying the defendant's motion for a new trial affirmed.

I concur: GRAY, P. J.

SMITH, J. (concurring). I concur in the conclusion of the majority of the court, and also with the reasoning of the opinion generally, but I am not prepared to hold that, upon the pleadings, findings, and evidence, the streets therein referred to are in fact not streets. Whether they are or not, however, I deem immaterial. For it is a settled principle that the owner of land abutting on a public street has an easement or right of way over the street appurtenant to his land; and from this it follows that any interference with this easement that injuriously affects his land must be regarded as "specially injurious to himself" and, therefore, as a proper subject for a personal action. Civ. Code § 3493. A mere interference with the easement not affecting the use or value of the land to which it is appurtenant, would seem to come within the definition of public nuisance, as given in section 3480 of the same code; for all the landowners abutting on the street, and thus entitled to the use of the easement, would be affected in the same manner—that is to say, the interference would be an injury to a common right. But a resulting injury, to the land of any owner is special and peculiar to himself, and he is, therefore, under the provisions of the section of the code cited, entitled to his remedy. Nor does it make any difference that numerous landowners are thus injured; the injury of each in such case is essentially different from that of the others, and each owner is, therefore, specially injured. These positions, I think, are sustained by the authorities cited in the opinion heretofore filed, to which I adhere. See, also, Bigelow v. Ballerino, 111 Cal. 559, 44 Pac. 307.

On Rehearing.

SMITH, J. Upon a reconsideration of this case on a second rehearing, we are of the opinion that the judgment and order denying the defendant's motion for a new trial should be affirmed on the grounds stated in the opinion originally filed, which is as follows:

The plaintiff is the owner of five lots of land bounded by and fronting on Railroad, Magdalena, and San Fernando streets in the city of Los Angeles. The defendant is the owner or lessee of lands on the other side of Magdalena street. We would give the directions, but the points of the compass are not shown on the plat in the transcript, and nothing is said upon the subject by the witnesses. The suit was brought to abate certain structures erected in the street by the defendant, and other nuisances thereon, and for an injunction. Judgment was for the plaintiff as prayed for. The appeal is from the judgment, and from an order denying the defendant's motion for a new trial; but the former appeal was not filed in due time and must be disregarded. It is found by the court that the defendant has "entered upon and taken possession of a part of said Magdalena, Railroad, and San Fernando streets, and has obstructed the same by the construction of various buildings and in other ways, and threatens to and will, unless restrained by this court, continue to occupy and obstruct the said streets and deprive plaintiff of all the benefits and rights to which she is entitled as the owner of the propery above mentioned, and the easement and right of way through, upon, and over said streets, and will cause great and irreparable injury to the plaintiff"; also, it is found that by the nuisance described "the value of the plaintiff's property will be greatly and materially diminished," and "the plaintiff will be thereby deprived of the benefits of said streets and of her rights as the owner of the land above described, and the right to use and occupy the said streets and the easement therein for the purposes of passing and repassing over said streets so in possession of the defendant, and will thereby suffer great and irreparable injury, for which she cannot be recompensed in damages." From the evidence it appears that the structures complained of occupy about 15 feet of the streets, leaving on Magdalena street, between them and the plaintiff's land, a space of 45 feet, which space is reduced to 30 feet by other nuisances habitually maintained in the street by the defendant. There is, however, no evidence of special injury to the plaintiff, except such as may be inferred from the above facts.

The principal question in the case, and, indeed, the only question that need be considered, is whether, by these facts, special injury to the plaintiff is shown; and if, in fact, a private right appertaining to her has been invaded, the question must be answered in the affirmative. Fisher v. Zumwalt, 128 Cal. 495, 496, 61 Pac. 82; Lind v. City of San Luis Obispo, 109 Cal. 343, 344, 42 Pac. 437. But it is a familiar and well-established principle that the owner of a lot abutting on a street has an easement or right of way over it, which in the strictest sense of the word is property. Prescott v. Edwards, 117 Cal. 302, 49 Pac. 178, 59 Am. St. Rep. 186; Schaufele v. Doyle, 86 Cal. 109, 24 Pac. 834, and cases cited; Eachus v. Los Angeles Electric Ry. Co., 103 Cal. 617, 37 Pac. 750, 42 Am. St. Rep. 149. And though this right is one that he holds in common with the public, yet in so far as it affects the value or use of his property it is a right peculiar to himself, and any interference with it constitutes a private as well as a public nuisance. Civ. Code, § 3479; Hargro v. Hodgdon, 89 Cal. 629, 26 Pac. 1106; Wood on Nuisances, § 830; O'Connor v. Southern Pac. R. R. Co., 122 Cal. 683, 684, 55 Pac. 688. In the cases of Schaufele v. Doyle and Eachus v. Railway Co., supra, the special effect of the nuisance complained of was to cut off access to the plaintiff's property. But in the latter case the principle is thus more broadly stated: "The right of the owner of a city lot to the use of the street adjacent thereto is property which cannot be taken from him for public use without compensation; and any act by which this right is impaired is to that extent a damage to his property." And in the former case it is said, citing Lexington, etc., R. R. Co. v. Applegate, 8 Dana, 310, 33 Am. Dec. 497: "If it should appear that such use encroaches on any private right, or obstructs the reasonable use and enjoyment of the street, by any person who has an equal right to the use of it, we shall be ready to enjoin all such wrongful appropriation of the highway." And it is added: "Upon the facts appearing in this case, we are of opinion that the reasonable use of the street by the plaintiff is obstructed, and her individual rights are encroached upon, by the defendants, and that an injunction should have been granted." No distinction can be drawn between the obstruction of access to the plaintiff's land, and any other nuisance by which its value or use is injuriously affected. The test is, not the greater or less number of persons who are affected by the nuisance, but whether the particular right of a landowner is affected. Lind v. City of San Luis Obispo, 109 Cal. 341, 42 Pac. 437; Fisher v. Zumwalt, 128 Cal. 496, 61 Pac. 82, supra. Nor as matter of law can the court say "that 30 * * * feet of the street will answer all the legitimate uses to which it might be put by the plaintiff, an abutting owner, any more than it can say that 10 feet would be amply sufficient for all his legitimate uses." O'Connor v. Southern Pac. R. R. Co., 122 Cal. 683, 684, 55 Pac. 688.

The above observations refer to cases where a right of the party complaining has been affected, which in all cases constitutes a private nuisance. As to obstructions constituting a public nuisance only, "the gravamen of the action is the special damage." Wood on Nuisances, § 830. Thus a person not owning land abutting on the street, or otherwise injuriously affected, cannot maintain an action for an obstruction in the street unless he is himself injured by it, as, e. g., where by reason of it he is damaged in his person. Civ. Code, § 3493. In this case it may be observed that it appears from the findings and the evidence that the lots and streets in question were parts of a large tract of land that had been subdivided by the owner, and the lots sold according to the recorded map; and it is argued by plaintiff's counsel that under the deed the grantees took rights of way over the streets, nor can this contention be contested. Prescott v. Edwards, 117 Cal. 298, 49 Pac. 178, 59 Am. St. Rep. 186; Hargro v. Hodgdon, 89 Cal. 623, 26 Pac. 1106. This, indeed, is not disputed by the appellant's counsel; but it is maintained that, when the streets became public, private rights of this kind are merged in the public right, and that interference with them cannot be the subject of a private action. But we can conceive of no principle upon which this contention can be allowed. The circumstance alleged in support of it is that thereby a multiplicity of suits might be brought; but under the authorities last cited, this is immaterial. To what extent such suits might be brought is to be determined by the simple consideration whether the land of plaintiff has been injuriously affected. The precise limit we need not here determine; it is sufficient that wherever it may be placed, the present case comes within it. Nor need we determine whether any distinction can be made between streets dedicated by private parties, and conveyances made in regard to them, and the streets in the city generally.

It is also claimed by appellant that the plaintiff's action is barred by the provisions of section 318, Code of Civil Procedure. But this cannot be. A public nuisance cannot be legalized by prescription (Civ. Code, § 3490); nor, so long as the streets remain such, can the rights of abutting land owners be thus affected.

The appeal from the judgment is dismissed, and the order denying the defendant's motion for a new trial is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

2 Cal. App. 346

McLEAN v. LLEWELLYN IRON WORKS.

(L. A. 1,517.)

(Supreme Court of California. Feb. 2, 1906.)

In Bank. Action by Sarah E. McLean against the Llewellyn Iron Works. An appeal from a judgment for plaintiff was dismissed by the Court of Appeal (83 Pac. 1082), and petition for rehearing in the Supreme Court denied.

PER CURIAM. The petition for rehearing in this court, after judgment by the District Court of Appeal for the Second Appellate District, is denied. It is, however, proper to say that we are not to be understood as affirming that portion of the opinion of the District Court of Appeal to the effect that the right of action by a private party to abate a public nuisance, because of special injury arising therefrom to him, may not be barred by the statute of limitations. Upon the issue as to the statute of limitations, the finding of the trial court was against the defendant, and that finding has sufficient support in the evidence. The statement of the opinion of the District Court of Appeal referred to above is therefore unnecessary to a correct determination of the appeal.

2 Cal. App. 561

HEWLETT v. BEEDE et al.

(Court of Appeal, Third District, California. Dec. 29, 1905. Rehearing Denied Jan. 29, 1906.)

1. EXECUTORS AND ADMINISTRATORS—LIABILITIES ON BONDS—CONTRIBUTION.

Code Civ. Proc. § 1613, declares that every executor is chargeable with the whole estate of the decedent which may come into his possession. Section 1391 provides that when two or more persons are appointed executors, the court must require a separate bond of each of them. Pol. Code, § 969, made applicable to executors by section 981, provides for contribution between the sureties on an original, and sureties on an additional, bond of a public officer. Civ. Code, § 2836, provides that a surety cannot be held liable beyond the express terms of his contract. *Held*, that there is no joint liability between the sureties on the separate bonds of coexecutors, and no right of contribution by one set of sureties against the other; consequently an executor who is compelled to make good to the heir the default of a coexecutor, whom he negligently permits to waste the estate, cannot in his individual capacity enforce contribution against the sureties of the coexecutor.

2. SAME—LIABILITY OF EXECUTOR—ACTS OF COEXECUTOR.

An executor who permits his coexecutor to handle the money of the estate, because the latter is a lawyer and knows more about the business, is jointly and severally liable with the coexecutor to the heirs, if through his inexcusable neglect he permits the coexecutor to lose the estate.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 508, 511.]

3. SAME—DEATH OF EXECUTOR—DUTIES OF SURVIVING COEXECUTOR.

It is the duty of a surviving executor, as such to sue the sureties of a deceased coexecutor for funds of the estate received by the latter and unaccounted for.

4. SAME—LIABILITY OF SURETIES—COSTS OF ACTIONS AGAINST COEXECUTOR.

The right of a surviving executor to recover from the sureties of a deceased coexecutor funds of the estate received and unaccounted for by the coexecutor does not entitle the surviving executor to recover costs of an action brought against him by the heir to compel him to make good the default of the coexecutor.

5. LIMITATIONS—ACTIONS ON BONDS.

Under Code Civ. Proc. § 337, requiring an action on a contract or liability founded upon a written instrument to be commenced within four years, an executor's right of action to recover of the sureties of a deceased coexecutor assets of the estate lost by the coexecutor accrues immediately on the death of the coexecutor, or, at the latest, when the estate is rightfully demanded by the heir, and is barred four years after that time.

Appeal from Superior Court, San Joaquin County; Ansel Smith, Judge.

Action by Samuel Hewlett against W. M. S. Beede and others. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

See 83 Pac. 1089.

J. B. Webster and C. H. Fairall, for appellant. Nicol & Orr, for respondents.

BUCKLES, J. On June 23, 1893, Alonzo McCloud, a resident of San Joaquin county, Cal., died testate, and in due time his will was admitted to probate and the court appointed R. D. Baldwin and Samuel Hewlett, executors. Each, qualifying, gave separate bonds, each in the sum of $25,000. The sureties on the bond of R. D. Baldwin were J. D. McDougald, Joseph H. Swain, Mary A. Baldwin, Joseph Fyfe, and W. M. S. Beede; each of said sureties qualifying in the sum of $10,000. The sureties on the bond of the said Samuel Hewlett were Henry Meyers for $10,000, L. Hewlett for $10,000, G. W. Trahern for $10,000, R. S. Johnson for $10,000, G. Gianelli for $5,000, and B. Gianelli for $5,000. On November 11, 1896, a decree was made and entered settling the final account, and the said executors jointly charged themselves with a balance of cash on hand subject to distribution of $2,503.21. On or about November 24, 1896, Wayne McCloud, then a minor, by his guardian, and Bessie Logan, legatees and devisees under the will of said Alonzo McCloud, filed their petition for a partial distribution, and on January 2, 1897, the court made and entered its decree adjudging that one-half of said $2,503.21 belonged to said Wayne McCloud and Bessie Logan. The said executors then placed in the Bank of Hollister, under an agreement between them and Wayne McCloud, in their individual names, but in trust for the said Wayne McCloud, the sum of $598, which was the sum distributed to him after the payment of certain taxes. On October 5, 1897, the said executor, Baldwin, died. On December 19, 1897, the said Wayne McCloud became of age and then demanded of executor Hewlett that he order the said bank to receive and retain the money deposited therein as the money of Wayne McCloud and credit the same on his indebtedness to the bank. After this the said Bessie Logan assigned her interest to Wayne McCloud, and he thereupon made the same request and demand of said executor, Hewlett, in relation to this money, as he had of his own $598; but said Hewlett neglected to comply with such demand and did not pay the same over to said Wayne McCloud. Whereupon the said Wayne McCloud brought suit against said Hewlett, as executor, and the said sureties on his bond, for the recovery of said moneys; and on the 6th day of December, 1899, the court rendered judgment against said Hewlett and his said sureties in favor of Wayne McCloud for the sum of $1,191, with interest on $592.60, for $50.85 costs, and that the sum of $598.40, which had been deposited in said bank in the names of Samuel Hewlett and R. D. Baldwin, be paid to the Bank of Hollister for the use of said Wayne McCloud, and that when so paid it should be credited on said judgment. Hewlett appealed to the Supreme Court (McCloud v. Hewlett, 135 Cal. 362, 67 Pac. 333), and the judgment against him was affirmed. The plaintiff paid the same, amounting to $1,161.25, and, after demanding the same of the said sureties on the bond of R. D. Baldwin, brought this action to recover the same from them. The judgment was for the defendants. The appeal is from the judgment and from an order denying motion for new trial.

"Every executor and administrator is chargeable in his account with the whole of the estate of the decedent which may come into his possession. * * *" Section 1613, Code Civ. Proc. "When two or more persons are appointed executors or administrators, the superior court, or a judge thereof, must require and take a separate bond from each of them." Section 1391, Code Civ. Proc. In Re Sanderson, 74 Cal. at page 214, 15 Pac. at page 762, the court held that: "Coexecutors are not liable to each other, but each is liable to the cestui que trust to the full extent of the fund he received." In the case of McCloud v. Hewlett, 135 Cal. 361, 67 Pac. 333, the court held that Hewlett and his sureties were liable to McCloud, who was the cestui que trust. The appellant claims that the case at bar is a parallel case where an officer is required to give additional bond, and quotes section 969, Pol. Code, which reads as follows: "Whenever the sureties on either bond have been compelled to pay any sum of money on account of the principal obligor therein, they are entitled to recover, in any court of competent jurisdiction, of the sureties on the remaining bond a distributive part of the sum thus paid, in the proportion which the penalties of such bonds bear one to the other, and to the sums thus paid, respectively"—and then urges that, where there are two executors who give separate bonds, the same rule applies as to contribution of sureties on each bond, and cites section 981, Pol. Code, to sustain such contention. The section reads as follows: "The provisions of this article apply to the bonds of receivers, executors, administrators and guardians." We do not think that the rule of contribution between sureties on the original bond and those on an additional bond is intended to apply to sureties on bonds of two or more executors. The sureties on the bond of Baldwin only promised to stand good for the acts and defalcations of Baldwin, while the sureties on Hewlett's bond only promised to stand good for his defalcations and acts, and it seems to us there would, in no view which may be taken, be a joint liability between the sureties on their separate bonds, and, if no joint liability, then there could be no right of contribution by one set of sureties against the other.

It must be borne in mind that this action is one in which the plaintiff prosecutes the cause, not in his representative capacity as executor, but in his private capacity against those who were sureties on the bond of Baldwin as an executor of the McCloud will, who is now dead. It is sought to recover from these sureties $86.75, which plaintiff's sureties paid for him in a suit by the heir, and the further sum of $300.50, claimed to have been expended by plaintiff as costs in the action the heir brought against him and his sureties. The plaintiff had repaid his sureties the $860.75, and therefore brings the suit in his own name. Whatever obligation rests upon the defendants arose upon a bond given by Baldwin, as executor. They were liable, if at all, only upon that bond, and they are entitled to stand upon the precise terms of their contract. Their liability is limited by the terms and conditions of the bond on which they are sureties, and such liability cannot be extended by implication beyond its terms. "A surety cannot be held beyond the express terms of his contract." Section 2836, Civ. Code; Heinlen v. Beans, 71 Cal. 295, 12 Pac. 167; San Luis Obispo v. Farnum, 108 Cal. 562, 41 Pac. 445; Heidt v. Minor, 89 Cal. 115, 26 Pac. 627; Elder v. Kutner, 97 Cal. 490, 32 Pac. 563; County of Glenn v. Jones, 146 Cal. 518, 80 Pac. 695. So far as the principal in a bond of this kind is concerned, the obligation of the surety is to answer to the heir for his breach of duty and not for a breach of duty to any other person who may have been invested with the same character of trusts with respect to the same estate. As between Baldwin and Hewlett, the former may have become personally liable to the latter for something the latter may have been compelled to do which the former ought to have done. But the defendants, as Balwin's sureties, did not agree to answer for Baldwin's private obligations to Hewlett. The obligation of the sureties as set out in the bond are: "Now, therefore, if the said Robert D. Baldwin, as such executor, shall faithfully execute the duties of his trust according to law, then this obligation to be void, otherwise to remain in full force and effect." Assume for the sake of argument that Baldwin did receive the moneys of said estate, that he did not pay over, and Hewlett was compelled to make good the amount to the heir, the sureties of Baldwin were not bound to repay Hewlett, for they only agreed to answer to the heir or the state of California for the heirs. In Hill v. Kemble, 9 Cal. 72, a constable collected $185 by execution for Hill and notified Hill that the money was ready for him. Hill said he did not need the money then and loaned it to the constable, and he did not pay the same. Suit was brought against a surety on the constable's bond. The court held: "The sureties upon the official bond of an officer are only responsible for his official acts, and not for private debts he may contract on his individual account." It matters not that Hewlett allowed Baldwin to handle the money of the estate because Baldwin was a lawyer and knew more about the business. Hewlett would still be jointly and severally liable with Baldwin to the heirs if, through his inexcusable neglect, he permitted Baldwin to lose the estate. In re Osborn, 87 Cal. 1, 25 Pac. 157, 11 L. R. A. 264. The heirs recovered from Hewlett the whole amount due them.

It is admitted by the pleadings that the "said executors verified and filed their joint final account of their proceedings in said estate; that the same was upon due notice given, heard, and considered by said superior court, wherein said settlement of said estate was pending and was thereupon duly allowed, approved and settled by the decree of said court, which was then and there given, made, and entered, and recorded on the 11th day of November, 1896"; and that said decree showed the executors had in their hands the sum of $2,503.21, which was the remainder of said estate after paying all claims and expenses and commissions. Baldwin died October 5, 1897, and the heir demanded his portion of the estate of the appellant on December 19, 1897, and was refused. Hewlett continued to administer the estate after the death of his coexecutor, and all the trusts of the executorship devolved upon him, among which were to collect and safely keep the property of the estate. If Baldwin had received the funds of the estate, and had not and could not account for them, Hewlett, as the surviving executor, had the right, and it was his duty, to bring an action against the sureties on Baldwin's bond for such funds for the benefit of the estate. This right, however, was not vested in Hewlett as an individual. It was an incident of the office he held. But no effort seems to have been made to have Baldwin account for the funds, nor to collect from the sureties after his death.

The appellant had permitted Baldwin to handle the funds of the estate without any reason, further than that he was a lawyer and knew more about it. The funds being lost in part through Hewlett's negligence, as has been shown, he became jointly liable with Baldwin and also severally. The heir ignored the joint liability, as he had a right to do, and sued Hewlett without joining Baldwin's sureties, and recovered judgment, which Hewlett paid, and now Hewlett, in his individual capacity, seeks to recover from these sureties what he was compelled to pay the heir, and also $300 costs of that action. The costs in no sense could be a charge against the sureties on Baldwin's bond, for the reason that any action the appellant could have maintained would have been one as executor against his coexecutor to recover for the heir the estate lost by Baldwin, and the costs sued for here were not made in such an action, but in an action brought by the heir and against executor Hewlett. This is not an action between joint obligors, or co-sureties, where the right of action would not accrue until payment had been made by one of those jointly liable; but the right of appellant here accrued at least when Baldwin died or immediately on the happening of the default. Baldwin's death occurred more than four years next prior to the commencement of this action, and the demand of the heir on Hewlett was made more than four years before the commencement of this action. If any right of action existed against these defendants as the sureties on Baldwin's bond, the statute of limitations was set in motion as soon as Hewlett, by his own action, could have made the claim payable in spite of the sureties. Immediately upon the death of Baldwin, Hewlett, as the surviving executor, became entitled to the possession of all moneys belonging to the estate. The duty of administering the estate at once devolved upon him. He knew, or should have known, then what became of the money which had been reported by the final account to have been on hand and held jointly by the two executors. This account, sworn to by Hewlett, as well as Baldwin, had informed these defendants here that the $2,503.21 was held jointly by the executors. If it was not so held, Hewlett, the appellant, knew it. A suit by Hewlett, executor, then, against Baldwin, executor, to recover the money for the heirs would have made the sureties on Baldwin's bond, the defendants here, liable for whatever default he (Baldwin) might have made. The heirs no longer have any concern in the question whether Baldwin made default or not, for they have received the estate and the matter becomes a purely personal one between Baldwin as an individual and Hewlett as an individual. Did the right of action exist at all against the sureties, the statute of limitations had run against it, and was set in motion as soon as Hewlett, by his own act, could have made the claim payable in spite of the sureties. These defendants had nothing to do with the administration of the estate. If Hewlett saw fit to turn over all the funds of the estate to his coexecutor and to negligently suffer their use in a manner contrary to law, he should not complain when made to suffer the loss his own conduct made possible. If his confidence was misplaced, he is the one who misplaced it. It was not the act of the defendants, but the alleged misplaced confidence of one executor in the other, that has led to the asserted loss. He that places confidence should watch that it is not abused. If he neglects to do so, the maxim applies, "Whose is the negligence, his is the loss."

The case was brought and tried by the appellant upon the theory that the sureties on Baldwin's bond were joint obligors with sureties on Hewlett's bond. This is a mistaken idea, as we have plainly pointed out. The authorities cited by appellant are those relating to contribution by joint or co-obligors and therefore do not apply to this case. Again, appellant proceeds upon the theory that he could not have commenced the action against Baldwin until he had paid over the estate. The all-sufficient answer is he could have sued Baldwin, in his official capacity, the moment he knew Baldwin had passed the estate out of his hands, and surely it was his duty to have sued Baldwin's sureties immediately after October 5, 1897, when Baldwin died, and at the farthest on December 19, 1897, when the heir demanded the estate. He was then the sole executor and entitled to the possession of the entire estate. In the first place, Hewlett was not responsible for any more of the estate than what came to his hands until he was negligent in letting his coexecutor keep possession of the estate after he had, by his joint account, notified the defendants that he himself held it jointly with Baldwin, and then, when Baldwin died, it was his duty to take charge of the estate, and he could not delay setting the statute of limitations running by failing to demand of Baldwin's sureties that they make good whatever default he had made to the estate. Harrigan v. Home Ins. Co., 128 Cal. 531, 58 Pac. 180, 61 Pac. 99. Hewlett was not standing in the same position as a creditor. His position was that of executor representing the estate, and as to Baldwin there was no payment for him to make. His duty was to collect the estate, and the statute began to run from October 5, 1897.

For the reasons herein stated, the action, being a personal matter between Hewlett and Baldwin, cannot be maintained against the sureties of Baldwin's bond as executor. Plaintiff's cause of action is barred by the provisions of section 337, Code Civ. Proc.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

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7 Cal. Unrep. 246

HEWLETT v. BEEDE et al. (Sac. 1,405.)

(Supreme Court of California. Feb. 26, 1906.)

Courts—Transfer of Cause—Time of Petition.

A petition to transfer a cause from the Court of Appeal to the Supreme Court, filed more than 10 days after the judgment in the former court became final, will be stricken from the files.

Action by Samuel Hewlett against W. M. S. Beede and others. Plaintiff petitions to transfer the cause from the Court of Appeal to the Supreme Court. Petition stricken from files.

See 83 Pac. 1086.

PER CURIAM. It appearing that on February 10, 1906, the clerk of this court inadvertently filed the petition of the appellant herein for an order transferring the cause for hearing from the Third District Court of Appeal to the Supreme Court, and that said date was more than 10 days after the judgment in the said District Court of Appeal became final therein, it is therefore now ordered that said petition be stricken from the files of this court.

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2 Cal. App. 633

YICK SUNG v. HERMAN et al.

(Court of Appeal, First District, California. Jan. 10, 1906.)

1. Sales—Executory or Executed Contract.

A written agreement reciting the receipt by a seller of a certain sum for potatoes delivered on a river bank, all to be sound and merchantable, shows a present sale, and not a mere agreement to sell in the future, and when the potatoes are delivered at the river bank the title passes to the buyer.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 162-169.]

2. Same—Warranties—Performance — Evidence.

Evidence examined, and *held* sufficient to sustain a finding that potatoes were delivered by a seller in accordance with the terms of the contract, that they were accepted by the buyer, and that they were of the quality called for by the contract.

3. Same.

In an action for the price of potatoes sold, in which the defense was breach of warranty, where there was evidence that all the land from which they were taken was of the same quality and the potatoes were all about the same, testimony of a witness that he had seen the seller digging and sacking potatoes and that the potatoes he saw were in good condition was admissible.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1268.]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Yick Sung against one Herman and others, doing business as Erlanger & Galinger. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Application to transfer to Supreme Court denied. 83 Pac. 1091.

J. B. Reinstein and W. P. Johnson, for appellants. A. B. Treadwell and Morehouse & Alexander, for respondent.

COOPER, J. Action to recover $854 for 2,020 sacks of potatoes alleged to have been sold by plaintiff to defendants at the following prices: Twenty sacks at 45 cents per sack, and 2,000 sacks at 42½ cents per sack. The court found for plaintiff, and judgment was accordingly entered. This appeal is from the judgment on the judgment roll and a bill of exceptions.

The appellants contend that the evidence is insufficient to support the findings, and show that the potatoes were not up to the quality specified in the contract. The main discussion is as to whether or not the contract was a present sale by which the title passed, or an agreement to sell in future. The contract is as follows:

"Contract.

"Received from Erlanger & Galinger, the sum of five dollars as part payment for the following described goods, viz.: 2,000 sacks B Bank at 42½ per sack, delivered f. o. b. on Bank, all of which goods I have this day sold to said Erlanger & Galinger, at the above prices on the following conditions: All goods to be sound and merchantable, of fancy quality, on arrival at San Francisco. Sacks to be well filled and in good shipping order. Said Erlanger & Galinger agree on their part to pay balance of purchase price on the receipt of the bill of lading for said goods, shipped in accordance with the above terms and conditions, and as specifically described. Sack 115 lbs. Yick Sung, Seller. Erlanger & Galinger, Buyer, per F Eshbach. Contract executed in duplicate. Dated November 20, 1902."

The court found: "That it was intended, and so understood by and between plaintiff and defendants, that the said transaction was a sale and not a contract." We are of opinion that the agreement was a sale, by which the title passed from the plaintiff to the defendants when the potatoes were sacked and delivered to defendants on the "Bank" as specified in the agreement. The agreement acknowledges the receipt of $5 as part payment for "2,000 sacks B Bank at 42½ per sack, delivered f. o. b. on Bank, all of which goods I have this day sold to said Erlanger & Galinger." The words "this day sold" mean a present sale. Of course, there remained something to be done. The plaintiff had to segregate, sack, and deliver at the river bank all of said 2,000 sacks of potatoes that were not already at the bank; but when the plaintiff had done this the title passed, and the potatoes, when so delivered, were the property of defendants. The authorities all hold that where the terms are expressed in a contract of sale by which a present sale is contemplated, and the articles or goods are delivered to the buyer at the place designated in the contract, the title vests in the buyer. Even in an executory contract of sale of articles to be selected from goods in bulk, when the articles or goods are selected and appropriated to the contract and delivered to the buyer, the title passes. A sale is a contract by which, for a consideration, one transfers to another property or an interest therein. Segregating the articles and setting them apart to the vendee by way of delivery fixes the responsibility upon the vendee to pay. The buyer must pay the price agreed upon by the terms of the contract when the goods are delivered. Of course, if the goods, although delivered, are not up to the specifications called for by the contract the vendee has his remedy by way of recoupment in damages when sued for the price. The evidence shows that "B Bank" meant Burbank potatoes, and that "on Bank" meant on the landing at the bank of the San Joaquin river. Our inquiry will then be directed to the question as to whether or not the evidence is sufficient to sustain the finding of the court that "plaintiff delivered to defendants at the time and place and in the conditions agreed upon the said 2,000 sacks, and that the said defendants received and accepted the same on the bank of the river.

The question is not free from difficulty, and there is much conflict in the evidence, but after a careful examination of the evidence we are of opinion that it supports the finding. There is evidence that one Eshbach was the agent of defendants for the purpose of making the purchase of the potatoes; that as such agent he examined and purchased the first lot of 20 sacks, and shipped them to defendants, and they received them without objection, and there is no controversy here as to the 20-sack lot; that Eshbach was an experienced buyer and lived near the farm of plaintiff and had been upon it often; that when the contract for the 2,000 sacks was entered into about 465 sacks had been dug, of which 100 sacks were at the landing and the balance in the field where plaintiff was engaged in digging; that Eshbach inspected these sacks and went into the field and examined the kind and quality of the potatoes that were being dug; that the remaining portion of the 2,000 sacks was dug from the same field, and was equal in quality and similar to the 465 sacks which Eshbach examined, and the 20 sacks of the first lot; that the potatoes were purchased as river Burbank potatoes, which are much inferior to the highland Burbank potatoes, and sell for a much less price; that the price at which the 2,000 sacks were sold was much less than the selling price of "Highland Burbank" potatoes at the time; that Eshbach was upon and around plaintiff's farm when the balance of the 2,000 sacks was being dug, sacked and shipped, and made no objection to the quality; that the common carrier received the potatoes at the river landing, and shipped them to defendants, who paid the freight upon them The witness McMillan testified that he lives about a fourth of a mile from plaintiff's farm, and that he saw the potatoes when they were being dug and sacked; that they were river Burbanks in good condition, that the land is of the same character throughout the field, and that the potatoes were dug, not from one part, but across the field. The witness Adams testified that he examined 464 sacks of potatoes on the Jackson Street Wharf after they had arrived in San Francisco; that he also examined the first shipment of 20 sacks, and found them exactly the same; that the potatoes were fancy first-class, but not extra.

The defendants did not rescind the contract, or notify the plaintiff not to deliver the potatoes. The plaintiff testified that he heard not a word of objection to the potatoes until he came to San Francisco to get his money. The principal objection made by the defendants to the potatoes is that they were uneven in size and watery, with soft ends. In view of the fact that the potatoes were purchased as river Burbanks; that the agent saw them when he was purchasing them; that they were of the same quality as the 20 sacks of the first purchase; that they were received by the agent and shipped to defendants, we think the court was justified in its findings. Of course, all presumptions here are in favor of the findings of the trial court, and a finding of fact must not be set aside when there is substantial evidence in its support.

The court did not commit error in overruling defendants' objections to questions asked of the witness McMillan for the purpose of showing that he saw plaintiff digging and sacking potatoes between November 20 and December 1, 1902, and that the condition of the potatoes he saw was good. In view of the fact that there was testimony tending to show that the land was all of about the same quality, and the potatoes all about the same, the evidence was competent. It was about the time that plaintiff was digging and delivering the potatoes to defendants. We find no other question necessary to be discussed.

The judgment is affirmed.

We concur: HARRISON, P. J.; HALL, J.

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2 Cal. App. 633

YICK SUNG v. HERMAN et al. (S. F. 3,887.)

(Supreme Court of California. March 8, 1906.)

In Bank. Application for order transferring cause from Court of Appeal. Denied.

For opinion in Court of Appeal, see 83 Pac. 1089.

PER CURIAM. The opinion of the District Court of Appeal appears to hold that under the terms of the contract of sale the title to the potatoes sold passed when they were sacked and delivered to the buyers on the "bank," and that they became property of the buyer at that time, instead of at the time when they arrived in San Francisco. Without expressing any opinion on the proper construction of the contract in this respect, we think the judgment of the superior court was properly affirmed upon the other grounds stated in the opinion of the District Court. The application for an order transferring the cause to the Supreme Court is therefore denied.

MEMORANDUM DECISIONS.

PEOPLE v. BUELNA. (Court of Appeal, First District, California. Feb. 1, 1906.) Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge. Louis Buelna was convicted of an offense, and he appeals. Affirmed. John W. Johnston and John H. Leonard, for appellant. U. S. Webb, Atty. Gen., and Benjamin K. Knight, Dist. Atty., for the People.

PER CURIAM. No brief having been filed herein on behalf of the appellant, and no appearance of counsel having been made in his behalf when the case was called for argument, upon motion of the Attorney General the appeal was submitted upon the record in the transcript, and the court, having examined the same and finding no error therein, now renders its judgment that the judgment of the superior court be, and the same is, hereby affirmed.

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148 Cal. 728

GATES v. GREEN et al. (L. A. 1,739.)

(Supreme Court of California. Feb. 21, 1906.)

COURTS — TRANSFER OF CAUSE TO DISTRICT COURT OF APPEAL—GROUNDS—SUFFICIENCY.

The reasons advanced in a motion to transfer a cause from the Supreme Court to the District Court of Appeal, based on the necessity of a speedy hearing of the appeal in order to preserve the rights of the successful party, are material only on the question whether the appeal should be advanced for hearing, and constitute no ground for transfer.

In Bank. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by W. W. Gates against G. R. Green and others. From a judgment for plaintiff, defendants appeal. On motion to transfer cause to the District Court of Appeal. Denied.

Will D. Gould and E. C. Oggel, for appellants. Flint & Barker, Charles Shurtliff, and Baker & Bowen, for respondent.

PER CURIAM. This is a motion for an order transferring the above-entitled cause from this court, where it is now regularly pending on appeal from a judgment and an order denying a motion for a new trial, to the District Court of Appeal of the Second District. The grounds of the motion are stated as follows in the notice of motion, viz.: "Said motion will be made on the grounds that, on account of the character of the action and of the property decreed to be sold therein, the delay necessary for a decision in this court would cause great and irreparable loss and injury to the plaintiff and respondent herein; that a speedy hearing of the appeal is necessary in order to preserve the rights of said plaintiff and respondent to the fruits of his judgment, if the same be affirmed; and that the appeal herein is frivolous and taken for the purposes of delay."

The case is one which, under the provisions of the Constitution as amended in 1904, falls within the appellate jurisdiction of this court. While this court may, on its own motion, order any such cause pending here to be transferred to a District Court of Appeal, such orders are made solely for the purpose of facilitating the business of this court, with a view to so utilize all of the appellate courts as to speedily enable those courts, working with this court, to clear the calendar of this court of its accumulated business, and considerations of the convenience of the parties to or the necessities of the speedy decision in any particular case play no part in the matter of such assignments. Such reasons as are advanced for the transfer in this case are material only upon the question as to whether the appeal should be advanced for hearing in whatever court it may be pending, and constitute no ground for an order of transfer.

The motion for an order of transfer is denied.

148 Cal. 690

MATTHAI v. KENNEDY. (S. F. 4,435.)

(Supreme Court of California. Feb. 12, 1906.)

APPEAL—TIME OF TAKING.

An order of dismissal entered on the minutes of the court as expressly provided by Code Civ. Proc. § 581, is in effect a final judgment, and the time within which an appeal must be taken runs from that date, though the clerk entered a judgment of dismissal at a subsequent date.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1897.]

In Bank. Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by Louise Matthai against George E. Kennedy, administrator. From a judgment of dismissal, plaintiff appeals. Dismissed.

Louise Matthai and Clara S. Foltz, for appellant. Dudley Kinsell, for respondent.

PER CURIAM. Plaintiff's action was dismissed on August 26, 1904, an order to that effect being entered upon the minutes of the court, as provided by section 581 of the Code of Civil Procedure. Subsequently, upon the 23d day of February, 1905, the clerk entered a judgment of dismissal. Plaintiff's appeal was taken within six months from the last-named date, but more than six months from the entry of the minute order. Defendant moves to dismiss the appeal upon this ground, and the motion must be granted. It is well settled by our decisions that the entry of the order of dismissal in the minute book of the court, being declared by the statute to be "effective for all purposes," is in its nature a final judgment, and from the date of that entry the time within which an appeal may be taken begins to run. Marks v. Keenan, 140 Cal. 33, 73 Pac. 751; Pacific Pav. Co. v. Vizelich, 141 Cal. 4, 74 Pac. 352; Swortfiguer v. White, 141 Cal. 579, 75 Pac. 172.

As this appeal was not taken within the time limited by law, it must be dismissed; and it is so ordered.

148 Cal. 659

In re WELLS' ESTATE. (S. F. 4,475.)

(Supreme Court of California. Feb. 9, 1906.)

APPEAL—DISMISSAL.

Where neither at the time of filing notice of appeal from an order setting apart a homestead, nor thereafter, did appellant file any undertaking on appeal, nor made any appearance or defense at the hearing of a motion to dismiss the appeal, with notice which motion he was duly served, appellees were entitled to a dismissal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2065; vol. 3, Cent. Dig. Appeal and Error, § 3127.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Asa R. Wells, deceased. On motion to dismiss two appeals from an order setting apart a homestead. Appeals dismissed.

Alexander & Church and D. E. Alexander, for appellants. C. H. Wilson, for respondent.

PER CURIAM. This case is before us on a motion of Reba E. Wells to dismiss two appeals from an order setting apart to her a homestead. One of the appeals is by Laura M. Wells, Susie B. Wells, and Asa H. Wells; and the other by William W. Wells. The appellants Laura M., Susie B., and Asa H. Wells have by their attorneys executed and filed a written instrument withdrawing their appeal and ask this court to dismiss the same without costs. As to the appellant William W. Wells, it fully appears from the record that he filed his notice of appeal on the 19th day of October, 1905, from the order setting aside the homestead, but he did not at the time of the notice file, and he has not since filed, any undertaking on appeal. He was duly served with notice of the hearing of this present motion to dismiss, and made no appearance or defense thereto. It seems clear therefore that the motion to dismiss the two appeals should be granted.

The motion to dismiss the said two appeals is granted, and the same are dismissed, but without costs against the appellants Laura M. Wells, Susie B. Wells, and Asa H. Wells.

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148 Cal. 622

SMITH v. DUBOST. (L. A. 1,331.)

(Supreme Court of California. Feb. 3, 1906.)

1. Appeal and Error—Findings—Conclusiveness.

An appellate court will not disturb a decision of fact based upon conflicting evidence.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3935.]

2. Trial—Findings—Sufficiency.

Where the matters which are found necessarily defeat the plaintiff's right of recovery, it is unnecessary that the findings should dispose of any further issues.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 941.]

In Bank. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by Edwin Smith against A. A. Dubost. From a judgment for defendant, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

F. A. Dorn and Dorn & Green, for appellant. McD. R. Venable and W. H. Spencer, for respondent.

PER CURIAM. This appeal was transferred from the District Court of Appeals for the Second Appellate District, to this court for disposition, because the justices of the District Court were unable to concur in a judgment. The several opinions—majority and minority—of the justices of the District Court accompanied the transfer, as the law requires they should. An examination of these opinions, under the record presented, satisfies us that the views expressed on the merits of the appeal as set forth in the majority opinion are correct. That opinion is as follows:

"This action was brought to compel an accounting of the affairs of a mining partnership alleged to exist between plaintiff and defendant, and to recover damages for false and fraudulent representations and concealment touching a certain quicksilver mine situated in San Luis Obispo county. The defendant had judgment and plaintiff appeals therefrom, and from an order denying a new trial. The findings are to the effect (1) that there was no partnership between plaintiff and defendant; (2) that defendant bought the mining property in question from plaintiff for a good consideration without fraud, received a deed from plaintiff for the entire property, and was the sole owner thereof. These findings fully disposed of the case as made by the pleadings. If there was no partnership there was no partnership accounting to be had. If there was no fraud or concealment and the consideration for the transfer was good, then the defendant had been the owner of the entire property for more than three years before the commencement of the action; and, hence, the plaintiff could recover nothing on the score of damages, or on any theory that the defendant held the property in trust for him. The further finding that plaintiff's cause of action was barred by the statute of limitations seems to have been sustained by the evidence, but as it was entirely unnecessary to the support of the judgment, in view of the other findings already referred to, we need give it no further notice. The evidence also supported all the findings. As to the partnership agreement, plaintiff testified to it, and the defendant denied it. The deed of the entire interest in the property to defendant was a strong circumstance corroborating the theory of no partnership. The evidence was also conflicting as to the fraudulent representations and concealment. The trial judge had the witnesses before him, and we will not disturb a decision of fact based upon conflicting evidence. It is the province of the trial court 'to determine between conflicting inferences and deductions which may reasonably be drawn from the testimony.' Merrill v. Gunnison, 145 Cal. 547, 79 Pac. 67. Many objections are urged as to the rulings of the court in the admission and rejection of evidence. We have examined them all and find that most of them are as to matters of no material importance in the case and that as to those exceptions having any merit in the first instance, they were each and all obviated by the subsequent admission of the pertinent evidence previously excluded. The findings dispose of all the material issues in the case, and we find no material or prejudicial error in the record. Where the matters which are found necessarily defeat the plaintiff's right of recovery, it is unnecessary that the findings should dispose of any further issues, as all other issues thereby become entirely immaterial. The judgment and order appealed from are affirmed."

The questions presented on this appeal require no further consideration than is given in the foregoing opinion. Nothing tending to disturb the conclusion there reached by the majority of the justices of the District Court of Appeal was presented upon the argument in this court in bank, had subsequent to the transfer of the cause here. Our views on this appeal coincide with those contained in the foregoing opinion and the conclusion reached, and we adopt that opinion as the opinion of this court.

The judgment and order appealed from are therefore affirmed.

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148 Cal. 590

HEWITT v. BOARD OF MEDICAL EXAMINERS OF THE STATE.

(S. F. 4,414.)

(Supreme Court of California. Feb. 1, 1906.)

1. Physicians and Surgeons—Revocation of License—Constitutionality of Statutes.

Legislation providing for the revocation of the certificate of a physician for professional or moral unfitness, and vesting in boards of physicians the duty of carrying out such legislation, is a proper exercise of the police power; but it must be reasonable in its provisions, and must apply to matters or conduct on the part of the physician which affect the health, morals, or safety of the community, and the acts or conduct which are made ground of forfeiture must be declared with certainty and definiteness.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Physicians and Surgeons, § 1.]

2. Same—Right to Practice—Nature of Right.

The right to practice medicine is a valuable property right, in which a practitioner is entitled to be protected and secured.

3. Same—Statutory Provisions—Constitutionalty.

The provision of St. 1901, p. 56, c. 51, which authorizes the revocation of the certificate of a physician by the board of medical examiners for unprofessional conduct, consisting of medical advertising in which grossly improbable statements are made, but which fails to define "grossly improbable statements" in any way, but leaves their definition in each particular case to the opinion of the then board of medical examiners, is too indefinite and uncertain to be capable of enforcement.

In Bank. Certiorari by Jessie C. Hewitt against the board of medical examiners of the state. Order of board annulled.

John D. Pope, for petitioner. William Tait, for respondent.

LORIGAN, J. This is an original proceeding in certiorari to annul an order of the board of medical examiners of this state revoking the certificate of petitioner authorizing her to practice medicine and surgery. The Legislature in 1901 (St. 1901, p. 56, c. 51) passed an act for the regulation of the practice of medicine and surgery and for the appointment of a board of medical examiners in the matter of such regulation. Various powers are conferred upon the state board under the act, among others the power to revoke the certificate of a physician or surgeon for "unprofessional conduct," and the act undertakes to declare what shall constitute "unprofessional conduct" so as to warrant such revocation. It specifies seven particulars in which the conduct of a physician shall be deemed unprofessional. Six of these designate precise and specific acts, the commission of which shall be deemed unprofessional, and as to the seventh (designated in the act as the fourth) it is provided that "all advertising of medical business in which grossly improbable statements are made" shall also constitute unprofessional conduct.

On April 26, 1905, petitioner was engaged in the practice of medicine and surgery in the city of Los Angeles under and by virtue of a certificate issued to her by the board of managers of the Eclectic Medical Society of this state, and on that date a complaint was filed against her before the state board of examiners charging her with unprofessional conduct in advertising medical business in which grossly improbable statements appeared, namely, in advertising in the "Times," a public journal in Los Angeles, the following: "Cancer Cured. The Mrs. S. J. Bridge Remedy, the only sure cure known in the world"—with notice to call at her office in said city and investigate. Upon a hearing before said board, the petitioner appearing, answering, and contesting the charge, an order was entered by the board on August 18, 1905, revoking her certificate. Petitioner by this proceeding in certiorari seeks to annul the order of said board, on the ground that the board was without jurisdiction to make it under the particular provision relating to unprofessional conduct, to which we have heretofore referred, and under which it assumed to act in doing so.

It is insisted by petitioner that this particular provision of the act is unreasonable, uncertain, and indefinite; that neither the act itself nor the law defines what shall be deemed "grossly improbable statements"; that the provision in question leaves it entirely to the opinion of the persons who at any time may constitute the board to determine whether a given statement is "grossly improbable," and confers authority upon such board to create an offense under the act and inflict punishment for its commission; and that for all these reasons this particular provision of the act in question is void. We think this position of the petitioner must be sustained. In considering this point we are not concerned with the particular merits of the proceeding before the board, but only with the principles of law which are involved in a consideration of the validity of the provision of the statute under which it acted. Legislation of the character embraced within the general scope of the act in question, in so far as it provides for the revocation of the certificate of a physician (the only matter we are concerned with), is sustained upon the ground that the Legislature has authority under its general police power to provide all reasonable regulations that may be necessary affecting the public health, safety, or morals, and with this object in view to provide for the dismissal from the medical profession of all persons whose principles, practices, and character render them unfit to remain in it. As the duty of determining whether such professional or moral unfitness exists must necessarily be vested in somebody other than the Legislature, it is usually committed by appropriate legislation to boards composed of men learned in their profession. Such power, however, to revoke the license of a practitioner when conferred upon a board must be under provisions of law which are reasonable, must apply to matters of conduct upon the part of the practitioner which affect the health, morals, or safety of the community, and the acts or conduct which shall render him liable to the penalty of forfeiture of his right to practice his profession must be declared with such certainty and definiteness in the act that he may know exactly what they are. The right to practice medicine is, like the right to practice any other profession, a valuable property right, in which, under the Constitution and laws of the state, one is entitled to be protected and secured.

Now to consider how the provision of the act as to "grossly improbable statements," warranting an invasion of this right and its destruction, accords with the principles of law announced. While the other particular acts which shall constitute unprofessional conduct are specially designated and defined in the act, it is nowhere therein pretended to define what shall constitute "grossly improbable statements." While, as we have said, the right of the Legislature to confer power upon a medical board to revoke the license of a physician is granted upon the authority of the Legislature to legislate in the interest of public health, safety, and morals, there is nothing in the terms of this provision authorizing the board to revoke a certificate to practice medicine on account of the publication of "grossly improbable statements," from which it can be even inferred that any of these considerations prompted the legislative mind in conferring the power of revocation upon the board, or that any of them are to be taken into consideration by that body in determining whether a given statement is "grossly improbable" or not. Under this provision the penalty of forfeiture of a physician's license is not made to depend upon falsity in fact of any matter contained in a statement, or knowledge on the part of the physician that it is false, or for the reason that it was intended or had a tendency to deceive the public, or to impose upon credulous or ignorant persons and so be harmful and injurious to public morals, health, and safety. It is a matter of no moment under the provision of the act, and is entirely immaterial whether the statement is true or false, beneficial or injurious. If, in the opinion of the board, the statement is "grossly improbable," the certificate to practice is to be revoked. The right of the physician to be secure in his privilege of practicing his profession is thus made to depend, not upon any definition which the law furnishes him as to what shall constitute "grossly improbable statements," but upon the determination of the board after the statement is made and simply upon its opinion of its improbability. No definite standard is furnished by the law under this provision whereby a physician with any safety can advertise his medical business; nor is there any definite rule declared whereby after such advertisement is had the board of medical examiners shall be controlled in determining its probability or improbability. The physician is not advised what statements he may make which will not be deemed "grossly improbable" by the board. No rule is provided whereby he can tell whether the publication he makes will bring him within the ban of the provision or not. The advertisement in connection with his medical business may be made in entirely good faith; the statement may be of such a character that it involves no moral delinquency on the part of the physician, nor in any degree tends to deceive or injure the public. These matters, however, have no controlling effect. If, in the judgment of the board, such statements are "grossly improbable" the right to practice is forfeited. Instead of furnishing some standard by which the physician can determine in advance what statements shall be treated as "grossly improbable," some definition of that term which will be a protection to him in his legal right to advertise his business, the statute, as far as his action is concerned, leaves that matter at large, but provides that after he has made the advertisement an ex post facto judgment of the board shall determine whether his statement is "grossly improbable" or not.

And the provision of the act, even as to the judgment of the board, furnishes no standard by which that determination shall be arrived at. Taking a given advertisement by a physician the members of one board might conclude that it contained "grossly improbable statements," while another board might reach an entirely opposite conclusion. One might conclude that the statement while "improbable" was not "grossly" so. The advertisement of a physician which one board had determined did not come within the inhibition of the rule according to its judgment, a succeeding board might conclude did. As the provision of the act in question does not define what shall constitute "grossly improbable statements," but leaves it to be determined according to the opinions of the particular members of the board who happen to constitute it when the matter of revoking a physician's license therefor is before them, it is obvious, if such a provision can be sustained, that it could operate disastrously not only upon individual physicians, but upon physicians of a particular school. And this act in itself is capable of furnishing the illustration. It provides that the state board of medical examiners shall consist of three different schools of medicine, the majority of the board to be elected from one particular school. It is matter of common knowledge that each school of medicine is governed in the treatment of diseases and injuries by rules, principles, and practices in material respects fundamentally and essentially different, the adherents of each implicitly believing that the eradication or alleviation of disease can only be successfully attained under the peculiar principles and practices of the particular school to which he belongs; that the successful treatment of a particular disease under radically different principles of medicine practiced by another school cannot be attained. Granting the validity of the provision of the act in question for the purposes of the illustration, it is obvious that under such circumstances any advertisement of medical business by a physician whose school is represented by a minority vote on the board of medical examiners stating that a given disease can be cured by him under a method peculiar to his school of medicine, different in principle and practice from that taught by the school of which the majority of the board is composed, would subject his license to revocation under the conscientious professional opinion of the majority of the board that his statement was "grossly improbable."

We hardly think it necessary to further pursue this subject. The right which a person possesses under the Constitution and the laws to practice his profession as a physician and surgeon cannot be made to depend upon a provision of a statute as vague, uncertain, and indefinite as is the provision we have been considering. If a physician's license is to be revoked for "grossly improbable statements"; if he is to be thereby deprived of his means of livelihood, of his right to practice a profession which it has taken him years of study and a large expenditure of money to qualify himself for, on the ground that he has made "grossly improbable statements" in advertising his medical business—it is requisite that the statute authorizing such revocation define what shall constitute such statements so that the physician may know in advance the penalty he incurs in making them. It is an easy matter for the Legislature to declare what statements in the advertisement of medical business shall be deemed "grossly improbable," and it must do so, and not leave it to a board of medical examiners after the publication is made to determine, in its judgment, whether the statements were or were not "grossly improbable," and according to its particular view of the matter revoke or refuse to revoke the license. The right to practice medicine cannot be made to depend upon such a vague, uncertain, and indefinite provision. The conclusion we reach as to the invalidity of this provision is, in our judgment, sustained by the general principles announced in the main and concurring opinions in Ex parte McNulty, 77 Cal. 164, 19 Pac. 237, 11 Am. St. Rep. 257, and in Matthews v. Murphy (Ky.) 63 S. W. 785, 54 L. R. A. 415.

We are of opinion, for the reasons given, that the provision of the statute in question, as far as it attempted to authorize the board of medical examiners to revoke the certificate of a physician for "grossly improbable statements" in an advertisement of medical business, is void; that in the matter at bar the state board of medical examiners had no jurisdiction to revoke the certificate of petitioner under this provision of the act; that its order in that regard was void; and it is hereby annulled and set aside.

We concur: HENSHAW, J.; McFARLAND, J.; ANGELLOTTI, J.; SHAW, J.

I concur in the judgment: BEATTY, C. J.

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148 Cal. 585

HYATT v. WILLIAMS, Mayor, et al.

(Sac. 1,279.)

(Supreme Court of California. Feb. 1, 1906.)

1. MUNICIPAL CORPORATIONS — POWER TO CONSTRUCT AND OPERATE LIGHTING PLANT —CHARTER PROVISIONS—CONSTRUCTION.

Stockton City Charter (St. 1889, p. 582, c. 11) § 30, providing that the council shall have power to provide for and regulate lighting of the streets and public places, and to provide for such lights as are necessary for the convenient transaction of public business, and page 578, § 1, authorizing the city to determine what are public uses and when the necessity exists for condemning lands therefor, do not empower the city to maintain works and carry on the business of supplying the inhabitants of the city with light.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 727.]

2. SAME.

The Stockton city charter, giving the council power to regulate the erection of gas and electric lights in the streets, does not give power to establish an electric light plant for the supplying of light to the inhabitants.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations. § 727.]

3. SAME.

Stockton City Charter (St. 1889, p. 636, c. 11) § 210, provides that, when the council shall adjudge it necessary to take private property for public uses, it may direct proceedings to condemn the same, under Code Civ. Proc. tit. 7, pt. 3, of which section 1238 provides that the right of eminent domain may be exercised for the purpose of supplying electricity to light incorporated cities. *Held*, that section 210 does not make the provisions of the Code a part of the charter, and thereby confer on the city the power to erect works to supply light to the city and its inhabitants.

4. SAME—STATUTES—CONSTRUCTION.

The bond act (St. 1901, p. 27, c. 32) merely gives the power to issue bonds necessary for the construction or maintenance of public utilities, where by other provisions of law the power to build works and operate such enterprises may be conferred.

Department 1. Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by G. C. Hyatt against C. E. Williams, mayor of the city of Stockton, and others. From a judgment for plaintiff, defendants appeal. Affirmed.

R. L. Beardslee and Budd & Thompson, for appellants. Nicol & Orr and E. I. Jones, for respondent.

SHAW, J. This is an action to enjoin the defendants, who are, respectively, sued as mayor, members of the council, and clerk of the city of Stockton, from selling certain bonds amounting to $160,000, purporting to be bonds of the said city, authorized by the citizens thereof at an election held under the bond act of 1901. St. 1901, p. 27, c. 32. The object of the bond issue was to obtain funds wherewith to construct and maintain an electric lighting plant, by means of which the city proposes to light the streets, avenues, and public places of the city and to furnish the inhabitants of the city with light. We are asked to determine the single question whether or not the city of Stockton has power to engage in the business of furnishing light to its inhabitants for their private use. If it has such power, then, if its ordinary revenues are insufficient therefor, it unquestionably is empowered by the statutes of 1901 above cited to borrow money on its bonds for the purpose of constructing the necessary works.

The rule whereby to determine what powers are vested in a city, in addition to those which may be inherent in every municipality, as stated by Mr. Dillon in his treatise on Municipal Corporations and approved in Von Schmidt v. Widber, 105 Cal. 157, 38 Pac. 685, is as follows: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: (1) Those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied." 1 Dillon, Mun. Cor. § 89. "The rule of strict construction of corporate powers is applicable to grants of powers to municipal and public bodies which are out of the usual range, or which may result in public burdens." Id. § 91. The particular clauses of the charter which it is claimed conferred the power in question are as follows: "The council shall have power to pass ordinances: * * * (5) To provide for and regulate * * * lighting and watering of the streets, avenues and public places. * * * (17) To provide for * * * such lights * * * as are necessary for the convenient transaction of public business." City Charter (St. 1889, p. 582, c. 11) § 30. It is also provided that the city "may determine and declare what are public uses, and when the necessity exists of condemning lands therefor, and what are the lands it is necessary to condemn." St. 1889, p. 578, c. 11, § 1.

Applying the rule of construction above stated, we think it clear that these clauses do not grant power to maintain works and carry on the business of supplying the inhabitants of the city with light. The providing of light for the public purpose of lighting the public streets and public places, and such lights as are convenient for the transaction of public business, is a very small and insignificant enterprise as compared with that of supplying light to the inhabitants generally for their private use. The two objects are manifestly distinct, because of the different nature of the use to which the lights are to be devoted in the different cases. The terms of the express grant of the power to provide light for the public purposes named do not indicate any intention to give the distinct and larger power to establish a plant for furnishing light for private use to all the inhabitants of the city who may desire it, and no such intention can be imputed to the framers of the charter from the language there employed. The power to determine what are public uses and to condemn lands for such use, if given the scope here contended for, would practically give the city power to engage in any enterprise of a public nature, whether mentioned specifically in the charter or not. The furnishing of water, gas, and light for the general use of the inhabitants, the establishment of street car lines for the purposes of public travel, and other public utility enterprises, any of which would probably entail upon a city the necessity of incurring a debt and greatly increasing the burden of taxation, might be determined to be public uses, and under this general clause, if so construed, the city would have power to engage therein, to issue bonds therefor not exceeding 15 per cent. of the total assessed value of the property of the city, notwithstanding the fact that nothing is said concerning such enterprises in the charter. We are of the opinion that no such scope can be given to the language of this section and that the power contended for is not conferred by its terms.

The question whether or not, if the city had erected or should erect a plant to supply electric light for the public streets, public places, and public buildings, it would have power to distribute any surplus thereof to the inhabitants for private use, does not arise in the case. Decisions on this question, some of which are cited by appellant, have no bearing on the proposition presented in the case at bar. It is clear that the power to construct works, in whole or in part, for the express purpose of supplying light to the inhabitants, is not incidental to, or included in, the power to construct such works to supply light for public streets and public buildings. There is another clause of the charter giving the council power to regulate "the erection of gas and electric lights in the streets." It cannot be reasonably contended that this clause gives any power to establish an electric lighting plant for the supplying of light to the inhabitants.

Section 210 (page 636) of the charter provides that when the city council shall adjudge it necessary to take private property for public uses it may direct proceedings to be taken by the city attorney under title 7, p. 3, Code Civ. Proc., to condemn the same. Section 1238 of this title of the Code of Civil Procedure provides that the right of eminent domain may be exercised for the purpose of supplying electricity to light or heat incorporated cities, together with the acquisition of lands, buildings, and all other improvements upon which to erect or operate machinery for the purpose of generating and transmitting electricity for such purpose. It is claimed the effect of section 210 of the charter is such that the entire chapter of the Code of Civil Procedure, above referred to, is made a part of the chapter, and that in consequence thereof there is conferred upon the city a power to supply light to the city and its inhabitants and to erect all such works as may be necessary for that purpose. This claim is clearly untenable. Section 210 does not make the Code of Civil Procedure a part of the charter, and it was not necessary that it should do so. A city would have the right to avail itself of the provisions of that chapter, without express authority in the charter. The section by its own terms does not purport to grant any power except the power to condemn property. It does not purport to give power to maintain plants or works for the supplying of any of the public uses whatever.

It is not necessary to consider the effect of the amendment of the Constitution making municipal charters paramount to general laws with respect to all "municipal affairs." The bond act of 1901, above referred to, does not purport to give the city power to engage in the carrying on of the public utilities therein mentioned. Its purpose and object is to give the power to issue the bonds necessary for the constitution or maintenance of such public utilities in any case where by other existing provisions of law or of the charter the power to build works and operate such enterprises may be conferred. The court below held that the city had not the power to issue the bonds for the purposes above stated, and thereupon gave judgment enjoining the defendants from selling or disposing of the said bonds. We think this action was correct.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; McFARLAND, J.

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148 Cal. 596

EISENMAYER et al. v. LEONARDT et al.

(L. A. 1,357.)

(Supreme Court of California. Feb. 1, 1906.)

1. DAMAGES — BREACH OF CONTRACT — EVIDENCE.

Where, in an action for breach of contract to organize a corporation and issue to plaintiff paid-up stock, based on the failure to organize the corporation, there was no evidence showing what value the stock would have had if issued, there could be no recovery for the value of the stock, within Civ. Code, § 3300, fixing the measure of damages for breach of contract as that which, in the ordinary course of things, will be likely to result therefrom.

2. SAME.

Where, in an action for breach of contract to organize a corporation to manufacture cement and issue to plaintiff paid-up stock, based on the failure to organize the corporation, the uncontradicted evidence showed that the material for making cement was insufficient to warrant an attempt to manufacture it therefrom, there could be no recovery for the value of the stock.

3. EVIDENCE—OPINIONS—QUESTIONS.

Questions asked a witness as to his opinion of the value of corporate stock, if issued, were properly ruled out, when no facts, real or hypothetical, were stated.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2292, 2303, 2370, 2376.]

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Anna Eisenmayer and husband against Carl H. Leonardt and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

A. C. Mouser, for appellants. Borden & Carhart, for respondents.

McFARLAND, J. This action is brought to recover damages from the defendants, Leonardt and Capitain, for their alleged failure to organize a cement manufacturing company, and to give to the plaintiff Anna M. Eisenmayer 100 shares of the stock of such company, when organized, in compliance with a certain written contract between said Anna and said defendants, set out in the complaint. The plaintiff N. P. Eisenmayer is the husband of said plaintiff Anna. The defendant Capitain was not served with summons and did not appear, and the action was prosecuted against the defendant Leonardt alone. The court made findings and rendered judgment for defendant, and appellants appeal from the judgment and from an order denying their motion for a new trial.

On the 7th day of December, 1896, there was pending in the superior court of San Diego county an action entitled "N. P. Eisenmayer v. Adolph A. Nuelle et al., No. 6,332," in which action the said Leonardt and Capitain (defendants herein) were defendants. The rights of the said Eisenmayer as plaintiff in said action have been assigned to the present plaintiff Anna, and she had control of the action. At that time the defendants herein were entertaining the project of organizing a company for the manufacture of cement out of certain deposits of rock and clay at a place called El Toro, and had issued a prospectus relating to the contemplated business. Under these circumstances the plaintiff Anna and the defendants Leonardt and Capitain, on said date—December 7, 1896—entered into the written contract out of which this litigation arises. The contract is quite long, and we will refer here only to those parts of it which are material to the consideration of this appeal. The said Anna is the party of the first part and the defendants the parties of the second part, and the first part of the contract is as follows: "That in consideration of the payment of $250.00 cash, by said second parties to said first party, the receipt whereof is hereby acknowledged, and the further payment of $250.00 on or before June 7th 1897, by said second parties to said first party, and the issuance to said first party, and delivery to her, of one hundred shares of the par value of $100.00 per share, of fully paid up and nonassessable stock of the El Toro Cement Manufacturing Company (or any other cement manufacturing company organized by the said second parties in lieu of the said El Toro Cement Manufacturing Company) when organized, such cement company to be so organized and the said 100 shares of the said stock to be so issued and delivered to her as aforesaid on or before June 7th, 1899." It further provides that "in consideration" that the parties of the second part shall guaranty certain dividends on the stock to be issued, to the extent of $500 and "in consideration" that they should before August 9th, 1897, pay $25 costs in the said action of N. P. Eisenmayer v. Nuelle et al., and that the first party "in consideration of all of the above and foregoing agreements on the part of the said second parties, and when the same have each and all been fully kept and performed on the part of said second parties, then, and not before, hereby agrees to cause said suit to be dismissed, and to forever waive and cancel all claims now existing against the defendants therein, and each of them, as set out in the amended complaint, filed therein." It is further provided "that any failure on the part of said second parties to keep and perform, as herein agreed and provided, any and all of the covenants and agreements herein contained, on their part, shall authorize said first party to at once proceed with said suit, the same as if this agreement had never been made, and that nothing herein contained shall in any way affect the rights of said first parties in said action, or of said plaintiff therein; and further, that the said $250.00, so paid cash, and also all sums that may hereafter be paid as herein provided, in the event of the failure of the said second parties to faithfully keep and perform each and all of the above agreements on their part, shall be forever forfeited by said second parties to the said first party, * * * and such forfeiture or forfeitures shall be regarded and treated as penalties for such failure or failures on the part of said second parties to so faithfully keep and perform the conditions and agreements herein contained on their part, when and as herein agreed and provided."

It is averred in the complaint that the defendants wholly failed to give plaintiff 100 shares, or any part thereof, of the cement manufacturing company to be organized, and have failed and refused to organize any cement manufacturing company whatever. It is further averred that if such 100 shares had been issued and delivered to plaintiff, they would "now be of the value of not less than $12,000," and that therefore plaintiffs herein have been damaged in the sum of $12,000. It is to be observed that the entire claim of plaintiffs for damages rests upon the averment that if the stock had been issued it would have been worth $12,000, or, at least, that it would have had some substantial value. The court found that the contract was made as alleged; that defendant had paid plaintiff the sum of $250, payable at date of the contract, and the $250 due on June 7, 1897; that defendants had not organized a cement manufacturing company, and had not issued to plaintiff any shares thereof; that "it is not true that said 100 shares of stock, if the same had been issued by the defendants and delivered unto the said plaintiff as recited in said writing, would have been of the value of $12,000, or of any other value; and the court finds upon the evidence before it that the value of said stock if the same had been issued and delivered cannot be ascertained and determined," and also that "it is not true that the said plaintiff has been damaged by the failure of defendants to issue and deliver the said stock as aforesaid, in the sum of $12,000, or in any other sum which can be ascertained or determined." The court also found, as a conclusion of law, "that the provision in said writing relating to the retention by the said plaintiff of the cash payments aforesaid, and the prosecution by her of said action pending in the superior court of San Diego county, affords the only measure of damages for the failure of the defendants to issue and deliver said stock unto plaintiff."

Respondent contends, with some plausibility, that the contract merely gives the parties of the second part an option to have the said pending action dismissed by organizing a cement company and issuing stock to plaintiff, and that their failure to do so merely resulted in their forfeiture of the money paid by them to plaintiff, with leave to the latter to resume the prosecution of said action, and that the contract does not contain any positive covenants on the part of the defendants to organize such company or issue such stock; but as the court below did not consider this question we will not discuss it. Respondent also contends that the court was right in finding that the retention by plaintiff of the cash payments, and the right to prosecute the said pending action, afford the only measure of damages for the failure to organize a company and issue stock to plaintiff—being, in substance, liquidated damages; but, while there is much force in this contention, we do not deem it necessary to definitely determine it, because, in our opinion, the court correctly found that if the defendants had issued the stock as recited in the contract, it would not have been of the value of $12,000, or of any other value, and that, upon the evidence, the value of the stock, if it had been issued, cannot be ascertained or determined. In the first place, this asserted value of stock which was never in existence is not based on any facts whatever. One can hardly conceive of anything more unsubstantial and imaginary. This fanciful value cannot even be called speculative or prospective, for there is nothing upon which to figure any speculative or prospective profits. The case is entirely different from that of Shoemaker v. Acker, 116 Cal. 239, 48 Pac. 62, cited by appellants. In that case there was the substantial fact of a growing orchard, which, at the time of the trial, was about three years old, and which "in the ordinary course of things" (Civ. Code, § 3300) would in a year or two be a fruit-producing and productive property; and, as there pointed out, actions have frequently been maintained for the destruction of growing crops, notwithstanding the bare possibility that they might never mature. But there was no similar fact in the case at bar, and no reason for supposing that "in the ordinary course of things" this nonexisting stock would, if created, have been of any value whatever. And, in the second place, it was affirmatively shown by the evidence that the stock, if issued, would have been of no value. Leonardt testified, and his testimony was uncontradicted, that investigations made shortly after the date of the contract showed that the material for making cement at El Toro was entirely insufficient in amount and quality to warrant an attempt to manufacture cement therefrom, although prior prospecting had led to the belief that it was sufficient; and that he had tried to find, but had been unsuccessful in finding, any other deposit with which the manufacture of cement could have been successfully prosecuted.

We do not think that the court erred in ruling out questions asked by appellants of their witness Pirtle as to his opinion of the value of the stock, if the company had been formed and the stock issued. The questions merely recited the provisions of the contract, and from those recitals he was asked to give his opinion as to what the value of this unissued stock would have been. There were no facts stated—either real or hypothetical—as a basis for an intelligent opinion.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; HENSHAW, J.; VAN DYKE, J.; LORIGAN, J.

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7 Cal. Unrep. 214

BERENTZ v. KERN KING OIL & DEVELOPMENT CO. et al.

(Court of Appeal, Second District, California. June 17, 1905.)

1. PROCESS—SERVICE BY CONSTABLE—RETURN —VERIFICATION.

Where a return of service of summons by a constable was not verified as required by Code Civ. Proc. § 410, it was ineffective.

2. SAME — MINING CLAIMS — OIL WELLS — LIENS—STATUTES.

Code Civ. Proc. § 1183, as amended by St. 1899, p. 34, c. 35, provides for a lien on the whole of a mining claim for labor performed or for materials furnished to be used in the construction of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, etc., and for labor performed in any mining claim or claims and the works owned and used by the owners for reducing ores, etc.; and section 1185 declares that the land on which any building, improvement, well, or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien, etc. *Held*, that the mining claims referred were mines of ore, exclusive of oil wells, and hence a claimant of a lien for the drilling of an oil well, etc., was not entitled to foreclose the lien, except as against such land as was necessary for the convenient use and occupation of the well.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Suit by J. H. Berentz against the Kern King Oil & Development Company and others. From a judgment for plaintiff, defendants appeal. Reversed.

For opinion on rehearing in Supreme Court, see 84 Pac. 47.

William P. Veuve and A. B. Bigler, for appellants. E. B. Coil, for respondent.

SMITH, J. The suit was brought to foreclose several liens for work and labor performed in the construction of an oil well on a tract of 80 acres of land described in the complaint. The Belmont Oil Company was and is the owner of the land, of which the other defendant holds a lease, and the latter defendant is also the owner of the drilling apparatus, derrick, etc., now on the land, and used, it is alleged, "in the development and working of the said land and mining claim." The Belmont Oil Company suffered default. The other defendant filed demurrer and answer, but did not appear at the trial. The judgment is against the Kern King Oil and Development Company and contractors for the sums therein named, and it is further adjudged "that plaintiff is entitled to enforce the liens upon the mining claims and the improvements described in the complaint herein for the said sum found due him, and that said liens are superior and paramount to the interest and claim of all the defendants herein." The appeal was taken within 60 days of the entry of judgment.

The judgment against the Belmont Oil Company must be reversed for the several reasons that there is no allegation in the complaint that it had any knowledge of the work done on the land, that the judgment goes beyond the prayer of the complaint, and that there was no competent proof of the service of summons.

With regard to the latter point, there is a return of one Bristol, a constable, that he had served the Belmont Oil Company in the county of San Bernardino, but this was not verified. Code Civ. Proc. § 410. It is, indeed, intimated in respondent's brief that the return of service was amended, but we are not cited to what part of the transcript this amendment is to be found, nor does it appear in the index, nor have we been able to find it.

The judgment against the other defendant must also, we think, be reversed. The judgment is for a lien upon the whole of the land described in the complaint; but there is no allegation in the complaint that the whole of the land was necessary for the convenient use and occupation of the well, nor was any evidence introduced with reference thereto, nor is there any finding upon the subject. It is also to be observed that the action of the court in this particular seems to have resulted from the statement of the plaintiff's attorney that it was not denied in the answer that the whole of said land was required for the convenient use and occupation of the well, by which, as the fact was not alleged in the complaint, the court was doubtless misled.

It is now urged by the respondent's attorney that, under the provisions of section 1183 of the Code, the lien in this case extends to the whole of the mining claim, whether necessary for the convenient use and occupation of the well or otherwise; citing Williams v. Mountaineer Gold Mining Co., 102 Cal. 134, 34 Pac. 702, 36 Pac. 388. But that case, we think, has no application, or, rather, none that can be regarded as favorable to the respondent's case. There the property involved was a "mining claim" in the ordinary sense of the word; that is to say, a "portion of the public mineral lands which the miner, for mining purposes, takes up and holds in accordance with mining law." Morse v. De Ardo, 107 Cal. 622, 40 Pac. 1018, and cases cited. And it was held that under section 1183 the lien extended to the whole of the mining claim. But from the decisions it appears to have been the opinion of the court that the section in question provides for two separate classes or categories of liens, namely, for labor performed or for materials furnished to be used in the construction, etc., "of any building, wharf, bridge, ditch, flume, aqueduct, tunnel, fence, machinery, railroad, wagon road, or other structure," and for labor performed "in any mining claim or claims and the works owned and used by the owners for reducing the ores," etc., which is very clearly the case; and from this it is to be inferred that the cases provided for in the two clauses are exclusive of each other. The question, then, is, to which of these categories is the case to be assigned, and upon this point we are of the opinion that it falls under the former category; that is to say, that it is a structure similar in character to the other structures specified, and that the lien will extend only to "a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court." Code Civ. Proc. § 1185. This is rendered clear by the language of the latter section, which refers to "any building, improvement, well, or structure," and also from the language of section 1183, as amended in 1899 (St. p. 34, c. 35), in which the word "well" is inserted between the words "aqueduct" and "tunnel," appearing in the first clause of the former act. In a later amendment, the second category is made to include, also, not only "any mining claim or claims," but also "any real property worked as a mine." But this has no application to the present case. It also seems apparent from the language of the second clause of the section, in all the forms it has assumed since the amendment of 1880, that the mining claims referred to, and also the mines included by the last amendment, refer to mines of ore, exclusively, and that it was never intended to have any reference to the sinking of oil or other wells.

It need not be determined in the present case whether the term "mining claim" can be construed as in any case applying to land owned in fee simple. Williams v. Santa Clara Mining Association, 66 Cal. 193, 5 Pac. 85; Bewick v. Muir, 83 Cal. 373, 23 Pac. 390; Morse v. De Ardo, 107 Cal. 622, 40 Pac. 1018.

Judgment appealed from is reversed.

We concur: GRAY, P. J.; ALLEN, J.

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148 Cal. 577

BERENTZ v. BELMONT OIL CO. et al. (L. A. 1,261.)

(Supreme Court of California. Jan. 30, 1906.)

1. PROCESS—SERVICE—PROOF.

Under Code Civ. Proc. §§ 410–415, requiring proof of service of summons by affidavit except in case of service by a sheriff, proof of service by "certificate" of a constable is insufficient to confer jurisdiction.

2. MINES AND MINERALS—LIENS—ENFORCEMENT.

Where, in an action to enforce a laborer's lien on a mining claim for development service rendered under a contract with the lessee of the property, there was no allegation in the complaint that the lessee had authority to develop the mine or that the owner had knowledge thereof, such complaint was insufficient to sustain a judgment against the owner.

3. LIENS—FORECLOSURE SUIT—JUDGMENT—CONFORMITY TO PROCESS AND PLEADINGS.

A judgment foreclosing a lien for a larger amount than the demand stated in the summons, and which in that particular did not correspond with the prayer of the complaint, was unsustainable.

4. MINES AND MINERALS—LABORERS' LIENS—ENFORCEMENT.

Code Civ. Proc. §§ 1183, 1187, provide that a miner working on a mining claim or a mechanic erecting reduction works or other structures useful in connection with mining operations thereon has a lien on the entire claim for his wages or the value of his material; and in respect to other lands section 1185 declares that the lien attaches only to the ground on which the building or other structure stands, together with a convenient space about the same or so much as may be found by the court necessary for the convenient use and occupation of such structure. *Held*, that an 80-acre tract of land in process of development as an oil mine was a mining claim within such lien law, and that laborers rendering services in the development thereof under contract with the lessee were entitled as against the latter to a lien on its interest in the whole land.

5. APPEAL—COMPLAINT—DEMURRER — HARMLESS ERROR.

Where, in an action to enforce a laborer's lien on a mining claim, the fact that the contract was in writing and that it was for more than $1,000 was clearly proved and found by the court, error, if any, in overruling a special demurrer to plaintiff's complaint for failure to allege such facts, the contract not having been recorded, was harmless.

6. MINES AND MINERALS—LABORERS' LIENS—VALIDITY OF CONTRACT.

Where a contract for the development of a mine was void, payment by the owner to the contractor was no defense to lien claims of laborers who rendered services in the development of the mine.

7. CONTINUANCE—ENGAGEMENT OF COUNSEL.

It was not an abuse of discretion to refuse a continuance on the ground that counsel for one of the defendants was detained by professional engagements in another county, without a showing that other professional advice under the circumstances was unavailable and that there was a meritorious defense to the action, which could not be effectively presented without the absent attorney's presence.

In Bank. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by J. H. Berentz against the Belmont Oil Company and others. From a judgment in favor of plaintiff, defendant Belmont Oil Company and Kern King Oil & Development Company appeal. Judgment against Belmont Oil Company reversed, and judgment against the Kern King Oil & Development Company affirmed.

Wm. P. Veuve and A. B. Bigler, for appellants. E. B. Coil and J. W. Wiley, for respondent.

BEATTY, C. J. This is an action to foreclose liens of laborers employed in sinking an oil well. The defendant the Belmont Oil Company owned the south half of a certain quarter section of land in Kern county, known as the "Baradino Placer Mining Claim." The land was leased to its codefendant, the Kern King Oil & Development Company, and that company had contracted with the defendants Martin and Berry for its development by sinking one or more oil wells thereon. The contract between the Kern King Company and Martin and Berry was in writing, but was not recorded. Plaintiff and his assignors were employed by Martin and Berry, and performed labor in sinking one of the wells contracted for by the Kern King Company, and they claim a lien upon the entire tract of 80 acres as a "mining claim" within the meaning of that expression as used in the lien law. Code Civ. Proc. § 1183 et seq. By the decree of the superior court it was adjudged that the plaintiff had a valid lien for the amount found due from Martin and Berry, together with interest and counsel fees, upon the whole of the 80 acres, and that the lien attached, not only to the leasehold interest of the Kern King Company, but to the fee. The usual order followed for a sale of the premises, application of the proceeds to payment of costs and satisfaction of the liens, and for a deficiency judgment against the contractors. The two corporations have joined in an appeal from the judgment, which was taken less than 60 days after its rendition, and they have included in the transcript a settled statement on motion for a new trial, claiming, along with other assignments of error, that one of the material findings is unsupported by the evidence. The appeal was taken to this court before the recent amendment of the Constitution, and was subsequently assigned to the District Court of Appeal for the Second District, where the judgment of the superior court was reversed as to both appellants. 84 Pac. 45. The cause is now for decision after rehearing in this court.

As against the Belmont Company and Martin and Berry, the judgment was entered upon their default. The Kern King Company demurred, and, its demurrer being overruled, answered the complaint, but failed to appear at the trial. We think it was rightly held by the District Court of Appeal that the judgment against the Belmont Company is erroneous. As to it the only evidence of service of summons was a certificate of a constable, while, except in case of service by a sheriff, the Code of Civil Procedure requires proof by affidavit. Code Civ. Proc. §§ 410–415. There is, however, a question whether this rule has not been relaxed in favor of constables by section 153 of the county government bill of 1897 (St. 1897, p. 492, c. 277), and since that question has not been argued we leave it undecided; for, even if there had been proof or finding of due service of the summons on the Belmont Company, the default judgment as to it would have been erroneous, for two reasons: First, there is no allegation in the complaint that the Kern King Company had authority as lessee to develop the mine, or that the Belmont Company had knowledge that the work was being done; and, second, the mine is charged with a lien for a larger amount than the demand stated in the summons. which in this particular does not correspond with the prayer of the complaint. For these reasons the judgment against the Belmont Oil Company must be reversed, and this leaves nothing to be considered except the right of the plaintiff to a lien upon the leasehold interest of the Kern King Oil & Development Company.

The more important questions presented by the appeal of that company relate to the construction of the lien law in its application to claims for labor in the development of mineral oil lands. The law contains express provisions as to "mining claims" to the effect that a miner working on a claim, or a mechanic erecting reduction works or other structures useful in connection with mining operations thereon, has a lien upon the entire claim for his wages, or the value of his material. Code Civ. Proc. §§ 1183–1187; Williams v. Mountaineer Co., 102 Cal. 134, 34 Pac. 702, 36 Pac. 388. But with respect to other lands the lien attaches only to the ground upon which the building or other structure stands, together with a convenient space about the same, or so much as may be found by the court necessary for the convenient use and occupation of such structure. Code Civ. Proc. § 1185. In construing this law the District Court of Appeal followed what it understood to be the decision of this court in Williams v. Mountaineer Co., supra, and held that there are two distinct categories of liens provided for, and that they are mutually exclusive, viz., liens for labor or materials employed or used in the construction of "any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, or other structure" where the lien attaches only to so much land adjacent to that upon which the structure stands as may be found necessary for its convenient use, and liens for labor and materials employed or used on mining claims, where the lien attaches to the entire claim and all its appurtenances. It is also held that a tract of land, though known as a placer mining claim and in process of development for the discovery and production of mineral oil, is not a mining claim within the meaning and intention of the lien law. The conclusion necessarily followed that the lien in question here fell within the category of those which attach to the structure only and a convenient space about it, and the judgment of the superior court was reversed for the reason that there was neither allegation, evidence, nor finding that the whole 80 acres was necessary or convenient for the use and occupation of the well. We think the District Court of Appeal misconstrued the decision in Williams v. Mountaineer Company as holding that the two categories of liens are mutually exclusive. The appellant in that case had furnished material for the construction of a mill, a tramway, a boarding house and other buildings, every one of them "structures" included in the first category upon which, with a convenient space about them respectively, he would have had a separate lien if they had been erected for different owners for purposes other than the working of a mine, but because they were built for a mine owner for use in working his mine, the appellant's claim of a separate lien upon them was disallowed, and his security was completely lost because he had not described the mining claim in his notice of lien. The effect of that decision, in short, is to transfer any building or other structure from the first to the second category whenever it is an adjunct or appurtenance to a mining claim, and, if a tract of land upon which a well is being drilled for the purpose of extracting mineral oil is a mining claim, the well, notwithstanding the inclusion of wells in the enumeration of structures upon which separate liens are allowed, is an essential part of the mine, and for that reason the lien of those who have made it extends to the whole claim, and would be lost if less was described in the lienor's notice.

The question, therefore, is whether this 80-acre tract of land in process of development as an oil mine is a mining claim within the meaning of the lien law, and we think that in any view of the case this question must be answered in the affirmative. Under the act of Congress of 1897 (Act Feb. 11, 1897, ch. 216, 29 Stat. 526 [U. S. Comp. St. 1901, p. 1434]), the location and sale of oil land is governed by the mineral laws of the United States applicable to the location and sale of placer mining claims, and if land is located and held under this law, it is a mining claim before patent in every sense of the word, and for the purpose of the lien law it does not cease to be a mining claim when, by a patent from the government, the fee is transferred to the locator or his assigns. This was clearly held in Bewick v. Muir, 83 Cal. 372, 23 Pac. 389, and the authority of that decision has never been questioned. Something said obiter by Justice Sharpstein, in the course of his opinion in regard to lands granted by the Mexican government, was disregarded in Morse v. De Ardo, 107 Cal. 624, 40 Pac. 1018; but it was not there decided that ground actually worked as a mine within a larger tract of agricultural land was not subject to a lien as such. The judgment of the lower court decreeing a lien upon 26 out of 160 acres of land including the mining works was reversed for want of a finding that the smaller tract was a mining claim. The question for decision here is therefore unembarrassed by any previous decision of the court inconsistent with the view above expressed, and we have only to deal with the points advanced in the argument in support of the opposite view. It is contended that the lien law, in speaking of mining claims, refers to mines of ore exclusively, but we think there is nothing in the language or policy of the law to justify that construction. By the act of Congress passed in 1897, oil locations were brought within the category of mining claims, and if the Legislature, in re-enacting section 1183 of the Code of Civil Procedure in 1899, had intended to restrict its operations to mines of ore, it would have made an express exception of oil locations. But not only was no such exception made, there was good reason why it should not be made. The Constitution of the state gives to mechanics, materialmen, artisans, and laborers of every class a lien upon the property upon which they have bestowed labor, or for which they have furnished material, for the value of such labor and material, leaving to the Legislature only the task of providing for the speedy and efficient enforcement of such liens. Article 20, § 15.

There may be a question whether the Legislature has thoroughly fulfilled its duty in this respect, but the law, such as it is, should be given a construction as fully in harmony with the Constitution as its terms will admit, and since there is no reason for making a discrimination against those who contribute to the development of oil claims, they should have the full benefit of the literal terms of the statute. This, indeed, is necessary to preserve its harmonious operation. The Constitution and the law alike purport to give the artisan, laborer, or materialman, a lien upon "the property" which his labor or materials have created or improved. If labor or materials have gone into a building or other structure, the lien attaches to the structure, to the ground upon which it stands, and to a space about it sufficient for its convenient use or occupation, that being deemed —and rightly so—the property created or improved. In case of labor or material contributed to the development or working of a mine, the rule, though expressed in different terms, is in effect the same. For mining claims have always been restricted by the rules and customs of miners prior to the enactment of the mining laws, and since that time by the laws themselves, to what is regarded as a reasonable quantity of placer ground, and, in case of lode claims, to so much only of the ground adjacent to the lode as is required for convenient working. The statute, therefore, does not in reality contain two rules for determining what is subject to a laborer's or materialman's lien. It contains but one rule, and that the rule of the Constitution which fastens a lien upon the property improved or benefited; and oil claims being within the reason, as well as the letter of the law, are, as they should be, governed by the same rule. When labor or material is expended in developing an oil claim, the lien attaches to the claim. If it is the claim of a single locator to 20 acres, the lien covers the 20 acres, and if it is a consolidated claim of several locators the lien will cover the whole of the consolidated claim, if it is being worked as a whole. In this case the land—80 acres—is only half the size permitted by law to be located as a consolidated claim. It is known as the "Baradino Placer Mining Claim." It is described in the complaint as a mining claim. It is not denied in the answer of the Kern King Company that it is a mining claim. The court finds that said company had a lease of the claim with power to develop it, and that it owns all the apparatus and improvements on the ground. There was really no issue between the plaintiff and the Kern King Company as to the land being a mining claim—so far as oil land can, under any circumstances, be a mining claim—and if there had been an issue it is found in favor of the plaintiff. The superior court, therefore, did not err in holding that plaintiff's lien extended to the whole 80 acres. This conclusion disposes of all the exceptions based upon the failure of plaintiff to allege, and of the court to find, that the whole of the 80 acres is necessary to the convenient use and occupation of the well.

Several assignments of error are based upon the failure of plaintiff to allege that the contract with Martin and Berry was in writing, or that it was for more than $1,000. When no contract between the owner of land and his contractor is recorded, those who work under the contractor have no means of knowledge whether the contract is in writing or not, or whether it is for more or less than $1,000, and these facts being peculiarly within the knowledge of the owner, he suffers no detriment from the failure of plaintiff to make them the subject of conjectural allegation. Here the facts that the contract was in writing, and that it was for more than $1,000, were clearly proved and found by the court, and the error, if any, in overruling the special demurrer directed to this point, was harmless. This view also disposes of the objection to the second and third counts of the complaint for failing to allege that anything was due the contractors when the lien notices were filed. The contract being void, payment by the owner to the contractor is no defense to the claim of lien.

We cannot say that it was an abuse of discretion to deny the Kern King Company's motion for a continuance, based upon the sole ground that its counsel was detained by previous professional engagements in Santa Clara county. It should have been made to appear that, under the circumstances, other professional advice was unavailable, and that there was a meritorious defense to the action, which could not be effectively presented without the presence of the absent attorney. Nothing of this kind was shown.

We find no error in the proceedings of the superior court prejudicial to the Kern King Oil & Development Company, and the judgment against it is therefore affirmed. The judgment against the Belmont Oil Company is reversed, and the cause remanded for further proceedings against that company as the plaintiff may be advised.

We concur: HENSHAW, J.; SHAW, J.; McFARLAND, J.; ANGELLOTTI, J.; LORIGAN, J.

2 Cal. App. 579

GOMEZ et al. v. SCANLAN et al.

(Court of Appeal, First District, California. Jan. 2, 1906. Rehearing Denied Jan. 31, 1906; Denied by Supreme Court March 1, 1906.)

1. HUSBAND AND WIFE—COMMUNITY PROPERTY—ACTIONS—JOINDER OF WIFE AS PARTY PLAINTIFF.

Though the right of a married woman to recover damages for false imprisonment is community property, she may join with her husband in an action therefor.

2. ABATEMENT AND REVIVAL—DEATH OF HUSBAND—SUBSTITUTION OF ADMINISTRATOR.

Where an action was properly brought by husband and wife joining as parties plaintiff, and the husband died pending the action, it was proper to substitute his administratrix.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Abatement and Revival, § 318.]

3. CONSTABLES — LIABILITY ON OFFICIAL BONDS—ACTS IN EXCESS OF AUTHORITY.

Where a constable, in executing a valid search warrant, exceeded his authority and committed trespass by causing a person to be imprisoned, the sureties on his official bond were liable.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sheriffs and Constables, § 354.]

Appeal from Superior Court, Contra Costa County; William S. Wells, Judge.

Action by Magdalena Gomez and another against Michael J. Scanlan and others. While the action was pending John H. Gomez, one of the plaintiffs, died and Magdalena Gomez, administratrix of his estate, was substituted. From a judgment for plaintiffs, defendants appeal. Affirmed.

A. L. Frick and R. H. Latimer, for appellants. W. M. Cannon and H. V. Alvarado, for respondents.

COOPER, J. This action was brought to recover damages, in the sum of $500, against defendant Scanlan, as constable, and the other defendants as sureties on his official bond, for false imprisonment. The case was tried before a jury, and a verdict rendered for plaintiff in the sum of $500. This appeal is from the judgment on the judgment roll without a bill of exceptions.

The action was brought by John H. Gomez and Magdalena Gomez, his wife, for false imprisonment and wrongs committed by defendant Scanlan on the person of the wife. Defendants claim that their demurrer, which was on the ground of misjoinder of plaintiffs, should have been sustained, for the reason that the right to recover damages by the wife is in the nature of a chose in action, is community property, and, like the damages when recovered, subject to the control, power, and management of the husband; and hence, being community property, the husband is the only necessary and proper party plaintiff. While ordinarily the rule is that the wife is not a proper party in an action to recover community property, this class of cases forms an exception. The rule has been recognized in this state in many cases, of which the following are a few: Sheldon v. Steamship Uncle Sam, 18 Cal. 527, 79 Am. Dec. 193; Matthew v. C. P. R. R. Co., 63 Cal. 451; Tell v. Gibson, 66 Cal. 274, 5 Pac. 223; McKune v. Santa Clara V. M. § L. Co., 110 Cal. 480; 42 Pac. 980. The claim that after the death of the husband the administratrix of the estate should not have been substituted, and that by such substitution there was an improper joinder of parties plaintiff, is equally without merit. The husband having been a necessary and proper party to the action when it was commenced, his legal representative became such upon his death, and the appointment of such legal representative. Newton and Wife v. Hatton, 2 Lord Raymond's Rep. 1208; Schouler on Domestic Relations (5th Ed.) § 77; Fordyce v. Dixon (Tex. Sup.) 8 S. W. 504.

It is further urged that the complaint does not state facts sufficient to constitute a cause of action as against the defendants who are sureties, for the reason that it shows that the wrongful acts complained of were done by the constable in his official capacity. The case of Felonicher v. Stingley et al., 142 Cal. 630, 76 Pac. 504, is relied on. In that case there was no allegation that the constable had any writ or order directing him to do anything, and the complaint did not state any facts showing or tending to show that the wrongs complained of were done by the constable while acting in his official capacity. It was said in the opinion: "The weight of authority and the rule in this state is that the officer and his sureties are responsible for every abuse of his official powers. When he has in his hands a valid writ, and under cover of the writ, claiming to act under it, he goes beyond it and commits a trespass, his sureties are liable." The facts alleged bring the case at bar within the above rule. The complaint alleges that the defendant Scanlan had in his hands a valid search warrant, "purporting to authorize said defendant Scanlan to search the premises of the plaintiffs in said town for certain personal property claimed by said Scanlan to have been stolen; that acting in his official capacity as such constable, and pretending to be authorized so to do by such search warrant, said defendant Scanlan did then and there maliciously and with force imprison the said plaintiff Magdalena Gomez, and deprive her of her liberty for the space of two hours; and while so imprisoned and deprived of her liberty said defendant Scanlan, pretending to be authorized so to do by such search warrant, maliciously and by force and threats of violence, caused the clothing of said plaintiff to be removed from her body and searched, and her person exposed to the view of said defendant and another person present." If the above allegations are not sufficient to show a liability on the sureties it would be difficult to show such liability. When an officer performs an act in strict accordance with the directions of a valid writ, and in the line of his official duty, neither he nor his sureties are responsible. If he willfully performs such act without any valid process and outside his official duty, he alone is responsible in damages. If he has in his possession a valid writ or order, and, claiming and even believing that he is acting within the scope of such writ or order, performs an illegal or unauthorized act as to the party against whom the writ or order runs, or as to a third party, then he is liable, and also his sureties to the extent of their bond. The condition of the defendant's bond was that he would well, truly, and faithfully perform the official duties required of him by law. He was not so faithfully performing his official duties when he did the acts set forth in the complaint.

The judgment is affirmed.

We concur: HARRISON, P. J.; HALL, J.

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2 Cal. App. 574

BATES v. ADAMSON et al.

(Court of Appeal, First District, California. Dec. 30, 1905.)

1. MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS—ASSESSMENTS—ERRORS.

Where the superintendent of streets of a city assessed defendant's lots at a sum greater than they should have been assessed for, it was a mere error in the assessment and not a jurisdictional defect, the assessment being made at a uniform rate, and having stated the numbers and frontage of each lot fronting on the portion of the street to be improved.

2. SAME—REMEDIES—APPEAL TO CITY COUNCIL—FAILURE TO APPEAL.

Vrooman Act (St. 1885, p. 156, c. 153) § 11, relating to municipal improvements, provides that any owner having any objection to the correctness of an assessment or proceedings taken by the superintendent of streets shall within 30 days from the date of the return, appeal to the city council stating his objections in writing, on which appeal the city council may remedy and correct any error or informality in the proceedings, etc., and that all decisions and determinations of the city council on notice and hearing shall be final as to all errors and irregularities which the city council might have remedied and avoided, and that no assessment shall be held invalid except on appeal to the city council, as provided, for any error, informality or defect in the assessment itself. *Held*, that such section provided a remedy for the correction of an assessment which was excessive, and defendants, having failed to pursue the same, were not entitled to assert such objection as a defense to a proceeding to enforce the assessment against their lots.

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by J. C. Bates, Jr., against W. R. H. Adamson and another, as executor and executrix, etc. From a judgment in favor of defendants, plaintiff appeals. Reversed.

J. C. Bates and D. H. Whittemore, for appellant. Bradley & McKinstry and Campbell, Metson & Campbell, for respondents.

COOPER, J. This action was brought to obtain a judgment and decree of lien upon the lot of defendants for $1,038.34, besides interest and attorneys' fees, being the amount claimed to be due from defendants as an assessment upon their lot for grading Seventeenth street between Stanyan and Ashbury streets, in the city of San Francisco. The court granted a nonsuit, and judgment was entered in favor of defendants, from which plaintiff appeals on the judgment roll and a bill of exceptions. Upon the trial the plaintiff offered in evidence the assessment, warrant, and diagram, with affidavit of demand and nonpayment, together with the certificate of the city engineer. The defendant objected to these documents, and to each of them, upon the grounds that the assessment was not made as provided by subdivision 10 of section 7 of the Vrooman act (St. 1885, p. 153, c. 153), that the assessment, while correctly stating the number of cubic yards credit to which the property owners are entitled who have performed work under private contract, does not correctly state the cash credit to which the property owners against whom assessments were made are entitled. The court sustained the objection to these documents, and thus ruled out the evidence on which plaintiff relied to prove his case. This ruling presents the material question upon this appeal.

The assessment and diagram show that the total number of cubic yards of grading on Seventeenth street, between Stanyan and Ashbury streets, was 63,773, the expense of which was assessable on the lots fronting on said designated portion of said street, being lots 1 to 11, inclusive, as shown on the diagram. The total number of front feet of all the lots was 2,872 feet 5 inches. The owners of lots 5 and 8, having 2,323 feet 4 inches frontage, performed all the grading in front of said lots, which amounted to 51,647 cubic yards, which was 10,058 cubic yards more than the amount of the assessment on said lots would have been, and they were accordingly credited with the full amount of the assessment against said lots. The assessor credited the excess of 10,058 cubic yards on the whole sum of 63,773 cubic yards. Defendants claim that the excess should have been credited on the remaining 12,126 cubic yards, and that the cost of the remaining grading was all that was assessable against the owners of the lots other than lots 5 and 8. If defendants' position is correct it is evident that in all cases where owners have graded the street in front of their premises in excess of the assessment for grading upon their lots, under subdivision 10 of section 7 of the Vrooman act (St. 1885, p. 153, c. 153) there would have to be a second and different assessment against the remaining lots. Under the view we take of this case it is not necessary to decide this question. If the superintendent of streets assessed the lot of defendants more than it should have been assessed for, it was an error in the assessment. The assessment made by him gave the numbers and frontage of each lot fronting on the portion of the street to be improved. The assessment was at a uniform rate per front foot. It fixed the amount of the assessment against each lot at such uniform rate. It is provided in section 11 of said Vrooman act that any owner, "having or making any objection to the correctness or legality of the assessment or other act, determination or proceedings of the superintendent of streets, shall, within thirty days after the date of the warrant, appeal to the city council, as provided in this section, by briefly stating their objections in writing and filing the same with the clerk of said city council. * * * Upon such appeal the said city council may remedy and correct any error or informality in the proceedings, * * * alter, modify, or correct the assessment in such manner as to them shall seem just; * * * and may instruct and direct the superintendent of streets to correct the warrant, assessment, or diagram in any particular, or to make and issue a new warrant, assessment, and diagram. * * * All the decisions and determinations of said city council, upon notice and hearing as aforesaid, shall be final and conclusive upon all persons entitled to appeal under the provisions of this section, as to all errors, informalities and irregularities which said city council might have remedied and avoided; and no assessment shall be held invalid upon appeal to the city council, as provided in this section, for any error, informality or other defect in any of the proceedings prior to the assessment, or in the assessment itself."

The above section gave defendants a tribunal to which they had the right to apply for relief. They had only to briefly state their objections in writing to the assessment and file it with the clerk of the city council. They had 30 days in which to do this, but do not appear to have made any objections in any manner to the assessment. The city council could have instructed the superintendent of streets to correct the assessment, or to make a new one. The object of the section is to treat all owners fairly; to give them a tribunal where, without technical formalities, they may have their rights adjusted, and all questions in regard to the assessment and proceedings leading up to it passed upon and corrected by the local authorities. This meaning is clearly expressed in the section, because it states that no assessment shall be held invalid, except upon appeal to the city council, for any error or defect in the assessment itself. It would have been fair to the contractor and to the other owners of lots on the street if defendants had made their objections to the assessment in the manner provided in the statute and at the time when it could have been corrected. As they did not do so they will not now be heard to complain as to any matter which the city council might have corrected upon such appeal. In Himmelmann v. Hoadley, 44 Cal. 276, a contract had been let for improving California street from Gough street to Cemetery avenue at a certain rate per square foot. Subsequently the line of Cemetery avenue was changed to the west, so that the distance from Gough street to Cemetery avenue was increased about 200 feet. The superintendent of streets included the cost of the additional work in the assessment. The claim was made that the assessment was void, but the court held it was an error which should have been corrected on appeal to the board of supervisors. It is there said: "But when the contract is valid, if the superintendent includes in the assessment the expense of work not provided for in the contract, or not performed under it, it is an error on his part, which may be corrected on appeal to the board as provided for in the statute. The cases above cited hold that that is the only remedy for an error of the superintendent which might have been corrected on such appeal." The same rule has been announced over and over again. The following are a few of the cases so holding: Chambers v. Satterlee, 40 Cal. 497; Boyle v. Hitchcock, 66 Cal. 129, 4 Pac. 1143; Wells v. Wood, 114 Cal. 255, 46 Pac. 96; Perine v. Forbush, 97 Cal. 311, 32 Pac. 226; Dowling v. Conniff, 103

Cal. 75, 36 Pac. 1034; Warren v. Riddell, 106 Cal. 352, 39 Pac. 781.

Defendants contend that the assessment is void upon its face, but the cases cited by them do not sustain such contention. In Spaulding v. Wesson, 115 Cal. 441, 47 Pac. 249, the court simply held that there was no jurisdiction in the municipality to enforce an assessment to improve private property. In Ryan v. Altschul, 103 Cal. 176, 37 Pac. 339, the court held the assessment void on its face because the assessment was made on one lot only, when the statute expressly states that it shall be made on all lots on both sides of the street. The court there said: "If the assessment includes expenses which, under any circumstances, might have been a charge upon the property assessed, and the alleged error is to be determined by matters outside of the assessment itself, the owner must first seek its correction by an appeal." It is further stated in the opinion: "An assessment is void upon its face if it purports to be for work which is not included in the contract upon which it is made, or which has not been authorized in the resolution of intention (Donnelly v. Howard, 60 Cal. 291; Partridge v. Lucas, 99 Cal, 519, 33 Pac. 1082, or if it appears from the diagram attached thereto to be upon lands which the statute does not make chargeable with the expense of the work (Parker v. Reay, 76 Cal. 103, 18 Pac. 124), or which lie outside the district to be assessed (Schumacker v. Toberman, 56 Cal. 508)."

The assessment in the case at bar is upon lots included both in the resolution of intention and in the contract under which the improvement was made, and is upon lands which the statute makes chargeable with the cost of the work and which do not lie outside of the district assessed. It follows that the court erred in sustaining the objections to the assessment and the other documents offered with it.

The judgment is reversed

We concur: HARRISON, P. J.; HALL, J.

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2 Cal. App. 533

POOL v. SUPERIOR COURT OF SISKIYOU COUNTY.

(Court of Appeal, Third District, California. Dec. 23, 1905.)

APPEAL AND ERROR—CASE ORIGINATING IN JUSTICE COURT.

As under Const. art. 6, § 4, appeal will not lie from the superior court in a case originating before a justice, and the appellate jurisdiction of the Court of Appeal is limited to appeals from the superior court and the issuance of writs necessary or proper to the complete exercise of its appellate jurisdiction, the judgment of the superior court in a case originating before a justice may not be reviewed by writ of error.

Petition of Leander Pool for writ of error to the superior court of the county of Siskiyou. Writ denied.

Jacob P. Wetzel, for petitioner.

McLAUGHLIN, J. The petitioner brought an action in the justice's court and on the trial, judgment was there rendered against him. He thereupon appealed to the superior court, and during the progress of a trial de novo was nonsuited. He seeks to have the judgment and rulings of the superior court reviewed by this court through the medium of a writ of error. This cannot be done. The appellate jurisdiction of this court is confined to appeals from superior courts, and the issuance of writs necessary or proper to the complete exercise of its appellate jurisdiction. Const. art. 6, § 4. No appeal lies to this court from any judgment or order in the case. Edsall v. Short, 122 Cal. 533, 55 Pac. 327. As this court has no appellate jurisdiction, certainly no writ is necessary or proper in the premises, unless it be one of the prerogative writs which this court in the exercise of its original jurisdiction may issue. Manifestly, certiorari is the only writ which could, by possibility, be appropriate, and it is well settled that this writ will not issue to correct errors or irregularities within the jurisdiction of an inferior tribunal. Borchard v. Supervisors, 144 Cal. 14, 77 Pac. 708. The jurisdiction of the superior court cannot be doubted, and hence the judgment there rendered is beyond review by this court.

The writ is denied.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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2 Cal. App. 433

CHAPIN v. ROSS.

(Court of Appeal, Second District, California. Dec. 12, 1905.)

REFORMATION OF INSTRUMENTS — FINDINGS —JUDGMENT.

Under Civ. Code, § 3399, providing that where, through a mistake of a party to a contract, which the other party knew or suspected, the contract failed to express the intent of the parties, it may be revised, and section 3402, providing that a contract may be revised and then specifically enforced, in an action to reform a contract for payment for "grading, curbing and sidewalking" a street, and to recover on the contract as reformed, for "grading, graveling, guttering, curbing and sidewalking," where the court found that there was no mistake of the parties to the written contract, but that the plaintiff understood, as defendant believed, that this referred to the entire cost of improving this portion of the street, such finding justified a judgment that the plaintiff recover the entire cost of the improvement.

Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by Clara L. Chapin against Abner L. Ross. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Robert Young, for appellant. H. S. Rollins, for respondent.

SMITH, J. Appeal from a judgment for the plaintiff, and an order denying the defendant's motion for a new trial. The suit was brought to reform a written contract, and to recover money thereon due as reformed. The contract, which is admitted, recites a conveyance of even date by the plaintiff to the defendant of certain lands on the easterly side of Grover street, in the city of Los Angeles; and by its terms, and in consideration of the conveyance, the defendant agrees "that when said Grover street shall be graded, curbed and sidewalked, he will pay all costs and expenses for grading, curbing and sidewalking said Grover street in front of the property now still owned by the party of the first part hereto, said property having a frontage of 639.56 feet on the west side of said Grover street, said grading, curbing and sidewalking to be uniform in character, workmanship and materials with that used on the other portions of said Grover street."

The allegations of the complaint with regard to mistake are (paragraph 2): "That at the time of making said written agreement, and immediately prior thereto, it was agreed and understood between the parties hereto that when said Grover street should be graded and improved so as to make the same what is commonly termed a 'graded street,' by being graded, graveled, guttered, curbed, sidewalked, and otherwise improved and placed in a finished and completed condition for travel and use thereof by the public, and acceptable to the city of Los Angeles, the said Ross, defendant herein, would pay the entire cost and expense for all of such improvements and work upon said Grover street in front of the property then owned by the plaintiff herein, lying on the west side of said Grover street and having a frontage thereon of 639.56 feet, as described in said written agreement"—and (paragraph 3) that by mutual mistake of the parties thereto the written agreement failed to express the intention and meaning of the parties as above indicated. The street was afterwards improved under an ordinance of the city of Los Angeles, "by being graded, graveled, guttered, curbed and sidewalked," etc., and the cost of the improvement was $1,524.77, which sum the defendant refuses to pay.

The court, in the language of the complaint, finds the second paragraph of the complaint to be true; and as to the allegations of paragraph 3 it is found "that there was no mutual mistake, or any mistake, of the parties to said written agreement at the time of the making of the same, but the plaintiff understood the promise therein made by the defendant, Ross, to pay for the grading, curbing, and sidewalking as referring to the entire cost for the improvement of said street, and said defendant at said time believed such to be plaintiff's understanding thereof." Upon these facts the court finds, as conclusion of law, that the plaintiff is entitled to recover the cost of the improvement, with interest, etc., and judgment was entered accordingly.

The points urged by the defendant for reversal are that the findings of the court above referred to are not justified by the evidence, and that the facts found are insufficient to justify the judgment. But, as to the first point, we cannot say that the evidence was insufficient; and we are of the opinion, as to the second, that the case comes within the provisions of sections 3399 to 3402 of the Civil Code, and that the findings are sufficient to support the judgment.

The judgment and order appealed from are affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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2 Cal. App. 529

SMITH v. SUPERIOR COURT OF NAPA COUNTY.

(Court of Appeal, Third District, California. Dec. 21, 1905.)

1. Justices of the Peace—Appeal—Procedure.

Code Civ. Proc. § 976, provides that when a party appeals to the superior court on questions of fact, or on questions of both law and fact, no statement need be made but the action must be tried anew in the superior court; and section 980 declares that on an appeal heard on a statement of the case, the superior court may review all orders affecting the judgment, etc., and may, if necessary or proper, order a new trial. *Held* that, where an appeal was taken from a justice's judgment granting a nonsuit, the appeal presented a question of law only, and hence on reversal the superior court was justified in remanding the case to the justice for trial and refusing to grant a trial on the merits de novo, notwithstanding the notice of appeal stated that the appeal was taken on questions of both law and fact.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 734.]

2. Judgment—Res Judicata.

Where a justice of the peace determines as a matter of law that the facts adduced by plaintiff are insufficient and grants a nonsuit, there has been no trial on the merits, and the judgment is not a bar to an action subsequently brought on the same cause.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1031.]

3. Certiorari—Review of Order on Appeal from Justice.

Where an action before a justice was appealed to the superior court on a statement of the case, such court had jurisdiction to determine the nature of the appeal, and certiorari would not lie to review the court's order based on a determination that the appeal involved only questions of law, even though such determination is erroneous.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Certiorari, §§ 41, 42.]

Petition for a writ of certiorari by J. C. Smith against the superior court of Napa county to review an order reversing a judgment of a justice of the peace and remanding the cause for trial. Denied.

C. N. Riggins, for petitioner. W. F. Henning, for respondent.

McLAUGHLIN, J. The petitioner was plaintiff in an action brought in the justice's court. When said plaintiff had rested his case, the justice granted defendant's motion to dismiss the action on the ground that plaintiff had failed to prove the cause of action stated in the complaint. Within ten days thereafter the petitioner prepared and filed a statement of the case. Amendments thereto were proposed by defendant, and in due time the statement was settled and allowed, and the record on appeal from the judgment of dismissal was filed in the superior court. The notice of appeal recited that the appeal was taken on questions of both law and fact. When the case was called in the superior court petitioner's motion to have the cause set for trial was denied, and thereafter an order was entered reversing the judgment of dismissal, and remanding the cause for a new trial in the justice's court. This order recites that the appeal was on questions of law, that it was heard on a statement of the case, and argued and submitted to the court upon questions of law.

Petitioner contends that he was and is entitled to a trial de novo in the superior court, and hence that such court was without jurisdiction to make the order remanding the cause. It is argued that the appeal, under the notice given, must be treated as taken on questions of both law and fact, and that even if it be considered as taken on questions of both law and fact, or on questions of law alone, petitioner was entitled as a matter of absolute right to a trial in the appellate court. It is said that under sections 976 and 980, Code of Civil Procedure, a new trial in the appellate tribunal is inevitable, whether the appeal be taken on questions of both law and fact, or on questions of law alone. If this question was open, we might, perchance, be inclined to adopt the construction placed upon section 908, Code of Civil Procedure, by counsel for petitioner. But it has been held repeatedly that if an appeal to a superior court is based on questions of law alone, the proper procedure is to remand the cause for trial in the justice's court, and we are not at liberty to depart from a rule of practice so firmly established. S. P. R. R. Co. v. Superior Court, 59 Cal. 471; Myrick v. Superior Court, 68 Cal. 100, 8 Pac. 648; Fabretti v. Superior Court, 77 Cal. 306, 19 Pac. 481; Maxson v. Superior Court, 124 Cal. 470, 57 Pac. 379. It must also be considered as settled that the notice of appeal is not conclusive as to the nature or character of the appeal. Maxson v. Superior Court, 124 Cal. 475, 57 Pac. 379; Myrick v. Superior Court, supra; Rickey v. Superior Court, 59 Cal. 662; Spelling on New Trial, § 749. The motion to dismiss in the justice's court was, in effect a motion for a nonsuit, and "the question presented on a motion for a nonsuit is a question of law." Donahue v. Gallavan, 43 Cal. 576; Cravens v. Dewey, 13 Cal. 43; Fogel v. Schmalz, 92 Cal. 413, 28 Pac. 444; Warner v. Darrow, 91 Cal. 309, 27 Pac. 737; Toulouse v. Pare, 103 Cal. 251, 37 Pac. 146; Craig v. Hesperia L. Co., 107 Cal. 675, 40 Pac. 1057; Spelling on New Trial, sections 332, 333.

This being true, the petitioner could not change the nature of the appeal by the mere recital that it involved questions of both law and fact. True, a motion for a nonsuit always involves the legal effect of certain admitted facts, but so does a demurrer to a pleading, and it has been held that an appeal from a judgment on demurrer is an appeal on a question of law alone. Maxson v. Superior Court, supra. It is said that the justice's court had no jurisdiction to dismiss the action on the ground that the evidence introduced by plaintiff was insufficient to sustain the averments of the complaint, and sections 925 and 890, Code Civ. Proc., are cited to support this view. Conceding, without deciding, that the justice's court had no such authority, still the question involved and presented to the superior court for review would be one of law, pure and simple. When a case has been tried on the merits, and a final judgment has been rendered in the justice's court, an appeal on questions of law and fact will compel a trial de novo in the superior court. But where a justice of the peace determines as matter of law that facts adduced by plaintiff are insufficient, and a nonsuit is granted, there has been no trial on the merits. In such event, the facts have not been determined, nor have the merits been passed upon, and the judgment is not a bar to an action subsequently brought upon the same cause of action. Merritt v. Campbell, 47 Cal. 545; Pyle v. Piercy, 122 Cal. 385, 55 Pac. 141; Hibernia v. Portener, 139 Cal. 93, 72 Pac. 716.

When a justice of the peace has not passed upon the issues of fact as tendered, he cannot through a mistaken opinion of law force the appellate tribunal to do so. "He must first proceed to do what the law requires of him, then, if his judgment upon issues of fact be appealed from, a new trial of them can be had in the manner declared by law to be appropriate. * * * It could not have been contemplated by those who framed and passed the statute which controls this case, that an action which was within the jurisdiction of a justice of the peace could be tried on issues of fact in the superior court, which had never been passed upon by the lower tribunal." Myrick v. Superior Court, supra. The appeal in the case at bar was heard upon a statement of the case. The error relied upon for reversal could not otherwise be reviewed, and we think the superior court properly remanded the cause for a trial of issues tendered and a determination of questions of fact involved.

There is another reason why the relief here sought must be denied. The record on appeal contained a statement of the case, and hence the superior court was necessarily called upon to determine the nature of the appeal. Its jurisdiction to decide that question being conceded, certiorari will not lie to review the conclusion reached. Such writ cannot be converted into a writ of error merely because there is no appeal. "It may not be used to correct errors or irregularities within the jurisdiction of the inferior tribunal. It is too well settled to require the citation of authorities that the writ of review runs to inferior tribunals, boards, or officers exercising judicial functions solely to correct errors in excess of jurisdiction, or, in other words, to confine such tribunals and officers exercising judicial functions to their proper jurisdiction." Borchard v. Supervisors, 144 Cal. 14, 77 Pac. 708; Valentine v. Police Court, 141 Cal. 617, 75 Pac. 336; Wittman v. Police Court, 145 Cal. 474, 78 Pac. 1052. The order recites that the appeal was on questions of law, that it was heard, argued and submitted for decision upon such questions, and, under the circumstances shown by the record this court must be and is entirely satisfied with the conclusion thus voiced. Great stress is laid upon the words "new trial" found in said order, but "the law respects form less than substance," and the mere use of the word "new" can neither rob the order of vitality nor the court of jurisdiction.

The writ is denied.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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2 Cal. App. 429

WOHLFORD v. CITY OF ESCONDIDO.

(Court of Appeal, Second District, California. Dec. 12, 1905.)

1. EVIDENCE — PRESUMPTIONS — OFFICIAL PROCEEDINGS.

It is presumed that an assessment for taxes was regularly made and in conformity to a valid ordinance, and not in conformity to a subsequent invalid ordinance.

2. TAXATION—ASSESSMENT—VALIDITY.

A municipal ordinance provided in accordance with Municipal Corporation Act (St. 1883, p. 273, c. 49) § 871, that all taxes should be assessed and constitute liens from and after the first Monday in March in each year. Pol. Code, § 3628, requires the assessment of property to the persons owning the same on the first Monday in March. Sections 3629, 3630, require every person to make a statement setting forth the property owned by him on the first Monday of March. The ordinance was amended so as to make the property assessable to the persons owning the same May 1st. The statement of a taxpayer referred to his ownership on May 1st. *Held*, that the amending ordinance was void, and that the reference to the ownership was the result of a mistake on the part of the assessor and taxpayer and did not affect the validity of the assessment, and the taxes paid under it could not be recovered, at least in the absence of a showing that the taxpayer was not the owner of the property on the first Monday of March.

Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by A. W. Wohlford against the city of Escondido. From a judgment for defendant, plaintiff appeals. Affirmed.

W. H. Francis, for appellant. F. P. Willard, for respondent.

SMITH, J. Appeal from judgment on defendant's demurrer to the complaint. The suit was brought by the plaintiff to recover the sum of 38 cents taxes alleged to have been illegally collected from him and paid to the tax collector under protest. The defect in the assessment relied upon, as alleged in general terms, is: That the taxes for the fiscal year of 1904 were assessed to persons owning, or claiming to own, or in possession of property on the 1st day of May, and not to those owning, or claiming, or in possession on the first Monday of March, 1904, and that plaintiff's property was so assessed; and it is contended by the appellant that under the constitution and laws of the state, the latter was the proper date. But the case as shown by the more specific allegations of the complaint is as follows: The defendant is a corporation of the sixth class, and by Ordinance No. 72, enacted in pursuance of section 871 of the municipal corporation act (St. 1883, p. 273, c. 49), adopted as the scheme of assessment and taxation for the city the provisions of that act, including and following the section cited, and the provisions of the Political Code concerning revenue, with some changes necessary to make the same applicable to the city affairs, and some others. By section 871 of the former act it is provided that "all taxes assessed," etc., "shall constitute liens on the property assessed from and after the first Monday in March in each year." And by section 3628 of the Political Code it is provided that in the assessment of property "the assessor * * * must assess such property to the persons by whom it was owned or claimed, or in whose possession or control it was at 12 o'clock m. of the first Monday of March next preceding"; and in sections 3629 and 3630 there are corresponding provisions as to the taxpayer's statement of property to be rendered to the assessor. But this ordinance was amended by Ordinance No. 91, of date March 2, 1897, providing that for the words, "first Monday of March," occurring in the sections of the Political Code named, there should be inserted, "first day of May." The form of statement for the taxpayer was changed accordingly, and the statement of appellant appearing in the record conforms to this ordinance.

It is claimed by the appellant that the provision of the latter ordinance is inconsistent with the system established by the constitution and by-laws in this state; and from this it is urged that the assessment was void. But assuming, for the purposes of the decision, that the former proposition is true, the only inference that can be drawn is that the provision in question was void, and that the provisions of Ordinance No. 72 touching this point—which are not open to the objection—continued in force. Hence, to support the appellant's position it must be assumed that the assessment did not conform to the provisions of the original ordinance. But the presumption is that the assessment was regularly made; and, hence, that its actual effect, under section 871 of the municipal corporation act, was to "constitute liens on the property assessed from and after the first Monday in March in each year"; and—leaving out of view the general allegation of the complaint, which is obviously a mere conclusion of law from the specific facts alleged—there is nothing in the record to show that the assessment was otherwise made, unless it be the statement of appellant made to the tax collector, which refers to his ownership on the 1st of May, the date referred to in the void provision of Ordinance No. 91. But this we regard as simply the result of a mistake on the part of the assessor and of the appellant, and as in no way affecting the validity of the assessment. The assessment, therefore, we regard as valid; and, as there is no allegation in the complaint that the plaintiff was not the owner of the property assessed to him on the first Monday of March, we are of the opinion that the demurrer was rightly sustained.

The judgment is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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2 Cal. App. 331

BRILL v. CARSLEY.

(Court of Appeal, Second District, California. Dec. 4, 1905.)

LANDLORD AND TENANT—TERM OF LEASE—AGREEMENT FOR RENEWAL.

Defendant leased from plaintiff premises to be used as a private hotel for the term of one year at a rental of $100 per month. Plaintiff thereafter made extensive improvements which were completed about six months after the tenancy began. Before their completion, he executed an instrument stating that defendant "can have the premises * * * at a monthly rental of $200 as long as she likes. This lease is not assignable or transferable." From the time the improvements were completed, defendant paid a monthly rental of $300 until some time after the expiration of the original lease, when she was served with notice to quit. Civ. Code, § 1943, provides that the hiring of real estate of the character of that in suit is presumed to be for one year, unless otherwise expressed. Section 1945 provides that, if a lessee holds over and the lessor accepts rent from him, "the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one month when the rent is payable monthly, nor in any case one year." *Held*, that the instrument executed by plaintiff, and under which defendant paid additional rental during the original term, did not convert the tenancy into one from month to month, or make it terminable at will by plaintiff after the expiration of the original term, but that at least it was an agreement for a new lease from the time the increased rental commenced for a term to be designated by defendant, which, in view of defendant's remaining in possession and paying the rent thereafter, was presumably for one year, under section 1943.

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by William Brill against Mrs. Nona Carsley. From a judgment for plaintiff on the pleadings, defendant appeals. Reversed.

Rehearing denied by Court of Appeal, January 2, 1906; by Supreme Court, February 2, 1906.

Isidore B. Dockweiler, for appellant. W. C. Batcheller, for respondent.

ALLEN, J. Action for unlawful detainer. Judgment for the plaintiff upon the pleadings, from which defendant appeals.

It appears from the complaint that on May 1, 1902, plaintiff leased to defendant the described premises, as a private hotel, for one year, at a monthly rental of $100; that during the tenancy extensive improvements thereon were made, with defendant's approval, the effect of which was to add 27 rooms to the building, which improvements were completed December 1, 1902. Defendant, after December 1, 1902, paid to plaintiff a monthly rental of $300, and continued so to do until July 1, 1903; that after the payment of the June rental plaintiff served upon the defendant a written notice to quit and deliver up possession of the premises on August 1, 1903, and thereafter, on August 4, 1903, served a three-days' notice to quit, or, in default, that legal proceedings would be commenced to recover possession, with treble rent as damages. Defendant answered, denying that the improvements were made with her consent; and alleging that on September 9, 1902, plaintiff executed to defendant the following instrument:

"This is to certify that Mrs. Nona Carsley can have the premises at 647 S. Grand ave., at a monthly rental $200.00 as long as she likes. Wm. Brill.

"This lease is not assignable or transferable."

And under this agreement defendant averred that she was holding. With the pleadings in this state, on motion duly made, the trial court rendered a judgment for plaintiff upon the pleadings for restitution and treble rent for the months of August, September, and half of October, at the rate of $200 per month—in the aggregate as trebled, $1,500.

We are of opinion that the rendition of this judgment upon the pleadings was error. Under section 1943, Civ. Code, a hiring of real property of the character here described is presumed to be for one year from its commencement, unless otherwise expressed in the hiring. Section 1945, Civ. Code, provides: "If a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one month when the rent is payable monthly, nor in any case one year." The admitted situation of the parties in September, 1902, was this: The plaintiff was making large expenditures upon the property, inceasing the rental value threefold. Under the written lease he could have recovered of defendant only $100 per month for the balance of the term. Harloe v. Lambie, 132 Cal. 136, 64 Pac. 88. The defendant recognized the fast approaching termination of her tenancy, and both parties evidently desired to obtain a benefit from the altered conditions. The instrument executed to accomplish this end is most uncertain. The amount of $200 therein expressed as rental is determined by the subsequent acts of the parties to have meant $200 in addition to the original $100 provided in the lease. When it was to take effect is as uncertain; evidently not from its date, for by the subsequent act of the parties they did not give it effect until December 1st. The stipulation as to the term being "as long as you like," it cannot be well said to have been intended as creating a tenancy at will on December 1st, when the parties by their act gave a part of it effect, for this would have given the plaintiff the right to have ended the lease even before its original termination, which would have been no consideration to defendant for her assumption of increased rental. Nor can it be said that the intention was that it should take effect at the expiration of the existing lease, for one of the changes in the terms of the original lease was as to the rental, and the parties by their acts treated this new agreement as taking effect December 1st, and we may not say that a part was to take effect one day and a part four months thereafter.

In what we have here said we do not desire to be understood as intimating that the written instrument was sufficient to create a tenancy at will, terminable by plaintiff under any circumstances. The probable intent of the parties in the execution and receipt of the written instrument set out in the answer was that it should be treated as a contract to execute a new lease on December 1st for such length of time as the defendant might designate. She seems to have made no designation, and no new lease was made; yet, relying on the terms contained therein, remained in possession after the term of the original lease. This promise and holding over should be sufficient to overcome the presumption of a tenancy from month to month on account of a monthly payment, as provided in section 1945, Civ. Code, which presumption being removed, a tenancy for one year would follow; and the same result would be obtained were we to treat it as an agreement for a new lease on December 1st, the apparently agreed termination of the old lease, for by section 1943, Civ. Code, a hiring without definite terms is presumably for a year. Viewing the answer in any light, the contract therein set out was sufficient, in our opinion, to constitute a defense to the cause of action set out in the complaint, and the motion for judgment upon the pleadings should have been denied and the parties put upon their proof.

Judgment reversed and cause remanded.

I concur: GRAY, P. J.

SMITH, J. I concur in the judgment, and, generally, in the reasoning of the opinion. I am not prepared to say, however, that the agreement of September 9, 1902, set up in the defendant's answer, is not a valid agreement according to its terms. Nor is it necessary in this case to hold the contrary, or to say anything affecting the question.

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2 Cal. App. 288

VALLEY LUMBER CO. v. WRIGHT et al.

MADARY v. SAME.

(Court of Appeal, Third District, California. Nov. 27, 1905.)

MECHANICS' LIENS — TRUST DEED — PRIORITIES.

Code Civ. Proc. § 1186, in relation to mechanics' liens provides that they shall be preferred to any lien which may have attached subsequent to the time when the building was commenced. *Held*, that where the owner of land gave a note for a loan secured by a deed of trust on the land, the same being properly recorded before any work was done, whereby the lender became obligated to make the advances, and the sums advanced were disbursed for labor and materials, the lien of the deed was superior to mechanics' liens, though the payments by the lender did not commence until after the work commenced.

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by the Valley Lumber Company against George A. Wright and others, consolidated with an action by M. R. Madary against George A. Wright and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

L. L. Cory, for appellants. O. B. Carter, for respondents.

CHIPMAN, P. J. Mechanics' and materialmen's liens. The only question involved in this appeal is whether plaintiffs' liens are superior to the lien of the trust company, defendant, as trustee, to secure certain moneys borrowed from the loan association, defendant, by defendant Wright. The trial court held the lien of the deed of trust to be superior to the mechanics' lien and gave judgment accordingly. No question arises upon the validity of plaintiffs' liens, and the appeal is from that part of the judgment only which adjudges their lien to be subordinate to the claim of the loan association. Defendant Wright was the owner of the real estate involved in the action, and had agreed with the loan association for a loan of $1,000, with the understanding that it was to be used in the erection of a building and to be paid as the work progressed, and the building to be part of the security. On April 1, 1902, Wright and wife executed the note and deed of trust on the property to secure payment of the same to the trust company, as trustee for the loan association. The trust deed was duly acknowledged and recorded on April 3, 1902, before any labor was performed on the building and before any material was commenced to be furnished. The loan association, through its agent, Waggoner, had notice that plaintiffs had commenced to furnish material prior to the actual payment of any of the borrowed money by the loan association. The first payment of $500 was made April 12, 1902, and the balance, according to the agreement, was paid May 7, 1902, and both sums were disbursed, shortly after the payment, among various persons, including plaintiffs, for labor and material.

Both parties rely upon section 1186 of the Code of Civil Procedure. "The liens provided for in this chapter are preferred to any lien, mortgage or other incumbrance which may have attached subsequent to the time when the building, improvement or structure was commenced or materials were commenced to be furnished." Respondents contend that they have brought themselves strictly within this section, while appellant's contention is "that the deed of trust had no life or validity until such time as some of the money for which the security was given was actually advanced or paid." Appellants call attention to Avery v. Clark, 87 Cal. 619, 25 Pac. 919, 22 Am. St. Rep. 272, holding that the mechanic's lien will take precedence of any lien, mortgage, or other incumbrance recorded subsequently to the time when the building materials were commenced to be furnished, and contend that the present case is analogous in principle to Withers v. Little, 56 Col. 370. In that case the mortgage of defendant Jacks was prior in date, but subsequent to plaintiff's mortgage in recordation, and plaintiff had no knowledge of Jacks' mortgage until recorded. But it did not appear that plaintiff paid or advanced any money when he took his mortgage, and the court said, "until this was done, he was no more than a volunteer, and the security executed to him could not outrank the prior security made to Jacks. Although the plaintiff was a purchaser without notice, he was not a purchaser for value, and his conscience was as much bound by the prior equity of the defendant Jacks as were the consciences of his mortgagors. In fact, he occupied no better position than his mortgagors." The judgment of the court, on petition for rehearing, was modified and the case sent back for a new trial on this issue raised by Jacks and not found upon by the trial court. However correct the principle thus stated, it formed no part of the case as decided, and what result came out of the new trial we do not know. It is well settled that a recorded deed of trust or mortgage takes priority over a lien for materials commenced to be furnished after the mortgage or deed of trust has been recorded. Williams v. Santa Clara M. Co., 66 Cal. 193, 5 Pac. 85; Tapia v. Demartini, 77 Cal. 383, 19 Pac. 641, 11 Am. St. Rep. 288.

The real question is whether there was only a deed of trust in form, without force or effect as to plaintiffs (which is their contention), when they began to furnish materials, as claimed by plaintiffs. Plaintiffs rely upon Tapia v. Demartini, supra; Hall v. Glass, 123 Cal. 500, 56 Pac. 336, 69 Am. St. Rep. 77, and some cases in other jurisdictions. In the first of these cases it was decided that a mortgage made in good faith to cover future advances is valid, not only between the parties thereto, but as against subsequent purchasers or incumbrances if properly recorded. It was also held that as against subsequent incumbrances of which the mortgagee has actual notice the lien of the mortgage cannot be enforced for advancements made after such notice; but, if the mortgage on its face shows that it is to stand as security for future advances, the amount of the latter need not be set out, and subsequent incumbrances are, by such mortgage, put upon inquiry and must ascertain the extent of the lien, or suffer the consequences, and that the foregoing rules apply to mechanics' liens. We do not think the principles here laid down are necessarily confirmatory of appellants' contention in the present case. Here the note and mortgage were executed for a definite amount, and there was an agreement on the part of the loan association to pay to Wright this amount, with the further understanding that the money should be used for the construction of the building, which latter was to be for the further security of the loan. The loan association was under an enforceable obligation to furnish this money, and the execution of the note and mortgage was sufficient consideration for the agreement. Savings Bank of Sacramento, California, v. Asbury, 117 Cal. 96, 48 Pac. 1081. The money was, in fact, paid and went into the building, and appellants, among others, got the benefit of it. There is a marked distinction recognized by the cases between advances which are optional with the mortgagee and advances which are agreed to be made, i. e., obligatory, and the amounts definitely fixed. This distinction is stated in Savings and Loan Soc. v. Barrett, 106 Cal. 514, pp. 532, 533, 39 Pac. 922, where the court seems to regard Tapia v. Demartini, supra, as stating the rule as to optional advances, as also does Hall v. Glass, supra. In no proper sense can the money which the loan association agreed to furnish, and for which the note and mortgage were given, be said to be future advances as advances are regarded in the cases. In no other way could the mortgagee be secure in his loan on lots which, without the building, would be insufficient security, except by some such agreement as is shown here. It appears from the evidence that the money was paid directly to different persons by the agent of the loan association on bills first approved by Wright, and all this time they had constructive notice of the recorded mortgage given to secure the note. There can be no doubt but that the record of the mortgage was in strict compliance with section 1186 of the Code of Civil Procedure and was constructive notice to defendants who thereafter furnished materials. While the lien law is to be liberally construed in furtherance of the purposes for which the lien is authorized, the lien is purely of statutory creation and has no existence except by virtue of the statute. If equitable considerations are to be indulged in determining the respective rights of parties situated as are these litigants, it would seem to us that equities are strong in favor of plaintiffs.

At the oral argument Mr. Cory, speaking for appellants, said: "I will admit that if it appeared here that at the time this deed of trust was made and put of record that the building and loan association was under a legal obligation to loan that thousand dollars, and in advancing the money afterwards was simply complying with that legal obligation, which Mr. Wright could enforce, why that would raise a different question." But he denied that there was anything in the record supporting that theory. The answer of the trust company alleges that before any labor was done on the building, or materials were commenced to be furnished, the loan association "loaned to said George A. Wright and Linnie Wright, his wife, the sum of $1,000.00, which they agreed to pay" and which was evidenced by their promissory note, and to secure its payment they executed and delivered to the trust company a deed of trust conveying the title to the real property in question. The court found the facts substantially as alleged. This deed of trust is made part of the complaint. The deed of trust recites that "whereas the said parties of the first part have borrowed of the party of the third part, the sum of $1,000.00 and agreed to pay the same with interest and premium according to its terms," etc. (setting forth the note), and "whereas said G. A. Wright has subscribed 15 shares of the capital stock of said building and loan association, of the par value of one hundred dollars, and has agreed to pay for said stock in monthly installments of six dollars, payable in advance until said shares are fully paid and matured, as provided in the by-laws, and has pledged said stock to said third party [the trust company] as security for the payment of said loan. * * * Now therefore in consideration of the aforesaid indebtedness," etc., reciting the making of the note, etc., the first parties convey the property, following which are numerous conditions with which the first parties agree to comply, "and these trusts shall be and continue as security to the parties of the second and third part for the repayment of the money so borrowed by the parties of the first part," etc. We entertain no doubt but that the correlative obligation to pay this money to Wright arose when he executed and delivered his note and agreed to pay it, and secured payment by conveying the legal title to his land to the trust company. He had performed every condition of the agreement for the loan on his part to be performed, and there was, to our view of the matter, a clear legal obligation on the part of the loan association to perform its part by furnishing the money which it did soon thereafter. This obligation was not optional with the association, but was obligatory, and we have so regarded it in this opinion.

Respondent cites the case of Home Savings & Loan Association v. Burton (Wash.) 56 Pac. 940, which arose under a statutory provision identical with our section 1186, and the facts are similar in all material respects, if we are right in our conclusion that the defendant loan association was under a legal obligation to pay the money. The case above cited shows careful consideration and presents a very full review of the authorities. The precise question raised here arose in that case and was fully discussed and decided adversely to appellants' contention. The reasoning of that case, amply supported as it is by authorities cited, is satisfactory and should rule this case. It has been held generally that a lien secured by mortgage, deeds of trust, or otherwise, for advances made or to be made for the construction of a building or other improvement on land, is ordinarily superior to a mechanic's lien subsequently attaching, although some of the money may have been advanced after the lien attached. 20 Am. & Eng. Enc. of Law (2d Ed.) p. 485. It was so held in New Jersey prior to the statute of 1879 (P. L. p. 77). Platt v. Griffith, 27 N. J. Eq. 207. But since the earlier cases the statute referred to has given to mechanics and materialmen a superior lien to that of a mortgage executed to secure future advances. Mutual Life Ins. Co. v. Walling et al., 51 N. J. Eq. 99, 26 Atl. 453. Under the humane provisions of our Constitution and laws favoring protection to laborers and materialmen, there would seem to be much in the New Jersey statute which should commend it to our Legislature.

In the present case, however, we feel constrained, by the state of the law and decisions, to affirm the judgment of the trial court, and it is so ordered.

We concur: BUCKLES, J.; McLAUGHLIN, J.

149 Cal. 1

MITAU et al. v. RODDAN et al. (Sac. 1,242, 1,243.)

DRESCHER v. SAME.

(Supreme Court of California. March 16, 1906. Rehearing Denied April 9, 1906.)

1. PARTIES—TRUSTEES OF EXPRESS TRUST.

Under Code Civ. Proc. § 389, requiring all persons interested in the subject-matter of the litigation to be made parties thereto, in an action relating to a trust deed in which there is a dispute between the beneficiaries, the beneficiaries, as well as the trustees, are necessary parties, notwithstanding section 369, authorizing trustees of an express trust to sue without joining with them the persons for whose benefit the suit is prosecuted; this section applying only to suits by the trustees affecting the trust property or rights under it against strangers.

2. SAME — DEFECT OF PARTIES — WAIVER OF OBJECTION.

Under Code Civ. Proc. § 389, providing that when a complete determination of a controversy cannot be had without the presence of other parties, the court must then order them to be brought in, the failure to bring in necessary parties is not waived by failure to raise the point by demurrer or answer, notwithstanding section 434, providing that if no objection be taken to a pleading by demurrer or answer, the defendant must be deemed to have waived it, excepting only the objection to the jurisdiction and the objection that the complaint does not state a cause of action.

3. APPEAL — ASSIGNMENTS OF ERROR — MATTERS CONSIDERED.

Under an assignment that the court erred in finding that certain sums were due from the defendants to the plaintiffs, the ruling of the court that the indebtedness involved was admitted by the pleadings is not involved; the assignment going only to the sufficiency of evidence to sustain the finding.

4. SAME—ESTOPPEL TO ALLEGE ERROR.

Where, after the trial court ruled that an indebtedness of defendants to plaintiffs was admitted by the pleadings, plaintiffs nevertheless offered evidence to prove the indebtedness, which was objected to by defendants on the ground that the indebtedness was not denied by the pleadings, the defendants cannot, on appeal, raise the point that a finding of the indebtedness by the court was not sustained by the evidence.

5. PLEADINGS—ADMISSIONS.

Where an action involved a contract for the sale of hops for several successive years, and the complaint charged a breach for the year 1895, but allowed a credit for a certain amount of hops for that year, but the defendants alleged that the amount so delivered was to be credited on another year at a higher value, and the court found in favor of the defendants on this contention, they cannot complain of the court's finding of an entire breach of the contract for 1895 as being contrary to the admission in the complaint.

6. CONTRACTS—PRACTICAL CONSTRUCTION BY PARTIES.

Where a contract for the sale of hops for several successive years, to be grown in the seller's hop yard, provided that the seller would deliver either first, middle, or last pickings of his respective crops, as might be desired or called for by the buyer, and for two years the seller notified the buyer when the crops were ready for delivery, whereupon he went on the premises and inspected the entire crop and made selections therefrom to fill the contract, this constituted a practical construction of the contract, showing that the buyer had the right to make such inspection.

7. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action in which a buyer of hops claimed damages for a breach of contract by the seller, error in the admission of evidence of a custom under which a buyer had the right to inspect the hops on the premises where grown before taking delivery was immaterial, where a practical construction of the contract by the parties showed that the buyer had the right to such inspection.

8. TRUSTS—COMPENSATION OF TRUSTEES—ATTORNEY'S FEES.

Under Civ. Code, § 2273, providing that a trustee is entitled to repayment out of the trust property of all expenses actually and properly incurred by him in the performance of his trust, where an action commenced by the trustees under a deed of trust was found by the court to be necessary, the trustees were entitled to an allowance for attorneys' fees, though there was no provision therefor in the trust deed, and though the main litigation was between the beneficiaries on one side and the defendants on the other.

9. APPEAL — DISPOSITION OF CAUSE — REVERSAL.

Where, on appeal, the only error found was that necessary parties were not brought in, but the trial had proceeded on the theory that these parties were before the court, the judgment will be reversed, but a new trial will not be required on the issues already tried, and judgment will be directed to be entered in accordance with the original finding except as to such issues as the parties brought in may raise by their pleadings.

Department 2. Appeals from Superior Court, Yuba County; E. A. Davis, Judge.

Actions by H. Mitau and others and by P. C. Drescher against J. W. Roddan and others. From judgments in favor of the plaintiffs, defendants appeal. Reversed.

W. H. Carlin and Hiram W. Johnson (Charles W. Slack, of counsel), for appellants. Albert M. Johnson and Devlin & Devlin, for respondents.

LORIGAN, J. Three appeals are taken in these cases, all presented upon one bill of exceptions, and will be disposed of together. The plaintiffs in one case are H. Mitau, E. A. Casey, and P. C. Drescher; in the other P. C. Drescher is the sole plaintiff. The defendants and appellants in both cases are J. W. and W. B. Roddan and Louis A. and E. C. Horst.

The first action was brought by Mitau and Casey, as trustees in a deed of trust, and P. C. Drescher, against the Roddans and Horsts. The Horsts were made defendants, for the reason that they had, subsequent to the execution of the deed of trust, bought the interests of the Roddans in the property affected thereby. It appears that for several years prior to 1896 the Roddans were hop farmers on lands owned by them near Wheatland, in Yuba county, and the plaintiff Drescher was a member of the partnership firm of Mebius & Drescher, composed of himself and Ludwig Mebius, which firm was engaged in the business of buying and selling hops. In July, 1896, the defendants Roddan executed to the plaintiffs Mitau and Casey, as trustees, parties of the first part, and

Drescher, as party of the third part, a deed of trust, by which they conveyed to Mitau and Casey, as trustees, their land in Yuba county. This deed was given to secure, in the first instance, the payment of a promissory note for $31,400 and interest, executed by the Roddans in favor of Drescher, together with further advances. It was also expressly given as security for all indebtedness of any kind or description—all claims, demands, indebtedness, and rights or causes of action—from whatever source arising, which then or thereafter during the continuance of the trust might exist in favor of, or become due to, Drescher or to the firm of Mebius & Drescher. While the trust deed ran in favor of the firm of Mebius & Drescher, that firm was not named in the instrument as a party thereto. The deed of trust contained also certain provisions making it a chattel mortgage, not to Mitau and Casey, but to Drescher individually, on all crops to be grown on the lands described in it during the continuance of any part of the indebtedness referred to. The complaint alleged that default had been made by the Roddans in the payment of the note to Drescher of $31,400, and that they were also indebted to Mebius & Drescher for merchandise sold and money advanced, evidenced by two promissory notes executed by them, aggregating, with interest, respectively, $8,258.77 and $13,485.10. It was further set forth in the complaint that the Roddans, individually and jointly, had entered into several agreements for the sale of their hop crops to Mebius & Drescher; these contracts covering the years consecutively from 1895 to 1899; that some of these contracts had been broken by the Roddans, and that the firm of Mebius & Drescher had suffered damages therefrom in large amounts. The complaint further alleged that Drescher and Mebius & Drescher, the beneficiaries under such trust deed, had, prior to the commencement of the action, applied to the trustees to sell the property mentioned in the trust deed, in order to accomplish the objects therein prescribed, and that the plaintiffs Mitau and Casey, as trustees, were in doubt as to the amounts due to Drescher and to Mebius & Drescher; that it was in dispute as to how much was due upon such indebtedness, as a considerable part of it was unliquidated; that a full accounting would be necessary to determine the amount, and that the Horsts, as successors of the Roddans, disputed the validity of certain contracts with Mebius & Drescher, upon which that firm claimed to be entitled to damages for their breach; that such trustees desired the advice of the court as to the manner in which said trusts should be carried out and performed; that they did not feel called upon to exercise, without the aid of the court, the power of sale conferred by the deed of trust, nor did they feel safe in proceeding to sell said property until after the amount of the indebtedness should have been ascertained. The prayer of the complaint was, among other things, that an accounting be had between Drescher, and between Mebius & Drescher and the defendants J. W. Roddan and W. B. Roddan and each of them; that the amounts due on said promissory notes be fixed, the amount of damages, if any, sustained by Mebius & Drescher by reason of the breach of the several contracts mentioned in the complaint be ascertained and determined, and that whatever amounts might be found due be declared to be secured by said deed of trust. The matters and allegations so far referred to pertain to the first action upon the trust deed.

In the second action—Drescher v. Roddan et al.—Drescher alone was plaintiff, and the Roddans and Horsts were defendants. That suit was brought by Drescher under the chattel mortgage provision of the trust deed to which we have already called attention. The complaint in that action contained the same allegations of indebtedness of Roddans to plaintiff and the firm of Mebius & Drescher; made substantially the same claim for damages on behalf of Mebius & Drescher against the Roddans, and prayed for an accounting between the defendants Roddan and the firm of Mebius & Drescher similar to that demanded in the action upon the trust deed, and for a foreclosure of the chattel mortgage for the amount found due upon such accounting as a lien upon the hop crops mentioned therein. Defendants filed a joint answer. No issue was made as to the amount due on the promissory note to P. C. Drescher, nor did the Roddans deny the indebtedness evidenced by the two promissory notes executed in favor of Mebius & Drescher. The Horsts, however, denied this latter indebtedness, and all the defendants denied any liability for damages by reason of alleged breaches of the contracts between the defendants Roddan and Mebius & Drescher set forth in the complaint in both actions, and averred that the Roddans had not been given proper credit by Mebius & Drescher for the purchase price of hops delivered to them under the contracts.

Judgments were rendered in both cases in favor of plaintiffs to the effect, among other things, that defendants Roddans were indebted to Mebius & Drescher in the sum of $69,485.32. Appeals are taken therefrom by the defendants; one bill of exceptions being by stipulation presented and used on both appeals. In addition to the appeals taken by the defendants, an appeal is also taken by the plaintiffs from that portion of the judgment in the action relative to the trust deed which refuses to allow attorney's fees to the trustees in the prosecution of such action. That appeal will be considered later; present attention being given to the merits of the appeals taken by the defendants. The points—four in number—urged by the defendants for a reversal are common to both their appeals, and will be discussed as they are presented.

1. The first and principal point relied on by defendants for a reversal is that the court erred in trying and deciding the cases without the presence of the firm of Mebius & Drescher as parties to the action. This firm was neither made a party plaintiff or defendant in the suits. Before the trial of these actions was commenced, counsel for defendants requested the court to bring in of its own motion, or to require the plaintiffs to bring in, either as parties plaintiffs or defendants, the copartnership of Mebius & Drescher, as a necessary party to a complete determination of the rights of all the parties to the controversy, and for that purpose to direct the plaintiffs to file an amended or supplemental complaint, as the court might deem proper. This motion was denied by the court; defendants excepted, and now urge the ruling of the court as error. We are satisfied that the motion of the defendants should have been granted. The principal relief sought in the actions, in fact, the main reason which justified their being brought at all, was the necessity of obtaining an accounting. It is the general rule in equity, continued in force by the provisions of the Code of Civil Procedure, § 389, that all who are interested in the subject-matter of a litigation should be made parties thereto, in order that complete justice may be done, and that there may be a final determination of the rights of all parties interested in the subject-matter of the controversy. McPherson v. Parker, 30 Cal. 455, 89 Am. Dec. 129; Young v. Hoglan, 52 Cal. 466; Wright v. Ward, 65 Cal. 525, 4 Pac. 534; Code Civ. Proc. § 389. In an action such as is brought here, which directly involves a general accounting between the beneficiaries under a trust deed, this rule must, of course, necessarily apply. No complete disposition of the matter properly in controversy—a settlement of the claims in dispute between Mebius & Drescher and the defendants—could be made without the presence of the former as parties to the action. We do not, however, understand respondents to contend that Mebius & Drescher were not necessary parties. Their contention is that as Mitau and Casey were trustees of an express trust for all the beneficiaries, they were authorized and empowered by section 369 of the Code of Civil Procedure to maintain this action and represent Mebius & Drescher as beneficiaries in any proceeding relative to the trust, including the dispute between Mebius & Drescher and the other beneficiaries as to the amount of indebtedness for which the trust property was liable as security; that they did so represent them, and that it was not necessary to join that firm directly as a party to the action. It is further contended that as no demurrer was interposed on the ground of non-joinder, or defective parties, and as the point was not raised in the answer of defendants, it must, under section 434 of the Code of Civil Procedure, be deemed to have been waived.

As to the first point. While it is true that by section 369 of the Code of Civil Procedure the trustees of an express trust may sue without joining with them the persons for whose benefit it is prosecuted, this section only applies to suits by the trustees, affecting the trust property or rights under it against strangers. It has no application where a suit is brought by the trustees which involves their relations with the beneficiaries, or which involves the relations of the beneficiaries between themselves. The Code rule is simply the old equity rule, which recognizes the exception we have mentioned. The rule and the exception are stated in Story's Eq. Pleading (10th Ed.) p. 204, in note B, that, "when a suit brought by a trustee to recover the trust property does not give rise to any conflict of interests between him and the cestui que trust, and does not involve an investigation as to their relations with each other, the cestui que trust are not necessary parties." To the same effect are Horsley v. Fawcett, 11 Beav. 565; Boyden v. Partridge, 2 Gray (Mass.) 190; Ashton v. Atlantic Bank, 3 Allen (Mass.) 217; Swift v. Stebbins, 4 Stew. & P. (Ala.) 447; Carey v. Brown, 92 U. S. 172, 23 L. Ed. 469. The court, in Carey v. Brown, supra, after declaring the general rule that all parties in interest were required to be joined, says: "To this rule there are several exceptions. One of them is that where the suit is brought by the trustee to recover the trust property, or to reduce it to possession, and in no wise affects his relations with the cestui que trust, it is unnecessary to make the latter parties." In the Estate of Straut, 126 N. Y. 212, 27 N. E. 259, in the matter there under consideration, it was held that the beneficiaries to the trust were not necessary parties, but it was further said that "if the purpose of the action had been, among other things, to determine the rights as between the beneficiaries themselves, or as between the trustees and the beneficiaries, then it would have been necessary to bring them in as parties." This necessity of making all persons parties in actions under the trust, where the relation of the trustees and beneficiaries are in question, or rights of the beneficiaries as between themselves are involved, is, in effect, the rule laid down in this state in McPherson v. Parker, 30 Cal. 455, 89 Am. Dec. 129, and in O'Connor v. Irvine, 74 Cal. 444, 16 Pac. 236. In view of these authorities, the claim of respondents that Mebius & Drescher were before the court by Mitau and Casey, their trustees, as effectually as if they had been directly brought in as parties to the suit, is untenable.

Nor is there any force in the further claim that the objection that Mebius & Drescher were not made parties was waived because not raised by demurrer or answer. It is provided by section 389, Code Civ. Proc., that: "When a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in." This provision of the statute is mandatory. When, upon the application by defendants, it appeared to the court, as it necessarily did from the pleadings, that it was essential to a full and complete determination of the controversy before it, that Mebius & Drescher should be made parties, it was the imperative judicial duty of the court to order them brought in, notwithstanding no objection to their absence had been raised by demurrer or answer. It was not a matter of discretion but of duty for the court, even upon its own motion, to require their presence. In O'Connor v. Irvine, 74 Cal. 442, 16 Pac. 236, this same matter was before this court for consideration, and it was there said: "If the necessary parties to a full determination are not before the court, it is the duty of the court on its own motion, to order them brought in, and this, although the defendants in the action have omitted to raise the objection of defective parties by demurrer or answer. The failure of the court so to do is fatal to the judgment." See, also, Winter v. McMillan, 87 Cal. 265, 25 Pac. 407, 22 Am. St. Rep. 243; Pomeroy, Code Rem. § 419.

Upon the oral argument in this case the attorneys for respondents presented, and, by permission of the court, filed, a stipulation signed by them, and an agreement executed by Mebius & Drescher, consenting to be bound by the judgment as entered, and waiving any claim for further amounts than were allowed them in such judgments, and agreeing to receive the amounts awarded such firm by the judgments, in full satisfaction of any indebtedness, obligation, or cause of action secured by said deed of trust, and asked that in case the judgments were reversed, that such reversals be made, not absolute, but conditional only; that such judgments be reversed unless, within a specified time, respondents furnish to appellants and deliver to them, upon payment of the amounts found due Mebius & Drescher by the judgments the written waiver of said partnership firm of any further claim against appellants upon the indebtedness secured by said deed of trust. We mention this offer here in connection with our discussion of the point that Mebius & Drescher should have been made parties to the action, as the proffered stipulation and consent bear directly upon that matter. We will give it no further attention at this time, but will revert to it later, after disposing of the other points raised on this appeal.

2. As a second count for a reversal, it is urged by defendants that the court erred in finding that the defendant J. W. Roddan was indebted to Mebius & Drescher in the sum of $8,258.77 and interest, aggregating $9,467.82, and that W. B. Roddan was indebted to said firm in the sum of $12,321.80 and interest, aggregating $14,128.52. The indebtedness so found by the court was that represented by the two promissory notes executed by the Roddans to the firm of Mebius & Drescher, and which we have heretofore mentioned. The complaint not only set up the notes, but set forth the various items of cash and merchandise—dates and amounts—furnished by Mebius & Drescher to the respective Roddans, which in the aggregate constituted the principal sums specified in said notes. In their answer (jointly made), the Roddans, for failure to deny the alleged indebtedness, admitted it; the Horsts denied it upon information and belief. The right of the Horsts to question the indebtedness arose under an agreement between them and the Roddans accompanying their purchase of the property after the execution of the trust deed, and subject to it. In that agreement the Horsts bound themselves to indemnify and save harmless the Roddans from all liability for any indebtedness secured by the trust deed, but at the same time it was expressly stipulated that the genuineness and justness of any such indebtedness was in no way admitted. Upon the opening of the trial, on submission of that proposition to the court, it was ruled that this indebtedness was admitted by the pleadings, notwithstanding the denial on information and belief of the Horsts. Assuming this ruling to have been error, it is not involved in the point made by appellants, which we are now considering; that goes only to the sufficiency of the evidence to sustain the finding attacked; it being in fact insisted by the appellants that there was no evidence at all to support this finding. It appears, however, that although the court had previously ruled that the indebtedness claimed was admitted by the pleadings, respondents nevertheless proceeded to and did introduce ample evidence to prove it. By making such proof opportunity was thus offered appellant, notwithstanding the previous ruling of the court, to also introduce evidence upon the same subject of indebtedness to meet that offered by the respondents. No evidence was offered upon their part, nor did they attempt to offer any. On the contrary, while respondents were making proof and inquiring as to several of the items of the indebtedness disputed, objection was made by appellant to the introduction of such evidence, on the ground that the indebtedness was not denied by the pleadings. This was, in effect, an admission of the indebtedness claimed, even if the proof actually offered was not ample to support the finding, and precludes the appellants from now raising any question on that subject.

3. The defendants next contend that the judgment rendered was erroneous in that it included in the sum of $2,400 damages al-

lowed for a breach of one of the contracts for the sale of hops made by the Roddans with Mebius & Drescher, dated May 7, 1895, an amount of $1,129.20, contrary to the express allegations and admissions of the pleadings. This latter amount represents the value of 18,820 pounds of hops at 6 cents per pound. Plaintiffs allege in their complaint that this quantity of hops was received by Mebius & Drescher under a contract with the Roddans of May, 1895, and their value at 8 cents per pound, as specified in that contract—$1,505.60—was credited on the general indebtedness of the Roddans to Mebius & Drescher; that this was the only delivery under that contract, which called for a delivery of 40,000 pounds, and they asked damages for the breach of the contract. Defendants denied that only this quantity of hops of that value was received by Mebius & Drescher on that contract, and, in effect, averred that large quantities of hops had been received on the several contracts set forth in the complaint of the value of $2,693.86. One of the contracts mentioned in the complaint, but upon which plaintiffs claimed no damages, was a contract of 1892. In this contract the value of hops to be delivered under it was fixed at 13 cents per pound. The court found in favor of defendants on the issue raised; that this 18,820 pounds of hops, together with some 9 bales, were delivered to Mebius & Drescher under the contract of 1892, and that defendants were entitled to the credit they asked of $2,693.86 therefor. As to the contract of 1895, the court found a total breach and awarded plaintiffs damages at the rate of 6 cents per pound on 40,000 pounds of hops, being the difference between the contract price of 8 cents and the market price of 14 cents, amounting to $2,400.

Appellants' claim is that as the plaintiffs admitted in their complaint the receipt of 18,820 pounds of hops under the contract of 1895, the court erred in including that amount in the award of damages for the breach of that contract. This contention of appellants would be entitled to more particular consideration if they had let the allegation as to the delivery of this quantity of hops under the contract of 1895 stand unchallenged. It is insisted now that they did so. As we construe the pleadings in this respect, however, we think that the issue made on this point amounted to more than a question whether plaintiffs had received more than 18,820 pounds of hops on the contract of 1895 at the value stated; that the issue actually raised and the one to which the evidence under it was addressed was upon which contract should this 18,820 pounds of hops be applied and what was their value; plaintiffs alleging that they should be applied on the contract of 1895 at the valuation per pound fixed thereby; the defendants averring that they were to be applied on a contract of 1892 and at a larger valuation. In this view of the issue the court found that this 18,820 pounds of hops were not to be applied upon the contract of 1895, but upon that of 1892, as it was claimed that they should be in the averment in defendants' answer. The disputed application of this quantity of hops having been settled in favor of defendants and credit given them therefor under the contract of 1892 left the contract of 1895 for the breach of which plaintiffs claimed damages entirely unfulfilled, and the court properly awarded damages on that basis. This was entirely equitable, and we are satisfied there was no admission in the pleadings which did not justify the judgment.

4. The last point made by appellants is that the court erred in admitting, upon an alleged breach of one of the contracts in question, evidence of a custom prevailing generally in the hop growing region of Wheatland, where the crops in dispute were raised, under which a buyer had the right to examine and inspect the hops upon the premises where grown before taking delivery thereof. Under the finding in the case, however, we think this error, if error at all, was immaterial. By a written contract of May, 1895, W. B. Roddan agreed with Mebius & Drescher for the years 1895 to 1899 inclusive, to sell them annually 40,000 pounds of a choice quality of hops to be grown on his hop yard at Wheatland, and to deliver in fulfilling this contract "either first, middle, or last pickings of his respective crops, or part of each, as may be desired or called for by the party of the second part." The deliveries were to be made by Roddan as the hops might be ready during the months of August, September, and October of each year; 10 days' notice to be given to Mebius & Drescher before he would tender delivery; such delivery to be made at the depot in Wheatland. The contract further provided that in the event of Roddan neglecting or willfully injuring the crop of hops by improper care in picking, drying, or baling, or if the quality intended for delivery should be inferior to what the contract called for, Mebius & Drescher would nevertheless have the privilege of taking them at a reduction in the price equal to the difference in value between such hops and those called for in the contract.

It is insisted by respondents that a reasonable construction of these provisions of the contract itself indicates that a right of inspection was given to Mebius & Drescher; that the option accorded them of making a choice of either first, middle, or last pickings of the hops as stated, or the right to exercise their option of taking the hops, even if not of the quality described in the contract, or not properly picked, cured or baled, could not be exercised without an inspection; and that as the right was thus given by the contract, admission of evidence of a customary right of inspection also was harmless. There is much of force in the position taken by respondents as to the meaning of these terms of the contract; whether, reasonably construed, they did not extend the right of inspection. While the contract does not directly confer any right of inspection, we think that the terms which we have particularly referred to, at least, fairly raise a question whether Mebius & Drescher were not given, under a reasonable construction of them, such a right. We do not find it necessary, however, to enter into any consideration of the construction to be placed by us on the contract in this particular, because it appears from the findings of the court, which were unchallenged, that the parties themselves placed a practical construction on it, which is controlling. The trial court found, with reference to the contract in question, that in the years 1895 and 1896 Roddan notified Mebius & Drescher when the crops for those years were ready for delivery; that thereupon Mebius & Drescher, within a time satisfactory to Roddan, went on the premises and examined and inspected his entire crop, and made selections therefrom to fill their contract; that the hops so inspected and selected were marked and stamped by Mebius & Drescher so as to identify and select them from the remainder of the crop, and thereafter Roddan hauled to the railroad depot at Wheatland the hops thus selected and accepted. The same course was pursued by the parties in August, 1897, as to a portion of the crop ready for delivery at that time, in partial fulfillment of the entire quantity to be delivered that year. As to the portion of the crop to be delivered in September, 1897, Roddan wrote Mebius & Drescher, early in that month, that it was baled, to come and inspect it and make their selection, but when, towards the end of September, they went to do so, Roddan had already sold the crop to the Horsts, and all of them refused to allow Mebius & Drescher to make any inspection or to take any delivery whatever under the contract.

It will be thus observed that from the very beginning, and during the years while the terms of the contract were being harmoniously carried out by the parties, and up to the very month of the repudiation of the contract by Roddan and the Horsts, the construction placed upon it by both parties to it was that Mebius & Drescher had the right of inspection. This was a practical construction placed upon the contract by the parties themselves, which renders it immaterial to consider what might be the literal construction of its terms. Parties to a contract have a right to place such an interpretation upon its terms as they see fit, even when such an interpretation is apparently contrary to the ordinary meaning of its provisions. And in all cases where the terms of their contract, or the language they employ, raises a question of doubtful construction, and it appears that the parties themselves have practically interpreted their contract, the courts will follow that practical construction. It is to be assumed that parties to a contract best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to his own interests, and to insistence on his rights, and that whatever is done by the parties contemporaneously with the execution of the contract is done under its terms as they understood and intended it should be. Parties are far less liable to have been mistaken as to the intention of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to law, and one of them then seeks a construction at variance with the practical construction they have placed upon it. The law, however, recognizes the practical construction of a contract as the best evidence of what was intended by its provisions. In its execution, every executory contract requires more or less of a practical construction to be given it by the parties, and when this has been given, the law, in any subsequent litigation which involves the construction of the contract, adopts the practical construction of the parties as the true construction, and as the safest rule to be applied in the solution of the difficulty. Mayberry v. Alhambra, etc., Co., 125 Cal. 446, 54 Pac. 530, 58 Pac. 68; Keith v. Electrical Engineering Co., 136 Cal. 181, 68 Pac. 598. In the case at bar the parties placed a practical construction upon the contract from the very beginning in favor of the right of inspection by Mebius & Drescher. They so construed it for a number of years, until Roddan disposed of the crop which he had written to Mebius & Drescher to come and inspect, and the question of construction was practically raised by strangers to the contract—the Horsts. Within the rule as above announced, the parties were bound by such practical construction, and, as that construction gave Mebius & Drescher the right of inspection, it was inconsequential error, if it was error at all, to admit evidence of a right also by prevailing custom to do so. This disposes of all the points made by defendants upon their appeals.

Now, as to the appeal by plaintiff which is taken from that portion of the judgment refusing to make any allowance to the trustees for attorneys' fees. The court seems to have denied the allowance because the trust deed did not expressly provide for attorneys' fees, and also because the litigation was really between Mebius & Drescher on one side, and the defendants on the other. The court, however, found that the action commenced by the trustees was necessary. We will not analyze the terms of the contract to ascertain whether it expressly provided for attorneys' fees in this action or not. The trustees were not concluded from allowance if it did not. It is provided by section 2273 of the Civil Code that: "A trustee is entitled to the repayment out of the trust property of all expenses actually and properly incurred by him in the performance of his trust." And the general rule is stated as follows: "Whenever necessary expenses are incurred in the administration of the trust, the trustee is entitled, without any express provision to that effect, to make the payments required to meet the necessary expenses out of the funds in his hands belonging to the trust. It is the duty of a trustee to assert and protect, diligently and faithfully, the interests of the beneficiaries, and if, in fulfilling that duty, he becomes involved in necessary litigation, he will be allowed in his accounts a reasonable amount expended for legal advice, counsel fees, and other expenses." 28 Am. & Eng. Ency. of Law (2d Ed.) 1089, 1090, 1091.

Our attention is not called to any authority in this state or elsewhere holding to the contrary. As the court found that it was necessary for the trustees to bring the action, they were entitled, under the Code and the general rule, to expenses, including attorneys' fees, incurred in discharging their duty in that regard under the trust. Notwithstanding the court finds the action was properly brought by the trustees, its refusal to allow attorneys' fees seems to be based also on the fact that the real litigation was between Mebius & Drescher on the one hand, and Roddan and Horsts on the other. But this afforded no reason for refusing any allowance to the trustees. They were compelled to bring the action that these disputes might be settled, and the trustees directed by the court how to execute the trust as to the conflicting and complicated matters involved under it. The fact that after suit brought, the main litigation developed into a controversy over the demands between Mebius & Drescher and defendants only affected the amount of the allowance which should be made to the trustees. While not entitled to an allowance covering all the litigation, they were at least entitled to an allowance for that portion of it which the court found it was necessary for them to inaugurate. There should be no difficulty in segregating that from the main litigation. All that is necessary is to restrict the allowance on behalf of the trustees to an amount which will compensate them for attorneys' expenses incurred in the litigation as far as it was necessary to be inaugurated by them in due execution of their trust. This disposes of all the points made on appeal by either side.

Returning now, as we said we would, to the stipulation and consent filed by Mebius & Drescher and their attorneys: We do not think that we should make the order in the manner or form suggested therein. We are satisfied, however, that an absolute reversal of the judgment should not be made. The litigation, as the transcript discloses (785 pages), was quite complicated. The cases were fully tried on all the material issues, and on the theory that Mebius & Drescher were in court. The defendants have, in their appeals, urged all the prejudicial errors which they claim entitled them to reversal. We have decided that there is no merit in any of them, save that Mebius & Drescher should have been made parties. The only effect of the failure to make them parties is that they are not bound by the judgments appealed from. We perceive no valid reason, however, why, when the cases are sent back to have them brought in, and they appear, that there should be a retrial of any of the issues raised in the cases, if they should elect, under proper pleading or stipulation, to be bound by the findings and conclusions of law theretofore made. We think, in the interest of justice to all parties, this should be permitted.

It is ordered, therefore, that the judgments appealed from be reversed; that the lower court order Mebius & Drescher to be brought in as parties to both actions; that upon their appearance, if, by proper pleading or stipulation filed, they shall elect to be bound by the findings and conclusions as already made (except as to the matter of attorneys' fees to the trustees), that no further retrial or consideration of any other issue in the case, save that, need be had. As to that issue, the finding of the court that the trustees were not entitled to an allowance for attorneys' fees is not sustained by, and is contrary to, the evidence, and necessitates a different finding by the court upon the evidence as it stands in the record, which the court is directed to make. Upon making such finding, and Mebius & Drescher having signified their election to be bound by that and the other findings and conclusions theretofore made, the court shall thereupon direct judgment to be entered on the findings and conclusions, without further trial of any issue in either case. Should Mebius & Drescher, however, upon their appearance file such pleadings as raise issues between the parties as to any matter not previously tried, or new issues, then the court shall proceed to a new trial only of the issues involved under such pleadings.

The judgments appealed from are reversed and the cases remanded with directions to the lower court to proceed with the disposition of them under the directions contained in this opinion. Costs of appeal are allowed to the respective appellants.

We concur: HENSHAW, J.; McFARLAND, J.

148 Cal. 773

In re TINN. (S. F. 4,528.)

(Supreme Court of California. March 14, 1906.)

1. CERTIORARI—WHEN TO ISSUE.

Under Code Civ. Proc. § 1068, providing that certiorari may issue where the inferior court has exceeded its jurisdiction, an order of the superior court canceling an order admitting to citzenship cannot be reviewed by certiorari, though rendered upon insufficient evidence or in some irregular method not going to the jurisdiction.

2. ALIENS — NATURALIZATION — NATURE OF ORDER.

An order admitting an alien to citizenship is a judgment possessing all the characteristics of an ordinary judgment.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Aliens, § 145.]

3. JUDGMENT—PROCEEDINGS TO ANNUL—MOTION.

A proceeding to annul an order admitting to citizenship, instituted three years after the original order cannot be sustained as a motion to set a judgment aside, Code. Civ. Proc. § 473, authorizing such a motion only within 6 months after rendition of judgment.

4. JUDGMENT — EQUITABLE RELIEF—PLEADING —NECESSITY.

Under Code Civ. Proc. § 405, providing that civil actions shall be commenced by filing a complaint, a proceeding to annul an order admitting to citizenship in which no complaint is filed cannot be considered as an equity action to set aside the order.

5. PLEADING—WHAT CONSTITUTES COMPLAINT.

The written consent of one admitted to citizenship that the order admitting him be set aside for fraud, filed in support of an oral motion to that effect, cannot be considered as a complaint satisfying the requirement of Code Civ. Proc. § 405, that all civil actions be commenced by filing a complaint.

6. JUDGMENT—PROCEEDINGS TO SET ASIDE—MOTION—CONSENT OF PARTY—JURISDICTION.

Where a motion to annul an order admitting an alien to citizenship was made more than three years after the original order, the appearance of the naturalized citizen and his consent to the granting of the motion would not give the court jurisdiction; Code Civ. Proc. § 473, authorizing a motion to set aside a judgment only within six months after its rendition.

In Bank. Certiorari by Walter Tinn to annul an order canceling a previous order admitting him to citizenship. Order annulled.

Lewis & Royce, for petitioner. Robert T. Devlin, U. S. Dist. Atty. N. D. Cal., and Frank A. Duryea, Sp. Asst. U. S. Atty., for respondent.

SHAW, J. This is a proceeding by Walter Tinn to obtain a writ of certiorari to annul an order of the superior court of the city and county of San Francisco, canceling a previous order of that court admitting him as a citizen of the United States. The order of admission was made November 19, 1902. The order of cancellation was made upon motion of the United States district attorney, purporting to be made as in the course of the original proceeding, on November 23, 1905. The only question which we can consider in a proceeding in certiorari is that of jurisdiction. The writ can only issue when the court under review has in some manner exceeded its jurisdiction. Code Civ. Proc. § 1068. If the superior court had jurisdiction to make the order canceling the previous order admitting the petitioner to citizenship, then its judgment in the matter cannot be reviewed in certiorari, although it may have been rendered upon insufficient evidence or in some irregular method of procedure not going to the jurisdiction.

The contention of the petitioner is that an order admitting an alien to citizenship, made by a court of competent jurisdiction, is a judgment, possessing all the characteristics of an ordinary judgment of a court having jurisdiction of the subject matter and the person; that after the lapse of six months from the time such order is made, it is too late to institute proceedings by motion to vacate the same; that when such proceedings are instituted after such lapse of time, the court is without jurisdiction to act therein; and that the only proceeding which can be thereafter taken to vacate such order is an action in equity to set it aside, on the ground that it is procured by fraud or mistake We think this contention is correct. It is settled by the authorities that an order admitting an alien to citizenship is a judgment of the same dignity as any other judgment of a court having jurisdiction. United States v. Norsch (C. C.) 42 Fed. 417; Commonwealth v. Paper, 1 Brewst. (Pa.) 263; In re McCoppin, 5 Sawy. 632, Fed. Cas. No. 8,713; Spratt v. Spratt, 4 Pet. (U. S.) 408, 7 L. Ed. 897; Stark v. Chesapeake Ins. Co., 7 Cranch, 420, 3 L. Ed. 391; People v. McGowan, 77 Ill. 644, 20 Am. Rep. 254. This being so, such judgment must possess the same qualities as any other judgment of a court having jurisdiction, and, consequently, it cannot be set aside, except in some recognized lawful mode. But three modes are recognized by law. These are, first, a motion made under section 473 of the Code of Civil Procedure, within six months after the judgment is taken; second, by an action in equity; third, by an appeal to some court having appellate jurisdiction over the subject. The latter is, of course, not involved here. The vacating order in question was made in a proceeding begun three years after the making of the original order, and, therefore, it cannot be sustained as a proceeding by motion under the code. After the lapse of six months from the time the petitioner was admitted to citizenship, there was no authority for the institution of a proceeding by motion to vacate the judgment admitting him.

It cannot be successfully contended that the proceeding was, either in form or substance, a suit in equity. No complaint, or other pleading, invoking the jurisdiction of the court to act against the defendant in the matter, was ever filed. A civil action can only be instituted by the filing of a complaint. Code Civ. Proc. § 405. Without such foundation for its action the judgment of a court of record is void, even though it be a court which has jurisdiction over the subject-matter referred to in the judgment. If the record of the judgment alone were produced, the presumptions in favor of the validity of such records would perhaps require another court, in a collateral proceeding, to assume that it was based on a proper complaint. But here the entire record is before us, and it is shown that the action of the superior court was invoked by motion only, without any complaint or other written pleading. The rule is that a judgment so obtained is of no validity or force. Mr. Freeman says that in order to give a court jurisdiction to act "there must be a cause to be heard, and when the tribunal is a court of record, such cause must be submitted to it by a complaint in writing." 1 Freeman, Judgts. § 118. Mr. Works, in his treatise on Jurisdiction, states the rule thus: "Jurisdiction of the subject-matter is obtained by the filing of such pleading or petition as will bring the action within the authority of the court." Works on Jur. p. 30, § 11. This rule is supported, and judgments so obtained declared to be void, by the following authorities: Spoors v. Coen, 44 Ohio St. 497, 9 N. E. 132; Jordan v. Brown, 71 Iowa, 421, 32 N. W. 450; Garretson v. Hays, 70 Iowa, 19, 29 N. W. 786; Dunlap v. Southerlin, 63 Tex. 38; Sheldon's Lessee v. Newton, 3 Ohio St. 499; Munday v. Vail, 34 N. J. Law, 422; Beckett v. Cuenin, 15 Colo. 281, 25 Pac. 167, 22 Am. St. Rep. 399; Young v. Rosenbaum, 39 Cal. 653.

Not only was there no complaint filed, and no action begun to cancel the original order for fraud in its procurement, but the record shows affirmatively that the proceeding was not so considered in the superior court. The record showing what there took place is as follows: "In the Matter of the Applications of Certain Persons to be Admitted to Become Citizens of the United States of America. In this matter, upon reading and filing the annexed consents and admissions, and now on motion of R. T. Devlin, Esq., the United States Attorney for the Northern District of California, and good cause appearing therefor, it is ordered that the cerificates of citizenship heretofore issued to the hereinafter named persons, on the dates set opposite their names, as follows, to wit: Walter Tinn, England, November 19, 1902 (here follow eight other names and dates), be, and the same are, hereby concelled and the order of this court admitting said hereinbefore named persons as citizens of the United States of America be vacated and set aside." The consent of Walter Tinn referred to in the foregoing record was the only writing produced relating to his case. It was manifestly not presented as a complaint or petition to the court, but was merely filed in evidence in support of the oral motion made by the United States attorney. It was a paper purporting to be signed and acknowledged by Walter Tinn, in which he "admits" that the order admitting him as a citizen and certificate thereof "were obtained by false testimony and fraud," and "consents that the order so admitting him as a citizen of the United States of America as aforesaid be vacated and set aside." Whatever force this document might have as evidence in an action or proceeding regularly begun, to prove an allegation of fraud, it clearly was not intended, nor can it be considered, as a substitute for a complaint against the petitioner. Even if it could be considered as an appearance to the motion and a consent that such motion be granted, it could not give the court power to act after the time had elapsed within which proceedings by motion could be instituted. It can only be considered as effective for the purpose for which the record shows it to have been intended, that is as evidence in support of the motion then made to the court. As such it could have no effect whatever to give the court jurisdiction over the cause. In whatever light the record is viewed, it is clear that the court never obtained jurisdiction to make the orders under review, and it follows that they should be annulled.

It is therefore ordered that the several orders of the superior court dated November 23, 1905, purporting to set aside the order of November 19, 1902, admitting Walter Tinn to citizenship as a citizen of the United States, and to cancel the certificate of citizenship then issued to him, be, and the same are, hereby annulled.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

148 Cal. 769

WITHERS v. MASSENGILL et al. (S. F. 3,478.)

(Supreme Court of California. March 14, 1906.)

1. Landlord and Tenant — Extension of Lease—Evidence.

Though an agreement claimed to have been made several months before the end of an existing lease, for a continuation of the term for a year from the date of the new agreement, the rental to run to the end of the old lease at the rate fixed thereby, and thereafter at a lower rate, is unusual, it is not so improbable that the jury must disbelieve oral testimony of such an agreement.

2. Forcible Entry and Detainer—Evidence—Sufficiency.

Evidence in an action of unlawful detainer examined, and *held* sufficient to sustain a verdict for defendants.

In Bank. Appeal from Superior Court, Monterey County; N. A. Dorn, Judge.

Action by M. Withers against W. T. Massengill and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Dougherty & Lacy, for appellant. S. F. Geil, J. K. Alexander, and Roy L. Alexander, for respondents.

SLOSS, J. In an unlawful detainer action to recover the possession of the premises, and damages for holding over after the expiration of the term, the defendants had judgment. Plaintiff moved for a new trial, and now appeals from the order denying his motion.

On May 1, 1899, the plaintiff, by a writing, leased the premises, consisting of a livery stable and the lot upon which it stood, in Salinas City, to one Tollett, for a term of three years, ending April 30, 1902. In January, 1901, the defendants, W. T. and J. T. Massengill, took a sublease from Tollett for the balance of the term, at a rental of $100 per month. The defendants remaining in possession after the expiration of the Tollett lease, this action was commenced on the 1st day of May, 1902. The defense relied on is possession under an oral lease, claimed to have been entered into on the 17th day of February, 1902, between the plaintiff on the one hand and J. T. Massengill, acting on behalf of his son and codefendant, W. T. Massengill, on the other, whereby plaintiff let the premises to W. T. Massengill for one year from February 17, 1902, at a monthly rental of $100 to May 1, 1902, and thereafter to the end of the term, of $75. The cause was tried before a jury, and the only question is whether the verdict in favor of the defendants, based, as it necessarily is, upon the existence of such oral lease, is sustained by the evidence.

As stated above, the oral lease was claimed by the defendants to have been agreed upon between the defendant J. T. Massengill and the plaintiff. No third person was present at the time of the alleged conversation. J. T. Massengill testified that on February 17, 1902, he had a conversation with plaintiff at the stable and that "the plaintiff gave me a lease of the premises for one year beginning on the 17th of February and ending on the 16th of February, 1903. I told him I intended to * * * pay $100 a month until the 30th of April, and thereafter until the * * * 17th day of February, 1903, at $75 per month." Withers, on the other hand, testified that he did not on the day in question meet Massengill at the stable, "nor did he (I) make any such agreement as Massengill has testified to." Upon the testimony of these two witnesses there arose a direct conflict as to the only fact in issue, and it would seem that under the established rule the verdict of the jury would be conclusive in this court, especially where the judge of the trial court has, by denying a new trial, indicated his satisfaction with the result. The appellant, recognizing the rule as to the binding force of verdicts based on conflicting evidence, contends that this case comes within the qualification that such conflict must be real and substantial, and that to support a verdict there must be something more than a "mere semblance or pretense of evidence." Driscoll v. Cable Railway Co., 97 Cal. 563, 32 Pac. 591, 33 Am. St. Rep. 203; Field v. Shorb, 99 Cal. 666, 34 Pac. 504. In order to bring his case within such qualification, plaintiff concedes that he must at least show either that Massengill's testimony is inherently so improbable as to be unworthy of belief, or that his admissions made at or about the time of the transaction were such as to stamp his testimony as necessarily untrue. Without reviewing at length the evidence introduced at the trial, we think the plaintiff has failed to establish either branch of this proposition.

As to the testimony of Massengill, considered by itself, it is urged that an agreement made several months before the end of an existing lease, for a continuation of the term for a year from the date of the new agreement, the rental to run to the end of the old lease at the rate fixed thereby, and thereafter, for the balance of the year, at a lower rate, is in itself an unnatural and improbable contract. It is, no doubt, unusual, but we cannot say it is so improbable that a jury must disbelieve testimony of such an agreement. Nor do we think the oral admissions of Massengill, testified to by several witnesses, are sufficient to require the holding, as matter of law, that his testimony should be disregarded. His statements to several witnesses that he had the stable for another year at $75 per month, while not, as regards the rental till May 1, in strict accordance with what he said at the trial, were of a casual character, and were made to persons who were not interested in the question, under circumstances which would not call for a detailed and exact enumeration of all the terms of the lease. Properly viewed, they did not produce a serious contradiction of his testimony. Other and more damaging statements claimed to have been made were either denied or explained by him.

The appellant bases his contention principally upon a letter written to him by J. T. Massengill 10 days after the alleged making of the oral lease. In this letter Massengill said: "You agreed to Mr. Brown and myself to take $75 per month rent for one year provided you did not sell it, which you would know about in one week, and let me know," etc. It is argued that this writing conclusively showed that at its date, the writer believed that no lease had been made, but only an agreement for a lease in futuro. Such construction, while possible, is a strict one, and we think the jury were justified in believing, notwithstanding this letter, that a lease had been made as claimed by defendants. At any rate the letter corroborated Massengill to the extent that it tended to show that some understanding had been reached between him and the plaintiff in February, 1902, regarding a further holding of the demised premises, at a monthly rental of $75, and, to the same extent, it contradicted the story of the plaintiff. The plaintiff's position at the trial was that he had, in February, been unwilling, for various reasons, to make any further lease to the defendants, and that he had made no agreement looking to such further lease. That there was ample evidence to justify the jury in disbelieving plaintiff in these particulars is, and, in view of the record, must be conceded. The plaintiff is, then, forced to take his stand on the proposition that while his own testimony that there was no agreement is to be disregarded, a consideration of all the testimony, taken together, shows that the agreement in fact made in February, 1902, was that the lease should be extended one year from May 1, 1902, and that Massengill, having learned that an oral lease for one year, to commence in futuro, would be invalid under the statute of frauds (Wickson v. Monarch Cycle Co., 128 Cal. 156, 60 Pac. 764, 79 Am. St. Rep. 36), testified to a lease commencing immediately, so as to avoid such invalidity. To adopt this view would bring about the curious result of holding that the only two witnesses to a conversation having given different and contradictory versions of it, and the jury having found that one of them did not tell the truth, it was bound to find that the other's version was also untrue, and that what really took place was a conversation between them which both denied, and which was not testified to by any witness in the case. Such a holding could be justified only by declaring, as a rule of law, that written statements of a party regarding a transaction, made at or about the time of its occurrence, are absolutely conclusive as to the nature of that transaction, so far as the author of the writing is concerned. Such is, of course, not the law. No doubt a written statement by a party, made at about the time of the transaction, is entitled to great weight, but, if it be contrary to his or other testimony at the trial, the conflict must be resolved by the jury according to the probabilities of the whole case as they may then appear. Under the circumstances here shown, we cannot say that the evidence was insufficient to sustain the verdict.

The order denying a new trial is affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.; HARRISON, J.

Note.—Justice McFARLAND being unable to act, Justice HARRISON, one of the justices of the District Court of Appeal for the First Appellate District, participates herein pro tempore, pursuant to section 4, article 6 of the Constitution of 1879 as amended in 1904.

148 Cal. 768

In re RUSSELL'S ESTATE. (No. 256.)

RUSSELL v. MARIA KIP ORPHANAGE et al.

(Supreme Court of California. March 14, 1906.)

Courts — Appellate Jurisdiction — Transfer of Cause.

Where a notice is of an appeal to the wrong court, the proper practice is to file the record in the court to which the appeal is taken, and to make a motion in that court to transfer the cause.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 1303.]

In Bank. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by William Russell against the Maria Kip Orphanage an others, relating to the estate of Robert Russell, deceased. Petition to transfer appeal from the District Court of Appeal. Denied.

Duncan McPherson, Jr., for appellant. Charles M. Cassin, for respondents. Charles B. Younger, Jr., for executor.

PER CURIAM. A petition has been filed in this cause for an order to transfer the appeal to this court; the appeal having, as it is claimed, been erroneously taken to the District Court of Appeal. The court desires to state what they consider the correct practice in cases where the notice is of an appeal to the wrong court. In all such cases, of course, the appellant will file the record in the court to which his appeal has been taken, and the proper practice is to make the motion to transfer in that court. Until the cause is transferred, the matter is pending there, and that court, whether the Supreme Court or the District Court of Appeal, is, as we construe the constitutional provision on the subject, authorized to make the proper order for the transfer of the cause.

For this reason alone, the petition is denied.

148 Cal. 669

CHURCHILL et al. v. WOODWORTH et al. (L. A. 1,588.)

(Supreme Court of California. Feb. 10, 1906. Rehearing Denied March 12, 1906.)

1. Parties — Mortgages — Foreclosure by Action.

An agent to whom a deed absolute in form was executed as security for a debt to the principal was not a necessary party to an action to have the deed declared a mortgage, and foreclosed, under Code Civ. Proc. § 367, providing that every action must be prosecuted in the name of the real party in interest.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parties, §§ 6–11.]

2. Process—Time for Service—Bringing in New Party.

Code Civ. Proc. § 581, subd. 7, requires the service of summons within a year after the commencement of the action. Section 353 provides that an action may be commenced against a personal representative within a year after the issuing of letters testamentary or of administration. Section 389 authorizes the bringing of new parties to an action and the service of summons on them. *Held*, that where an action was properly commenced against the heirs of a decedent to foreclose a mortgage, and an administrator was afterwards appointed, the court might order him to be brought in as a party and summons to be served on him over a year after the commencement of the action, but within a year of his appointment.

3. ADMINISTRATORS — ACTIONS AGAINST — WAIVER OF RIGHT.

A right to sue an administrator is not waived by bringing an action against heirs of the decedent before appointment of the administrator.

4. LIMITATION OF ACTIONS — MORTGAGE DEBT —ADVANCES TO PROTECT SECURITY — NEW PROMISE—EFFECT.

Notwithstanding the general rule of law and the provision of Civ. Code, § 2876, that where the holder of a subsequent lien is compelled to satisfy a prior lien for his own protection, he may enforce payment of the amount paid as a part of his claim, a mortgagee's claim for advances to protect his security may be barred by the two or four year limitations (Code Civ. Proc. §§ 337, 339), though the original indebtedness is continued by the giving of a new note.

5. APPEAL — PRESENTATION OF QUESTION IN LOWER COURT—PLEA OF LIMITATIONS.

The objection that a plea that a cause of action is barred by the provisions of Code Civ. Proc. § 339, is insufficient for failure to refer to the subdivision of the section, as required by section 458, is waived by failure to urge it in the trial court.

6. MORTGAGES—ADVANCES TO PROTECT SECURITY — MORTGAGE BY MORTGAGEE — SETTING ASIDE.

Where a deed is made to an agent to secure a debt to his principal, a mortgage on the premises given by the agent to procure a loan to pay off prior liens will not be set aside at the instance of the grantor after the principal's claim for the advances to pay the prior liens has been barred by limitations.

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Jerome Churchill and another, as administrators, against Jennie S. Woodworth and others. From a judgment in favor of plaintiffs, and from an order denying a new trial, defendant John T. Jones, administrator of the estate of L. B. Woodworth, appeals. Reversed.

Jones & Weller, for appellant. Hunsaker & Britt and Gillis & Tapscott, for respondents.

ANGELLOTTI, J. This is an action brought by plaintiffs to have a deed absolute in form declared to be a mortgage, and to foreclose the same. Plaintiffs had judgment, and defendant Jones, administrator of the estate of L. B. Woodworth, deceased, appeals from the judgment and from an order denying his motion for a new trial.

Said Woodworth, on November 8, 1894, being indebted to plaintiffs as administrators of the estate of Charles B. Boyes, deceased, executed to Jerome Churchill a deed conveying certain real estate in the city of Los Angeles, which deed was in form an absolute conveyance, but was executed solely as security for the existing indebtedness to plaintiffs and such future indebtedness to them as might accrue. On November 13, 1897, upon an accounting had between the parties, it was found that the amount of such indebtedness then due was $15,462.60, for which sum Woodworth executed his note to plaintiffs, which note was made payable one day after date. No part thereof or of the interest accruing thereon has ever been paid. Woodworth died intestate October 27, 1900. On November 14, 1901, no administration of the estate of Woodworth having been commenced, plaintiffs commenced this action against the heirs of deceased. On December 16, 1901, appellant was appointed administrator of the estate of Woodworth, and letters were issued to him. On November 12, 1902, summons was issued upon the original complaint. On December 10, 1902, the court, upon the application of plaintiffs, allowed the filing of an amended and supplemental complaint bringing appellant in as a party defendant, and ordered that summons be issued and served upon appellant, which was done.

Plaintiffs allege in their complaint, and the court found, that Jerome Churchill, in order to protect the security for the indebtedness, discharged certain paramount liens upon the mortgaged property, as follows, viz.: (1) By the payment of $3,286 on May 6, 1896, a mortgage executed by Woodworth and his wife to one Klokke, securing an indebtedness amounting on that date to such sum. (2) By the payment of $3,476.65 on May 6, 1896, a mortgage of Woodworth and his wife to the Columbia Savings Bank, securing an indebtedness amounting on that date to such sum. (3) By the payment of $1,479.98, on April 15, 1896, a delinquent street assessment, to the city of Los Angeles, for the widening of Los Angeles street. The court allowed these amounts, with interest at the rate of 7 per cent. per annum from the respective dates of payment. Plaintiffs further allege in their complaint that Jerome Churchill was compelled to borrow $7,000 of the amounts so advanced, from the Los Angeles Savings Bank, and that he had, on April 16, 1896, executed his note bearing 7 per cent. interest to said bank in said amount, and gave as security therefor a mortgage to said bank upon the property held by him under such deed, and, subsequently, in December, 1900, renewed said note and mortgage, "that no part thereof has been paid, and the same is now a valid and subsisting lien upon said premises." Defendants admitted the execution of such notes and mortgages by Churchill, and simply deny, in general terms, that Churchill had any right or authority to execute the same. The court found that the notes and mortgages were executed as alleged, and the proceeds used for the payments of the liens as alleged. If the mortgage executed by Churchill to the bank was originally a valid lien on the property, it must be held under the pleadings and findings that it continued to be such for the full amount due thereon at the time of judgment. The trial court, while crediting plaintiffs with all the amounts expended by them, including the $7,000 which was so borrowed, made no provision in the judgment for the freeing by plaintiffs of the land from the mortgage lien of the bank, but directed the sale of the land, and the payment to plaintiffs of the aggregate amount found due, $39,979.97, which included the $7,000.80 borrowed. Upon these facts, several points are made for reversal.

1. It is urged that Jerome Churchill, to whom the deed was made, was a necessary party plaintiff. As between plaintiffs and the appellant, the plaintiffs are the real parties in interest, and there can be no question as to their right to bring the action in their own names. Their agent or trustee, Jerome Churchill, as an individual, was not a necessary party. See Code Civ. Proc. § 367; Anglo-California Bank v. Cerf (Cal. Sup.) 81 Pac. 1077.

2. We can see no force whatever in the contention that the court was not authorized to bring appellant in as a party and direct the issuance and servance on him of summons more than a year after the commencement of the action. As already noticed, summons had been issued as against the original defendants within the year, so the court had not lost jurisdiction of the case under subdivision 7 of section 581 of the Code of Civil Procedure. Appellant, upon his appointment as administrator (December 16, 1901), certainly became a proper party to be made defendant. It is apparent that a complete determination of the controversy could not be had without the presence of the administrator, representing as he did the other creditors of the deceased. The time within which an action might be brought against him as personal representative of the deceased had not expired when the order was made and summons issued, for, under section 353 of the Code of Civil Procedure, such action might be commenced at any time "within one year after the issuing of letters testamentary or of administration." Under section 389 of the Code of Civil Procedure, therefore, the court then had the right to order him to be brought in as a party, and to that end "order amended and supplemental pleadings, or a cross-complaint, to be filed, and summons thereon to be issued and served." Plaintiffs were under no obligation to procure the appointment of an administrator earlier. "Under that section [section 353, Code Civ. Proc.] a party having a cause of action against the estate of a deceased person is not bound to cause administration to be had, because the statute expressly extends his time for one year after the issuance of letters." Davis v. Hart, 123 Cal. 384, 388, 55 Pac. 1060.

3. We are unable to see any merit in the contention that plaintiffs waived their right to bring an action against the administrator within a year after the issuance of letters, by commencing the action against the heirs of deceased before the appointment of an administrator.

4. The advances made to discharge liens on the mortgaged property for the purpose of protecting the security, were all made in April and May, 1896, while Woodworth did not die until October 27, 1900, more than four years thereafter. Appellant contends that the right of plaintiffs to recover the amount of these advances is barred by section 337 or section 339 of the Code of Civil Procedure, both of which sections were pleaded in bar by appellant. We are unable to see any good answer to this contention. It may freely be conceded, as contended by plaintiffs and upheld by many authorities, that the amount advanced for the protection of the security became at once a part of the debt secured by the mortgage, so that payment thereof could at one time have been enforced as a part of the claim for which the lien existed, but this concession does not materially assist them. It might bring these advances within the statute applicable to the original indebtedness, and thus enable them to be recovered with such indebtedness at any time before the statute had run against the same, but it could accomplish nothing more. The original indebtedness then existing would have been barred by the statute at the death of Woodworth, had it not been for the new note for $15,462.60 given on November 13, 1897. Plaintiffs contended, and the trial court concluded, that no part of these advances was included in the new note, and it is manifest that the only theory upon which a recovery of such advances, in addition to the amount due on the new note, can be sustained, is that such advances were not included. If the statute was running against the whole mortgage debt, including these advances, at the time of the giving of the new note, why did it not continue to run, regardless of such new note, against any portion of the debt that was not included therein? If I owe $1,000, secured by mortgage, and immediately prior to the completion of the statutory period give a new note for $500 only, it would not be contended that the giving of such note affected the running of the statute as to the other $500. We can see no distinction material here between such a case and the one at bar. The statute was running against the whole of this debt, including these advances, and a new note was given as to a portion only of the debt. This necessarily excluded from the effect of the new note, such portions of the debt secured by the mortgage as were not included therein. It is entirely immaterial that the excluded portions became a part of the mortgage debt solely by reason of the fact that they were made to protect the security. They either became a part of the mortgage debt, or they

did not. If they became a part of the mortgage debt, they could only be relieved from the effect of the statute, which would, in due course, bar the debt, by some act on the part of the mortgagor which purported to include them. The giving of a new note by him for a specified amount not including them was not such an act. If they did not become a part of the debt, they necessarily became barred by the provisions of section 339 of the Code of Civil Procedure providing that actions must be brought within two years, upon a contract, obligation, or liability, not founded upon an instrument of writing. The effect of the new note was to keep the mortgage alive only as to such debt as was evidenced thereby. In this state, the rule is that a mortgage is only an incident of the debt, and that when the debt is barred in whole or in part, the mortgage is correspondingly barred. It cannot, of course, be successfully contended that portions of a debt secured by a mortgage may not become barred by the statute, although as to other portions the statute has not run.

We find no case in which the precise question here presented has ever been decided. There is some general language in some of the decisions relative to the right of the mortgagee to add to his own lien the amount of advances necessary for the protection of his security, and collect the whole amount upon foreclosure of the mortgage, but the particular question here presented was not involved in any of the cases cited. In none of them did it appear that the statute had run against any part of the original indebtedness. It must be borne in mind, also, that, in the majority of states, the rule is that the equitable remedy to enforce the lien of the mortgage exists notwithstanding the debt itself may be barred, provided the statute has not run against the mortgage. Under that rule, so long as the mortgage is kept alive, no part of the debt secured thereby can be barred in the sense that the mortgagee loses his right to enforce it against the mortgaged property. This appears to have been the rule in all the states from which cases are cited by plaintiffs, at the time such decisions were rendered. With us, however, as already observed, the mortgage is enforceable only for such portions of the debt as are not barred. It must also be borne in mind that we are discussing the case of a mortgage containing no provision as to the right of a mortgagee to make such advances, or the manner in or time at which they shall be repaid. Section 2876 of the Civil Code, providing that where the holder of a subsequent lien is compelled to satisfy a prior lien for his own protection, he "may enforce payment of the amount so paid by him, as a part of the claim for which his own lien exists," if applicable here, does not assist plaintiffs in this regard. It accomplished no more, at most, than to make the amounts paid, a part of plaintiffs' then existing claim, subject to the same rules of limitation, but when such amounts were excluded from the new note, the statute then running against the whole indebtedness continued to run against them. We are satisfied that recovery of these advancements must be held to be barred either by section 337 of the Code of Civil Procedure, or by section 339 of the Code of Civil Procedure, and it is immaterial here which section is applicable.

It is urged that the plea in bar of section 339 of the Code of Civil Procedure was insufficient in that it omitted to state the subdivision of the section referred to, the section containing three subdivisions, and section 458 of the Code of Civil Procedure, providing that, in pleading the statute of limitations, it is not necessary to state the facts showing the defense, "but it may be stated generally that the cause of action is barred by the provisions of section (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure." Defendant here alleged, simply, "that the indebtedness sued on herein is barred by the provisions of section 339 of the Code of Civil Procedure of the state of California." Subdivision 1 of the section in question was the only provision thereof that could, by any possibility, be applicable to this case. Subdivision 2 relates to actions against sheriffs, coroners, and constables, and subdivision 3 to actions to recover damages for the death of one caused by the wrongful act or neglect of another. No demurrer was interposed to the answer, which, for the purposes of the trial, was assumed to sufficiently present the defense, and the court made its findings thereon. Under these circumstances, we are satisfied that the attempt to plead subdivision 1 of section 339 should not be treated as a nullity, and that the objection to the manner of pleading it was waived by the failure of plaintiffs to urge such objection in the trial court. The appellant's specifications of insufficiency of evidence to sustain the findings upon the issues as to the statute of limitations are sufficient to present the question here under the liberal rule laid down by the more recent decisions, and whatever may be the rule as to a waiver of points by a failure to discuss them in the opening brief, we are satisfied that appellant's brief was not such as to indicate any waiver of his defense of the statute of limitations.

5. In view of our conclusions upon the question of the effect of the statute of limitations, it is unnecessary to consider at length any of the remaining points on which appellant states, in his closing brief, that he "especially relies for a reversal." There was sufficient evidence to support the findings as to the advances made for the protection of the security. While the findings are not as clear and definite as they might have been upon the question as to whether these advances were included in the $15,462.60 note

of November 13, 1897, when construed liberally in support of the judgment, we think that they sufficiently show that they were not so included. There was sufficient evidence to support a finding that they were not included. As to the Churchill mortgage to the Los Angeles Savings Bank, assuming the same to be a valid lien upon the property, we are of the opinion that the appellant is entitled to no relief in this action, in the event that plaintiffs are not allowed to recover the amounts advanced, by reason of the plea of the statute of limitations. The whole of the money borrowed by Churchill on his note and said mortgage was devoted to the payment of amounts constituting paramount liens on said land—were necessarily made for the protection of the property of appellant, constituting plaintiff's security, and appellant should not be granted the affirmative relief of having the property cleared of the lien without repaying the amount which was so borrowed and properly advanced by plaintiffs for the protection of their security. We find no other point requiring attention.

The judgment and order denying a new trial are reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

We concur: SHAW, J.; McFARLAND, J.

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3 Cal. App. 263

MULLENARY v. BURTON.

(Court of Appeal, Second District, California. March 16, 1906.)

1. Appeal — Harmless Error—Admission of Evidence.

Any error in the admission of evidence of a judgment roll to rebut proof of payment, where there was no proof of payment, was not prejudicial, where it had no possible connection with other issues.

2. Account, Action on—Evidence—Admissibility.

In an action on account, it was proper to permit plaintiff to state his custom in keeping accounts.

3. Same.

In an action on account for services as ranch superintendent, evidence as to disposition of grain raised on the ranch, after the defendant ceased to have any interest therein, was properly rejected.

4. Evidence—Best and Secondary Evidence—Time of Bringing Action.

Oral proof of the time of bringing an action was properly rejected; the record being the best evidence.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 536.]

5. Damages—Interest—Computation.

Under Civ. Code, § 3287, providing that every person entitled to damages certain, or capable of being made certain by calculation from a particular day, is also entitled to interest from that day, in an action of account for services, interest was properly allowed from the last day of employment, both under a contract for a definite salary and on recovery of reasonable value of services.

6. Limitation of Actions—Pleading.

A plea that a cause of action is barred by Code Civ. Proc. § 339, is sufficient, without designating the subdivision of the section.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 683, 684.]

Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by E. B. Mullenary against J. Ben Burton. From a judgment in favor of plaintiff, and from a conditional order denying a new trial, defendant appeals. Affirmed on condition.

C. A. Storke, for appellant. B. F. Thomas, for respondent.

ALLEN, J. Action on an account for services. Verdict and judgment for plaintiff, from which judgment, and a conditional order denying a new trial, defendant appeals.

The complaint alleges that on January 1, 1889, defendant employed plaintiff as ranch superintendent and agreed to pay him for such services $600 per annum; and, in addition, to furnish plaintiff and his family board. Plaintiff concedes a payment for such services to the extent of $1,624, and alleges the balance to be unpaid. The complaint contains a second count, which avers that plaintiff's wife performed services on said ranch as cook for defendant's servants under an employment, for which services defendant agreed to pay a reasonable salary; that such reasonable salary was and is $20 per month, no part thereof being paid. It is further alleged that on February 5, 1895, defendant left the state of California and has ever since that date been absent therefrom. Defendant pleaded payment as to the claim averred in the first count, and denied the employment of the wife, or that the reasonable value of her services was as claimed, or any other sum. As a further defense, the statute of limitation is pleaded by a general averment that the cause of action against defendant were long since barred by the provisions of section 339 of the Code of Civil Procedure. The jury found a verdict in plaintiff's favor for $5,588.19, which is the full amount claimed by plaintiff after deducting the admitted payment, together with interest thereon from February 1, 1895.

The court, upon hearing the motion for a new trial, made its order "that within 10 days from date hereof plaintiff credit upon the judgment entered herein the sum of $1,500, or that within the said time plaintiff file herein his written consent that such credit be made upon said judgment upon the final determination of the action of Stella Burton v. Ed. Mullenary, No. 5,034 in this court, now pending on appeal to the Supreme Court in favor of defendant, plaintiff herein. Should final judgment in said action be in favor of plaintiff therein (Stella Burton), judgment herein to be immediately of full force and effect. Execution on judgment herein to be stayed until final judgment is entered in said action of Burton v. Mullenary, and neither said judgment nor said credit to bear interest. Plaintiff failing to make the credit or file the written consent above mentioned within 10 days from the date hereof, motion for new trial is granted. If plaintiff makes the foregoing credit or files said written consent within the time named, then said motion for a new trial is denied." Defendant appeals from so much of said order as denies his said motion for a new trial on condition above stated. It is admitted that the written consent above specified was duly filed by the plaintiff within the time required; and we take notice of the fact that the case of Burton v. Mullenary, on appeal to the Supreme Court and mentioned in said action, was affirmed by the Supreme Court June 27, 1905. 81 Pac. 544.

The first point presented by appellant upon this appeal is that the trial court erred in admitting in evidence the judgment roll in the case of Stella Burton v. Mullenary; said judgment being upon appeal and defendant herein not a party thereto or bound thereby. The defendant, in support of his plea of payment, introduced papers and proceedings in another case between plaintiff and defendant, among which papers was a certain receipt given to the sheriff for $1,500 in consideration of the execution of a certificate of sale in that action. It further appears from the record and papers introduced that the service upon defendant in that action was a substituted one, and therefore no personal judgment could exist other than one having the effect of a judgment in rem, valid only for the purpose of upholding a sale of attached property. Anderson v. Goff, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34. The certificate of sale so in evidence was insufficient to establish that plaintiff had acquired a title at such sale. The sale was not consummated until execution of deed by the sheriff, and until such consummation the estate remained in the judgment debtor. Cummings v. Coe, 10 Cal 531; McMillan v. Richards, 9 Cal. 412, 70 Am. Dec. 655. No deed being offered in evidence, there was therefore, in a strict sense, no proof of payment to rebut, and, the introduction of the judgment roll objected to being only for the purpose of rebutting, such proof of payment was not required of plaintiff; yet, it having no possible connection with the issues other than as relating to such payment, its receipt in evidence was not prejudicial. In addition, the record discloses that upon the motion for a new trial the order fully protected the defendant from the possibility of paying this $1,500 a second time, and the affirmance of the case establishes the invalidity of the sale upon which the receipt was based.

The foregoing observations, with reference to the first point, apply to the second and third points raised by appellant, which relate to the same unconsummated sale by the sheriff, and to the same claim of payment relied upon by reason of the certificate.

The next point made by appellant is that it was error to permit plaintiff to state his custom in keeping accounts. We perceive no error in this regard. It is always competent, when books of account are introduced, to show the time at which the entries were made. Nor do we find any error in the action of the court in rejecting testimony as to the disposition of the grain raised upon the ranch after defendant ceased to have any interest therein; nor in sustaining an objection to the offer of oral proof of the time of bringing the action, as to which latter matter the record was the best evidence of such date. The account book received in evidence was shown to be a book of original entries kept by the plaintiff, but nothing was contained therein other than the payments made by defendant to plaintiff, and the items entering into the general credit of $1,624 mentioned in the complaint.

Appellant next contends that certain charges given by the court to the jury were erroneous. We perceive no error in the first and fourth instructions. They should be read in connection with the other instructions given, and the whole together correctly state the law upon the subject to which they are directed.

We are of opinion that it was proper to allow interest from the date of the termination of the employment upon the unpaid amount due plaintiff, either on account of his own services or those of his wife, which were not barred by the statute of limitations. Section 3278, Civ. Code, provides: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day." The contract had been fully performed by plaintiff and his wife, the fruits thereof accepted by the defendant without objection, and he was clearly in default. The only matter for ascertainment was the value. There can be no question of the certainty of ascertainment of the amount of plaintiff's claim on account of his own services, and we think that interest from the maturity of the claim was recoverable, as well, on account of the wife's services, notwithstanding the value was not fixed by the contract. Mix v. Miller, 57 Cal. 356. The court erred, however, in charging the jury that they must disregard the plea of the statute of limitations and render a verdict, if they found in plaintiff's favor, for the whole sum earned and unpaid between the commencement of the services and their termination. The theory of the trial court that the statute was improperly pleaded, by reason of the omission in the answer to designate the subdivision of section 339 under which the claim was asserted, is held not to be correct in Churchill v. Woodworth (Cal. Sup.) 84

Pac. 155. The error, however, in this charge to the jury, was in no sense prejudicial, as affecting the claim of plaintiff for his own services and those of his wife for the two years preceeding the commencement of the action. There was no testimony or claim tending to show that any portion of these services were barred. But as to all preceeding services the bar was complete, and such charge, or refusal to charge, in connection with the statute of limitations, could be prejudicial only as affecting that portion of the claim actually barred. It is seen from the record that the payments of money received during the two years immediately preceding the expiration of the term of employment were insufficient, coupled with the payments made between February, 1901, and 1903, to pay for the services of those two years. There is therefore no testimony even tending to show payment on account of services of the husband or wife for the two years immediately preceding February 1, 1895, amounting, with interest to the date of the rendition of judgment, to the sum of $2,710.63, and the plaintiff is therefore entitled, if he shall so elect, to an affirmance of the judgment to that amount; otherwise, a new trial will be necessary.

It is therefore ordered that upon the plaintiff's filing in the lower court, within 30 days from the filing of the remittitur, his consent to a modification of the judgment, by striking out the words and figures "five thousand five hundred and eighty-eight dollars and nineteen cents ($5,588.19)," and inserting in lieu thereof the words and figures "two thousand seven hundred ten dollars and sixty-three cents ($2,710.63)," the judgment and order so modified shall stand affirmed; and that, if such written consent be not filed, the judgment and order appealed from be reversed.

We concur: GRAY, P. J.; SMITH, J.

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148 Cal. 646

THOMPSON v. BASLER et al. (Sac. 1,259.)

(Supreme Court of California. Feb. 8, 1906.)

1. Public Lands—Receiver's Receipt—Issuance—Effect—Title to Maintain Actions Concerning the Land.

Although title does not pass from the United States to a homestead entryman until the issuance of a patent the receiver's receipt issued to an entryman in possession and claiming land under Rev. St. U. S. § 2290 [U. S. Comp. St. 1901, p. 1389], constitutes sufficient title to enable him to maintain or defend a suit concerning the land.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, § 76; vol. 17, Cent. Dig. Ejectment, § 43.]

2. Same—Sufficiency of Title.

By Rev. St. U. S. § 2291 [U. S. Comp. St. 1901, p. 1390], a patent may issue to a person making a homestead entry, upon proof of residence and cultivation for five years, and section 2297 [U. S. Comp. St. 1901, p. 1398] provides for a forfeiture of the right and the reverting of the land to the government upon proof, to the satisfaction of the register of the land office, that the settler has changed his residence or abandoned the land for more than six months at any time. *Held*, that where in ejectment plaintiff, a homestead entryman, showed the issuance of a receiver's receipt to him and gave evidence of possession, defendant, claiming under a tunnel location, could not attack plaintiff's rights on the ground that he had not complied with the statutory requirements as to residence and cultivation.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, § 302.]

Department 1. Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Henry Thompson against C. M. Basler and others. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

Holl & Dunn and Johnson & Chase, for appellants. McCoy & Gans, for respondent.

SLOSS, J. The plaintiff, claiming possession of and title to 160 acres of land as a homestead entryman, under the land laws of the United States, commenced this action of ejectment against the defendant to recover the possession of a portion of the premises, and $100 damages. Judgment went for the plaintiff according to the prayer of his complaint, and the defendant now appeals from an order denying his motion for a new trial.

It appears that on April 16, 1900, there was issued to the plaintiff the receipt of the receiver of the land office for the entry of the 160 acres, under section 2290 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1389], and that, shortly thereafter, he took possession of the land described in his receipt as his homestead entry thereunder. In the autumn of 1902 the defendant came upon the land, took possession of about 20 acres, began to run a tunnel therein for mining purposes, and posted and recorded notices of location for the purpose of acquiring tunnel rights under the laws of the United States. Rev. St. U. S. § 2323 [U. S. Comp. St. 1901, p. 1426.] The claim of the defendant, as stated in his brief, is: "That the plaintiff did not comply with the homestead laws of the United States after making his application and obtaining the receiver's receipt." In support of this claim, he introduced testimony tending to show that, subsequent to the entry, the plaintiff had not resided on the land, and that he had failed to make the cultivation of the land required to obtain a patent thereto, under Rev. St. U. S. § 2291 [U. S. Comp. St. 1901, p. 1390]. Although title does not finally pass from the United States until the issuance of a patent, it is well settled that the receiver's receipt issued to a homestead entryman in possession and claiming land under Rev. St. U. S. § 2290, constitutes ample title to enable him to maintain or defend a suit concerning the land. Code Civ. Proc. § 1925; Goodwin v.

McCabe, 75 Cal. 584, 17 Pac. 705; Morrison v. Coleman, 87 Ala. 655, 6 South. 374, 5 L. R. A. 384; Case v. Edgeworth, 87 Ala. 203, 5 South 783; Gulf, etc., R. Co. v. Clark, 101 Fed. 678, 41 C. C. A. 597.

The plaintiff having by the offer of the receipt, coupled with evidence of possession, made a prima facie showing of a right to sue in ejectment, the question is whether it was open to the defendant, claiming to enter under a tunnel location, to attack plaintiff's right by showing that there had been a failure to comply with the statutory provisions requisite to ripen the homestead right into a perfect title by patent. Under section 2291 of the Revised Statutes, a patent may issue to the person making the entry, upon proof of residence and cultivation for the period of five years, and compliance with certain other conditions. And section 2297 [U. S. Comp. St. 1901, p. 1398] provides for a forfeiture of the right and the reverting of the land to government upon proof, to the satisfaction of the register of the land office, after notice to the settler, that such settler has changed his residence or abandoned the land for more than six months at any time. The necessary effect of these provisions, taken in connection with the statutes creating the federal Land Department, is to confer upon the officers of that department the exclusive power to determine the facts of residence and cultivation with relation to homestead entries. "The Land Department of the United States has been created as the tribunal for determining the right under the laws of the United States of any person to receive a patent for any of the public lands, and that tribunal is vested with jurisdiction to determine all questions of fact that may arise in any controversy respecting such right." Gage v. Gunther, 136 Cal. 338, 343, 68 Pac. 710, 89 Am. St. Rep. 141. Where the Land Department has passed upon such questions of fact, its determination is (in the absence of a showing of fraud or imposition) conclusive upon the courts. Stewart v. McHarry, 159 U. S. 643, 16 Sup. Ct. 117, 40 L. Ed. 290; Gage v. Gunther, supra. And, similarly, while a question is under the consideration and within the control of the Land Department, the courts will not render a decree in advance of the action of the government officials, and thereby render such action nugatory. Marquez v. Frisbie, 101 U. S. 473, 25 L. Ed. 800; Casey v. Vassor (C. C.) 50 Fed. 258; Humbird v. Avery (C. C.) 110 Fed. 465.

In this case the question of plaintiff's residence and cultivation were within the control of the Land Department, and could have been determined by it either on an application for patent, or on proceedings to have the land revert to the government, pursuant to Rev. St. § 2297. Since no steps had been taken to cancel the entry under the provisions of section 2297, the lower court rightly held that it had no power to determine whether or not the plaintiff had forfeited his rights for failure to reside on the land and cultivate it. The land in question having been, by a homestead entry, valid on its face, and subsisting of record, withdrawn from entry under any law of the United States (see Hastings, etc., R. R. Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363), the defendant was not, by virtue of his tunnel location, in a position to attack plaintiff's right in this action. These views necessarily dispose of the contention that the findings as to the title and possession of the plaintiff are not sustained by the evidence. And we think the finding that the plaintiff sustained damage in the sum of $100 finds sufficient support in the record. No other points are made for reversal.

The order denying a new trial is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

148 Cal. 759

WUTCHUMNA WATER CO. v. RAGLE et al.

(Sac. 1,264.)

(Supreme Court of California. March 2, 1906.)

1. WATERS AND WATER COURSES—IRRIGATION—ADVERSE POSSESSION—EXTENT OF RIGHT.

The rule that adverse possession of land for a period of time prescribed by the statute of limitations not only bars the remedy, but extinguishes the right of the person holding the true written title and vests a perfect title in the adverse holder, applies to the prescriptive right to divert water.

2. JUDGMENT—CONFORMITY TO FINDINGS—IRRIGATION DITCH—ADVERSE USER.

Where, in a suit to enjoin defendants from diverting any portion of the waters of an irrigation ditch, the court found that defendants were the unqualified owners as against plaintiff, when the action was brought, of an absolute right to divert a certain amount of water from a ditch in the manner, during the period and to the extent specified in the decree, the court, not having found that such right had been at any time exercised under any conditions relating to notice, had no authority to decree that the exercise of plaintiff's right should be subject to the giving of two days' notice to plaintiff or his superintendent of defendants' need of water from the ditch for irrigation purposes before attempting to divert the same.

Department 1. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by the Wutchumna Water Company against L. A. Ragle and others. From an order denying defendant's motion to vacate the original judgment and to amend the court's conclusions of law, and from that portion of the decree which required defendants to give plaintiff notice of their intention to take water from an irrigation ditch, defendants appeal. Reversed.

Alfred Daggett, for appellants. E. O. Larkins, for respondent.

LORIGAN, J. This action was brought to enjoin defendants from diverting any portion of the waters of a certain water ditch known as the Wutchumna ditch, situated in Tulare county, to all of which plaintiff claimed to be the owner. By their answer defendants, as an affirmative defense to said action and as a basis of their right to divert water from said ditch, averred facts under which they claimed that, as early as 1877, their predecessor in interest in the lands described in their answer had, under an agreement with the Pioneer Canal Company, to whose rights in said canal plaintiff succeeded, acquired a perpetual right to divert two cubic feet of water per second from said ditch for the irrigation of said land, that from 1878 to 1885 said predecessor of defendants diverted said water by cutting the bank of said ditch, but that from 1885, in order to enable him to divert the quantity of water which he claimed was necessary, and to which he was entitled, he placed a dam in the channel of said ditch sufficient to divert said two cubic feet of water, and thereafter said dam was maintained therein, and said quantity of water diverted from, said ditch by the predecessor of defendants and by defendants themselves, openly, notoriously, continuously, and uninterruptedly, under a claim of right so to do, adversely to said plaintiff, and with the knowledge and acquiescence of said plaintiff from 1885 down to the filing of plaintiff's complaint on July 3, 1902. The answer concluded with a plea in proper form of the statute of limitations.

Upon the issues made by their pleading the case was tried by the court and findings of fact and conclusions of law followed. The findings of the court are quite full. It found that there was a parol agreement between the predecessor in interest of defendants and the Pioneer Canal Company, under which the diversion of water from saidWutchumna ditch by said predecessor had its inception; that said predecessor, and defendants as his successor in interest, had, for a period far exceeding five years prior to the commencement of the action, continuously, openly, notoriously and uninterruptedly, under a claim of right, and adversely to plaintiff, taken and diverted from the ditch of plaintiff water sufficient to irrigate the 40 acres of land described in their answer during the months of April, May, June, and up to July 15th of each year, using a head of two cubic feet per second, and water sufficient to irrigate 20 acres of said 40 acres from July 15th to August 15th and from February 1st to April 1st of each year, using a head of one cubic feet per second, which said water was taken and diverted by means of said ditch and dam referred to in their answer; and that plaintiff's cause of action against defendants for the diversion of water from said Wutchumna ditch and to the extent and for the purposes above found was barred by stated provisions of the statute of limitations. In addition the court found: "That the said plaintiff * * * is the owner of said Wutchumna ditch, and the water diverted thereby, subject to the right of said defendants * * * to take and divert water from said Wutchumna ditch as aforesaid; and that said defendants * * * now have, and they and their ancestors and predecessors in estate for more than 20 years last past have had, the right as against the said plaintiff, to take and divert water as aforesaid from the said Wutchumna ditch for irrigation on said 40 acres of land; and that said defendants have the right as against said plaintiff to keep and maintain in the channel of said Wutchumna ditch a dam sufficient to enable them to take and divert from said ditch the quantity of water aforesaid at the times aforesaid."

As conclusions of law from the findings the court decided that defendants were entitled to divert water from the ditch of plaintiff at the times and in the quantities specified in the findings just referred to, and to keep and maintain a dam in the channel of plaintiff's ditch sufficiently high for that purpose, and then further decided: "That plaintiff provide and maintain at the point of diversion of the Jones (defendants') ditch a permanent headgate, dam and measuring box, which shall be under the control and supervision of plaintiff, and that defendants, or either of them, shall not interfere with the same, nor turn the water out of said Wutchumna ditch without giving the superintendent at least one day's written notice that they needed the water turned out for the irrigation of their said lands. Should the superintendent after notice refuse or neglect to turn out the water which they or either of them are entitled to, or less than the quantity herein awarded, defendants, or either of them, may open said headgate and turn the water out to which they may be entitled. In case said superintendent cannot be found after diligent inquiry, defendants may post said notice above referred to at the said dam or headgate, in lieu of delivering the same to him as aforesaid. At the end of each irrigation defendant shall promptly close the headgate and turn the water back down said Wutchumna ditch, or notify the superintendent that their irrigation is completed." Judgment was entered upon the said findings and conclusions of law, which, after adjudging the right of defendants to take the quantity of water at and for the times designated, and to maintain a dam in the ditch of plaintiff for that purpose, contained also as a part thereof, verbatim, that portion of the conclusions of law which we have just quoted.

Defendants were satisfied with the findings of fact, but being dissatisfied with the conclusions of law and the judgment entered thereon, in due time, under sections 663 and 663½ of the Code of Civil Procedure, and on the ground of inconsistent and erroneous conclusions of law, not consistent with and not supported by the findings of fact filed, moved the court to set aside said conclusions of law, and the judgment entered thereon, and to amend said conclusions of law by striking therefrom that portion thereof above quoted, and to enter a different judgment by striking from the judgment entered all that portion which followed and embraced the said quoted conclusions of law as a part of it. On the hearing of the motion the court, in effect, denied it, but made an order vacating said judgment, amended its conclusions of law, and order and entered another judgment thereon, to which defendants duly excepted.

The amended conclusions of law, and the judgment entered thereon, differ in no material respect from that portion of the conclusions and judgment theretofore made and entered, and against which defendants' motion was directed. The amended portion of the conclusions of law and the judgment entered, which follows its identical language, provides: "That plaintiff, prior to Jan. 15, 1904, provide and thereafter maintain a permanent dam, measuring box, and headgate at the point of diversion of the Jones (defendants') ditch, and if plaintiff fails to comply with this order within the time aforesaid defendants may divert from said Wutchumna ditch at said point of diversion of the Jones (defendants') ditch the water to which they may be entitled and which they are hereby awarded, using all necessary means. That, upon plaintiff providing and maintaining the dam, measuring box, and headgate as aforesaid, defendants shall not turn water out of said ditch without giving the superintendent, ditch tender, or other agent of plaintiff in charge of said ditch, at least two days' written notice, personally delivered to him, or at least three days' written notice by posting the same on said headgate, or depositing it in any box affixed to such headgate that plaintiff may provide for the purpose of receiving such notice. At the end of each irrigation defendants shall promptly close said headgate and turn the water back down the Wutchumna ditch. Should plaintiff, after the giving of said notice, refuse or neglect to turn to defendants the quantity of water defendants demand and may be entitled to receive at the time designated, then defendants may enter upon said ditch and take therefrom the water they are entitled to receive. Such notice to be dated and signed, and state that at a time named defendants will need the water to which they are entitled, or if all is not required, a designated quantity."

Two appeals are taken by defendants, one from the order denying their motion, as made, to set aside and vacate the original judgment and amending the previous conclusions of law, which branch of the appeal is presented on a bill of exceptions; the other is from that portion of the final judgment which follows the amended conclusions of law last made, and is presented on the judgment roll. Both these appeals are presented together, and, as the ground urged for a reversal is common to both, we will discuss only the appeal from the quoted portion of the final judgment entered upon the amended conclusions of law, because the conclusion we reach upon the question of its validity will necessarily dispose of the appeal from the order.

The particular point urged on the appeal from said judgment based on the amended conclusions of law is that the portion thereof providing for notice to be given by defendants before they can exercise the right to take water from the ditch of plaintiff is not warranted or supported by the findings of fact, and is erroneous. In other words, it is insisted that, as it appears from the findings of fact that the defendants had acquired and possessed at the commencement of the action the absolute, unqualified, and unrestricted right to take and divert from the plaintiff's ditch a certain quantity of water at certain times, and that such right had its origin in a parol grant, and was matured and made effectual by a use of more than five years, openly, notoriously, continuously, uninterruptedly, and adversely, and with the knowledge and acquiescence of plaintiff and its predecessors, under a claim of right, and as there is no finding by the court that this right was exercised at any time by giving any kind or character of notice to plaintiff, the court was without warrant or authority by its judgment to impose any conditions or limitations with respect to notice upon the future exercise of their right; that the amended conclusions of law and that portion of the judgment following them, relative to requiring notice, are inconsistent with the facts found, which showed that the defendants when plaintiff's action was commenced then had the vested, absolute right, without notice of any kind to plaintiff, to divert during fixed periods given quantities of water from the Wutchumna ditch. We think there can be no doubt of the legal correctness of the position of defendants.

Under the findings of the court the defendants had, at the commencement of the action, acquired a perfect and complete prescriptive right to divert the waters in question from plaintiff's ditch. This right was acquired and perfected by virtue of the statute of limitations. It has long been the settled law in this state that the adverse possession of land for a period of time prescribed by the statute of limitations not only bars a remedy, but extinguishes the right of the person holding the true written title, and vests a perfect title in the adverse holder. Arrington v. Liscom, 34 Cal. 365, 94 Am. Dec. 722. The perfect title which such adverse occupancy confers "is denominated a title by prescription, which is sufficient against all." Civ. Code, § 1007. While Arrington v. Liscom, supra, involved the question of title by adverse possession to land, the doctrine announced there has been uniformly held applicable as to the prescriptive right to divert water. As said in Water Co. v. Richardson, 72 Cal. 601, 14 Pac. 381: "So far, therefore, as the title to property is concerned, or, at all events, so far as the title to real property is concerned, prescription and limitation are convertible terms; and a plea of the proper statute of limitations is a good plea of a prescriptive right. The language of decisions with reference to water rights has been in accordance with this view. See Crandall v. Woods, 8 Cal. 144; Campbell v. West, 44 Cal. 646; Cave v. Crafts, 53 Cal. 135." To the same effect are the later cases of Alta Land, etc., Co. v. Hancock, 85 Cal. 227, 24 Pac. 645, 20 Am. St. Rep. 217; Faulkner v. Rondoni, 104 Cal. 146, 37 Pac. 883. Under these authorities the defendant, at the time plaintiff commenced its action, having already acquired, as the findings show, a prescriptive right to divert the waters of the Wutchumna ditch, the extent of that right is to be determined from the nature and character of the adverse user on which it is founded; the right is commensurate with the extent to which it was adversely enjoyed for the requisite statutory period sufficient to vest the right.

Now the findings show that the right to take these waters had its inception in a parol grant to the predecessors of defendants of a perpetual right to do so, and that by adverse user for over 20 years the defendants had acquired the right to take the waters from such ditch in the manner, and to the extent, and during the periods stated in the findings. It is nowhere found by the court that the parol grant of a perpetual right had attached to it any condition or limitation as to its exercise, nor that the adverse right, found to have been acquired by and vested in defendants at the commencement of the action, was ever exercised under any conditions relative to notice, or that any notice was ever given by defendants to plaintiff, save the notice it had from the open and notorious use of the waters of which the court finds the plaintiff had knowledge, and in which it acquiesced. On the contrary, the finding of the court is to the clear effect that the right acquired and possessed by the defendants as against plaintiff, when the action was commenced, was an absolute, unconditioned, unqualified, and unrestricted right to divert waters from the Wutchumna ditch in the manner, during the periods, and to the extent that the court found. As the right so acquired is not found by the court to have been at any time exercised under any conditions as to notice, the court was without authority in its amended conclusions of law, and in the portion of the judgment complained of, to attach such conditions to the exercise of the enjoyment of the right in the future. In Allen v. San Jose Land & Water Co., 92 Cal. 138, 28 Pac. 215, 15 L. R. A. 93, plaintiff brought an action to restrain defendants from laying pipes permanently in a ditch across his land. Defendants answered, setting up title to the ditch and water by adverse user; admitted that they intended to lay pipes therein permanently, and averred that as laid these pipes would be of no greater carrying capacity than their ditch; that laying them would render the use of the easement less burdensome to plaintiffs' servient estate and more convenient to defendants; that no damage would be done to plaintiffs' land, and no damage or trespass was threatened or intended. Judgment awarding a perpetual injunction restraining defendants from laying the pipes was granted plaintiffs on the pleadings. In sustaining the judgment on appeal this court said: "Section 806 of the Civil Code provides: 'The extent of a servitude is determined by the terms of the grant or the nature of the enjoyment by which it was acquired;' and it appears to be settled doctrine that both parties have the right to insist that so long as the easement is enjoyed it shall remain substantially the same as it was at the time the right accrued, entirely regardless of the question as to the relative benefit and damage that would ensue to the parties by reason of a change in the mode and manner of its enjoyment. Defendants' title rests upon a right by prescription—an implied grant, a grant which limits and defines defendants' rights as fully and as strictly as though the grant were express; and for the purpose of determining its terms we must look to the nature of the enjoyment by which it was acquired, for, as provided by the section already quoted, the nature of that enjoyment measures the extent of the servitude." It was subsequently held by this court, in harmony with the principle declared in the decision just quoted, that where, in 1889, one had built a flume across a ditch, which obstructed the flow of water in said ditch, and had maintained said flume thereafter until 1899, not under license, but as a right, he acquired a prescriptive title thereby, and could not be required to do some act as a condition to the future maintenance of said flume. Centerville & K. I. D. Co. v. Sanger Lumber Co., 140 Cal. 388, 73 Pac. 1079. See, also, Gregory v. Nelson, 41 Cal. 289; Oliver v. Agasse, 132 Cal. 299, 64 Pac. 401. The principle declared in these authorities is that the rights of a party who has acquired a prescriptive title, and the rights of one against whom said title is acquired, are mutual, and each is entitled to demand that the prescriptive right be exercised in the same manner that it was exercised while it was being acquired.

Under the principle declared by the authorities just cited, the future use and enjoyment by defendants of the right to divert the waters of the Wutchumna ditch is to be measured by the use and enjoyment whch they possessed when their prescriptive right accrued and became vested. The findings of fact shows that defendants had acquired this right by continuous adverse user, and that their use and enjoyment of the right had been in the manner prescribed by the statute of limitations; that this right had been acquired under the conditions prescribed by said statute, and was possessed as completely as the statute could vest it. The court having so found, and it nowhere appearing in any finding that the prescriptive right, which the court finds was vested in the defendants at the commencement of the action, was ever exercised by giving any notice to plaintiff, the court could not modify, restrict, or qualify that right by imposing conditions in its conclusions of law or in the judgment for the exercise of it in the future under notice to the plaintiff. While in the briefs of counsel for appellants it is insisted that all the quoted part of the judgment appealed from is erroneous, including the portion thereof requiring plaintiff to provide and thereafter maintain a permanent dam, measuring box and headgate at the point of diversion of the Jones (defendants') ditch, as well as that portion requiring notice to be given plaintiff by defendants before they shall be entitled to turn water out of said ditch, yet, as on the oral argument objection to the first part of the judgment was abandoned, and appellants' attack confined solely to the matter of notice, our disposition of the appeals will be confined to this latter point. It is, as we said in the beginning, unnecessary to discuss the appeal taken from the order, nor do we think it necessary upon reversal to make any particular direction concerning it, as the essential point involved in both appeals can be disposed of under the order to be made on the appeal from the final judgment.

As upon the facts found the court was not warranted, either in its original or amended conclusions of law, or in the first or final judgment, in requiring defendants to give any notice to plaintiff as a condition upon which their acquired prescriptive right to divert waters from plaintiff's ditch should be exercised, both the order and judgment appealed from are reversed, and the lower court is directed to enter a judgment on the findings of fact, eliminating and excluding all that portion of the judgment appealed from which requires that defendant shall give to plaintiff any notice before exercising their right to divert and use water from the Wutchumna ditch to the extent that the findings show that the defendants have the right to use the same.

We concur: HENSHAW, J.; McFARLAND, J.

148 Cal. 610

FARNUM et al. v. CLARKE et al. (S. F. 3,503.)

(Supreme Court of California. Feb. 3, 1906.)

1. Injunction—Grounds—Breach of Contract.

By the express provisions of Civ. Code, § 3423, an injunction cannot be granted to prevent the breach of a contract, the performance of which cannot be specifically enforced.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 113.]

2. Specific Performance—Vendor and Purchaser—Sufficiency of Defendants' Title.

The forest reservation act (Act Cong. June 4, 1897, c. 2, 30 Stat. 11) provides that whenever the United States reserves land for forest purposes all persons owning land within the boundaries of the reservation, upon surrendering the same to the government, may select in lieu thereof an equal amount of other public land, vacant and open to settlement. *Held*, that where one surrendered land within a forest reservation, and filed a selection of public lands in compliance with the regulations of the land department, accompanying it with proofs that the lands selected were vacant and open to settlement, he acquired at least an inchoate equitable right, capable of being enlarged into a complete title by the approval of the commissioner of the general land office, and hence one to whom he had contracted to convey the land so selected could maintain an action for specific performance to the extent of the selector's title.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 48.]

3. Same—Sufficiency of Plaintiffs' Performance.

Where plaintiffs employed defendant to locate government lands, and agreed to pay him $5 an acre for all tracts located and for which a good title should be obtained, and to deposit a sum in a bank with directions to pay over the price per acre to defendant on delivery of proper deeds, and plaintiff, in pursuance of the contract, paid into the bank all the money to be paid, and the locations had been made, and plaintiff had been placed in possession, and expended moneys in taking possession and in the care of the lands, the contract was so far executed that plaintiff was entitled to maintain an action for specific performance.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 249.]

4. Same—Inability of Performance by Defendant.

Civ. Code, § 3390, subds. 4, 5, provides that an agreement to perform an act which the party has no power lawfully to perform when required to do so and an agreement to procure the act or consent of any third persons cannot be specifically enforced. *Held*, that where defendant contracted to locate public lands and procure the title for plaintiff, defendant to be paid a specified sum per acre by plaintiff, and defendant filed proper locations of government land vacant and open to location and did all that the law required him to do to procure a good title, and the locations were before the Commissioner of the General Land Office to be passed on by him in proper time, the contention that an action by plaintiff for specific performance could not be maintained under the statute was without merit.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 31.]

5. Vendor and Purchaser—Construction of Contract—Sale or Agency.

Where a contract required defendant to select for plaintiff government lands, for which plaintiff agreed to pay him a certain sum per acre, plaintiff to deposit money in a bank, with directions to pay over the acreage price to defendant whenever he should deliver to the bank a deed from the person making the location to plaintiff, the contract was not one of sale, but one creating an agency between plaintiff and defendant.

6. Injunction—Restraining Breach of Contract—Complaint—Sufficiency.

A complaint alleged that plaintiff employed defendant B. to locate certain government lands for plaintiff, plaintiff to pay him a specified sum per acre for all that portion of the tract which could be located and good title obtained; that defendant B. was agent of defendant C. for the purpose of locating in the name of C.

government lands in lieu of lands previously held by C. under patents from the United States within the forest reservation of the United States, which had been relinquished and conveyed by C. to the United States under the act authorizing those holding lands within forest reservations to select other public lands in lieu thereof; that the lands held by C. within the forest reservation were held as securities for moneys advanced to B. by C.; that the lands selected in lieu thereof were likewise held; that it was agreed between B. and C. that on the sale of the lieu lands the proceeds should be credited upon B.'s indebtedness and that C. should convey his interest to the purchasers; that in pursuance of such contract certain lands were selected in the name of C. for the benefit of plaintiff, but that subsequent to the selection, C., with the consent of B., conveyed an interest in the lands to a certain corporation, which had knowledge of the contract between plaintiff and B., and plaintiff prayed that defendants be enjoined from conveying, etc., any of the lands selected. *Held*, that the complaint sufficiently stated a cause of action both against C. and against the corporation.

7. SAME—TEMPORARY INJUNCTION—GROUNDS.

Code Civ. Proc. § 527, provides that an injunction may be granted at any time before judgment on a verified complaint or affidavit showing satisfactorily that sufficient grounds exist therefor. *Held*, that where defendant selected public lands under a contract to secure them for plaintiff, in an action to restrain defendant from conveying the land selected by him, etc., plaintiff was entitled to preliminary injunction.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 305, 306.]

8. SAME—DISSOLUTION—GROUNDS.

A showing that the Commissioner of the Land Office had not acted on the selections made by defendant did not warrant the dissolution of plaintiff's temporary injunction.

Department 2. Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by N. C. Farnum and others against C. W. Clarke and others. From a judgment for defendants sustaining a demurrer to an amended and supplementary complaint, and from an order dissolving a temporary injunction, plaintiffs appeal. Reversed.

Charles W. Slack, E. O. Larkins, and U. T. Clotfelter, for appellants. Leon Samuels and Freeman & Bates, for respondents.

LORIGAN, J. Two appeals are here presented, one from a judgment for defendant after a demurrer to an amended and supplemental complaint had been sustained, and plaintiffs had refused to amend, the other from an order dissolving a temporary injunction which had been granted when the action was commenced. The demurrer which was sustained was a general one, and the validity of the order with reference to it is the first question presented for determination.

The amended and supplemental complaint alleges, that on December 5, 1899, the plaintiffs and the defendant John A. Benson entered into a contract which is set forth at length in the complaint, the essential provisions of which recite that plaintiffs employ and contract with Benson to locate for them certain government lands, described by particular governmental subdivisions, situated in Kern county, this state, in the district of lands subject to sale at the United States land office in Visalia, said lands aggregating 3,320 acres, for which the plaintiffs agree to pay him $5 per acre, for all that portion of said tracts which can be located and a good title obtained; that plaintiffs will deposit $16,600 in the Kern Valley Bank of Bakersfield with directions to said bank to pay to said Benson $5 an acre for the land described whenever Benson shall deliver to said bank a deed from the person who makes the location conveying to the plaintiffs all of the right, title, and interest, both present and prospective, of the said locator to the lands described in the agreement, or any portion thereof, together with evidence that the said land has been located by the party making the conveyance, and that said location has been accepted by the Commissioner of the General Land Office Benson agrees that he will locate and select said land, or cause the same to be located and selected for plaintiffs in the proper United States land office, under the laws of the United States and in conformity with the rules and regulations of the Interior Department. The contract further provides for the refunding to the plaintiffs by Benson of the sum of $5 an acre for any portion of said lands to which title may fail. The contract is signed by all the parties thereto and appended to it is the certificate of the Kern Valley Bank, of the same date as that of the contract, that $16,600 had been deposited in the bank by plaintiffs to be paid Benson whenever the same, or any portion thereof, was payable to him under the terms of the foregoing agreement. The complaint further alleges that the defendant Benson was the agent of defendant Clarke for the purpose of selecting and locating, in the name of said Clarke, government lands of the United States in lieu of lands which had theretofore been held by Clarke under patents from the United States within the public forest reservations of the United States, and which had been duly relinquished and conveyed by Clarke to the government of the United States under the provisions of an act of Congress approved June 4, 1897, c. 2, 30 Stat. 11, entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1898, and for other purposes"; that the lands so held by Clarke within the public forest reservations as aforesaid, were held by him as security for moneys advanced to Benson by Clarke, and the lands selected and located by Benson in the name of Clarke, in lieu of said lands held by the latter within the public forest reservations of the United States, were likewise held by Clarke as security for moneys advanced as aforesaid; that it was agreed between Clarke and Benson, that when the lands so selected and located as aforesaid were sold by Benson, and the price was satisfactory to Clarke, the moneys received therefrom should be credited upon the indebtedness of Benson, and that Clarke should convey all his right, title, and interest to the lands so sold, to the purchasers thereof; that about the 9th of December, 1899, Benson, as agent of Clarke, and in pursuance of the said contract of December 5, 1899, and for the purpose of carrying its provisions into effect, duly selected and located, in the manner prescribed by law, in the name of said defendant Clarke, and in lieu of lands theretofore held by said Clarke as aforesaid, the lands described in said contract; that the price stipulated to be paid by plaintiffs for said described land was satisfactory to Clarke; that said selections and locations of said lands were made in pursuance of the said agreement between defendants Benson and Clarke and for the use and benefit of plaintiffs, and for the purpose of obtaining the patent of the United States to said lands so selected and located, and conveying said lands to the plaintiffs under, and in accordance with, the provisions of said contract; that said lands so selected and located for and on behalf of the plaintiffs were, at the time of their selection and location, vacant and unclaimed and unoccupied public lands of the United States and were at said time free and open to entry and settlement under the laws of the United States and did not then, nor do they now, contain any known mines, salines, or minerals, petroleum, or mineral oil; that plaintiffs have in every respect complied with the terms of said contract of December 5, 1899, to be by them complied with, and have been at all times since its execution, and are now, ready and willing to perform all its terms to be by them performed; that prior to the commencement of this action the plaintiffs entered upon and took possession of said lands, so selected and located for their use and benefit and on their behalf, by the permission and acquiescence of the said defendants Benson and Clarke, and have expended in so taking possession, and in the care of said lands, the sum of $500; that Benson and Clarke prior to and ever since the commencement of the action, have wholly failed and refused to perform the terms of the contract of December 5, 1899, to be by them performed, and have repudiated the said contract, and have threatened, and do now threaten, to withdraw the said selections and locations made as aforesaid for the use and benefit and for and on behalf of the plaintiffs from record, and have threatened, and do now threaten, to sell and dispose, or cause to be sold and disposed, the said selections and locations to other parties, and to deprive the plaintiffs of the possession of said lands so selected and located and the right to obtain the title thereto, and that if not restrained by the court will carry said threats into effect and thereby plaintiffs will be deprived of the possession of and the title to said lands and will suffer great and irreparable injury thereby. Then follow allegations that subsequent to the selection and location of said land for and on behalf of plaintiffs by Clarke, the latter, with the consent of Benson, conveyed an interest in said lands to F. A. Hyde & Company, who thereafter conveyed the same to the Headlight Exploration Company; that at the time of the conveyance of said interest to said corporations they both had knowledge of the contract of December 5, 1899, between Benson and the plaintiffs, and of the agreement between Benson and Clarke, and that Benson was the agent of Clarke as aforesaid; that each of said corporations are under the control of, and are mere agencies of, said Clarke for the purpose of carrying out his threats to sell and dispose of said selections and locations made for and on behalf of plaintiffs, and that the conveyances made to said corporations were made by Benson and Clarke for the purpose of depriving the plaintiffs of the possession and title to said lands. The prayer of the complaint is that the defendants be perpetually enjoined and restrained from in any manner conveying, transferring, selling, deeding, incumbering, and in any manner dealing with the said selections and locations of said described lands, and with said lands, and in any manner disposing of said selections and locations otherwise than in accordance with the terms and provisions of the contract of the 5th of December, 1899. As to the defendant Clarke it is further asked that it be decreed that he holds the said described lands in trust for plaintiffs, and that he convey said lands to them, upon receiving a patent of the United States therefor, and for other relief, etc. The foregoing constitute the main and principal allegations in the complaint to be kept in view in considering the validity of the order sustaining the demurrer.

It is quite clear, from the argument of counsel for respondents, that the theory upon which the demurrer was sustained by the lower court was that the allegations of the complaint did not show such facts as would entitle plaintiff to a specific performance of the contract, and hence the prayer of plaintiffs for an injunction to prevent the acts complained of would not lie, because it is specially provided by section 3423 of the Civil Code that "an injunction cannot be granted: * * * 5. To prevent the breach of a contract the performance of which would not be specifically enforced." Thus the main consideration here is whether the complaint does show such facts as would warrant specific performance. It is insisted by respondent that the contract cannot be specifically enforced, first, because its performance requires the procurement by Benson of the approval and acceptance by the Commissioners of the General Land Office for the locations made, and the obtaining of a good title to said property, obligations which, it is claimed, subdivisions four and five of section 3390 of the Civil Code expressly declare cannot be specifically enforced, and for the additional reason that specific performance will not be decreed where the defendants have no title to the land involved, and it is claimed that under the locations made neither Benson nor Clarke acquired any title to the property described in the contract. In determining the force of the last proposition it will be necessary to consider in a general way the provisions of the forest reservation act of Congress of June 4, 1897, under which the selections in question here were made. That act provides that whenever the United States reserves land for forest purposes, all those persons owning lands within the boundaries of such forest reservation, upon surrendering the same to the government, shall be entitled to select in lieu thereof an equal amount of other public vacant land open to settlement. The effect of the terms of the act was to provide for an exchange of lands between the United States and the owner or claimant of land within forest reservations. On one hand, the individual conveyed his land within the reservation to the United States; on the other hand, the United States granted him the right to select in lieu thereof a quantity equal to what he had conveyed to it, the same to be selected from the public domain. His right under the act to make such selection within it, was co-extensive with that domain, and limited only to the selection of lands which were vacant and open for settlement.

The locations, which were made by Benson in Clarke's name for the benefit of the plaintiffs, were selections made under such right, and it is held that, when such a selection is made, the locator acquires an interest in the land selected, and immediately upon the filing of such selection is to be regarded as the equitable owner of such land. Kern Oil Co. v. Clarke, 30 Land Dec. Dep. Int. 550; Olive Land & Development Co. v. Olmstead et al. (C. C.) 103 Fed. 568. It is claimed by respondents that in the case of Cosmos Exploration Co. v. Gray Eagle Oil Co. (C. C.) 104 Fed. 20, it was held that no such equitable title is created by such selection, but only on approval of the commissioner of the general land office. As we understand the decision, we do not think it goes so far. But if it could be so construed, it would only be authority to the extent that by such location itself no perfect equitable ownership was created; that in order to create such a perfect equitable title, location and the approval of the commissioner were both necessary. That case, however, nowhere decides that a locator, by virtue of his location, acquires no right or interest at all in the property. It is to be remembered that under the act, one who has conveyed his title to lands within the forest reservation, is not taking lands in lieu thereof by grace of the government, but under a solemn contract relative to an exchange of lands. The United States pledged itself to grant him, from the public domain, lands of equal extent and area to those that he conveyed to it, the only condition imposed by the act being that, as so selected by him, they should be vacant and open to settlement. When a locator under the act files his selection in compliance with the rules and regulations of the land department, and accompanies it with proof that the lands of which he makes selection are vacant and open to settlement, and these facts are true, the Commissioner of the General Land Office has no arbitrary right to reject the selection, but must approve it, and upon such approval the right of the selector to the land takes effect by relation as of the date of his original selection. Kern Oil Company v. Clarke, supra. When such an approval is had by the commissioner, the locator becomes the full equitable owner in the land selected, but it by no means follows that until then he had acquired no interest or right in the land by virtue of his selection. On the contrary, we are satisfied that he did. He was possessed of the right under the act to acquire public land, had exercised that right to become the owner of the particular land on which he filed the selection, and had done all that was required by him to do under the act in order to obtain a perfect title. Under these circumstances, if he acquired nothing more, he acquired at least an inchoate equitable right, a right which was capable of being enlarged into a complete title by the approval of the Commissioner of the General Land Office, and was a right which the land department itself, in effect, recognizes may be sold and assigned after such selection is filed. Matter of Henry C. Mallory, 31 Land Dec. Dep. Int. 213.

So, in the case at bar, the selection of the lands in question under the contract, by Clarke for Benson, created a present right or interest in them in favor of the latter for the benefit of the plaintiffs. And if the facts as stated in the complaint otherwise disclose a right to specific performance in favor of plaintiffs, we are satisfied that a sufficient interest or ownership in the lands under the selections as made existed in defendants Clarke and Benson, upon which such a decree would operate. It is not necessary, in order to sustain the right to a specific performance, that at the time such performance is sought to be compelled, the vendor should have a complete equitable or legal title to the land which he contracted to convey. It is sufficient that he then have some interest in the property. It is no answer for a vendor to say, when specific performance is sought under his contract, that the interest or title which the decree seeks to affect, is not as complete as he agreed to convey. If the vendee is willing to enforce the contract against a lesser interest, or a less perfect title, it does not lie with the vendor to object on that account. It is only when the vendor has no title nor interest in the lands at all, that such a decree will not be awarded, for the very good reason that courts will not attempt to require done what it is impossible to do. If, however, the vendor has any interest in the property contracted to be conveyed, the vendee may enforce the contract as to whatever interest he may possess. Marshall v. Caldwell, 41 Cal. 611; Swain v. Burnette, 76 Cal. 299, 18 Pac. 394; Burks v. Davies, 85 Cal. 110, 24 Pac. 613, 20 Am. St. Rep. 213; Easton v. Montgomery, 90 Cal. 315, 27 Pac. 280, 25 Am. St. Rep. 123. Under the principle and upon the authority of those cases, as the selections of the lands described in the contract here in question vested a present interest in Clarke, as agent of Benson, for the benefit of plaintiffs, they would be entitled to a decree specifically enforcing the contract under the allegations of the complaint against both Clarke and Benson. From such allegations in the complaint (which, for the purpose of the demurrer, must be taken as true), it appears that the plaintiffs have fully complied with all the terms of the contract required to be performed of them; they have paid into the bank all the money to be paid for said lands on compliance with the contract; the locations provided to be made have been made; an interest in all the property described in the contract has been acquired by defendants Benson and Clarke for the benefit of plaintiffs under it; and plaintiffs have been placed in possession thereof by these defendants, and have expended large sums of money in taking such possession and in the care of said lands. These facts show that the contract has been so far executed by all the parties to it as to leave no room for doubt, under the general principles of law governing the specific enforcement of contracts, that plaintiffs would be entitled to maintain an action for that purpose. Nor do we think there is any merit in the point made by respondents, heretofore referred to, as to the application of subdivisions 4 and 5 of section 3390 of the Civil Code as to specific performance under the allegations of the complaint. If any obligation was imposed on Benson under the contract to procure a good title to the lands, or to procure the acceptance of the Commissioner of the United States Land Office of the locations, and we hardly think there was, these obligations have by virtue of the partial execution of the contract been performed by him. He has filed the locations and done all that the law required him to do to procure a good title. It is not suggested what else he could do. The locations are now before the Commissioner of the General Land Office by virtue of their being made, and in due and proper time he will pass upon them.

This disposes of the main controlling point in the case, namely, whether the allegations in the complaint would be sufficient to warrant specific performance of the contract, and we think they would. Some other points are made by respondent. It is claimed that under the contract relied on Benson was not an agent of plaintiffs, and hence no question of trust relationship can arise under its construction; that as between the parties the contract was one for the sale by Benson of the lands described and not of agency for its location. We do not think this point requires much discussion. The opening language of the contract is significant on this point. The word used there as indicating his relationship to the plaintiffs is that they "employ" him. Aside from this a consideration of all the terms of the instrument we think clearly shows that as to Benson it was not a contract of sale but one of agency. As to the defendant Clarke we are satisfied that the complaint states a sufficient cause of action against him, and as to the corporations defendant there can be no question of it. The other points made by respondents we deem untenable. We are satisfied, for the reasons given, that the complaint states a cause of action against the defendants warranting an injunction, and that the sustaining of the demurrer to it by the lower court was erroneous; that the allegations of the complaint disclose most, if not all, of the conditions which, under section 3422 of the Civil Code, authorize the court to grant an injunction to prevent a breach of the obligation existing in favor of the plaintiffs. The only exception to the allowance of an injunction to prevent the breach of a contract as provided for in section 3423 of the same code applies to cases where the performance of the contract would not be specifically enforced. As we have shown that the contract involved here could and would be specifically enforced, this latter section has no application. It is true that an action for specific performance would not now invest in the plaintiffs an interest in the lands as fully and completely as the contract contemplated they should ultimately obtain. Such a complete interest could only be secured through the approval of the selections by the Commissioner of the General Land Office. Until he does act, however, Benson has nevertheless such an interest, acquired by the act of selection itself, which he can convey, and which he could be compelled to convey. It is not apparent, either, but that at any time shortly he may acquire by such approval of the selections by the commissioner a complete title, and hence be able to perform the contract, as was contemplated. This, however, for the purposes of present consideration, is of no particular moment. All we are concerned with now is, that there exists a contract capable of specific performance and to prevent the breach of which an injunction will lie, as that is the only relief the plaintiffs are now seeking, and to which we think the allegations of the complaint show they are entitled.

Now as to the validity of the order vacating and dissolving the temporary injunction, which the court had granted on the filing of the original complaint, restraining Benson and Clarke from in any manner dealing with the land and premises described, or in any manner interfering with or disposing of the selections involving said land. When the order vacating such temporary injunction was made, there was on file in the action an amended and supplemental complaint containing all the material allegations which are set forth in the second amended and supplemental complaint, which we have just finished considering. The facts stated in such amended complaint would, if proven upon the trial, entitle the plaintiff, for the reasons we have heretofore suggested, to the relief prayed for—a perpetual injunction restraining defendants from committing a breach of the contract which it is alleged they were threatening. In aid of that relief, and to make it effectual if granted, they were entitled, under section 527 of the Code of Civil Procedure, to a preliminary injunction upon the allegations of their verified complaint, and to have such injunction continued in force. If it were not so continued, their efforts to obtain the relief, which their complaint shows they would ultimately be entitled to, would be abortive. If unrestrained, the threatened breach could be committed by the defendants, irreparable injury follow, and any judgment obtained would be ineffectual. As is declared in Porter v. Jennings, 89 Cal. 444, 26 Pac. 965, if such a preliminary injunction be not granted and continued in force, it might appear that when a judgment entitling the plaintiff to the relief sought was entered, that the calamity which he was seeking to avert had fallen; the breach of the contract he was endeavoring to prevent had been made; the locations and the lands disposed of, and that the relief came too late. In this view, therefore, it was the duty of the court to continue in force the temporary injunction which had been issued, and the order of the court vacating it was erroneous, unless its action in doing so can be sustained, upon the facts stated in an affidavit of Benson, filed and used upon the hearing of the motion to dissolve such temporary injunction. This affidavit is short, and states that ever since said lands were located, he had been unable to obtain evidence of the fact that such locations had been accepted by the Commissioner of the General Land Office, that said commissioner had never approved said locations, and that prior to the commencement of this action said commissioner had suspended the townships wherein said lands are situated from entry. He does not deny any of the facts stated in the complaint as to the threatened action of Clarke and himself with reference to said lands, or any of the other facts which are set forth in said complaint, and what he does state in no manner warranted the court in disturbing the temporary injunction. In effect all that is shown by Benson's affidavit is that the Commissioner of the General Land Office has not yet approved the locations, and has suspended from entry the townships in which the lands upon which they were filed are situated. But the fact that the commissioner has not acted upon the selections did not warrant a dissolution of the injunction so as to permit Clarke and Benson to go on and commit the breach of the contract which it is alleged they were threatening to do, and which Benson in his affidavit does not deny that they intended doing. Nor is the fact that the commissioner has not yet acted upon such locations of any significance as far as the relief sought by plaintiff is concerned. It appears thereby simply that the commissioner has neither approved nor rejected the selections; that he has not acted at all. But, as the law requires him to act in the matter, he will undoubtedly do so in proper time. He may do so at any time; accept the locations and issue a patent. Nor is the fact of any moment that the commissioner has suspended from entry the townships wherein the land described in the contracts is situated. Such order may be revoked at any time. It is only temporary. And as made it does not affect locations which were made prior to the order of suspension. Such locations, though suspended under the general order suspending the townships in which they are made from entry, are only suspended temporarily; they still attach as selections, and are valid until rejected by the commissioner. Matter of Melvin P. Yates, 11 Land Dec. Dep. Int. 556. So these facts presented by Benson's affidavit afforded no reason for the disturbance by the lower court of the temporary injunction.

This disposes of both appeals, and as the order of the court sustaining the demurrer was erroneous, as likewise was the order vacating and dissolving the temporary injunction, the judgment and order appealed from are reversed. The lower court is directed to overrule the demurrer interposed to the second amended and supplemental complaint with leave to defendants to answer, and to restore the temporary injunction.

We concur: HENSHAW, J.; McFARLAND, J.

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148 Cal. 601

COMMERCIAL BANK v. WELDON et al.

(L. A. 1,425.)

(Supreme Court of California. Feb. 3, 1906. Rehearing Denied March 5, 1906.)

1. INTERPLEADER—EVIDENCE—SUFFICIENCY.

On an issue in interpleader whether a certain tract of land, the sale of which gave rise to the fund, was purchased by one of the claimants under a contract made jointly by himself and the other claimant, or under a later contract made after abandonment of the first one, evidence *held* to support a finding that the purchase was under the second contract.

2. JOINT ADVENTURES — ABANDONMENT OF CONTRACT—MAKING NEW CONTRACT.

Where two parties jointly obtained an option for the purchase of land agreeing to pay installments of the price on certain dates, one of the joint purchasers was under no obligation to pay an installment either for his own benefit, or that of the other purchaser, and on failure to pay, either of the purchasers was at liberty to make a new contract of purchase excluding the other from its benefits.

3. VENDOR AND PURCHASER—OPTION TO BUY LAND—FORFEITURE—NOTICE—NECESSITY.

Where an option for the purchase of land required payments at certain dates and made time of the essence, providing that prompt payment was a condition precedent to the right to require conveyance, failure to make a payment when due entitled the vendor to forfeit all the purchasers' rights without giving them notice.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 23.]

4. TRUSTS—CREATION.

A. and B. jointly procured an option for the purchase of land requiring payments to be made at certain dates. After failure to make one of these payments B. and C. entered into a new contract for the purchase of the land. C. and A. made an agreement whereby A. gave C. a quitclaim deed and he agreed that, on the completion of the first contract, he would convey a certain undivided interest in the property to A. The land was finally purchased under the second contract. *Held* that the contract between C. and A., in which the quitclaim deed was given did not create a trust in favor of A. and that the acceptance by B. of a conveyance from C. after performance of the second contract was not a fraud on A. which would entitle him to pursue the proceeds of the property.

5. SAME—CONTRACT—CONSTRUCTION.

The contract under which the quitclaim deed was given did not amount to a covenant to obtain the land under the first contract.

Department 2. Appeal from Superior Court, Santa Barbara County; Felix W. Ewing, Judge.

Action of interpleader by the Commercial Bank against W. R. H. Weldon and others. From a judgment in favor of Weldon, Emma M. Williams and others, also claimants, appeal. Affirmed.

Rehearing denied March 5, 1906; Beatty, C. J., dissenting.

C. A. Storke and Richards & Carrier, for appellants. S. E. Crow and B. F. Thomas, for respondent.

LORIGAN, J. This is an appeal from a judgment accompanied by a bill of exceptions in which the evidence and errors relied on for a reversal are presented. The defendant Weldon had judgment and two of the other defendants, Mrs. Williams and Hankey, appeal.

The action is one of interpleader, brought by the plaintiff bank, to require defendants to set forth and litigate between themselves their respective claims to a fund of $12,500 in the hands of plaintiff, part of the purchase price of a tract of land, to which fund all the defendants asserted a right. The defendant Cayce answered, disclaiming any interest in the fund, and under proper pleadings the defendant Weldon, on the one hand, and Mrs. Williams and Hankey, jointly interested on the other, press their respective claims to the fund. The admitted facts in the case are as follows:

On December 6, 1900, one E. W. Chapman held an option to purchase from W. E. Dean, on or before May 1, 1901, about 31,760 acres of the Rancho Los Prietos y Najalayegua, in the county of Santa Barbara. On said December 6, 1900, said Chapman entered into a written agreement to sell to said defendants, W. R. H. Weldon and one H. L. Williams, his interest to said land under said option, on certain terms and conditions, namely, that there should be paid him $2,500 on the signing of the agreement, $2,500 within 120 days after said December 6, 1900, and $20,000 to be paid on or before April 25, 1901. Payment of these sums was made a condition precedent upon which the obligation of Chapman to convey depended, with the further provision that in the event of a failure by Weldon and Williams to make any of such payments the agreement would be null and void and of no effect, that the payments already made by them should be forfeited, and that "time is to be of the essence of this agreement." On the signing of the agreement the $2,500 provided to be paid therein was paid. On April 9, 1901, said H. L. Williams by written agreement transferred all his interest in said contract between Chapman, Weldon, and himself to the defendant E. S. Cayce, which conveyance was at once recorded. On the same day that the conveyance from Williams to Cayce was made an agreement was executed by Cayce and Williams, reciting, among other things, that "whereas, the said H. R. Williams has this day made a quitclaim deed to all his right, title and interest in that certain agreement above mentioned (the agreement of December 6, 1900, with Chapman) to said E. S. Cayce of the city and county of Santa Barbara, state of California; and whereas, the said E. S. Cayce and W. R. H. Weldon are about to raise the necessary money to pay for the said above-mentioned property, it is thereby understood that the reason for my giving a quitclaim deed to the said above-mentioned property with my name connected was because the bank that Cayce and Weldon are borrowing the money from refuse to loan with my name connected with the transaction: It is hereby understood and agreed by and between the parties hereto that as soon as the said E. W. Chapman, or others, complete the terms of this agreement of sale, December 6, 1900, then the said E. S. Cayce is to transfer back, or cause to be transferred a ¼ undivided interest in said property in the said Los Prietos Ranch containing about 31,760 acres."

This agreement was recorded on October 12, 1901, long subsequent to its execution. On April 18 or 19, 1901, Weldon went to San Francisco from Santa Barbara and obtained a conveyance from Chapman and Dean to himself and Cayce of the portion of the

Rancho Los Prietos, heretofore referred to. After such conveyance and on May 9, 1901, Weldon and Cayce entered into a contract with one J. L. Washburn to sell him said property for $50,000, of which $10,000 was paid down, and the balance of $40,000 to be paid within one year thereafter, a deed in escrow being deposited with the plaintiff bank to be delivered to said Washburn on payment of such balance. On May 13, 1901, Weldon and Cayce mortgaged said property for $17,000, and on February 17, 1902, Cayce conveyed all his interest in said land to the defendant Weldon. On May 9, 1902, Washburn made final payment of the balance of the purchase price to the plaintiff bank and received the deed. It is the right of the respective parties to $12,500 of such balance that is involved in this action. Cayce never transferred to Williams or his assignors any interest in said land or to any of the money derived therefrom, and the defendants, Mrs. Williams and F. W. Hankey, are the successors in interest of said H. L. Williams thereto, if he had any interest therein.

In addition to these admitted facts the court made findings as to other disputed ones, and such of them as are material we refer to. The court found that the $2,500 paid to Chapman on the execution of the agreement of December 6, 1900, was paid entirely by Weldon, that Williams did not contribute any part of it, nor repay to Weldon any part of it; that on the 6th of April, 1901 (being 120 days after the execution of the agreement of December 6, 1900), when the second installment of $2.500 mentioned in said agreement became due, no part of it was paid, and on account of such failure to pay, E. W. Chapman elected to consider himself released from all obligations created by such agreement; that by reason thereof said agreement lapsed and became extinguished on said April 6, 1901, and null and void between all the parties thereto; that thereafter and on the 18th or 19th of April, 1901, defendants Weldon and Cayce entered into a new agreement with Chapman for the purchase of a portion of said Los Prietos Rancho for the price of $20,000, which Weldon then paid out of his own funds, whereupon a conveyance was executed by said Chapman, and the holders of the legal title to said land, to said Weldon and Cayce; that H. L. Williams was not a party to the said last-mentioned contract, nor did he contribute any of the purchase price of said land; that prior to April 6, 1901, the defendant Weldon had decided not to do or perform any act further under said agreement of December 6, 1900, did not do so, and considered the same terminated, but, being desirous of making a new agreement for the purchase of said parcel of land, out of abundance of caution, requested said Cayce to secure to himself a transfer from said H. L. Williams of the interest of the latter in said agreement of December 6, 1900; that the defendant Weldon had no notice of the agreement between H. L. Williams and E. S. Cayce until the recordation of said instrument on the 12th of October, 1901, and that the transfer to Weldon of the interest in said land which Cayce acquired therein, by the conveyance from Chapman and others, was not a fraud upon said H. L. Williams.

The only point involved on this appeal is whether the evidence is sufficient to sustain the findings, the chief claim of appellants being that the principal finding made by the court, that the interest in the Los Prietos Rancho was acquired under a new agreement between Chapman, Weldon and Cayce of the 18th and 19th of April, and not in consummation of the agreement between Chapman, Weldon and Williams of December 6, 1900, is not sustained by the evidence. This contention of appellants is based more upon what they claim should have been the proper construction given by the court to the testimony in the case upon the subject rather than upon any real insufficiency of the evidence as it is presented in the record and actually construed by the court, to support the findings. The only evidence directly bearing upon the matter is the testimony of the defendant Weldon himself. It is admitted by counsel for appellants in their brief, discussing more particularly the finding that Weldon had decided not to do or perform any act under the contract of December, 1900, and considered the same terminated, that there are declarations of Weldon found in his testimony which would well support this finding, but they claim that his testimony, considered as a whole, falsifies his declared intentions in the matter of carrying out said contract. That there is testimony on the part of Weldon, not only sustaining this particular finding, but all the other findings regarding the abandonment of the old contract and the making of the new one, is equally clear from the record, and we do not think it is subject to the criticism which counsel subjects it to. At least, it is not for us to say what credibility the lower court should have given to his testimony. It believed what he said on the subject, and we must construe his testimony as favorably as possible in support of the findings which it tends to sustain.

The testimony of Weldon shows, giving a general résumé of it, because there is no evidence in conflict with it in the record, that prior to the time when the second payment under the contract of December 6, 1900, was about due, he wrote to Chapman that he would not make it—that he relinquished his claims under the contract—that in fact such payment was not made, either by himself or Williams; that he so notified Chapman because the latter had asked him in case he concluded not to go on under that contract, to notify him to that effect; that he had made up his mind not to go ahead with the contract in conjunction with Williams, for personal reasons satisfactory to himself, and it was on this account that he purposed abandoning the agreement; that subsequent to April 6, 1901, he and Cayce (who seems to have acquired some interest in the contract of December 6, 1900), believing that their rights under the contract of that date had become forfeited, and both having concluded not to have anything further to do under it, the former suggested to Cayce the advisability of getting a new agreement for themselves and Chapman, or purchasing the property from him on different terms. This was agreed to. As to the matters connected with the making of such new agreement, Weldon testified that notwithstanding he and Cayce considered the old contract at an end, and had no further intent of acting under it, still as he (Weldon) had been advised that Williams was a man who would be liable to cause trouble with any business matter with which he had been connected, out of an abundance of caution he deemed it advisable, before attempting any new arrangement with Chapman, to obtain a relinquishment from Williams of all his interest under the old contract; that he sent Cayce from Santa Barbara to Los Angeles to obtain it; that Cayce returned with a quitclaim deed of such interest to himself, but that he had no actual knowledge at that time, or until January, 1902, of the contract made between Cayce and Williams at the time the former obtained Williams' quitclaim deed; that some days after Cayce returned with the deed from Williams, Weldon went to San Francisco to see Chapman concerning the property; that Weldon considered at that time that the old contract was at an end, and that Williams had no further interest in any dealings concerning the land. In their negotiations Chapman explicitly stated that the contract of December 6, 1900, had expired through failure to make the second payment under it, that it was at an end, and that he could not do any further business under it; that they then discussed a new deal relative to the property, Weldon informing Chapman that he would not pay $25,000 for the property, and that as he (Chapman) had but a few days to acquire it under his contract with Dean, he would give him $20,000 for it, which, after considerable discussion, Chapman accepted; that when this agreement was reached Chapman stated, in addition to his previous declarations, that he considered the agreement of December 6, 1900, at an end for noncompliance with its terms, that if he felt under any obligation to Williams in the matter he would not feel at liberty to make the sale to Weldon and Cayce, but that, as he considered the old contract forfeited, he felt that he had a legal right to make the sale, which he accordingly did, making a deed to Williams and Cayce of the property, Weldon paying from his own funds the $20,000 consideration therefor.

We think this testimony, which was uncontradicted, warranted the court in finding that the purchase of these lands was not had under the contract of December 6, 1900; that that contract, in as far as any rights which Weldon and Williams had under it, had expired by virtue of its unfulfilled terms relative to the second payment, and the election of Chapman to consider all rights under it terminated and forfeited. Weldon was under no obligation, when the second payment became due, to make it, either for himself or the benefit of Williams. He owed no legal obligation to Williams to perform the contract, and while their default in making such second payment did not relieve them from the right of Chapman to enforce the terms of that contract against them if he saw fit, still if the latter was willing to consider the agreement abrogated, and treat with Weldon on the subject of a new contract between them with reference to the property, there is no rule of law which would preclude himself and Weldon from making it, to the exclusion of Williams from any participation or benefit under it. As time was expressly made the essence of the original agreement, the default of Williams and Weldon in the second payment, effectually forfeited all rights under it, and Chapman had an absolute legal right to consider it so forfeited. He was not required to give—as the argument of counsel for appellants would seem to indicate he should—notice to Weldon and Williams, upon their default, that, as far as their rights were concerned, the agreement was terminated. No affirmative action on the part of Chapman was necessary. By force of the terms of the agreement itself, the rights of Weldon and Williams had ended, and he could make any other contract with Weldon for a disposition of the property that he saw fit. Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17, and cases therein cited.

It is insisted, however, by appellants, that if it be conceded that the interest in the Los Prietos Rancho was acquired under a new arrangement made by Weldon with Chapman for himself and Cayce, and not under the old agreement, still that, under the contract between Cayce and Williams, made when the quitclaim deed of the latter was executed, Cayce held the interest acquired under the deed from Chapman to himself and Weldon, in trust to convey one-fourth of the interest he acquired thereunder to Williams, and that the conveyance by him of such interest to Weldon, who took with notice of the rights of Williams under said contract, was a fraud upon Williams, and that appellants can pursue the funds derived from Cayce's sale of such trust interest into the hands of the bank, under a right superior to that of Weldon thereto. We do not think that this contract between Cayce and Williams operated to create a trust, or that notice of its existence affected the right of Weldon in the property acquired under his deed thereto from Cayce. Weldon was not bound by notice of the existence of such agreement between Williams and Cayce, or its terms, any further than appeared in the agreement itself. By such agreement Cayce only agrees to convey to Williams an interest in the property, in the event that the old contract is consummated, and the court found that it never was consummated, but that the land was acquired under an entirely new agreement. The notice imparted to Weldon by the agreement between Cayce and Williams was that of any interest in the property which Cayce might acquire under the old agreement he would convey a quarter to Williams. As the interest which Cayce acquired was not obtained under the old contract, it was no fraud on the right of Williams that Weldon should take a conveyance from Cayce of all his interest in the land. It is insisted that, under the contract between Cayce and Williams, Cayce covenanted that Weldon and he should make the purchase under the old agreement. We do not think the recital in that agreement amounted to a covenant, or that it imposed any obligation upon Weldon and Cayce to complete the purchase of the land under the old agreement of December 6, 1900. In whatever way the recital may be considered it could not bind Weldon, as he was not a party to it. And if it be treated as an agreement on the part of Cayce, under the evidence in the case, the most that can be said relative to such agreement is that Cayce violated it and became liable to damages for its breach. No trust was imposed under it, nor did it give Williams or his successors any claim to the fund involved here, and to which they only assert claim under the theory of the existence of a trust in the lands in favor of Williams, of which they claim Weldon had notice when he took the deed.

The judgment appealed from is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

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148 Cal. 695

JAEGEL v. JOHNSON et al. (SULLAWAY et al., Interveners). (Sac. 1,281.)

(Supreme Court of California. Feb. 12, 1906. Rehearing Denied March 14, 1906.)

1. HUSBAND AND WIFE — COMMUNITY PROPERTY.

In an action to quiet title, in which plaintiff claimed under a deed from a husband and defendants claimed as heirs of the wife, evidence *held* sufficient to support the finding of the trial court that the land was not purchased with the separate funds of the wife, but was community property.

2. APPEAL—HARMLESS ERROR.

Where a certain fact has been proven beyond controversy by evidence introduced by defendants, they are not prejudiced by the subsequent admission of other evidence of the same fact offered by plaintiff.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4161.]

Department 2. Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Anton Jaegel against Ella Johnson and others, in which Mrs. Ada Sullaway and others intervened. From a judgment for plaintiff, defendants and interveners appeal. Affirmed.

Shanahan & Braynard, for appellants. Reid, Dozier & Carr, for respondent.

McFARLAND, J. This is an action to quiet title to a piece of land designated as lot 9 in block 25 of the city of Redding. The trial court rendered judgment in favor of plaintiff, and the defendants and interveners appeal from the judgment and from an order denying their motion for a new trial.

The respondent claims title through a deed, which on its face conveys the lot to him, executed by S. A. J. Eckles; and the appellants claim as heirs of Mrs. Electa L. Eckles, now deceased, who at the time of her death, and for many years prior thereto, was the wife of said S. A. J. Eckles. After the death of Electa, the husband, S. A. J. Eckles, conveyed the lot to respondent, the latter paying to the former in cash the full market value of the lot; but appellants contend that it was the separate property of the wife Electa, and passed at her death to her heirs. The court found that the lot was community property and not the separate property of the wife; and the question in the case is whether that finding can be sustained. On June 30, 1879, at which time the said S. A. J. Eckles and Electa Eckles were husband and wife, the title to said lot was in J. B. Haggin, and on that day he executed a deed conveying it to the wife Electa. This was before the amendment of 1889 to section 164 of the Civil Code. The appellants put the husband, S. A. J. Eckles, on the stand as their witness, and he testified that the lot was paid for by his wife with her own money which she had at the time of the marriage, and that he did not directly or indirectly pay any part of the purchase money. But, upon cross-examination, and for the purpose of impeachment, he was asked if he had not on various occasions made declarations to persons named, and at times and places designated, which were inconsistent with and contradictory of his testimony, and to the effect that he was the owner of the lot, that he had paid for it with his own money, that Mrs. Eckles never had any right to it, etc. There were various questions of that kind asked him on cross-examination; to some of these he answered that he did not remember, to others that he would not say that he did or not, and to others he answered in the negative. Respondent introduced evidence that he did make the statement inquired about to the persons and at the times and places named in the question. On this subject it is sufficient to say that the court below was justified in holding, as it evidently did hold, that the witness had been impeached, and that his testimony should be disregarded. And the court was justified in finding that, apart from the testimony of said Eckles, there was not sufficient evidence to maintain the proposition that the lot was paid for by the separate funds of the wife, and was not community property. The judgment and order must, therefore, be affirmed, unless the court, on the trial of the case, made erroneous rulings so prejudicial to appellants as to warrant a reversal. S. A. J. Eckles was appointed administrator of the estate of his deceased wife, and is still acting in that capacity, the administration being still pending; and most of the exceptions to rulings of the court related to a judgment obtained by respondent in a certain action brought by him against S. A. J. Eckles as administrator of the estate of his said wife Electa, which judgment respondent set up and claimed to be conclusive against her heirs. But the court found that said judgment was collusive, invalid, and void; and therefore the rulings above referred to, whether erroneous or not, are of no consequence on this appeal.

Appellants contend that the court erred in allowing respondent to introduce certain declarations and acts of the grantor S. A. J. Eckles in support of the latter's title to the lot; and that such declarations and acts were immaterial, incompetent, and, as they say, "self-serving." But most of these declarations and acts were within the line of impeachment for which a proper foundation had been laid; and to some of them there were no objections or exceptions. Respondent introduced over appellants' objections two or three mortgages made by S. A. J. Eckles of the lot in question after the death of his wife; and it may be that it was error to allow these mortgages for the reason that they were acts and declarations tending to show an assertion of title by respondent's grantor, and were not admissible for that purpose—although Eckles' attention was called to them on his cross-examination. But these rulings were unimportant and not prejudicial to appellants because, before they were made, appellants themselves, of their own motion, had introduced evidence showing that Eckles had made such assertions of title. They had introduced nearly all the papers and proceedings in the estate of Electa Eckles, which showed that the inventory verified by S. A. J. Eckles did not contain said lot 9 as part of her separate estate. And, moreover, they introduced the whole of the deed from Eckles to respondents—only a part of which had been introduced by respondent when first presenting his case in chief—and this deed contained, among other things, this clause: "Said lot having been purchased by the party of the first part herein on June 30, A. D. 1879 and during his marriage with Electa L. Eckles, now deceased, from James B. Haggin, who at the request of the parties of the first part herein conveyed said lot to Electa L. Eckles, at that time the wife of the party of the first part herein; that the purchase price of said lot was paid by the party of the first part herein out of the funds acquired by him during the marriage of himself and said Electa L. Eckles, now deceased; that said premises was community property; that said Electa L. Eckles during her lifetime, and during said marriage acquired other real estate by gift or devise, all of which was her separate property and was administered on by the administrator of her estate, which estate is not as yet closed, no claim having been made by said administrator to the above-described premises, which, under and by virtue of section 1401 of the Civil Code of the state of California, vested in the party of the first part herein as the surviving husband of said Electa L. Eckles deceased." Indeed, the fact that S. A. J. Eckles claimed the said lot 9 as community property was not questioned; there was no evidence to the contrary; and appellants having, themselves, proved the fact, other evidence to the same effect afterwards introduced by respondent was of no consequence, and the conclusion of the court upon that subject must have been the same if the evidence objected to had not been introduced by respondent. We see no other objections which touch matters important or prejudicial, and no other points necessary to be specially noticed. There is, therefore, no ground for disturbing the judgment or order appealed from.

Under the above views we need not consider respondent's contention that there is no properly presented or settled bill of exceptions in the transcript, and that there is nothing before the court other than the ordinary judgment roll.

The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; LORIGAN J.

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148 Cal. 677

KOCH v. SOUTHERN CALIFORNIA RY. CO. (L. A. 1,333.)

(Supreme Court of California. Feb. 10, 1906.)

RAILROADS — ACCIDENT AT CROSSING — CONTRIBUTORY NEGLIGENCE.

A person who drives rapidly over a railroad crossing without looking at all for an approaching train, or taking any precautions as to his own safety, is negligent, though the gates at the crossing are open.

[Ed. Note.—For cases in point. see vol. 41, Cent. Dig. Railroads, §§ 1043, 1072.]

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by John Koch against the Southern California Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Edward F. Wehrle and Anderson & Anderson, for appellant. C. N. Sterry, T. J. Norton, Paul Burks, and E. E. Millikin, for respondent.

HENSHAW, J. Plaintiff sued to recover damages for personal injuries occasioned him by reason of the alleged negligence of the defendant in so operating its trains that plaintiff was struck by one of them at the crossing of a street in the city of Pasadena. The negligence charged was the omission upon the part of the defendant company to sound the bell and to close the gates maintained at the crossing at the time of the approach of the train. Upon the taking of all the testimony the court instructed the jury to find a verdict for defendant, which the jury did, and the court's ruling in this regard is the subject of this appeal.

The consideration of the question necessitates the presentation of the evidence, which is here given, as favorably to the plaintiff as the facts warrant. Plaintiff, about 10 o'clock at night, was driving two horses attached to a light spring wagon toward the railroad track at a gait which he describes as "a pretty fair trot" and which others describe as a "brisk trot." Colorado street, upon which he was driving, is 75 feet wide with an electric railroad track running along it a little south of the middle of the street. The sidewalk on the south side of the street is 11 feet wide. An alley 30 feet wide crosses Colorado street at right angles, and defendant's railroad track also crosses the street in the center of that alley. The train which struck plaintiff's spring wagon consisted of a locomotive, 13 loaded freight cars and a caboose. It came from the south through this alley up a steep grade at a speed of about 4 miles an hour, and having come almost to a standstill at a station just beyond, the engine was laboring heavily to get under way on the up grade and "was puffing very hard with a loud exhaust.' There was evidence tending to show that the engine bell and the whistle were silent, and it will be assumed that they were. There were gates across the street on each side of the railroad track, and these gates were not closed as the train crossed the street. Colorado street was paved with asphalt and plaintiff's horses were newly shod with smooth shoes. He approached the track of defendant without checking the speed of his horses and "looking straight ahead." He says he could not see or hear the train, and first saw it when the noses of his horses were about on the railroad track. According to the map or plat of the locality found in the record, as well as according to the undisputed evidence of witnesses, the buildings in the vicinity were so disposed that, if the plaintiff had been on the alert and driving with reasonable caution, he might have caught sight of the approaching train in ample time to have avoided the accident. Plaintiff was, and had been for six years, familiar with the crossing, but he took no precautions whatever before driving upon it. He did not stop. He did not slow up. He did not look. He did not listen. The clattering of his horses' feet and the noise of his wagon would certainly have interfered with his hearing the approaching train. He was moving faster than the train and failed to take any precautions by slowing up to listen, but had he been on the alert he could have heard and seen the train in time to have avoided the accident. It is difficult to understand, then, how he could have come into collision with this slow-moving locomotive, excepting that he either absent-mindedly or recklessly approached and drove on the track. Indeed, from his own testimony, it is plain that he approached the crossing with a total disregard of its dangers. In substantiation of this is his statement to one of the witnesses, which is not denied, that "My main idea was to get home. I was not paying any attention to anything." Under the facts, then, the plaintiff, after accepting the invitation to proceed, extended to him by the open gates, used no precaution whatsoever, did absolutely nothing for his own protection and safety. He did not lessen the speed of his horses; he did not listen for the approach of the train, which was made audible to others some time before he drew near the crossing; he did not look for the train, as he, himself, testifies he kept his eyes straight ahead; and the first intimation he had of its approach was when his horses shied away from the engine.

The case thus presented is not one as to the degree or amount of care which should be exercised by one about to cross a railroad under the invitation to proceed given by the open gates, but whether under such circumstances a man may fail or decline to exercise any care whatsoever, treating the open gates as a positive assurance of safety. Of course, in any case such as this, where it is shown that a plaintiff has exercised some care, the question whether or not the care actually exercised was due and sufficient, will always be a matter for determination by the jury. But where, as here, the unconflicting evidence shows that he exercised no care whatsoever, it becomes a question of law to say whether or not such a plaintiff's case shall be submitted to the jury. If it is so submitted, it can only be upon the theory that the open gates were an absolute warranty of safety, justifying the plaintiff in proceeding without any heed or caution. It is for this proposition that appellant contends. But such we do not understand to be the law. A railway crossing is, itself, a place of danger and is an effectual warning of danger, a warning which must always be heeded, and the exercise of ordinary care in traveling over such a place is not excused by the negligent omission of the railway company, itself, to exercise reasonable care. Green v. Southern California Ry. Co., 138 Cal. 1, 70 Pac. 926; Herbert v. Southern Pacific Company, 121 Cal. 227, 53 Pac. 651; Lambert v. Southern Pacific Company, 79 Pac. 873. Nor is it the law that when a railroad company adopts safety gates or any other appliance for the protection of the public, the public is thereby absolved from all duty of taking care of itself. A person is still required to exercise due and ordinary care, and while the quantum of care which will be reasonable may be less where the gates are provided and are relied upon by the traveler, still the gates, themselves, are not an assurance and a warranty such as to justify a traveler in going blindly ahead in total disregard of all ordinary precautions, as did the plaintiff in this instance. Greenwood v. Philadelphia, etc., 124 Pa. 572, 17 Atl. 188, 3 L. R. A. 44, 10 Am. St. Rep. 614; Rangeley's Adm'r v. Southern R. R. Co., 95 Va. 715, 30 S. E. 386; Pennsylvania, etc., v. Pfuelb, 60 N. J. Law, 278, 37 Atl. 1100; Dawe v. Flint, & P. M. R. Co., 102 Mich. 307, 60 N. W. 838; Romeo v. Boston, etc., 87 Me. 540, 33 Atl. 24; Thompson, Negligence, § 1614.

The case of Ellis v. Boston, etc., 169 Mass. 600, 48 N. E. 839, contains a critical review of the matter, and it is said: "The raising of the gates was, no doubt, a circumstance which justified the plaintiff in starting to cross the railroad when he did, and he had a right to expect that, if any engine or train was approaching the crossing on the inbound track, a whistle would be sounded or a bell be rung. But, in attempting to cross the railroad, he was bound, in the exercise of ordinary care, to himself exercise his own powers of observation, and to take thought for his own safety; and he was not entitled to have his case go to the jury unless there was evidence from which it could be inferred that he did this. No such inference can be drawn either from his own testimony or that of the other witnesses. The general rule that one who attempts to cross a railroad track must reasonably use his own powers of observation to assure himself that there is no danger from approaching trains is clear. Chase v. Railroad Co., 167 Mass. 383, 45 N. E. 911, and cases cited. And the rule applies to one from whom a train approaching upon a second track is hidden by a train which has just passed. Bancroft v. Railroad, 97 Mass. 275; Winslow v. Railroad, 165 Mass. 264, 42 N. E. 1133. While the raising of the gates justified the plaintiff in attempting to cross when he did, and while that fact and the facts that no whistle was sounded and no bell was rung are to be taken into consideration on the question of how much he must himself look and observe as he makes his way across, these circumstances do not excuse him from looking and listening and taking thought for his own safety. He cannot rely wholly upon them, and cannot recover without showing more, as to his own conduct, than that he so relied. Butterfield v. Railroad Co., 10 Allen, 532, 87 Am. Dec. 678; Merrigan v. Railroad, 154 Mass. 189, 28 N. E. 149; Tyler v. Railroad Co., 157 Mass. 336, 32 N. E. 227. We are of opinion that, as matter of law, there was no evidence from which it could be found that the plaintiff himself exercised due care, and the verdict for defendant was rightly ordered. Exceptions overruled."

Excepting for the presence of gates, this case is parallel in its facts with Hager v. Southern Pacific Co., 98 Cal. 309, 33 Pac. 119; but, as has been said, the presence of gates does not justify the total indifference and disregard to danger which was evinced by plaintiff in this case.

The judgment appealed from is therefore affirmed.

We concur: McFARLAND, J.; LORIGAN, J.; ANGELLOTTI, J.; SHAW, J.

BEATTY, C. J. I dissent. When the superior court instructs a jury to find for defendant, this court, in reviewing the judgment, must not only assume the entire truth of plaintiff's evidence, but must give him the advantage of every inference which can be fairly drawn from it. Conflicting evidence, and inferences from it, must be wholly disregarded. This proposition seems to be conceded by the court, and certainly it is fully supported by the first decision cited in its opinion on the principal question of law presented by the case. Greenwood v. Railway Co., 124 Pa. 576, 17 Atl. 188, 3 L. R. A. 44, 10 Am. St. Rep. 614. I think, however, that in stating the case this rule has not been strictly observed with respect to important particulars. The statement that the plaintiff was moving faster than the train is based entirely upon the opinion of the defendant's witnesses —the engineer and fireman—that they were going about four miles an hour, but this evidence was weakened by the admission that the average speed of the train between Los Angeles and San Bernardino was 15 miles an hour, and that the grade they were ascending at the place of the accident was but a minute fraction over 1 per cent. (1.06). It was also in conflict with equally definite evidence on the part of the plaintiff, from which the jury would have been warranted in finding that the speed of the train was at least 50 per cent. in excess of plaintiff's speed. Two entirely disinterested witnesses, Holloway and Simons, crossed the track going west just before the accident. They were in a buggy, proceeding at a slow trot. Holloway testified that they met plaintiff about one-fourth of the length of the block from defendant's track (about 50 feet), and Simons, testifying as a witness for defendant, stated that when they came in sight of the train at the crossing, it (meaning, I suppose, the headlight) was about midway between Green and Colorado streets, a distance of more than 200 feet from the point of collision. Conceding that this character of evidence is somewhat indefinite, it is no more indefinite than the estimate of defendant's witnesses that the train was moving about four miles an hour, and, accepting it as approximately correct, it proves that, while the buggy, proceeding at a slow trot, moved 50 feet from the track to the point where it met plaintiff's wagon, and while plaintiff, moving at a brisk trot, proceeded another 50 feet to the point of collision, the train had moved twice as far, necessarily at a rate of speed twice the average speed of the two vehicles, and probably at a rate much faster than that of the plaintiff. This fact has an important bearing upon another fact which is highly material, in view of the rule as to contributory negligence to be considered hereafter. For, if plaintiff was moving 6 miles an hour (I assume this rate because in the discussion here it has been agreed that a brisk trot is equivalent to at least 6 miles an hour), the train was moving 9 miles an hour, and it is susceptible of mathematical demonstration from other data supplied by the uncontradicted evidence of actual measurements that plaintiff could not have seen the headlight of the train until the heads of his horses were within 12 feet of the track (i. e., less than a second and a half of time). These data are: A solid row of brick buildings extending from a line 15¼ feet west of the center of the track a distance of 150 feet —the entire length of the block. It was dark. The first part of the train that plaintiff could have seen was the headlight, which was moving north on a line 15¼ feet east of the brick building adjoining the alley. Plaintiff was moving east on a line about 21 feet north of the same building. His rate of progress was 6 miles an hour, equivalent to 8⅘ feet a second. The train, moving at the rate of 9 miles an hour, would cover 13⅕ feet a second. Plaintiff sat 14 feet back of his horses' heads. The hind wheels of his wagon extended 4 feet farther to the rear. The collision was with his hind wheel as he was clearing the track at the east rail.

It will be seen in the ensuing discussion, as it appears from the opinion of the court, that in cases of this kind it is always a material question whether the plaintiff, after discovering his danger, was able to avoid it, and one of the questions here is whether this court can hold, as matter of law, that the plaintiff, within the brief space of a second and a half, could have reined in his horses, or done anything more prudent after seeing the locomotive, than to try to cross ahead of it. It will be seen that, in the opinion of the court, the conduct of the plaintiff and his whole case takes its color from the assumed slow motion of the train and his own reckless speed. If it be true that upon this point there is, as I have attempted to show, evidence warranting the inference that the speed of the train was 50 per cent. in excess of the plaintiff's speed, we must, for the purposes of this appeal, take that as a fact proven, and we are not then forced to conclude that it was the mere recklessness or absence of mind of the plaintiff which placed him in front of the locomotive. For he tells us plainly what he was doing and why he did it. He knew the crossing, and he knew that the defendant guarded the crossing by gates which, from his observation, were always lowered when trains were passing. He knew he was approaching the crossing, and he "kept his eyes straight ahead in order to see if anything was in the way." His idea was—as is probably the belief of a majority of men—that where the state of traffic calls for the erection of crossing gates, the duty and the practice of the railway company is to employ men to attend them and to close them on the approach of a train, and not alone in the daytime, but at all times at which trains may be expected to pass. So believing, and seeing the gates open and motionless, he took it as an assurance of safety and an invitation to proceed. A fair construction of his testimony shows that he was acting consciously upon this view of the situation, and not with a mind solely intent upon getting home, and oblivious to everything else. It is true he did not go upon the stand and formally deny the statement of one of defendant's witnesses, which is quoted in the opinion of the court, to the effect that he was not paying attention to anything, but that evidence was contradicted in advance by the whole tenor of his testimony in chief, and the expression, itself, admitting it to have been reported with literal fidelity, was used within 12 hours after the accident, very shortly after he recovered consciousness, and while he was acutely suffering from concussion of the brain. Considering that of the three agents of defendant who were sent to the hospital to obtain plaintiff's statement, one, its "special inspector," did not testify; that another, a surgeon, testified to a statement not at all at variance with plaintiff's testimony at the trial; and that only one, the operator at the Pasadena station, testified to the expression quoted—I do not think we can assume as a fact that the plaintiff, in approaching the crossing, was not paying attention to anything. On the contrary, the case, as the plaintiff might reasonably have asked the jury to view it, and as we, therefore, are bound to view it in considering the instruction to find for the defendant, was simply this: The plaintiff, perfectly aware that he was approaching a city crossing, guarded by gates which, according to his experience, were always lowered on the approach of a train, drove forward without slackening the brisk pace of his horses because he saw the gates standing open, and because he regarded the open gates as an assurance of safety and an invitation to pass. He looked straight ahead to see if there was anything in the way, and was entirely excused from looking in the direction of the approaching train, because his view in that direction was cut off by a solid row of brick buildings which prevented him from seeing the locomotive until it was too late to have avoided the accident. He might, however, have heard the sound (the loud exhaust of the engine) made by the train if he had stopped to listen. Or if he had so slackened his pace as to leave him in perfect control of his team, he would have seen the locomotive in time to have pulled up while the train was passing. The question is whether it was his duty under the circumstances to stop for the purpose of listening, or to approach the gates so cautiously that he could rein in his horses instantly on the sudden appearance of the train emerging from behind the building which obstructed his view. The question, in other words, is whether the rule that the failure on the part of a traveler to stop and look and listen, is negligence in law (negligence per se, as it is sometimes designated) applies to a grade crossing of a city street, which, in compliance with municipal regulations or by the voluntary act of the railroad company, is guarded by gates arranged to be lowered while trains are passing, or by flagmen habitually stationed there for the purpose of signaling that the way is clear.

Upon this question the cases and the text-writers are by no means agreed. There are decisions both ways, and the text-writers have inclined to one side or the other, according to their respective views of public policy. The opinion of the court cites only section 1614 of Thompson on Negligence, and the cases referred to in illustration of the text. But section 1614 of Dr. Thompson's work does not state his view of the question. It states the view to which he is evidently opposed, as will be seen by reference to the preceding section (1613), where he says: "Many decisions * * * concede that the traveler approaching a railway crossing has the right to rely upon the fact that the gate is open, or that the flagman is absent from his post, and to assume from these indications that no train is approaching, and that he may safely proceed to cross; and so where the gates are up and a flag flying, indicating that a train will stop before reaching the crossing; and so where the traveler, having waited several minutes, starts to cross on the gates being raised. While, as we shall soon see" (referring to section 1614, cited by the court), "some courts condone the fault of the railroad company in luring the traveler to his death or injury by deceptive appearances, and visit all the blame on the traveler, yet, even these courts concede that a traveler approaching a crossing guarded by gates, is not required to exercise the same vigilance in looking and listening as when he approaches one not so guarded," etc.

With the sole exception of the Pennsylvania case, the decision cited in the opinion of the court will be found on examination to furnish a very slender support to its conclusion. In Greenwood v. Phil. W. & B. R. Co., 124 Pa. 572, 17 Atl. 188, 3 L. R. A. 44, 10 Am. St. Rep. 614, the doctrine contended for by defendant is, indeed, carried to its extreme limit. There a hose cart, responding to an alarm of fire (a false alarm as the event proved), was driven rapidly upon a gate crossing and one of the firemen injured by a passing train. An instruction to find for the defendant was affirmed because it appeared that the driver of the cart, relying on the open gates, did not stop to listen as he approached the crossing. Outside of Pennsylvania, I think, it would be difficult to find a case going to this extent. In every other case cited the person injured was a pedestrian, and in every case the decision turned upon the fact that the plaintiff, after passing the gates, could have seen the approaching train in ample time to have avoided the accident if he had used his eyes. This was the whole point of the decision, and in each case, except the New Jersey case, previous decisions of the same court, in which it had been held that travelers had a right in approaching a grade crossing to rely upon open gates as an assurance of safety, were distinguished upon the ground mentioned.

Take the Virginia case—Rangeley's Adm'r v. Railway Co., 95 Va. 715, 30 S. E. 386. The facts of that case are stated at page 720 of 95 Va., and page 387 of 30 S. E., as follows: "The record considered as on a demurrer to the evidence shows that the deceased, on the night of the accident, with his companion, left a restaurant, the porch of which extended to within 8 or 10 feet of the railroad track; that he went to a point on or near the track, and was standing there talking when struck by the defendant's train; that the night was dark, but that the locality was well lighted by electric lamps; that the track was straight in the direction from which the train came, with nothing to obstruct the view in that direction after leaving the restaurant porch; that the train was backing about as fast as a man could walk, not over 5 miles an hour, up grade, using steam, and that the bell was ringing from the time it commenced to back until after the unfortunate man was run over." The court, discussing the refusal of an instruction which, "in effect informed the jury that a person approaching a railroad crossing where gates are required to be kept and lowered on the approach of trains, has the right when he sees that the gates are not lowered, to presume that no train is approaching, and that he is under no obligation to use his senses to ascertain whether a train is approaching," referred to another case reported in the same volume, for the correct rule in such cases. Kimball and Fink, Receivers, v. Friend's Adm'r, 95 Va. 125, 27 S. E. 901. The facts of that case were that the plaintiff rode a bicycle on the track at about the speed of a trotting horse. The sides of a cut prevented him from seeing the approaching locomotive until he was too close to avoid the collision, and he was killed. He did not stop to listen, and he did not approach the crossing at such a moderate rate of speed as would enable him to control his movements. There was no direct evidence, of course, that he did or did not listen. Upon a very full discussion of the evidence and the rulings giving and refusing instructions, the court holds that a traveler is not required to exercise the same vigilance in approaching gate crossings as he must exercise at crossings not so guarded, and that in such cases the question of contributory negligence is peculiarly one for the consideration of the jury. The judgment for the plaintiff (defendant in error) was affirmed.

Next in order is the New Jersey case, Pennsylvania R. Co. v. Pfuelb, 60 N. J. Law, 278, 37 Atl. 1100. That was another case of a pedestrian walking upon a gate crossing and being killed by a train which he could have seen approaching for a long distance before he stepped on the track, and a circumstance to which much weight was attached was the fact that when he was approaching the track he saw the gate standing open while another train was passing, which was notice that the open gates were not an invitation to cross.

Dawe v. Flint & P. M. R. Co., 102 Mich. 307, 60 N. W. 838, was another case of a pedestrian injured by a train which she could have seen approaching, after passing the gates, long before it struck her. The case is distinguished from Richmond v. Railway Company, 87 Mich. 374, 49 N. W. 621, and Evans v. Railroad Company, 88 Mich. 442, 50 N. W. 386, 14 L. R. A. 223. The rule established by those cases, and not questioned by the Dawe Case, is, that "a party approaching a railroad track has a right to rely upon the absence of such warnings of danger, as it is shown to be the custom of the railroad company to give." See point 2, syllabus, p. 442, 88 Mich. "When gates are provided by railroad companies at street crossings, the public have a right, the gates being open, to presume, in the absence of knowledge to the contrary, that the gatemen are properly discharging their duties, and are not negligent in acting upon the presumption that they are not exposed to a danger which could only arise from a disregard of such duties." And see Van Auken v. Ry. Co., 96 Mich. 307, 55 N. W. 971, 22 L. R. A. 33.

A Maine case is next cited by the court, Romeo v. B. & M. R. R., 87 Me. 540, 33 Atl. 24. This was another case of injury to a pedestrian who, for a distance of 80 feet from the track, had a plain view of the approaching train, if she had raised her eyes to look. The case was distinguished, for this reason, from State v. B. & M. Railroad, 80 Me. 430, 15 Atl. 36, and Hooper v. B. & M. Railroad, 81 Me. 260, 17 Atl. 64. In the first of these cases the gates had been erected voluntarily by the railroad company, and they did not operate them at night, but, nevertheless, it was held to be a question for the jury, whether the deceased was guilty of contributory negligence in driving on the track without stopping. The second case is to the same effect.

Coming to Massachusetts, an extensive quotation is made from the opinion in Ellis v. B. & M. R. R., 169 Mass. 600, 48 N. E. 839. I think it can hardly be said that the opinion in that case contains a critical review of the matter. The plaintiff walked through the gates and stepped on the track in front of a train that he could have seen if he had looked. It is expressly stated that the raising of the gates was a circumstance which justified him in starting across the track, but his failure to use his eyes when he was in perfect control of his own movements, and in a place of safety, was held to be negligence. It is an error, I think, to regard this case, or any of the cases in which a man or woman on foot was injured by a train they could have seen approaching if they had looked along the track, as authority in this case. With the single exception of the New Jersey case, they were all decided by courts that hold to the doctrine that open gates are an assurance of safety which justify the traveler to enter the crossing without stopping to listen, and all that is said in any of the decisions in regard to the obligation of the traveler to make use of his senses has reference to the ability of a pedestrain to avoid the danger after passing the gates by simply stopping when the train has come into his view. In this case the plaintiff could have done nothing to save himself after the train came in view. The views of the Supreme Court of Massachusetts, regarding a case such as this, are stated in Clark v. Boston & Maine Railroad, 164 Mass. 434, 41 N. E. 666. There, the plaintiff, hauling a load of hay with a team of two horses, drove at a trot down a grade to a gate crossing without attempting to stop, and was injured. Exceptions to a verdict in his favor were overruled by the Supreme Court upon the ground that "there is no absolute rule of law that a traveler approaching the crossing at a grade of a highway by a railroad must under all circumstances stop to look and listen for a train before entering on the railroad." (First point of syllabus.) See, also, Conaty v. New York, etc., Ry. Co., 164 Mass. 572, 42 N. E. 103, and section 1613 of Thompson on Negligence, and the cases cited under that section, particularly the opinion of Judge Elliott in the case of Penn. Co. v. Stegemeier, 118 Ind. 306, 20 N. E. 843, 10 Am. St. Rep. 136, and the opinion of Judge Williams in Railway Company v. Schneider, 45 Ohio St. 688, 17 N. E. 321. Both of these cases were very elaborately argued and considered, and the conclusions of the courts were widely at variance with the doctrine to which we are committing this court in the first case we have had to consider involving the question of negligence in approaching a gate crossing. It is, in my opinion, very important on the first presentation of this question, that this court should adopt that rule which is dictated not only by considerations of public convenience, but of humanity. If we lay down the rule that open gates at street crossings are an assurance of safety to all persons and an invitation to pass without stopping to listen when the view is obstructed, I feel assured that the railroad companies will see that their gates are kept in order and tended by careful and competent keepers. There will be no accidents of this kind, and both life and property will be rendered more secure without any impediment to the great and increasing railroad traffic. Their trains will be able to move with the same or greater celerity than now, and without danger of encountering obstacles at the points where gates are established. But the traffic conducted by rail is not the only thing to be considered. The multifarious traffic of large cities upon their public streets is to be considered and promoted as far as it can be done without injury to more important interests, and since the careful operation of crossing gates would be no interruption to the passage of trains, while it would leave the use of the streets free at all times when the gates were open, the rule which I advocate would conserve all interests at no cost except for the erection and repair of the gates, and the wages of keepers—a cost which in most cases would be trifling in comparison with the privilege of crossing the city streets at grade.

There is, perhaps, less difference between me and the court upon the question of law involved in this case than there is with respect to the facts. It is, at all events, recognized in the opinion of the court, that there is a distinction to be observed between cases of accidents at gate crossings and those at crossings not so guarded. This distinction was repudiated in a majority opinion of the district court of appeal, and as the judge who presided at the trial was one of the two justices who concurred in that opinion, I am satisfied, not only from that circumstance, but from the argument of counsel for respondent here, that the case was taken from the jury upon the assumption that it was governed entirely by the strict rule applied to accidents at unguarded crossings in such cases as Green v. Southern California Railway Company, 138 Cal. 1, 70 Pac. 926, and Herbert v. Pacific Company, 121 Cal. 232, 53 Pac. 651, and not upon the theory of this decision that the plaintiff could have avoided the accident after the train came within range of his vision.

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148 Cal. 660

ARNOLD v. AMERICAN INS. CO.

(L. A. 1,544.)

(Supreme Court of California. Feb. 10, 1906.)

1. Insurance — Action on Policy — Pleading.

In an action on fire policies on frame buildings while occupied as dwelling houses and on household furniture "while contained in the above-described dwelling house," the complaint must allege that the houses were occupied as dwelling houses at the times of the fires and that the furniture was contained in the house referred to.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1595.]

2. Pleading—Aider by Verdict and Judgment.

In an action on fire policies the failure of the complaint to allege that the houses insured were occupied as dwelling houses and that the furniture insured was contained in one of them as required by the terms of the policy was not cured by verdict and judgment, even in the absence of any objection by demurrer or answer in the trial court.

3. Same—Defects Cured by Answer.

The failure of the complaint. in an action on fire policies, to allege that the houses insured were occupied as dwellings and the furniture was contained in one of them as required by the policy was not cured by an allegation in the answer that a great portion of the furniture had been removed from the house described in the policy before the fire.

4. Insurance—Breach of Warranty by Insured.

The temporary presence in a house of a half pint of gasoline in a bottle securely corked which was not the cause of a fire was not sufficient to avoid the policy of insurance, although it contained a provision against keeping gasoline on the premises.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 787.]

5. Same—Waiver.

Any breach of warranty by an insured in keeping gasoline on his premises for a short time, contrary to the provisions of the policy, was waived by the insurer where its adjusting and supervising agent had knowledge of the breach and assured the insured that the policy would not be avoided, notwithstanding a stipulation in the policy that no officer of the company should have power to waive its provisions unless the waiver should be in writing and attached thereto.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 948, 968.]

6. Same—Action on Policy—Pleading.

In an action on a fire policy, the plaintiff, to avail himself of the insurer's waiver of a breach of warranty, need not plead the waiver.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1637.]

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Eliesa Arnold against the American Insurance Company. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

E. W. Freeman and A. D. Laughlin, for appellant. M. M. Meyers and R. L. Horton, for respondent.

ANGELLOTTI, J. This action was brought to recover on three policies of insurance against loss by fire, made by defendant to plaintiff. Judgment went for plaintiff for the full amount claimed, and defendant appeals from such judgment, and from an order denying its motion for a new trial.

It is claimed that the amended complaint failed to state facts sufficient to constitute a cause of action. A general demurrer for want of facts was interposed in the lower court and overruled. The facts material to this contention, as shown by the complaint, are as follows, viz.: One of the policies was for $1,500 on a "one-story frame building,

* * * while occupied as a dwelling house, * * * situated No. 729 * * * Stewart street * * * Los Angeles, California." Another was for $3,500 "on the two-story frame building, * * * while occupied as a dwelling house, * * * situated No. 735 * * * Stewart street, * * * Los Angeles, California." The third was for $2,000 "on household furniture," etc., "all while contained in the above-described dwelling house," which was the two-story frame building situated No. 735 Stewart street. The policies were all issued on April 9, 1901. There were three fires. The first occurred May 21, 1902, and resulted in $70 damage to the house at 735 Stewart street and $33 to the furniture. On June 15, 1902, the same house was damaged by fire to the extent of $121, and the furniture to the extent of $76. On June 21, 1902, both houses and the furniture were damaged the house at 735 Stewart street to the extent of $1,645.-76, the house at 729 Stewart street to the extent of $25, and the furniture to the extent of $1,000. The complaint nowhere alleged that at the time of any of these fires either house was occupied as a dwelling house, or that the furniture insured was contained in the house No. 735 Stewart street, nor did it allege any facts from which such a conclusion might be inferred or even surmised.

That such allegations were essential to the statement of a cause of action is very clear, and is practically admitted by plaintiff, who relies entirely upon the contention that, it not appearing that the point was specially made in the lower court, any defect in this respect was cured by the answer thereto. As to the question of the insufficiency of the amended complaint, it is unnecessary to do more than to refer to the case of Allen v. Home Ins. Co., 133 Cal. 29, 65 Pac. 138, where, as here, the policy covered a building "while occupied as a dwelling house," and where the demurrer interposed did not specify this particular objection. This court there said: "The principal contention under this head is that the complaint does not allege that the building, at the time of the fire, was occupied as a dwelling house. It was in the contract between the insurer and the insured, that the premises were insured while occupied as a dwelling house. It was essential for plaintiff to prove that the fire occurred while the premises were occupied as such dwelling house. If it was essential to prove such fact, it was essential to allege it. Each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged. * * * The allegation was not merely a condition precedent, as referred to in section 457 of the Code of Civil Procedure. It went to the very essence of plaintiff's right to recover. Certain conditions subsequent to the right of recovery, matters of defense, the nonperformance of conditions subsequent, and certain negative prohibited acts need not be pleaded by plaintiff; but the rule does not extend to the essence of the cause of action. The facts alleged in this complaint may all be true, and yet the plaintiff not be entitled to recover. She could not recover unless she proves more than the complaint alleges. It was therefore error to overrule the demurrer." The insurer was not liable upon the policies at all, except upon proof that the loss occurred within the terms of the policy. It was therefore essential to the statement of any cause of action that a loss within the terms of the policy should be alleged. That the houses were occupied as dwelling houses at the time of the fires, and that the furniture was, at such times, contained in the specified house, were essential to any liability on the part of defendant, and therefore essential to the statement of a cause of action. Not being alleged, they must be taken as having no existence. Hildreth v. Montecito Water Co., 139 Cal. 22–27, 72 Pac. 395. The complaint lacked essential and necessary allegations in a case of this character, and was fatally defective. Burbridge v. Rauer, 146 Cal. 21, 25, 79 Pac. 526.

Such a defect is not cured by verdict and judgment, even in the absence of any objection by demurrer or answer in the lower court, and objection made on account thereof may be made at any time. Code Civ. Proc. § 434. It is true that courts are not inclined to look favorably upon objections to pleadings specifically made for the first time after judgment, where, upon suggestion before trial, the defect could have been easily overcome. A somewhat liberal rule, therefore, has frequently been applied in construing a complaint where the objection is made for the first time after judgment. Facts essential to a cause of action appearing by reasonable implication only, and allegations made in the form of a legal conclusion, which merely implied the necessary material facts, have been held sufficient as against such an objection. An example of this is the case of Penrose v. Winter, 135 Cal. 289, 67 Pac. 772, where there was no other allegation of the essential fact of nonpayment except the allegation that "there is now due and owing," etc. This was held sufficient after judgment, the ground of the ruling being that the objection was rather to the manner of pleading an essential fact than to the total failure to allege such fact, and that such faults, in the absence of demurrer, are cured by the judgment. It has, however, never been held that a defective pleading may be cured by verdict, where there is an entire absence of both direct and implied allegation of a material fact, and such a ruling would be in violation of fundamental principles relative to pleadings. The decisions in this state are clear and decisive upon this point. See Richards v. Travelers' Ins. Co., 80 Cal. 505, 507, 22 Pac. 939; Barney v. Vigoreaux, 92 Cal. 631, 28

Pac. 678; Hurley v. Ryan, 119 Cal. 71, 51 Pac. 20; Penrose v. Winter, supra; Burbridge v. Rauer, supra.

It is suggested in plaintiff's brief that upon the trial evidence showing that the houses were in fact occupied as dwelling houses at all times up to and including the time of the last fire was received without objection on defendant's part. If it be assumed that such a fact would affect the question before us, a complete answer to the proposition is to be found in the fact that the record on appeal does not show that the fact is as stated in the brief of counsel. Whatever may be our surmise as to what evidence was given on the trial, we are bound by the record on appeal. There is nothing in the bill of exceptions from which we can infer that there was any evidence given tending to show that the house at 729 Stewart street was ever occupied as a dwelling house, or that the house at 735 Stewart street was ever so occupied save and except upon the night of May 21, 1902, the occasion of the first fire. This evidence was only incidentally received in connection with the matter of having gasoline upon the premises in alleged violation of the terms of the policies. Nor was the defect cured by the answer of defendant, except, possibly, so far as the furniture policy was concerned. It was affirmatively alleged in the answer that, subsequent to the issuance of such furniture policy, and prior to June 21, 1902, the date of the last fire, a great portion of the furniture was removed from the house, No. 735 Stewart street, and was not therein at the time of the fire. Assuming, under the authorities cited by plaintiff, that the material issue as to the furniture being in the house described in the furniture policy at the time of the fire was thus sufficiently supplied to make the verdict and judgment good so far as that policy is concerned, it cannot be held that the defects as to the remaining policies were thereby cured. The allegation in the answer did not make the complaint good. It was originally, and still is, fatally defective in that it fails to state a cause of action on any policy. The allegation of the answer simply aided the complaint so far as is necessary to uphold a finding upon the issue tendered thereby, viz.: that the furniture was, at the time of the fire, in the house, No. 735 Stewart street. This is not sufficient to uphold the verdict and judgment on the three policies. The principle upon which rests the rule to the effect that a complaint which lacks the averment of a fact essential to a cause of action, may be so aided by an averment of that fact in the answer as to uphold a judgment thereon, is that, although the complaint is fatally defective, the necessary issue having been in fact tendered by the answer, and tried, a judgment will not be reversed merely for the purpose of allowing an issue to be tendered by plaintiff upon the matter that has already been practically put in issue by the parties, at the instance of defendant, and determined. To the extent that the issue so made and determined disposes of the controversy, the defect in the complaint is cured, but no further. We can see no escape from the conclusion that the judgment must be reversed because of the failure of the amended complaint to state facts sufficient to constitute a cause of action.

For the purposes of another trial it will be necessary to discuss another matter. It is contended that the policy on the house No. 735 Stewart street and the furniture policy were avoided by reason of the fact that plaintiff had about a pint of gasoline, contained in a bottle, on said premises on May 21, 1902, the time of the first fire. The policies each contained the following printed provision, viz.: "This entire policy, unless provided otherwise by agreement indorsed hereon, or added hereto, shall be void if * * * (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzola, dynamite, ether, fireworks, gasoline, greek fire * * * or petroleum." Each policy also contained a provision allowing the use of one gasoline stove, the reservoir thereof to be filled during daylight only and when the stove was not in use, and also stipulated that "no gasoline except that contained in said reservoir, shall be kept within the building." About the date of the first fire, May 21, 1902, plaintiff, who had purchased a quart bottle of gasoline for cleaning purposes, which work was done in the yard in the rear of the house, No. 735 Stewart street, and consumed about one-half of the gasoline, took the bottle containing the remainder into said house for the purpose of cleaning certain household articles, and left the same, securely corked, on a table in one of the rear rooms of said house. Immediately upon the discovery of the small fire of May 21st, the bottle of gasoline, which was in no way connected with the origin of the fire, was removed, and at no time thereafter was there any gasoline in said house. Over the objection of defendant, plaintiff was allowed to introduce evidence to the following effect: The next morning after the first fire, defendant's agent, who had procured this insurance, and who was defendant's special agent and adjuster, having charge of the affairs and local agents of the defendant in Southern California, went upon the premises for the purpose of adjusting the loss caused by said fire. Plaintiff then informed him of the circumstances above related as to the gasoline. He made no objection and proceeded to adjust said loss. The general agent of defendant at San Francisco, later, in response to the report of the adjuster relative to the fire, wrote to said adjuster, commending the conduct of plaintiff and her husband in the matter of the extinguishment of the fire. No notice of any disposition on the part of defendant to consider the policies voided by reason of the gasoline matter was ever given, and defendant continued to retain the premiums theretofore paid, and allowed plaintiff to rest secure under the belief that the property was still covered by the policies.

We are of the opinion that the facts as disclosed show no substantial violation of the condition contained in the policy. We doubt very much whether any policy upon a house used for human habitation would be found to be valid, if the mere temporary presence of a trifling amount of any of the prohibited articles for necessary household or medicinal purposes should be held sufficient to invalidate it. The slight risk entailed by such a condition is necessarily contemplated in every case of insurance of an inhabited dwelling house. Probably this defendant would never have undertaken to defeat this action upon any such ground, if it did not have what it considered good reasons for disputing the claim upon more substantial grounds, which it might not be able to prove to the satisfaction of a court or jury. Provisions of the nature of the one under consideration are strictly construed so as to prevent a forfeiture, and a mere technical violation, not within the apparent object or spirit of the stipulation, is not sufficient to invalidate the policy. 2 Cooley's Briefs on Law of Insurance, p. 1689. The cases cited by learned counsel for defendant are all cases where the prohibited articles were habitually kept or used for some considerable time, or the temporary use was of such a nature, or under such circumstances, as to substantially increase the risk, and no case has been cited where a policy has been held invalid under such circumstances as are here shown. In Bastian v. British American, etc., Co., 143 Cal. 287, 77 Pac. 63, 66 L. R. A. 255, a stick and a half of dynamite was kept in the cellar of an insured lodging house for several months next preceding the fire. In Cerf v. Home Ins. Co., 44 Cal. 320, 13 Am. Rep. 165, a kerosene oil light was habitually left burning at night in a store, as a protection against burglars; the policy prohibiting the keeping or using of any burning fluid without written permission. In each of these cases the violation might well be held to be substantial.

Were we, however, in any doubt as to this question, there could be no doubt upon the proposition that the evidence given for the purpose of showing a waiver of any breach in this respect was properly admitted for that purpose, and, if true, fully showed a waiver. The knowledge of the adjusting and supervising agent of defendant of the facts relative to the presence of the gasoline on the occasion in question was the knowledge of the defendant. See 3 Cooley on Insurance, p. 2520. In the face of this knowledge, the defendant gave no intimation of any intention on its part to consider the policies terminated by reason thereof, but retained the unearned portion of the premium, and allowed plaintiff to rest under the implied assurance that the policies continued in full force and effect, notwithstanding the technical violation of the letter of the condition. By such assurance, plaintiff was persuaded to refrain from securing other insurance to protect herself against possible future loss. Such a loss having occurred, it is too late for defendant to defend against the same upon this ground. See May on Insurance, § 502; Westchester Fire Ins. Co. v. Earle, 33 Mich. 143; Fishbeck v. Phenix Ins. Co., 54 Cal. 422; Murray v. Home Benefit, etc., Ass'n, 90 Cal. 402, 27 Pac. 309, 25 Am. St. Rep. 133; West Coast L. Co. v. State, etc., 98 Cal. 502, 33 Pac. 258; Horton v. Home Ins. Co., 122 N. C. 498, 29 S. E. 944, 65 Am. St. Rep. 717; Phœnix Ins. Co. v. Halcombe (Neb.) 78 N. W. 300, 73 Am. St. Rep. 532.

We do not consider at all material in this connection the presence of the printed stipulation to the effect that no officer, agent, or representative of the company shall have the power to waive or be deemed to have waived conditions of the policy, unless such waiver shall be written or attached thereto. Such provisions existed in the policies in some of the cases cited, and were not considered effectual to prevent the conduct of the officers of the company from constituting a waiver or estoppel on the company. The doctrine is that the company has knowledge when its proper officer has the knowledge, and if with such knowledge it leads the insured to rely upon his policy as a valid policy, notwithstanding the breach of condition of which it knows, it will not be heard to allege such breach against a claim for a subsequent loss, accruing at a time when, from the conduct of the company, the insured had every right to believe that his property was protected by the policy.

Nor is there anything in the point that the question of waiver or estoppel was not in issue, because plaintiff did not allege a waiver, or facts constituting an estoppel, in her complaint. It is incumbent upon a plaintiff, in an action upon a policy of insurance, to allege the performance of conditions precedent, such as the giving of any required notice of loss, etc., and performance of all promissory warranties, but limitations, stipulations, and conditions which are in the nature of conditions subsequent, and go to defeat the liability of the insurer, are matters of defense, which, to be available to the insurer, must be alleged in the answer, as they were in this case. To this matter so alleged in the answer, under our system of pleading, any defense by way of replication was open to plaintiff without pleading. See Ency. Pl. & Pr. p. 414, and note, and page 422; Breedlove v. Norwich, etc., Ins. Co., 124 Cal. 164, 168, 56 Pac. 770; Allen v. Home Ins. Co., supra.

The judgment is reversed, and the cause remanded for further proceedings, with directions to the lower court to allow the plaintiff to amend her complaint, if she so desires.

We concur: McFARLAND, J.; SHAW, J.

148 Cal. 650

RENTON v. GIBSON et al. (Sac. 1,254.)

(Supreme Court of California. Feb. 9, 1906.)

1. MORTGAGES—PURPOSE OF CONVEYANCE.

Under Civ. Code, § 2924, providing that every transfer of land made only as security for another act is a mortgage, a transfer to enable the grantee to recover a judgment quieting title in him is not a mortgage.

2. SAME—DEED FOR SECURITY—EVIDENCE.

In order to show that a deed is not an absolute conveyance, but intended merely as security, the evidence must be clear and convincing.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 109.]

3. SAME—SUFFICIENCY OF EVIDENCE.

In an action to recover land, evidence *held* insufficient to show that a deed of the land from plaintiff to defendant was intended merely as security or was a deed in trust.

Department 2. Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by H. T. Renton against W. E. Gibson and others. From a judgment for plaintiff, defendants appeal. Reversed.

Thomas C. Huxley, for appellants. W. H. Slade, for respondent.

HENSHAW, J. Plaintiff brought his action against defendants as claiming an interest in real estate adverse to him. Against defendant Gibson the complaint averred "that up to the 29th day of June, 1901," plaintiff had been the owner of the land in question; that on or about that date, by an instrument in writing, he conveyed and quitclaimed the property to defendant Gibson; that the conveyance was made to Gibson and accepted by him as security for the repayment of "certain moneys advanced, and to be advanced, by said Gibson in clearing the title to said real property and not otherwise, and it was stipulated and agreed to by and between said plaintiff and said defendant Gibson that he, said defendant Gibson, would reconvey to this plaintiff the said property upon payment to him, said Gibson, of the money so advanced as aforesaid in clearing the title to said land and property, together with interest thereon at the rate of 8 per cent. per annum." It is further alleged that in accordance with this agreement defendant Gibson successfully prosecuted to judgment an action in the superior court whereby title to the land in question was quieted in favor of Gibson; that thereafter plaintiff tendered Gibson the amount claimed to have been expended by him, namely, the sum of $135, and demanded a reconveyance, which reconveyance he refuses to execute. Defendant Ingram was brought in under an allegation that he "claimed to have some interest in the land adverse to the plaintiff." Defendant Gibson answered by denial, but affirmatively alleged his willingness to convey an undivided one-half of the property in question to plaintiff. Defendant Ingram by his answer set up that upon the 14th day of April, 1902, the plaintiff claiming to be the owner of an equal undivided one-half of all of the land, executed and delivered to the defendant an agreement in writing wherein and whereby, in consideration of the payment of a certain sum of money and certain shares of the capital stock of a corporation, he agreed to vest in the defendant Ingram and authorize the defendant Gibson to transfer and convey unto defendant Ingram all of the right, title, and interest of plaintiff in and to the tracts of land in controversy. He further averred that the agreement had never been performed by or on the part of the plaintiff; it had never been canceled or annulled, but at the commencement of the action was in full force and effect, and that ever since the making of the agreement he (Ingram) has stood and still stands ready, able, and willing to perform the same upon performance by or on behalf of the plaintiff, Renton.

The court, as to defendant Gibson, found in accordance with the allegations of the complaint declaring specifically that "on or about the 26th day of June, 1901, said plaintiff, by an instrument in writing, purporting to be a conveyance to W. E. Gibson of said property in question, as security for money advanced by defendant Gibson to plaintiff," etc. It further found "that there was an agreement between said plaintiff and defendant W. E. Gibson, whereby said Gibson was to commence and prosecute a certain suit to quiet title to said land and premises; that said Gibson was to advance the money necessary to prosecute said action to quiet title thereto; and that said defendant Gibson was to hold said land as security for any and all expense that he necessarily incurred in the said action to quiet title to said land." Further, "that the said conveyance was made to defendant Gibson, and accepted by him as security for the repayment to him of money advanced and to be advanced by said Gibson in clearing the title to said property, and not otherwise"; that Gibson in furtherance of this agreement had advanced the sum of $135, and that there was due to him the sum of $135, with interest at the rate of 8 per cent.; that plaintiff had tendered that amount, and that that amount was now in the hands of the clerk of the court as a tender; and that defendant Gibson refused to accept it. The conclusion of law following this was that plaintiff was entitled on the payment of $135 to defendant Gibson to have his title to the land quieted and to a decree that defendant Gibson reconvey to plaintiff the premises, and upon his failure so to do that a conveyance be made by a commissioner. The judgment against Gibson was in conformity with this.

The findings touching the defendant Ingram will be adverted to hereafter.

It is not easy to understand the meaning of the court's findings when they are considered in the light of the evidence in the case. This difficulty, however, is not unnatural in contemplation of the circumstance that plaintiff's attorney seems to have been himself extremely uncertain of the legal character of the transaction which the parties had entered into, in one complaint pleading that plaintiff had conveyed the title to the property to the defendant Gibson "in trust," and in a subsequent complaint striking out this averment, and pleading, as above set forth, that the conveyance was made as "security." If the finding of the court, following in this regard as it does the allegation of the complaint, is to be taken as a declaration that the deed from plaintiff to defendant was security in the sense that it was a mortgage merely, then this finding is not only not clearly and convincingly supported by the evidence, as all the authorities require shall be done before a written instrument of such dignity as a deed shall be proved other than what on its face it purports to be (Sheehan v. Sullivan, 126 Cal. 193, 58 Pac. 543), but it is opposed to the great weight of the evidence and to the very declarations of the complaint itself. The complaint pleads that plaintiff had title "up to" a certain day, from which the presumption arises that after that date he parted with title. This presumption is aided by the direct averment that plaintiff made a deed to defendant at that time and that this deed was made for the purpose of enabling defendant to commence and prosecute in his, defendant's name, an action to quiet title to the property. Whatever be the form of an instrument other than a deed of trust, it is, of course, well settled that if it be intended as security merely it is a mortgage, title does not pass, and only a lien results in favor of the named grantee, who in law is but the mortgagee. Section 2924 of the Civil Code contains this express declaration in language admitting of no misunderstanding when it says: "Every transfer of an interest in property other than in trust made only as security for the performance of another act is to be deemed a mortgage," and a mortgage is "a contract by which specific property is hypothecated and for the performance of an act without the necessity of a change of possession." Civ. Code, § 2920. But here, by the very terms of the complaint, the allegations of which are supported by plaintiff's own evidence, there was something more contemplated by the deed than the mere hypothecating of the property as security for moneys to be advanced. It was the understanding of all the parties that defendant Gibson was to take title by this conveyance, as otherwise all of the parties would have been guilty of a fraud upon the court in beginning and prosecuting an action to quiet title when all knew, understood, and agreed that the deed under which plaintiff claimed was not, and was never intended to be anything more than a mortgage.

Moreover, the case is not left without positive evidence upon this point. For, while plaintiff testifies that Gibson was to advance the money simply to clear up the title to the property, and was to be repaid with 8 per cent. interest, and was to have no interest in the property, but was to hold it as security merely for the repayment of the money, he further says, in the course of his somewhat cloudy explanation of the matter, that Gibson would not go ahead with the proposition at all unless he got the quitclaim deed, insisted upon that before commencing suit, and that it was further agreed that after quieting title to the property Gibson should proceed to develop it, paying to plaintiff one-half of the proceeds. It is true, too, that Mr. White, who was a witness for plaintiff, and who was the attorney for Gibson in the suit to quiet title, testifies that his understanding of the transaction between plaintiff and Gibson was that Gibson had no title or interest in the property except by way of security, yet when catechised as to how he found it in his conscience to come before a court and foreclose title upon an instrument which was but a mortgage and conveyed no title, he shuffles and evades, saying: "The complaint was fair upon its face. I don't know that I am called upon to pass an opinion on that point. I say that it was fair upon its face." When further asked how he could undertake to vest a defendant with a good title upon the strength of a mortgage his only answer is that he "was acting for Mr. Renton in this proceeding." But, as against this evidence, is that of his own written agreement with defendant Gibson to the effect that he would return to Gibson the money paid him by Gibson for attorney's fees and costs if he did not successfully prosecute Gibson's suit to quiet title and obtain a decree quieting title to the land in favor of Gibson. And still more significant is the fact that, while the deed when recorded and as recorded shows an absolute conveyance to Gibson, after recordation and after suit to quiet title had been successfully terminated, when the deed was returned by White to Gibson it contained a written interlineation to the effect that "this deed is given as security for money advanced, and is intended as a mortgage only." We say, therefore, that the complaint itself, taken with the plaintiff's evidence in support of it, establishes that the instrument was something more than a mere mortgage, and that it did convey, and must of necessity have conveyed, the legal title to the property to defendant Gibson, for the purposes contemplated—the commencement and prosecution by Gibson of a suit to quiet title to the land in question, and the procuring a decree of the court to that effect. So far as these purposes were concerned the transfer could not have been a mortgage. It is only those transfers made as security for the performance of an act (other than transfers in trust) which are mortgages (Civ. Code, § 2924), and as it was contemplated between parties that an act should be done by defendant in relation to the real property, which act could not lawfully have been performed by him if he were not the holder and owner of the legal title, it must follow from this point of view that the conveyance was what it purported to be on its face, a deed either absolute or in trust for the indicated purposes.

So much is clear as to this phase of the transaction. We next come to consider the situation of the parties at the time of the commencement of this action, where defendant is claiming title under a deed absolute in form and plaintiff is seeking to show that the conveyance, though absolute in form, was but a mortgage security for advances which defendant had made to him. The finding, it will be noticed, declares that defendant took the property as security for the repayment of this money, and not otherwise. "Security" is a word of broad import. Certain trust deeds in real estate are recognized by our decisions, by which trust deeds the legal title passes to the trustee, with power of sale. In all respects these deeds and transfers of title are "security," but they are not mortgages. A mortgage by which no title whatsoever passes, and whereby but a lien upon the property is acquired, is likewise "security." We are left in doubt which form of security was intended by this finding. But one thing is certain that in both cases, even conceding (without, of course, so deciding) that in the case of a trust of this nature in real property such trust may be proved by parol; the rule still obtains that to overcome the legal effect of a written instrument purporting to convey land absolutely, the parol testimony, showing that the instrument was other than what it purports to be and was merely security by way of mortgage or by way of trust deed, must be clear and satisfying. In this case the evidence is not only not clear and convincing, but strongly preponderates against the finding. We have already shown of what plaintiff's evidence consisted, how inconclusive and unsatisfactory it inherently is; and that there seemed no reason why defendant should take title in himself, employ an attorney, expend money, and undertake the labor of quieting the title to the property when his sole return in the event of success was to be repayment of the amount expended with 8 per cent. interest. Defendant's own testimony, however, presents a rational and understandable explanation of the transaction. The title to the property had been for some years in dispute. Nothing had been done with it, and plaintiff had no money with which to clear title or do anything. In this condition he agreed to take the title himself and to expend the necessary money in clearing the title for a one-half undivided interest in the land, with the further understanding, not as plaintiff vaguely testifies, that he should have an option to develope and pay plaintiff one-half of the proceeds, but that after clearing title defendant would advance money and do development work upon the property, which was mining property, plaintiff to become liable for one-half of the expenditures, and to become entitled to one-half of the profits. Such is defendant's explanation, and this explanation is not only fully corroborated by Mr. Du Brutz, an attorney at law, who was present at the conferences and advised the defendant Gibson in the transaction, who testifies positively that upon his advice the deed was made as an absolute conveyance, and that for his services and risks defendant Gibson was to have an undivided one-half interest in the property, but it is further corroborated by the circumstances, as testified to by the defendant Gibson, that when plaintiff complained that he had nothing to show that he had any interest in the property, Gibson gave him a written declaration that he stood ready to deed to plaintiff an undivided half interest at his request, which paper, if plaintiff did not legally accept, he at least took into his possession and carried away with him. Still further corroboration is found in the testimony of defendant Ingram, that plaintiff always represented to him that he owned an undivided one-half interest in the property, and that this was the explanation of the fact that plaintiff's contract to sell to him, Ingram, was a contract to sell "all of his right, title, and interest," in and to the property in controversy; that the contract was so drawn because plaintiff had explained that all of his right, title and interest was an undivided one-half interest.

Summing up on this proposition, therefore, these conclusions follow: (1) That if, as between plaintiff and defendant Gibson, it is undertaken to show that the deed was a mortgage merely, the evidence is too vague and unsatisfactory to justify a finding to this effect. It lacks absolutely the clearness and convincingness of proof without which the terms of so solemn an instrument as a deed should not be disturbed. (2) If it be sought to treat the instrument as a deed in trust, then conceding, though not deciding, that such a trust may be proved by parol, there is, for the reasons given, a failure of satisfactory proof upon this point, and there is left nothing but the written and signed agreement by Gibson to plaintiff to convey to him a one-half interest upon request. This, treated as a declaration of trust signed by the trustee, constitutes the measure of plaintiff's right.

The court found the contract between Ingram and the plaintiff to be for an undivided one-half of the land. It further found that Ingram had paid upon his contract such amount as was due and payable under it, and that the contract "still remains unperformed upon the part of defendant H. C. Ingram and this plaintiff"; that the only reason assigned by defendant Ingram for his failure to pay the balance of the unpaid purchase price was that the "United States patent therefor does not appear in the abstract of title of said property," and "that the defendant Ingram is entitled to a period of 60 days from and after the service upon him of a copy of this decree and of an amended abstract of title from plaintiff showing a clear title to said premises, within which to pay plaintiff" the balance of the purchase price, "and if said defendant Ingram does not complete his purchase and pay plaintiff said money and transfer plaintiff said stock in the period of 60 days from said date defendant Ingram shall be barred of all right, title, claim and interest therein." The only allegation which the complaint contains affecting the defendant Ingram is the one above quoted, yet under it the court without pleadings reforms a written instrument which, in terms, agrees to convey all of plaintiff's interest into an agreement to convey an undivided one-half of his interest. It finds that plaintiff has not performed his contract, and as to defendant, finds that certain things by him "remain unperformed." Naturally, since what defendant Ingram was to perform was the payment of money and stock to complete the purchase price, those things remained unperformed until tender by plaintiff of a good and sufficient deed. Yet, where it clearly appears that defendant himself is not in default, and that he stands ready and willing to perform, an attempt by this judgment is made to fix a time limit and foreclose his right under the contract. Still further, the contract between plaintiff and Ingram was for a good merchantable title, since the contract itself declares that the money will be refunded if, upon examination, the title is not found to be perfect. Yet the court not only forecloses Ingram's right within the 60 days, but decrees that he shall fulfill his contract or be foreclosed upon presentation of an amended abstract of title from plaintiff "showing a clear title" to said premises. It is not even made to appear whether that clear title shall be shown in Gibson, Renton, or in a stranger. Suffice it upon this proposition to say, that as the evidence and findings both show that defendant Ingram was not in default, the judgment against him is wholly erroneous, and he should have been given a judgment for costs.

For the foregoing reasons, the judgment and order as to appellants Gibson and Ingram are reversed, and the cause remanded for further proceedings in conformity with the foregoing opinion.

We concur: McFARLAND, J.; LORIGAN, J.

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148 Cal. 691

REYMOND v. LABOUDIGUE. (Sac. 1,245.)

(Supreme Court of California. Feb. 12, 1906.)

SPECIFIC PERFORMANCE — PERFORMANCE BY PLAINTIFF—DEFINITENESS OF CONTRACT.

Where plaintiff orally agreed to sell defendant his interest in certain railroad land for $250 and a further sum of $48.30, which plaintiff had already expended on the land, and to loan defendant and another $100 to enable them to get a deed of the land from the railroad, and defendant in writing promised to pay $250 and agreed that in case he left the place before that amount was paid the property should go to plaintiff, when he should pay the price of the land that defendant bought from the railroad, for $51.50, the price of the land referred to is either $51.50 plus $48.30, or is indefinite and uncertain, so that the plaintiff in either case is not entitled to the reconveyance on his offer to pay defendant $51.50.

Department 1. Appeal from Superior Court, Shasta County; Charles M. Head, Judge.

Action by Lucien B. Reymond against Celestin Laboudigue. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Reid, Dozier & Carr, for appellant. Tillotson & Sessions (Bush & Perry, of counsel), for respondent.

ANGELLOTTI, J. This is an appeal from a judgment rendered in favor of defendant upon the sustaining of his demurrer to plaintiff's second amended complaint, plaintiff declining to further amend.

Disregarding the objections of uncertainty made by the demurrer, the sole question for determination, as stated by counsel for plaintiff, is as to whether the complaint states facts sufficient to constitute a cause of action for specific performance of an agreement to convey real estate. The complaint shows that the only written evidences of any such agreement were two papers, executed and delivered by defendant on July 20, 1901, which were as follows, viz.:

(1) "250.00. French Gulch, July 20th, 1901. Six months after date I promise to pay to L. B. Reymond the sum of $250.00 hundred dollars after the first cleanup of firs crushing in gold coin of united states of america with out interest. Celestin Laboudigue. Witness: Chas. Joseph."

(2) "French Gulch, July 20, 1901. I the under signed C. Laboudigue agree to L. B. Reymond if i should leave the place before the $250.00 is paid that property is to goo back to L. B. Reymond when he pays the price of the land that he C. Laboudigue bough from the R. R. Company, for the sum of $51.50 fifty-one dolars and fifty cents. Celestin Laboudigue."

It is claimed by plaintiff that these somewhat vague and uncertain writings must be construed in the light of the surrounding circumstances alleged in the complaint, and that when so construed they are sufficiently definite and certain to warrant the relief demanded, which is a decree requiring defendant to convey to plaintiff the S. E. ¼ of the S. E. ¼ section 11, township 33 N., range 7 W., M. D. M., situated in Shasta county, Cal., for the sum of $51.50.

From the complaint the following facts appear, viz.: One Joseph went into the possession of said land in June, 1901, for the purpose of mining on the same. Plaintiff purchased an undivided one-half interest from Joseph, and went into possession with him. The land then belonged to the Central Pacific Railway Company. Between June 12, 1901, and July 20, 1901, Joseph and the plaintiff did mining work thereon, running a tunnel of about 36 feet, and sinking a shaft of about 12 feet, the plaintiff's share of the expense being $48.30. In July, 1901, they made an application to the railway company for the purchase of said land, and were informed by the land agent of the company that they might purchase it for $100 and $3 additional for the deed. On July 20, 1901, while they were preparing to purchase the land, plaintiff orally agreed with defendant to sell him his interest in the land for $250, and the further sum of $48.30 (the amount already expended by plaintiff), and also to loan him and Joseph the necessary $100 to pay the railway company for the land, and it was agreed that the deed from the company should be made to the defendant and Joseph as grantees. The amount of $100 was advanced by plaintiff, and the deed of the company made to the defendant and Joseph. Defendant entered into possession of said property with Joseph. On August 10, 1901, he paid to plaintiff the said $48.30 part of the purchase price. At or about the same time he and Joseph repaid to plaintiff the $100 advanced. No part of the $250 has ever been paid. Within 3½ months of July 20, 1901, defendant left said land and has ever since remained away therefrom, and has done no work thereon. It does not appear that defendant ever did any mining work on said land. On May 23, 1902, plaintiff tendered to defendant $51.50, and demanded from him a conveyance of said land, but defendant refused to accept said $51.50, or execute said deed.

Disregarding all other points made by defendant, it appears very clear to us, in the light of the surrounding circumstances alleged, either that the written contract is too indefinite and uncertain in the material matter of the amount to be paid by plaintiff to defendant, as a condition precedent to his right to a conveyance, to warrant a decree of specific performance, or that plaintiff has failed to pay or offer to pay to defendant the full amount which, under the contract, he was compelled to pay, before being entitled to a conveyance. Under the writing relied on, plaintiff is entitled to the property only "when he pays the price of the land." What is meant by the phrase "price of the land"? The words following that phrase, viz., "That he * * * bought from the R. R. Company, for the sum of $51.50 fifty-one dolars and fifty cents," appear to be simply words of description to identify the land referred to. At any rate, they may reasonably be so construed, and the surrounding circumstances alleged lend force to such construction. The "price" paid by defendant for the land was not only the $51.50 paid to the railway company, but also the $48.30 paid to plaintiff, together with his promise to pay the $250 referred to in the writing. We cannot say that the writing does not mean that the plaintiff should take back the land only on paying to defendant all of the amounts that had, in fact, been paid by defendant therefor, both the full amount actually paid to plaintiff and the amount paid to the railway company. This would certainly be a more fair and more reasonable contract than one that would require defendant to forfeit all amounts actually paid to plaintiff, in the event that he abandoned the place only after he had paid all except a small portion of the $250, which would be the contract if plaintiff's construction be the correct one. If this is the proper construction of the agreement, plaintiff was not entitled to any relief in this action, for he had offered to pay to defendant only $51.50, and was, therefore, not entitled to receive a conveyance. It is, of course, not disputed that the general rule is that a party is not entitled to specific performance unil he has performed, or offered to perform, all conditions precedent on his part, required by the terms of the contract.

If, on the other hand, it be uncertain whether or not this is the proper construction of the agreement, plaintiff must fail altogether in his effort to obtain specific performance. It is elementary that specific performance will not be enforced unless the contract not only contains all the material terms, but also expresses each in a sufficiently definite manner. In Pomeroy on Contracts, § 159, it is said: "An uncertain contract * * * may perhaps embrace, in a partial manner, all the material terms, but on account of the inexact, indefinite, or obscure language in which one or more of them is stated, it fails to express the intent of the parties with sufficient clearness to enable a court of equity to enforce its provisions. The specific performance of an agreement, thus uncertain, will not be decreed." As said in 26 American and English Encyclopædia of Law (2d Ed.) p. 33: "The contract sought to be enforced must, at all events, be so certain that its meaning can be ascertained, as an indefinite contract cannot be enforced, because the courts do not know to what the parties agreed. The meaning and intent of the parties should be placed beyond the bounds of mere conjecture by full and clear proof." We are satisfied that we would not be warranted in holding that the agreement clearly and definitely shows that the plaintiff was to be entitled to a conveyance upon the payment to defendant of the sum of $51.50 only.

Our conclusion upon this point makes it unnecessary to consider any of the other points made in support of the judgment.

The judgment is affirmed.

We concur: SHAW, J; McFARLAND, J.

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148 Cal. 723

WINSLOW v. CITY OF VALLEJO.

(Sac. 1,238.)

(Supreme Court of California. Feb. 17, 1906.)

1. EASEMENTS — EXTENT OF RIGHT—LIMITATION BY USE.

Where a grant of an easement is general as to the extent of the burden to be imposed on the servient tenement, an exercise of the right, with the acquiescence and consent of both parties, in a particular course or manner, fixes the right, and limits it to the particular course or manner in which it has been enjoyed.

2. SAME — CONSTRUCTION OF GRANT — SURROUNDING CIRCUMSTANCES.

For the purpose of ascertaining the extent and limits of an easement the entire instrument creating the easement is to be considered in view of the circumstances surrounding its execution and the situation of the parties, and if the language of the instrument, viewed in the light of all conditions existing when it was executed, give a right in excess of the one actually used, such right will continue to exist notwithstanding the exercise for a time of a lesser privilege.

3. SAME—LIMITATION BY USE.

Civ. Code, § 806, provides that the extent of a servitude is determined by the terms of the grant or the nature of the enjoyment by which it was acquired. A city was granted a right of way over land for any water pipes or mains which should be laid by it, provided that all pipes should be laid so that not less than 1½ feet of ground should cover the same, and also the right to enter into and upon the lands for the purpose of laying down and maintaining the water pipes and mains. In pursuance of this grant the city, with the consent of the grantor, laid a 10-inch water pipe and used the same for about nine years. *Held*, that the city by laying the pipe and using the same limited the location and extent of its easement, and could not thereafter lay an additional 14-inch pipe alongside of the pipe originally laid, when that pipe proved insuffìcent to adequately supply the city with water.

4. INJUNCTION — GROUNDS—ABUSE OF EASEMENT.

Where a city had an easement for the construction and maintenance of a water pipe over the lands of another, injunction was the proper remedy for its wrongful act in laying an additional water pipe which it had no right to lay under the terms of the easement as defined by the use thereof.

Department 1. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by Addie Winslow against the city of Vallejo. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. A. Lamont and James S. Lamont, for appellant. H. D. Gill, for respondent.

SLOSS, J. The defendant, the city of Vallejo, appeals from a judgment enjoining it from entering upon certain land belonging to the plaintiff and laying thereon a 14-inch pipe, or from entering for any purpose except that of inspecting, repairing, or renewing the water main already laid across said land.

The findings, which are not attacked, show the following facts: The city of Vallejo has for some years owned and operated a water system for the purpose of supplying the city and its inhabitants with water. The water is impounded in a reservoir situated in Solano county and is thence conveyed through a 10-inch iron main pipe line to the city of Vallejo, a distance of about 14 miles. The pipe line was laid about nine years before the commencement of this action, and in its course passes through the lands of various property owners, including the plaintiff. By reason of the growth of the city, the 10-inch main has become inadequate for the needs of the inhabitants, and the city has undertaken to lay an additional pipe, 14 inches in diameter, which it is about to run across the plaintiff's lands within three feet of the 10-inch pipe line. While an express finding as to damage is not, in our view, important, it may be proper to say that the trial court finds that the laying of the new main will damage plaintiff's orchard and a crop growing on the land. The 10-inch main was laid under a grant of a right of way, dated June 15, 1893, from the then owners of the land to the defendant, and, inasmuch as no compensation for any further or other right was paid by the city, the question is whether the conveyance or grant of 1893, taken in connection with the facts above stated, gave to the defendant the right to run a 14-inch main through the lands of the plaintiff, over a route outside of and in addition to that occupied by the 10-inch line. The instrument in question, after reciting a consideration of $1 and the furnishing of water by the city to the owners of the land, to the extent of not more than 1,000 gallons per month, grants, and conveys to the city a right of way over the land described as follows: "Being the right of way on, in, through and over the land of the parties of the first part hereinafter described for any water pipes or mains which may be laid by the city of Vallejo, the party of the second part, and the right to maintain such water pipes and mains, provided that all water pipes and mains shall be laid so that not less than 1½ feet of ground shall cover such water pipes and mains, and that in no case shall the said water pipes or mains interfere with the proper cultivation of the lands of the parties of the first part, and also the use of so much land as is necessary in the laying down and maintaining of said water pipes and mains, and also the right to enter into and upon said lands for the purpose of laying down and maintaining said water pipes or mains, and also at all times in the future for the purpose of repairing and inspecting and maintaining said water pipes or mains, and causing no more damage in such entry or entries than cannot be avoided. Should said party of the second part cause any damage by such entry or entries is is hereby agreed that reasonable compensation shall be paid by said city of Vallejo to the parties of the first part. Said water pipes and mains to be laid and maintained on present surveyed line as near as may be."

Section 806 of the Civil Code provides that "the extent of a servitude is determined by the terms of the grant or the nature of the enjoyment by which it was acquired." In the present case the easement or servitude was acquired by grant, and we must therefore determine its extent by looking to the terms of the grant. But the conveyance is general in its terms and affords no basis for determining the number of pipes, their size, or their exact location. What is granted is the right of way for "any water pipes or mains which may be laid by the city," such pipes to be covered by not less than 1½ feet of ground, and to be "laid and maintained on present surveyed line as near as may be." The rule is well settled that where a grant of an easement is general as to the extent of the burden to be imposed on the servient tenement, an exercise of the right, with the acquiescence and consent of both parties, in a particular course or manner, fixes the right and limits it to the particular course or manner in which it has been enjoyed. In Onthank v. L. S. & M. S. R. R. Co., 71 N. Y. 194, 27 Am. Rep. 35, the plaintiff, in 1863, had granted to the predecessor of the defendant the right to enter upon his lands "for the purpose of laying down and keeping in repair an iron pipe" to carry water from a certain reservoir across said lands. The grantee laid a two-inch pipe across plaintiff's land. In 1871, the defendant enlarged its reservoir and put down a four-inch in place of the two-inch pipe. It was held that the easement of the defendant became fixed as to extent and location by the laying of the original pipe, with the consent of both parties, and that it could not thereafter be exercised in any other place, nor could the size of the pipe be increased. The court said, per Earl, J.: "After the grantee had once laid its pipe and thus selected the place where it would exercise its easement thus granted in general terms, what was before indefinite and general became fixed and certain, and the easement could not be exercised in any other place. * * * But why is not the right also fixed for the same reasons as to the size of the pipe, and the quantity of water to be diverted? I can perceive no reason for confining the operation of this rule to the mere place where the right is to be exercised. There is the same reason for applying it to the entire right granted." In Jennison v. Walker, 11 Gray (Mass.) 423, the court said: "Where an easement in land is granted in general terms, without giving definite location and description to it, so that the part of the land over which the right is to be exercised cannot be definitely ascertained, the grantee does not thereby acquire a right to use the servient estate without limitation as to the place or mode in which the easement is to be enjoyed. When the right granted has been once exercised in a fixed and defined course, with the full acquiescence and consent of both parties, it cannot be changed at the pleasure of the grantee." This case involved the location and course of an aqueduct. The same principle has been applied to the construction of a dam (Orphan Home v. Buffalo Hydraulic Association, 64 N. Y. 561); and to the location of a right of way Wynkoop v. Burger, 12 Johns. 222; Bannon v. Angier, 2 Allen (Mass.) 128; O'Brien v. Goodrich, 177 Mass. 32, 58 N. E. 151; Garraty v. Duffy, 7 R. I. 476.

It is, of course, true, that for the purpose of ascertaining the extent and limits of the right granted the entire instrument is to be considered, in view of the circumstances surrounding its execution, and the situation of the parties. Herman v. Roberts, 119 N. Y. 37, 23 N. E. 442, 7 L. R. A. 226, 16 Am. St. Rep. 800. And if the language of the grant in question, viewed in the light of all the conditions existing when it was executed, clearly gave to the defendant a right in excess of the one actually used, such right would still exist, notwithstanding the exercise for a time of a lesser privilege. Quigley v. Baker, 169 Mass. 303, 47 N. E. 1007. But we see nothing in the language of this grant, or in the conditions existing when it was executed, to indicate that it was intended to give the defendant the right to increase from time to time the number of pipes laid. The appellant's plea for such construction is based largely on the fact that the conveyance throughout uses the words "pipes" and "mains" in the plural number, and that, therefore, the parties could not have intended to limit the city to a single pipe. But, while the city might, at the outset, have laid more than one pipe, the most that can be said regarding this language is that the grant is indefinite as to the number of pipes. The city, having elected to lay one, is bound by this election. It might with equal force be urged that inasmuch as there was no limitation on the size of the pipe to be laid, the defendant might at any time replace the 10-inch pipe with one of twice or three times the diameter. Such view is entirely inadmissible under the authorities cited above. It is true, as urged by appellant, that the parties to the grant knew that the right of way granted was for the purposes of a municipal water supply, and they may have contemplated that with the growth of the city, additional means of conducting water to it might be necessary. It by no means follows, however, that the grantors, in conveying a right of way for water pipes over their land, intended to burden that land with an easement the extent of which could never be definitely ascertainable, and which might be enlarged again and again, as often as the growth of the city of Vallejo might make it necessary to extend the operations of the water plant.

We think, therefore, that the construction given to the conveyance by the lower court was correct, and that the laying of the 10-inch pipe, with the acquiescence of both parties, measured and limited the location and the extent of the easement. "It is elementary that the location of an easement of this character cannot be changed by either party without the other's consent, after it has once been finally established, whether by the express terms of a grant, or by acts of the parties tantamount in their effect." Vestal v. Young (Cal. Sup.) 82 Pac. 381; Allen v. San Jose L. & W. Co., 92 Cal. 138, 28 Pac. 215, 15 L. R. A. 93. If the defendant had no right to lay the new pipe, injunction was the proper remedy. "It is the settled law of this state that, irrespective of other damage, an injunction will be granted to prohibit the continuance of action that obstructs one in the free use and enjoyment of his land, where such action, if continued, will ripen into an easement." Vestal v. Young, supra, and cases cited.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

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148 Cal. 705

PEOPLE v. HANFORD UNION HIGH SCHOOL DIST. et al. (Sac. 1,262.)

(Supreme Court of California. Feb. 17, 1906.)

1. Schools and School Districts—Annexation of Adjacent District—Assumption of Indebtedness—Pro Rata Indebtedness.

Under Const. art. 11. § 18, providing that no school district shall incur any debt for any purpose, exceeding in any year the income provided for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose, any assumption by a school district, not included in a high school district, of a pro rata of bonded indebtedness originally created by such high school district, is, as to such school district, the incurring of such an indebtedness or liability.

2. Same—Assent of Electors—Necessity for Election.

Under Const. art. 11, § 18, providing that no school district shall incur any indebtedness or liability for any purpose exceeding in any year the income provided for such year without the assent of two-thirds of the qualified electors given at an election, and Pol. Code, § 1670, subd. 22, providing that any school district adjacent to a high school district may be admitted to the latter district by the supervisors of the county on such terms as may be agreed on between the trustees of the school district seeking admission and the high school board, whenever a majority of the heads of families shall present a petition for such annexation, accompanied by a petition signed by a majority of the members composing the high school board, an order of annexation made by the supervisors and based on an agreement whereby the trustees of the school district seeking annexation purported to bind the district to pay its pro rata of taxes for the maintenance of the annexing high school district and the liquidation of bonded indebtedness thereof was ineffectual, where no election was had in the school district to determine whether or not it should pay its pro rata of such indebtedness, even though the action of the trustees was expressly assented to by a majority of the heads of families in the district.

Department 1. Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by the people of the state of California against the Hanford Union High School District and others. Judgment for defendants, and the people appeal. Reversed.

U. S. Webb, Atty. Gen., and Jones, Park & Jacobs, for the People. Letus N. Crowell and E. T. Cosper, for respondents.

ANGELLOTTI, J. This is an action brought by the Attorney General, in the name of the people of the state, upon the complaint of certain taxpayers of Excelsior School District of Kings county, to obtain a decree excluding the Hanford Union High School District from exercising any powers, privileges, functions or franchises over any of the territory of said Excelsior School District. The claim of the state is that Excelsior School District constitutes no part of said high school district, and the question presented by this proceeding is as to the validity of certain proceedings having for their object the admission of said Excelsior School District as a part of said high school district.

There is no dispute as to the facts. The Hanford Union High School District was formed in the year 1893 by 10 continguous school districts of Kings county, under the provisions of section 1670, Pol. Code, and ever since that time has conducted and maintained a union high school, known as the "Hanford Union High School." Excelsior School District was in 1893, and ever since has been, one of the school districts of said county, and was not included in the formation of such high school district, but lay adjacent thereto. In the year 1895, the electors of the high school district, at an election regularly called for that purpose, by two-thirds vote, declared in favor of the issuance and sale of the bonds of said district, in the amount of $7,500, bearing interest at the rate of 6 per cent. per annum, and running 10 years, and such bonds were regularly issued and sold by the supervisors of the county, and the proceeds used for the purpose for which they were voted, viz., the purchase of a lot and the building and furnishing of a school house thereon. In July, 1898, the full amount of the principal of said bonds was still unpaid, and $4,500 thereof remained unpaid at the date of the trial of this proceeding. In September, 1898, a majority of the heads of families of Excelsior School District presented to the board of supervisors of Kings county a petition for the annexation of said district to said high school district, which petition was accompanied by a petition signed by a majority of the members of the high school board of said high school district, and also by a contract in writing which had theretofore been entered into between the trustees of the Excelsior School District and said high school board, reciting the terms upon which Excelsior School District should be admitted. The terms recited were: "That the said Excelsior District agrees to pay its pro rata of the taxes for the maintenance of the said Hanford Union High School from July 7th, 1898; and that said Excelsior District agrees to pay its pro rata of the taxes for the liquidation of the interest and bonded indebtedness of said Hanford Union High School District that is due and unpaid July 1st, 1898." On September 7, 1898, the board of supervisors of Kings county made its order reciting the conditions of admission agreed on, and also that the board of trustees of Excelsior District had in writing accepted such conditions, and concluding, "Now, therefore, * * * it is hereby ordered that the territory embraced in said Excelsior School District be and the same is hereby annexed to the Hanford Union High School District." These were the only proceedings ever had for the purpose of accomplishing the annexation, and no election has ever been called or had in Excelsior School District to determine whether or not said district should pay its pro rata of the taxes for the maintenance of said high school, or its pro rata of taxes for the liquidation of the bonded indebtedness of the high school district, or the interest thereon. Ever since such proceedings were had, the high school district has assumed to exercise government and control over Excelsior School District under the claim that the same constituted a part thereof, and the board of supervisors have treated the same as a part of said district, and levied taxes thereon, both for the maintenance of the high school and the payment of interest on the bonded indebtedness and such part of the principal as became due. This proceeding was commenced in January, 1902. Judgment was given in favor of defendant, decreeing Excelsior School District to be a part of the high school district. Plaintiff appeals from such judgment.

The statutory provision regarding the annexation of an adjacent school district to a high school district is as follows, viz.: "Any school district adjacent to a high school, union, or joint union high school district, in the same or in an adjoining county, may be admitted to said high school district, by action of the board of supervisors of the county in which the school district is located, *upon such terms as may be agreed upon between the trustees of the school district seeking admission and the high school board*, whenever a majority of the heads of families, as shown by the last preceding school census, shall present to said board of supervisors a petition for such annexation, accompanied by a petition signed by a majority of the members composing the high school board of the district to which admission is desired. * * * All the provisions relative to the levy and collection of the tax necessary to maintain a union high school district shall apply to the levy and collection of the tax required for a joint union school district, as in this section provided." Subdivision 22, § 1670, Pol. Code. The italics in the above quotation are ours. For the purposes of this case it will be necessary to consider only one feature of this statute. It is apparent therefrom that it was the intention of the Legislature that no adjacent school district could be admitted to or become a part of an existing high school district, except upon such terms and conditions as might in fact be agreed upon by and between the respective authorities of the school district and the high school district, and that the board of supervisors should have no authority to make an order of annexation, except upon such terms as might thus be agreed on. The Legislature has seen fit to make this condition, and the courts are not at liberty to dispense therewith.

One of the terms considered essential by the respective authorities in the case before us was, that Excelsior School District should bind itself to pay its pro rata of the existing bonded indebtedness of such high school district. It must be assumed, in view of the agreement made, that the high school district was not willing to admit Excelsior District except upon that condition. The order of the board of supervisors was undoubtedly made upon the theory that Excelsior District had, by the action of its board of trustees, and, perhaps, the assent of a majority of its heads of families, made an agreement binding itself to perform all the obligations attempted to be imposed, including the payment of its pro rata of the bonded indebtedness. Upon no other theory could the board of supervisors make a valid order of annexation, for the district could be annexed only on such terms as had been agreed on, and, here, it could not be admitted without making itself liable for its pro rata of the bonded indebtedness. That Excelsior District did not make itself liable for any portion of such bonded indebtedness appears very clear. Our Constitution provides that "no county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner, or for any purpose, exceeding in any year the income or revenue provided for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose. * * * Any indebtedness or liability incurred contrary to this provision * * * shall be void." Article 11, § 18. This provision absolutely precludes the imposition of the burden of any indebtedness of the character described therein upon any of the political subdivisions named therein, except in the manner therein provided.

As has been universally recognized, it is applicable whenever it is sought to make any of the political subdivisions named liable for an indebtedness on account of money borrowed, to be evidenced by the bonds of such subdivision, payable out of the revenue of succeeding years. The bonded indebtedness involved here was originally created by the high school district, in the prescribed way, and was, as to such district, a valid indebtedness. Any assumption, however, of a pro rata of this indebtedness by any school district not included in such high school district, would be, as to such school district, the incurring of such an indebtedness or liability, just as fully and completely as the original creation of such indebtedness, by the high school district, was an incurring of such an indebtedness or liability on its part. In each case, the political subdivision is attempting to incur a liability in excess of its provided income or revenue, no part of the amount of which can ever be paid from its ordinary revenues, but all of which is obtainable only by special levy, to be made for the express purpose of paying the same. Such a liability on the part of any political subdivision named in the constitutional provision can be created, the Constitution says, only with the assent of two-thirds of the qualified electors of such subdivision, voting at an election to be held for that purpose, and the property owners in the subdivision are protected by such constitutional provision against any tax to pay such indebtedness, unless it has been so assented to by the electors. In view of this provision, the trustees of Excelsior District were without power to bind the district in this matter, even though their action was expressly assented to by a majority of the heads of families in the district. In one way only could such a liability be assumed by the district, viz.: the method prescribed by the Constitution. If the statute under consideration must be construed as authorizing the trustees of the adjacent school district, by their mere agreement to that effect, to bind the district in such a matter as the assumption of any portion of an existing bonded indebtedness of another district, it is plainly in violation of the constitutional provision. McBean v. Fresno, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191, and kindred cases are relied upon in support of the claim that the assumption of the burden to pay a pro rata of the bonded indebtedness and interest thereon is not the incurring of such an indebtedness or liability as is included within the constitutional provision. We are unable to perceive that these cases are at all in point.

As, in view of the terms agreed upon by the respective boards of trustees, it was essential to the admission of the Excelsior School District as a part of the high school district, that it should assume the burden of paying its pro rata of the bonded indebtedness and interest, and as it never did legally assume this burden, or become in any degree liable on account thereof, the order of annexation made by the board of supervisors must be regarded as ineffectual for any purpose.

The judgment is reversed, and the cause remanded for proceedings not inconsistent with the views herein expressed.

We concur: SHAW, J.; HENSHAW, J.

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148 Cal. 711

BOGGS et al. v. GANEARD. (Sac. 1,280.)

(Supreme Court of California. Feb. 17, 1906. Rehearing Denied March 19, 1906.)

1. PUBLIC LANDS—"SUITABLE FOR CULTIVATION."

Const. art. 17, § 3, providing that public lands "suitable for cultivation" shall be granted only to actual settlers, applies to land originally unfit for cultivation, but which, at the time of application for purchase, has been made fit for cultivation, without regard to how it was reclaimed.

2. SAME—QUESTIONING RIGHT TO PURCHASE—CERTIFICATE OF PURCHASE.

The question whether public land was suitable for cultivation, at the time application to purchase it, and so under Const. art. 17, § 3, could not be purchased by one not an actual settler, may be raised in a proper proceeding after applicant has paid the purchase price, and received a certificate of purchaser.

3. CONSTITUTIONAL LAW — IMPAIRING OBLIGATION OF CONTRACT—CHANGE OF REMEDY.

Act March 2, 1903 (St. 1903, p. 67, c. 61), amending Pol. Code, § 3443, so as to provide an additional method for contesting the right of one to purchase public land, on the ground that at the time of application to purchase the land had been reclaimed and made fit for cultivation (the method being by action by one who had occupied the land for 10 years before the application), though retroactive in applying where an application to purchase was made and a certificate of purchase was issued prior to adoption of the statute, impairs no obligation of contract, as it merely gives a new remedy.

4. STATUTES—SPECIAL LEGISLATION.

Act March 2, 1903 (St. 1903, p. 67, c. 61), amending Pol. Code, § 3443, to provide a special proceeding in the courts for determination of questions as to validity of proceedings for purchase of public lands, is not a special law regulating the practice of courts of justice, prohibited by the Constitution; the ordinary rules as to practice, pleadings, and evidence, including motion for new trial and appeal, being recognized.

Department 1. Appeal from Superior Court, San Joaquin County; George E. Church, Judge.

Action by Louise E. Boggs, executor, and others, against Thomas H. Ganeard. From an adverse judgment, defendant appeals. Affirmed.

John B. Hall, for appellant. Nicol & Orr and Dunlap & Plummer, for respondents.

ANGELLOTTI, J. This proceeding, involving the question as to the right of defendant to purchase from the state, as swamp and overflowed land, a tract of land containing 159.98 acres, was instituted in the superior court of San Joaquin county, under an order of reference made by the surveyor general under the provisions of section 3443, Pol. Code, relative to the purchase of swamp and overflowed land, as amended March 2, 1903. Judgment was given decreeing that defendant was not entitled to purchase the land and canceling his certificate of purchase. Defendant appeals from said judgment, and from an order denying his motion to vacate the same and enter judgment for him upon the findings, made under sections 663 and 663½ of the Code of Civil Procedure. The appeals come before us on the judgment roll, and a bill of exceptions showing the proceedings on the motion to vacate the judgment.

The question presented is as to whether the facts shown by the pleadings and findings are sufficient to support the judgment. The land in question was segregated as swamp and overflowed land by authority of the United States, prior to December, 1879. No application for the purchase thereof other than that of defendant, has ever been made, plaintiffs not having applied to purchase the same and not now seeking to purchase. Defendant's application was made on September 21, 1901. Defendant was not an actual settler on the land, but in all other respects he was qualified to purchase. His affidavit of application was, upon its face, in due form, and sufficient to show his right to purchase this land, being in strict conformity with the requirements of section 3443, Pol. Code. His affidavit was claimed to be false in regard to one matter stated therein, viz., that he knew of his own knowledge that there were no settlers on the land. The law then required, as it ever since has, that the affidavit should state that he knew "of his own knowledge that there are no settlers" on the land, "or, if there are, that the land has been segregated more than six months by authority of the United States." The affidavit also showed that the land had been so segregated. The applicant paid to the surveyor general the required fee, and subsequently, his application having been approved, paid the full purchase price, $159.98, and was given a certificate of purchase, bearing date March 20, 1902. On March 14, 1903, no patent having been issued to defendant, plaintiffs filed in the office of the surveyor general their affidavit, setting forth that at the time of the filing of defendant's application, and for more than 10 years next prior thereto, they and those under whom they claim, were in the possession and occupancy of said land for farming purposes, such occupancy and possession being open and notorious and evidenced by ditches, embankments, and levees showing the actual extent thereof, and had, at the time of the filing of defendant's application, actually reclaimed such land and reduced the same to a state of cultivation "by a system of levees and ditches constructed and maintained at great expense by affiants and those under whom they claim," and had been farming and cultivating the same. The affidavit further stated that defendent's affidavit of application was false, in that he therein stated that he knew of his own knowledge that there were no settlers on the land, when, in truth and in fact, there were, and for more than 10 years next prior thereto there had been, settlers on said land. Upon this affidavit, the surveyor general made his order referring the questions raised thereby to the superior court of San Joaquin county, and plaintiffs, within 30 days thereafter, commenced this action to determine the same.

According to the findings of the court, all the allegations in plaintiffs' affidavit as to their use of the land, and the condition at the time of defendant's application are true, and the court expressly found that at the date of defendant's application, and for more than 10 years prior thereto, the land was "suitable for cultivation," having been "reclaimed by means of ditches, embankments, and levees by the grantors of plaintiffs," that "no part of said lands had been reclaimed or reduced to a state of cultivation by any swamp land district," and that defendant had never been a settler on said land. It further found that defendant's affidavit was false in the respect stated in plaintiffs' affidavit, and gave judgment in the manner hereinbefore specified. Disregarding for the moment all questions as to procedure, and the right of persons not in privity with the state to question the right of defendant to purchase, we are satisfied that it must be held, upon the record before us, that the land was at the date of defendant's application, "suitable for cultivation," within the meaning of those words as used in section 3 of article 17 of our Constitution, and that by reason of that fact, any sale of the land to defendant was forbidden, he not being an actual settler thereon. It is provided in that section that "lands belonging to this state, which are suitable for cultivation, shall be granted only to actual settlers." That this land was, in fact, suitable for cultivation at the time of such application, cannot be disputed under the findings of the court. Defendant's claim that it was not such within the meaning of the constitutional provision is based upon the fact that it was originally unfit for cultivation, and has been reclaimed and made suitable for cultivation not by natural causes, but by the hand of man, the findings showing that it was so changed "by means of ditches, embankments, and levees," constructed and maintained by plaintiffs and their grantors. If the doctrine of Fulton v. Brannan, 88 Cal. 454, 26 Pac. 506, is to be adhered to in the future as it has been ever since that decision was rendered, it would appear to be immaterial how the land was made suitable for cultivation. That case certainly determined that neither the condition of the land designated as swamp and overflowed at the time of its cession to the state, nor its condition at the time of the adoption of the constitutional provision, as to suitability for cultivation, was controlling.

The land there involved was covered with water until several years after the adoption of the constitutional provision, when it became reclaimed by natural causes. When it is settled that the Constitution speaks without reference to the condition of the land at either of these times, it must follow that it speaks with reference to the condition at the time of sale, or, rather, the initiation of the proceedings for purchase. And so this court expressly declared in Fulton v. Brannan, supra, where, discussing and approving a prior decision involving land of another character (Manley v. Cunningham, 72 Cal. 236, 13 Pac. 622), it said: "If this decision is to stand as expressive of the law of this state, all swamp lands which, *at the time application was made for their purchase*, were fit for human habitation, and by ordinary farming processes can be made suitable for cultivation, can be sold only to actual settlers, and in quantities not exceeding 320 acres." (The italics are ours.) The rule there expressed has never been departed from, and in all subsequent cases the condition of the land at the time of application for purchase has been taken as the controlling factor, in determining whether the land fell within the operation of the constitutional provision.

The Constitution thus speaking with reference to the condition at the time of application, it must follow that it is absolutely immaterial how land in fact suitable for cultivation at that time, became so. The Constitution includes all lands in its classification into two classes only. All lands not suitable for cultivation is in one class, and all land suitable for cultivation in the other. With reference to the question of granting to actual settlers only, there is no subclassification of the latter class authorized by the Constitution, and neither the Legislature nor the courts can make such a classification of lands in fact suitable for cultivation, based upon the manner in which they became suitable. See Fulton v. Brannan, 88 Cal. 456, 26 Pac. 506; Albert v. Hobler, 111 Cal. 398, 400, 43 Pac. 1104. The constitutional prohibition is applicable to all lands suitable for cultivation at the time of application, i. e., to all lands which, at such time, are ready for occupation, and which, by ordinary farming processes, are fit for agricultural purposes. Manley v. Cunningham, 72 Cal. 236, 241, 13 Pac. 622. The question discussed in Fulton v. Brannan, supra, as to what lands not reclaimed at the time of the application may be considered lands suitable for cultivation within the meaning of the Constitution, is not involved here. In the determination of such a question, the method and expense of the necessary future reclamation work are, of course, material factors, but they can play no part where the land has actually been reclaimed and made suitable for cultivation at the time of the application to purchase. This land falling within the class specified in the constitutional provision quoted above. at the time of defendant's application to purchase, its sale to him was at such time prohibited, he not being an actual settler thereon. It would appear to follow that he acquired no enforceable right to the land by reason of his application, payment and certificate of purchase, all made at a time when the law absolutely prohibited the sale to any except an actual settler. There is nothing in the law that gives such effect to the ex parte approval by the surveyor general of an application to purchase swamp and overflowed land, the subsequent execution of the certificate of purchase, which is at most simply evidence of a contract to convey, and payment of the purchase price, as would preclude a subsequent inquiry as to the right of the applicant to purchase. Payment for the land and a certificate of purchase based upon valid proceedings taken in that behalf undoubtedly confer rights upon the applicant which cannot afterward be impaired by the state, and this is the whole effect of the decisions to the effect of certificate and payment, relied upon by defendant. One qualified to purchase certain land under the law existing at the time of his application, complies with all the requirements of the law, pays for the land and receives his certificate. He thereby becomes entitled to a patent, and no subsequent constitutional or statutory enactment will be effectual to deprive him of the acquired right. As to him, the state is simply a trustee of the legal title. But any question as to the validity of the proceedings upon which the applicant bases his claim, may be raised and determined in any authorized proceeding, at any time prior to the issuance of patent. The applicant has no such vested right as forbids such inquiry. His claim to an enforcement of the contract must be based entirely upon the theory that his proceedings were valid. that he was at the time of application qualified to purchase the land and that he complied with the then existing law relative to purchase, and his certificate of purchase is, at most, only prima facie evidence of this. No law in force at the time of defendant's application or since enacted gave it any greater effect. The fact, that, under the law, an applicant was not, at the time of his application qualified to purchase the land, or did not comply with the then existing law regarding such applications, being made to appear in any authorized proceeding, his proceedings to purchase will be held void ab initio.

The decisions of this court in which the proceedings taken by the holder of the certificate of purchase have been held ineffectual to confer any right, either because the applicant was not qualified to purchase, or because he had not complied with the law relative to such applications, are so numerous, and the rule applicable is so well settled, that it is unnecessary to cite authorities. In at least three cases it has been expressly held, overruling a contrary contention, that the certificate of purchase does not bar an inquiry into the rights of the purchaser. Gilson v. Robinson, 68 Cal. 539, 542, 10 Pac. 193; Jacobs v. Walker, 76 Cal. 175, 18 Pac. 129; Taylor v. Weston, 77 Cal. 534, 541, 20 Pac. 62. It is true that the cases were generally contests as to the right to purchase initiated under statutory provisions authorizing the same, by persons who had also made application and were also seeking to purchase, but they all recognize the fact to be that neither certificate nor payment forecloses inquiry into the validity of the proceedings upon which the applicant bases his claim to a conveyance, and that his claim must fail, as absolutely void, whenever properly questioned, and it is shown that he was not entitled to purchase. In some of such contests, judgment was denied to the holder of the certificate, although the one claiming as against him the right to purchase, was also adjudged to be not entitled. Goldberg v. Thompson, 96 Cal. 117, 30 Pac. 1019, is such a case. The court there adjudged that neither party was entitled to purchase certain swamp and overflowed land, although Thompson held the certificate of purchase, upon the ground that the land had become suitable for cultivation prior to application, and neither party was an actual settler thereon, and this, although the finding of the court as to suitability for cultivation was outside the issues made by the pleadings. The court there said: "If land is of the class which can be sold only to residents, and neither contestant is a settler, the court cannot ignore the character of the land and the question of residence because it is convenient for the parties to do so. On the contrary, it must decide against both if neither is entitled to purchase." While the Legislature has seen fit to make a certificate of purchase prima facie evidence of title, it has been held that such a certificate will not avail in ejectment against a third party in possession of the land, who shows that the land was suitable for cultivation at the time of the application upon which the certificate was issued, and that the applicant was never an actual settler on the land. Miller v. Prentice, 82 Cal. 104, 23 Pac. 8; Trimmer v. Bode, 82 Cal. 647, 23 Pac. 136. The effect of all the decisions plainly is that proceedings for the purchase of land from the state, taken by one not qualified to purchase, confer no right whatever to the land, notwithstanding payment of the purchase price and issuance of certificate of purchase.

In view of our conclusions upon the questions already discussed, the remaining questions which must here be determined are easy of solution. They relate principally to the proposition as to whether or not the amendment of March 2, 1903 (St. 1903, p. 67, c. 61), to section 3443, Pol. Code, providing for contests and their reference for adjudication to the superior court, can be held to apply in cases where the application to purchase was made and certificate issued prior to its adoption, as was the situation here. By its terms, it was expressly made to apply to all cases, regardless of the time of application, and the claim here is that giving it the intended effect would render it violative of the constitutional provisions prohibiting the passage of any law impairing the obligation of a contract. Concededly, the contest here was within the terms of the amendment. Substantially, the amendment provides as follows: Any false statement in the affidavit of the applicant defeats his right to purchase. At any time prior to the issuance of patent, upon it being made to appear to the surveyor general by the affidavit of any settler or person occupying the land for farming purposes, that he, or those under whom he claims, have been in the possession and occupancy of such land, or any part thereof, for farming purposes, for over 10 years next preceding the application of the other party, their occupancy being open and notorious, and evidenced by actual enclosure or ditches, monuments, embankments, or levees showing the actual extent thereof. and that they or those under whom they claim had, at the time of the other party's application, actually reclaimed such land and reduced the same to a state of cultivation, or that the affidavit filed by such applicant "is false in any of the statements made therein," the surveyor general shall refer the questions raised by such affidavits to the superior court of the county in which the land or some part thereof is situated. Within 30 days thereafter, the person initiating the contest, shall commence action in such court to determine the same. Pending final judgment therein, all proceedings in the surveyor general's office respecting such lands shall be stayed. If upon the trial it shall appear that any of the statements made in the affidavit of the person desiring to purchase were false, or if it shall appear that the statements made in the affidavit of the settler or occupant are true, the approval of location or certificate of purchase, if any has been issued, shall be canceled by the judgment, and the surveyor general, upon the filing of a copy of such judgment with him, must enter an order of cancellation accordingly. If, however, it shall appear that the affidavit of the purchaser is in all respects true, and the statements made in the affidavit of the settler or occupant are untrue, it shall be so adjudged, and the surveyor general shall issue evidence of title in accordance with such judgment. It will be observed that under the terms of this provision, except in the case of false statements in the affidavit of the applicant, it is essential to a determination against the applicant that the land had actually been brought to a state of cultivation at the time of the application, and was, at such time, in the possession of another. It may here be assumed that any false statement in defendant's application to the effect that he knew of his own knowledge that here were no settlers on the land was immaterial, in view of the further stated fact that the land had been segregated more than six months, and also that the provision of the amendment authorizing the cancelation of the certificate for any false statement in the affidavit, however immaterial, could not apply to cases where payment had been made and certificate issued prior to its enactment. It is not necessary to express any opinion upon these questions. In so far as it authorizes an inquiry as to whether the land was suitable for cultivation at the time of the application, and as to whether the applicant was an actual settler thereon, it simply provides an additional method, by which, before a competent court and upon due process of law, the question as to the right to purchase may be determined, and by which, if it be found that his proceedings were invalid, they may be adjudged to be of no effect.

Under the law as it was at the time of his application, defendant's right to purchase this land was subject to question at any time prior to the issuance of patent. We have already seen that any other person, by simply presenting an application for purchase and demanding a trial in the superior court, could have initiated a contest wherein the application of defendant would have been declared void by the court, although the contestant himself might also have been held not entitled to purchase. Doubtless, the state might at any time have maintained an action for the same purpose. The amendment, in this respect, does no more than to authorize the same inquiry as to the validity of the proceedings to be made at the instance of and by private persons who have not sought to purchase the land. Such a proceeding, although maintained by private parties, is really for the benefit of the state, being in furtherance of and for the enforcement of its declared policy that lands suitable for cultivation should be granted only to actual settlers, and the party maintaining the same is, in effect, but the agent of the state, performing a duty allotted to him by the laws of the state. The adoption of this additional method of ascertaining as to the validity of defendant's claim, in no way affected any right guarantied him by the constitutional provision invoked. He had no right to purchase this land if it was suitable for cultivation at the time of his application and he was not then an actual settler thereon. He had no vested right as to the precise mode and manner of inquiry concerning its suitability for cultivation, as long as he was given an opportunity, upon proper notice and before a competent tribunal, to answer any attack made upon his claim in this respect, as fully and effectually as he could have done under the laws in force at the time of his application. A change in the law to this extent affects only the remedy, and disturbs or impairs no existing legal right. The cases uniformly hold that as long as vested rights are not impaired, retrospective laws giving new and additional remedies for existing rights, or giving a remedy at law where one previously existed in equity only or vice versa, are valid. As said in Rich v. Flanders, 39 N. H. 304, a party has no right to complain of these things as violations of the Constitution, so long as the laws leave him a competent court bound to administer justice to him according to the rights the law gave him, when his right of action or defense became invested. See, also, Hepburn v. Curts, 7 Watts (Pa.) 300, 32 Am. Dec. 760; Schenley v. Com., 36 Pa. 29, 78 Am. Dec. 359; Sampeyreac v. U. S., 7 Pet. 222, 238, 8 L. Ed. 665; Paschall v. Whitsett, 11 Ala. 472; Curtis v. Whitney, 13 Wall. 68, 20 L. Ed. 513; Oullahan v. Sweeney, 79 Cal. 539, 21 Pac. 960, 12 Am. St. Rep. 172. So far as the question under discussion is concerned, it is entirely immaterial what person or class of persons may be authorized to initiate such an inquiry, or what may be their relation to the land involved. Having the right to provide for the inquiry as to whether the claim of the applicant is valid, in such manner as it sees fit, subject to the limitation as to impairment of vested rights, the state may authorize such an inquiry to be instituted and maintained by any officer or person or class of persons. Whoever is so authorized is simply made the agent of the state for that purpose. It is of no concern to the claimant who is so designated. Whoever the person designated is, the claimant is only called upon to meet the claim of the state, made through its agent, that, by reason of the land being suitable for cultivation and he not being an actual settler thereon, the attempted proceedings for its purchase by him are void, and confer no right.

We are of the opinion that there is nothing in the contention that the amendatory act violates the provision of our Constitution relative to special laws regulating the practice of courts of justice. The right of the Legislature to provide a special proceeding in the courts for the determination of questions as to the validity of proceedings for the purchase of its public lands, and to make different provisions for the various classes of such lands, has long been recognized, and cannot be doubted. The nature of the subject is such as to justify such provision. See Deyoe v. Superior Court, 140 Cal. 476, 481, 74 Pac. 28, 98 Am. St. Rep. 73. So far as we can see, the ordinary rules as to practice, pleadings, and evidence, including motion for new trial and appeal, are all recognized by the statute as applicable to the proceeding here authorized, and no change is therein attempted, except in the single particular that the statute requires the contestant to set forth in his complaint copies of the affidavits filed by himself and the applicant before the surveyor general. This is for the purpose of enabling the court to determine what questions have been properly referred to it for adjudication, and is justified by the nature and object of the proceeding. The judgment of cancelation provided for is, in effect, simply a determination upon the question as to the right of the applicant to purchase the land.

It is unnecessary to discuss any of the other questions presented. It being determined that the amendment to section 3443, Pol. Code, is a valid law, and, so far as it authorizes judicial inquiry and final determination, at the instance of a settler or occupant of the land for farming purposes, as to its suitability for cultivation at the time of the application, and the applicant's qualifications to purchase the same, applicable in cases where the application was made prior to its enactment, it follows that the superior court had jurisdiction of the proceeding, and that the findings support the judgment.

As to the validity of the provisions of the amendment regarding any false statement in the affidavit of the applicant, as applied to applications made and certificates issued prior to their enactment, we express no opinion.

The judgment and order appealed from are affirmed.

We concur: SHAW, J.; SLOSS, J.

(148 Cal. 729)

HAMPTON et al. v. CHRISTENSEN et al.
(S. F. 3426, 3427).

(Supreme Court of California, Nov. 25, 1905. Opinion in Bank, Feb. 21, 1906.)

1. Mechanics' Liens — Payments — Deductions—Rights of Owner.

A building contract provided for payment of $2,000 on completion of the building and 25 per cent. of the contract price within 35 days thereafter, amounting to $2,750. The contractor being unable to obtain credit from materialmen, the owner agreed to guaranty his accounts with certain materialmen for material necessary to complete the building and assumed obligations to the amount of $905.21, which amount he paid after the building was completed at a time when no liens had been filed and no notice to withhold had been served, with the exception of one amounting to $905.08. *Held*, that the owner was not deprived of the right to deduct the amount so paid from the completion payment as against mechanic's lien claimants by Code Civ. Proc. § 1184, providing that no payment made prior to the time when the same is due shall be valid for the purpose of defeating or diminishing any lien in favor of any person except the contractor.

2. Same—Statutes—Construction.

Code Civ. Proc. § 1184, relating to mechanics' liens and providing that as to all liens except that of the contractor, the whole contract price shall not be diminished by any prior or subsequent indebtedness, offset or counterclaim in favor of the reputed owner and against the contractor, refers only to offsets not arising under the terms of the contract and of which, from an inspection of the contract, materialmen and laborers could have no notice.

3. Same—Failure to Complete Building—Damages by Delay.

Where a building contract provided for a completion payment of $2,000 and a final payment of $2,750, which amounted to 25 per cent. of the contract price which was not due until 35 days after completion of the building, as provided by statute for the benefit of mechanic's lien claimants, the owner, as against such claimants, was entitled to deduct as a first lien from the completion payment an amount due from the contractor for materials provided for but not furnished and damages actually sustained by the contractor's failure to complete the building within the time prescribed, notwithstanding Code Civ. Proc. § 1183, providing that a mechanic's lien shall extend to the entire contract price, etc.

4. Same.

The excess, if any, due the owner above the amount of such completion payment cannot be charged against the 25 per cent. final payment to the injury of mechanic's lien claimants.

5. Same—Notice of Lien.

On the service of notice of a claim by a materialman on the owner as required by Code Civ. Proc. § 1184, subd. 2, the latter is immediately bound to withhold sufficient funds from the contractor to pay such materialman, together with attorneys fees in the sum of $100 and estimated costs and is not entitled to charge subsequent payments, though legal and within the contemplation of the contract, against the part of the contract price so required to be set apart.

6. Same—Judgments—Nonlien Claims.

Where a materialman filed no lien, a judgment in his favor against the contractor containing a provision that such materialman was entitled to have the judgment satisfied out of "any residue" in the hands of the owner after the claims of all the lien claimants had been satisfied was erroneous, in so far as it purported to charge the residue from the proceeds of the sale of the property with such judgment after the satisfaction of mechanics' liens.

Department 2. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by A. C. Hampton and others against Andrew Christensen and others. From a judgment in favor of plaintiffs, defendants Charles Franzoi and the United States Fidelity & Guaranty Company appeal. Reversed.

Wal. J. Tuska, Rigby & Rigby, P. F. Dunne, Walter H. Linforth and Jackson Hatch, for appellants. S. Rosenheim, Barna McKinne, and Jordan & Brann, for respondents.

HENSHAW, J. This is a consolidated action to enforce on the part of certain materialmen and laborers their liens against the property of appellant Charles Franzoi, upon a building contract entered into between him and the contractor Christensen. The owner appeals from the judgment against him and from the order denying his motion for a new trial. The United States Fidelity & Guaranty Company likewise appeals from the judgment given against it upon the contractor's bond. The court found that the contract in all respects was valid and in compliance with the law concerning mechanics' liens, and that it was duly recorded as required by law.

The contract price was payable in five installments. The fourth installment, payable on the completion of the building, was $2,000, and 25 per cent. payable 35 days after completion, was $2,750. Franzoi, the owner, did not join issue with the lien claimants as to the amounts which they respectively alleged to be due them, nor as to the validity of their respective liens. He joined issue only upon the allegations as to the sum due from him to the contractor, which, in the cases of some of the lien claimants, was alleged to be in excess of $6,000. Upon trial, the court aggregated the completion and final payments, amounting to $4,750, and added to this the amount admitted to be due for extra work, $96, making a total of $4,846. This sum, reduced by certain payments credited to Franzoi, amounted to $4,030.70, which last sum he found to be due from the owner to the contractor and subject to the liens of the claimants. He refused to reduce this sum by certain other payments and disbursements found to have been made by Franzoi, and his refusal so to do as to these separate items is the basis of the principal complaints upon this appeal. For convenience we will refer to the $2,000 payment due upon completion as the "completion payment," and the 25 per cent. payment retained for 35 days as the "final payment."

1. The court refused to allow credit to the owner for the sum of $905.21 paid for glass, hardware, etc. This amount was admittedly paid under the following circumstances: Before the completion of the building, Christensen represented to the owner that he could obtain no credit from materialmen, and, consequently, could not complete the building. He requested the owner to guaranty his accounts with these materialmen for the material necessary for completion, and to deduct these amounts from the completion payment when it became due. This Franzoi did, his obligation to pay the materialmen having been assumed before the completion payment was due, but the payments to these men having been made after the completion payment was due; the court upon this finding that "All of said payments, though actually made by the said Franzoi after the completion payment was due, were, and each and all of them was, assumed by the said Franzoi, and the said Franzoi actually obligated himself to pay the same * * * at a time when no payment whatever was due from him, the said Franzoi to the said Christensen." From this the court concluded that the obligation to pay, thus assumed, was the equivalent of the prohibited payment of section 1184, Code of Civil Procedure, where it is declared that "No payment made prior to the time when the same is due * * * shall be valid for the purpose of defeating, diminishing or discharging any lien in favor of any person except the contractor; but as to such liens, such payments shall be deemed as if not made." No liens had been filed against the property at the time these payments were made. No notice to withhold had been served upon the owner, with the exception of one, amounting to $509.08. Conceding that under this notice it became the duty of the owner to withhold the sum of $509.08, with attorneys' fees and costs, it was not his duty to withhold any other part of the $2,000 which became due to the contractor upon completion, and it is not disputed that he would have been justified in paying this difference of about $1,500 over to the contractor. The contention of respondent, however, is—and this contention was adopted by the trial court—that because Franzoi, before the completion payment became due, had "obligated himself" to pay these materialmen, this obligation in some way, by operation of law, became a prepayment out of the fund in advance of the date of its falling due. It is true that equity in many instances, under the maxim that it will regard as done that which ought to have been done, will treat a promised performance of an act as an actual performance as of the time when it should have been performed. But it does this always in aid of natural justice, and never in aid of the harsh rule of law exacting penalties and forfeitures, which equity abhors. In West Coast Lumber Co. v. Knapp, 122 Cal. 81, 54 Pac. 533, this court has said: "So far as the statute has the effect of compelling the owner to pay more than he has agreed to pay, or to pay his debt twice, it is highly penal and should be strictly construed in his favor. Those who seek to inflict upon him a penalty for his failure to comply with the terms of the law must show clearly that the dereliction has occurred. The law must be construed against the exaction of the penalty if in reason it can be." In substance, what was this transaction upon the part of Franzoi? In return for the contractor's promise to reimburse him out of the completion payment when it became due, he guarantied or assumed the contractor's responsibility for the payment of certain material necessary for the completion of his house. When the completion payment became due (no rights by way of liens or notice to withhold having intervened) he would have been at perfect liberty to pay this money to the contractor. Indeed, no one will dispute but that, still holding the money, he could have gone with the contractor and paid it over himself to the materialmen, thus to make sure that the obligations were canceled. Or, again, no one would question his right to have paid over the money to the contractor, and immediately to have received back from him the amount of these obligations. But because he did not adopt one of these roundabout ways of accomplishing the same result, but, instead, himself paid the amount of the funds due the contractor and deducted the amount so paid, it is contended that having done this, in contemplation of his obligations previously assumed, he must pay the money twice. This, instead of being a

construction of a penal statute in favor of the owner, is a tightly stretched and extremely attenuated construction against him. If, before he actually made these payments out of this fund after it became due, demands to withhold, and claims of liens aggregating $2,000 had been served and filed, he then, in the eye of the law, would have stood compelled to sequester this money and hold it to meet these demands, and thus might have been obliged, under his guaranty or obligation, to pay out of his own pocket the amounts which he had assumed on behalf of the contractor. That was the only risk which he ran; but, as in this case a demand amounting to only $500 had been served upon him, there was still $1,500 to be devoted to the extinguishment of these obligations. Finally, upon this point it may be said that, as this penal clause of the statute is to be construed in favor of the owner, the question may be taken as determined in the owner's favor under the finding of the court that the payments were actually made after the completion payment was due.

2. The court found that there were certain materials, trifling in their individual character, but aggregating in value $194.79, which the contractor failed to furnish and which Franzoi, himself, was compelled to supply, by reason of the failure of Christensen to place these materials in the building. But it refused to allow appellant deduction from the full contract price of this amount. The right of the owner under this contract to such a deduction is sufficiently shown by the pleadings and findings. The court's refusal is justified by respondent upon the language of section 1183 of the Code of Civil Procedure to the following effect: "In case of a contract for the work between the reputed owner and his contractor, the lien shall extend to the entire contract price, and such contract shall operate as a lien in favor of all persons except the contractor to the extent of the whole contract price;" together with the language of section 1184 of the Code of Civil Procedure to the following effect: "As to all liens, except that of the contractor, the whole contract price * * * shall not be diminished by any prior or subsequent indebtedness, offset or counterclaim in favor of the reputed owner and against the contractor." The contract also contained a provision that for delay in the completion of the work the owner should be entitled to damage from the contractor in an amount not to exceed $10 per day. The court found that the owner had actually sustained damages in the sum of $550, but refused also to deduct this amount from the contract price. Although these two items are dissimilar in character, they are in one respect essentially the same. They are both deductions claimed by the owner to be due him under the very terms of the contract, and the disallowance of both was based upon the same provisions of the law. They may, therefore, be discussed together. By appellant it is contended upon the authority of Kellogg v. Howes, 81 Cal. 175, 22 Pac. 509, 6 L. R. A. 588; McDonald v. Hayes, 132 Cal. 490, 64 Pac. 850; Stimson Mill Company v. Braun, 136 Cal. 124, 68 Pac. 481, 57 L. R. A. 726, 89 Am. St. Rep. 116, and other like cases, that it is the settled law in this state that where there is a valid contract between the owner and contractor, such contract is the absolute measure of the owner's liability. He contends that this doctrine has application to its fullest extent, and quotes the language of this court in Stimson Mill Co. v. Braun to the effect that the contract being of record, materialmen and laborers may inspect and examine it, and if not content with its provisions may refuse to furnish material or labor, "but if they do furnish any their right to a lien must be limited by the terms of the contract." Further, he contends that if the provision of the lien law to the effect that the whole contract price shall not be diminished by any prior or subsequent indebtedness, offset or counterclaim in favor of the reputed owner and against the contractor, is to be construed as respondents would have it construed, and as the court actually did construe it, the provision is absolutely void for the same reasons as those given by the court in the Stimson Mill Company Case, where it was determined that the requirement that the whole contract price should be payable in money was void, as being an unwarranted interference with property rights and the right of contract. This last proposition may be summarily disposed of. If such a construction were to be given to the clause in question, indubitably the clause itself would be declared void. But such is not the true construction. The clause has reference, in the first place, to offsets not arising under the terms of the contract, and as to which, from an inspection of the contract, materialmen and laborers could have no notice. Manifestly, it would be unjust if, as against the demands of such, the owner were allowed to plead in reduction of the contract price some claim against the contractor as to which, in the very nature of things, they could have had no notice. These classes of offsets or counterclaims, whether arising before the execution of the contract or subsequent thereto, are all excluded. Dore v. Sellers, 27 Cal. 593; Schmid v. Busch, 97 Cal. 188, 31 Pac. 893. But, upon the other hand, certain matters of offset, if provided for by the terms of the contract itself, may, both with justice and legality, be allowed.

If the owner, for example, is obliged to furnish material and labor to complete a contract abandoned by the contractor, or if material of cheaper value is substituted in the building, or if upon default of the contractor to complete, the owner enters into the possession of the uncompleted building, no one could question the justice of the owner's claim for an allowance for any of these matters—if an allowance for them was contemplated by the provisions of the contract—for the contract price is established and agreed to in express contemplation of the fact that the particular material shall be used, and that the building shall be turned over to the owner completed. If the particular materials are not used, if the building is turned over uncompleted, so that the owenr has to accept it unfinished, or complete it at his own cost, there has been a failure by so much to put the amount of the contract price into the structure, and it would be manifestly unjust that the owner should be expected to pay for that which, without any fault of his own, he has not received. The second item of damages for failure to complete in time, differs somewhat from the first, where the loss was occasioned by the necessity of the owner to make good the deficiencies of the contractor in the furnishing of omitted material. It is a perfectly legal contract which makes time of completion of its essence, and provides that the contractor, for a failure to perform in time, shall make good to the owner such loss as the latter may sustain thereby. More than this, it is a deduction or offset which, but for the lien law, the owner would have the unquestioned right to claim from the amount found due the contractor under the contract. Reference to the following cases will disclose that it is well settled that the owner is entitled to an allowance for damages for noncompletion: Mehrle v. Dunne, 75 Ill. 239; Murphy v. Buckman, 66 N. Y. 297; Millsap v. Ball, 30 Neb. 728, 46 N. W. 1125. But the right of materialmen, artisans and laborers of every class is to have a lien upon the property upon which they have bestowed their labor or furnished their material for the full value of the same, and this right is one solemnly guarantied to them by the Constitution of the state. Article 20, § 15. The Legislature is enjoined to pass laws for the speedy and efficient enforcement of these liens. Every provision of the laws which the Legislature may enact must be subordinate to and in consonance with this constitutional provision. It will be noted that, in framing these laws, primarily designed for the protection of materialmen and laborers, the Legislautre has seen fit to reserve, for the use of these lien claimants, but one of the payments. After providing that no payment shall be made until the commencement of the work, it sets aside a fund amounting to 25 per cent. of the contract price, to be held for 35 days after the completion of the building, and this fund, in case of a valid contract, is practically the only money available to meet the demands of lien claimants. And, whatever may be said of other payments, this amount of money cannot lawfully be depleted or reduced to the injury of any such claimant. If it could be, it would be setting at naught the constitutional provision granting a lien for the full value of the labor done or material furnished. Upon the other hand, ample opportunity is accorded to the owner by our laws to protect himself against all derelictions, omissions, and neglects upon the part of the contractor. And this he may do by providing for reserved payment to be made on completion, sufficiently large to protect him against any violation of the contract. In case of such violation there would then be justly chargeable against the completion payment, and chargeable as a first demand upon the fund, such sums as the owner might prove due him in recoupment for damages. Out of this payment would, therefore, first come (if contemplated by the terms of the contract) the necessary cost to the owner of completion in case of abandonment, the cost of making good trifling imperfections and omissions, and the proved damages in case of failure to complete on time. But if there be no such completion payment provided for in the contract, or if such completion payment be more than exhausted by the demands of the owner, then we hold that the excess of such demand cannot be carried over and made a charge against the 25 per cent. final payment, to the injury of any lien claimant thereon; for, as has been said, since this final payment is the only fund which the Legislature has sequestered to meet the demand of the lien claimants, to permit this would be to deprive them of their constitutional right to a lien. Making application of these principles to the case at bar, there was a completion payment fund of $2,000, subject, first, to the just demands of the owner. He was entitled, therefore, to a credit against this fund of $194,79 and $550, or a total of $744.79. The next claim upon the fund was that of the Humboldt Lumber Company for the amount of its demand, "including counsel fees, not exceeding $100, besides reasonable costs." Section 1184 Code Civ Proc. This money, under the lumber company's notice to withhold, must be regarded as sequestered, as though under garnishment, for the amount of the company's demand. The rest of the $2,000 was subject to the payments made by the owner, certain of which we have heretofore considered under paragraph 1, and others of which—those to Mangrum & Otter, and Smith & Young—the court actually allowed. The result, however, is that the legal demands upon the $2,000 payment by the owner himself, and next by the lumber company, taken with the payments which the owner made out of the fund, far exceed its amount. In figures, the excess is as follows:

Due owner........................	$ 744 79
Due lumber company..............	509 08
Plus attorney's fees..............	100 00
Paid Whittier, Fuller, and others....	905 21
Paid Mangrum & Otter, and others..	807 25
Making a total of.............	$3,066 33

But, as has been said, there was, for the payment of these demands, no more than the sum of $2,000. This excess of $1,066.33 is not chargeable against the 25 per cent. final payment until the demands of all the lien claimants have been first satisfied out of that fund, and in this case the demands are in excess of the fund. If hardship to the owner seems to result from this, it may be answered that it is always in his power to guard against loss by making the completion payment large enough to protect him, or by exacting an undertaking from the contractor for this purpose; while, upon the other hand, if encroachments were allowed upon this fund, the practical result would be, in most instances, to deprive materialmen and laborers of the lien guarantied them by the Constitution. For this excess payment then, of $1,066.33, the owner's right of recovery is against the contractor alone.

3. We think the notice to withhold, served on behalf of the Humboldt Lumber Mill Company, though inartificially drawn, was sufficient under the requirements of section 1184 of the Code of Civil Procedure. Schallert-Ganahl Lumber Co. v. Neal, 91 Cal. 362, 27 Pac. 743; French v. Powell, 135 Cal. 640, 68 Pac. 92; Corbett v. Chambers, 109 Cal. 178, 41 Pac. 873. As has been said, under subdivision 2, foregoing, it became the duty of the owner, upon service of this notice, to withhold sufficient funds to pay the claim of the lumber company, together with attorneys' fees in the sum of $100 and estimated costs, and his subsequent payments after service of that notice, even though legal and within the contemplation of the contract, cannot be allowed to affect so much of the fund as was thus set apart by force of this notice, operating in the nature of a garnishment.

4. The firm of Sanborn & Vail had sold picture-molding to Christensen, used in the building, to the amount of $145.73. They filed no lien, and the court found and decreed, and its decree was carried into the judgment, that Sanborn & Vail were entitled to a judgment against the defendant, Christensen, for this amount, with interest, but that they were not entitled to a lien upon the property of Franzoi. So far, there is no objection to the finding. But the finding proceeds: "The said Sanborn & Vail Company are entitled to have said judgment satisfied out of any residue that may appear in the hands of the said defendant, Franzoi, after the claims of all the lien claimants herein adjudicated have been fully satisfied." If "residue" here means surplus moneys due from the owner to the contractor after payment of all liens, this also is unobjectionable. If it means a residue belonging to Franzoi, as appears from the further finding that Sanborn & Vail are entitled to have their judgment satisfied "from the product of the sale of the property after the claims of all the lien claimants have been fully satisfied," then, manifestly, it is error in awarding a judgment payable out of the funds of the owner in favor of one who has no lien upon the owner's property.

5. The appeal of the United States Fidelity & Guaranty Company is sustained, with directions to the trial court to enter judgment in its favor upon the ground that the purported undertaking given by it is void. Shaughnessy v. American Surety Co., 138 Cal. 543, 69 Pac. 250, 71 Pac. 701.

6. This court, under its decisions, is unable to review the action of the trial court in fixing attorneys' fees in the absence of a showing of a plain abuse of discretion upon the part of that court. Clancy v. Plover, 107 Cal. 272, 40 Pac. 394; Mulcahy v. Buckley, 100 Cal. 490, 35 Pac. 144; Pacific Mutual Life Ins. Co. v. Fischer, 106 Cal. 224, 39 Pac. 758. And it cannot be said that such abuse was established in this case. No evidence was taken, and the record does not enable us to say that the separate amounts awarded for attorneys' fees were excessive.

A new trial in this case is unnecessary, and it is, therefore, ordered that the consolidated judgment of the court here appealed from be, as to the appellant, the United States Fidelity & Guaranty Company, reversed, with instructions to enter a judgment upon the findings in its favor, and as to the appellant, Franzoi, that, upon the findings, the judgment be modified to conform to the views of the court above expressed. Appellants will recover their costs upon appeal.

We concur: LORIGAN, J.; McFARLAND, J.

In Bank.

PER CURIAM. The opinion heretofore rendered in department is modified by striking therefrom all of paragraph 6, down to and including the words "fees were excessive." So modified, the opinion and judgment in department are approved and adopted as the opinion and judgment of the court in bank.

148 Cal. 743

PEOPLE v. BROWN. (Cr. 1,266.)

(Supreme Court of California. Feb. 26, 1906.)

1. CRIMINAL LAW — APPEAL — TRANSCRIPT — CONTENTS—NOTICE—SERVICE.

Pen. Code, § 1240, provides that in a criminal case an appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered or filed a notice stating the appeal from the same and serving a copy thereof on the attorney of the adverse party. *Held* that, where a transcript on a criminal appeal failed to show that the notice of appeal was served on any one, the appeal cannot be considered.

2. JURY — QUALIFICATION OF JURORS — OPINIONS.

Where jurors had heard common rumors and reports, had read newspapers, and from such rumors and reading had formed opinions which required evidence to remove, but they testified that if sworn as jurors they could and would set aside their opinions and be influenced solely by the evidence and by the law, and would require the prosecution by its evidence to prove defendant's guilt beyond a reasonable doubt, or they would "vote to set him free," they were qualified to sit.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 461-478.]

In Bank. Appeal from Superior Court, Del Norte County; J. L. Childs, Judge.

Harry Brown was convicted of murder, and he appeals. Affirmed.

E. E. Winters, for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Deputy Atty. Gen., for the People.

HENSHAW, J. Defendant was tried and convicted of the crime of murder, and the death penalty was imposed. He appeals from the judgment and from the order denying his motion for a new trial.

Section 1240 of the Penal Code provides that in a criminal case "appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered or filed, a notice stating the appeal from the same, and serving a copy thereof upon the attorney of the adverse party." In People v. Colon, 119 Cal. 668, 51 Pac. 1082, it was held that the proceedings specified in section 1240 must be taken to confer upon this court jurisdiction to hear and determine the appeal. People v. Colon quotes from People v. Bell, 70 Cal. 33, 11 Pac. 327, where it is said: "The transcript herein does not show that the notice of appeal was served on anyone. The law requires that it shall be served on the attorneys of the adverse party (Pen. Code, § 1240), and the transcript on appeal must show it. People v. Phillips, 45 Cal. 44; People v. Clark, 49 Cal. 455. This not being the case, the appeal cannot be considered." As this omission and error was called to appellant's attention by respondent's brief, and as no effort has been made to cure the omission, or to show that service was in fact made, it must be concluded that no service was made, and that the court is without jurisdiction to consider this appeal.

It may, however, be added that this court, in its natural reluctance to deny a hearing to an appellant under sentence of death, has carefully examined the alleged errors presented upon the appeal, and find them, one and all, to be without merit. The single proposition presented upon the appeal is that the court erred in its rulings to the challenges of defendant to certain of the jurors, which challenges, after examination, were interposed for cause. The defendant had exhausted his peremptory challenges. As to each of the jurors the case was the usual one, where they had heard common rumors and reports and had read the newspapers. From these rumors and from their reading, they had formed opinions which would require evidence to remove. At the same time they could and would, if sworn as jurors, set aside their opinions and be influenced solely by the evidence and by the law, and would require the prosecution by its evidence to prove the guilt of the defendant beyond a reasonable doubt, or they would "vote to set him free." The case thus presented comes within the rule as declared in People v. Owens, 123 Cal. 482, 56 Pac. 251, and People v. Miller, 125 Cal. 44, 57 Pac. 770, where, upon a like state of the evidence, it was declared that the jurors were not disqualified.

For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.

148 Cal. 625

PEOPLE v. TOWN OF ONTARIO.

(L. A. 1,483.)

(Supreme Court of California. Feb. 3, 1906. On Rehearing, March 5, 1906.)

1. Constitutional Law — Delegation of Legislative Power — Fixing Boundaries of Towns—Annexation of Territory.

St. 1889, p. 358, c. 247, providing that new territory may be annexed to any town by the filing of a petition describing the territory desired to be annexed and a favorable vote at the election called pursuant to the petition, thus leaving the determination of the boundaries of the annexed territory to the inhabitants, is not for this reason invalid as a delegation of legislative authority, since under Const. art. 11, § 6, forbidding the Legislature to create or provide for the organization of municipal corporations by any other than general laws, fixing the boundaries of towns is not a legislative function.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, §§ 116, 120.]

2. Same — Departments of Government — Municipal Functions.

Neither Const. art. 3, § 1, providing that the powers of government shall be exercised by the legislative, executive, and judicial departments, and that no person exercising powers belonging to one department shall exercise any of the functions of another department, nor article 11, § 13, providing that the Legislature shall not delegate to any association or individual power to perform any municipal function, has any application to or affects the validity of St. 1889, p. 358, c. 247, permitting territory to be annexed to towns at the discretion of the inhabitants.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, §§ 116, 120.]

3. Municipal Corporations — Annexing Territory—Statutes Applicable.

Under St. 1889, p. 358, c. 247, providing that territory may be annexed to any incorporated town by the filing of a petition describing the territory desired to be annexed and a favorable vote by the inhabitants of the town and the territory to be annexed, territory, portions of which are uninhabited, may be annexed if as a whole it may fairly be said to be inhabited; St. 1899, p. 37, c. 41, providing for the annexation of uninhabited territory, and expressly stating that it shall not be construed to repeal any part of any act relating to the annexation of inhabited territory, applying only to territory all of which is uninhabited.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 74.]

4. Same—Special Election—Petition—Sufficiency — Finding of Board—Record — Necessity.

Under St. 1889, p. 358, c. 247, providing that the board of trustees of a town, on receiving a petition signed by one-fifth of the voters of the town and of territory sought to be annexed, shall call a special election and submit the question of annexation to a popular vote, it is not necessary that any record of the determination of the board as to the sufficiency of the petition be made other than the order submitting the proposition, which order implies a finding that the petition was sufficient to give the board power to act.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 100.]

5. SAME.

If it were necessary for the record to show that the board had passed on the sufficiency of the petition, a recital in the order calling the election that the petition was signed by one-fifth of the voters would be sufficient for that purpose.

6. SAME—DETERMINATION OF BOARD—FORCE AND EFFECT.

In a collateral attack on the action of the board by quo warranto questioning the legality of the annexation, the order calling the election is also conclusive as to the sufficiency of the investigation made by the board and of the evidence on which they acted in determining the sufficiency of the petition.

7. SAME — ACTION OF BOARD — REGULARITY—TIME OF MEETING—EVIDENCE—SUFFICIENCY.

In quo warranto to determine the legality of the annexation of territory to an incorporated town under St. 1889, p. 358, c. 247, requiring the town board to call an election on petition, minutes of the board purporting to be the minutes of regular and adjourned meetings, and showing that the meeting, pursuant to the adjournment of which the meeting at which the election was ordered was held, took place on the first Tuesday in March, in connection with evidence that regular meetings were held on the first Tuesday of each month, were sufficient, under Code Civ. Proc. § 1920, making official entries prima facie proof of the facts stated, to justify a finding that the petition was acted on at a regular adjourned meeting.

8. SAME—NOTICE OF ELECTION—SUFFICIENCY.

Under St. 1889, p. 358, c. 247, providing that on presentation of a petition for the annexation of territory to a town, the board shall call a special election, and cause notice to be given, a notice signed by the acting president of the board, attested by the town clerk, and published by order of the board, is sufficient.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 100.]

9. SAME — BALLOTS—FORM—CORRESPONDENCE TO NOTICE.

St. 1889, p. 358, c. 247, provides that on petition for the annexation of territory to a town, the board shall call an election and give notice, inviting the voters to vote on the proposition by placing on their ballots the words "For annexation" or "Against annexation," or equivalent words. A notice published after the adoption of the present ballot law described the ballots to be used in the language of the statute, while the ballots actually used contained the words "For annexation—Yes" and "For annexation—No," with directions to stamp a cross after the "Yes" or "No," as the voter desired. *Held*, that the form of ballot used sufficiently corresponded to the notice.

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Quo warranto by the people of the state of California against the town of Ontario. From a judgment in favor of defendant, and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Tirey L. Ford, U. S. Webb, C. E. Sumner, and Henry M. Willis, for the People. T. E. Parke, E. R. Annable, and Otis, Gregg & Surr, for respondent.

ANGELLOTTI, J. This is an action in the nature of quo warranto, brought to determine the validity of certain proceedings whereby defendant, a municipal corporation of the sixth class, claims that certain territory, lying adjacent to the town of Ontario, has been annexed to and is now a part of said town. Defendant had judgment in the court below, and this is an appeal from the judgment and from an order denying a motion for a new trial. The annexation proceedings were had under the act of March 19, 1889, providing for the annexation of territory to incorporated towns and cities, and for the incorporation of such annexed territory in and as a part of such municipalities. St. 1889, p. 358, c. 247.

1. The question principally discussed by counsel is as to the constitutionality of said act; it being claimed by plaintiff that the statute is unconstitutional for certain reasons. While the constitutionality of this act has heretofore been upheld by this court as against certain objections made to it (People v. City of Oakland, 123 Cal. 598, 56 Pac. 445, and Vernon, etc., Dist. v. Board of Education, 125 Cal. 593, 58 Pac. 175), and while the constitutionality of an act relating to the exclusion of territory from a municipal corporation, having a somewhat similar provision as to the circumstances under which an election upon the question must be ordered as the act under consideration, has also been upheld (People v. Common Council, 85 Cal. 369, 24 Pac. 727; People v. Coronado, 100 Cal. 571, 35 Pac. 162), it is claimed that the precise objections here made have never before been squarely presented or decided. This claim may here be conceded to be correct. The act of 1889, so far as is material to the objections here made, provides as follows: "The boundaries of any incorporated town * * * may be altered and new territory annexed thereto * * * upon proceedings being had and taken as in this act provided. The council, board of trustees, or other legislative body of any such municipal corporation, upon receiving a written petition therefor containing a description of the new territory asked to be annexed to such corporation, and signed by not less than one-fifth in number of the qualified electors of such municipal corporation, computed upon the number of votes cast at the last general municipal election held theren, must, without delay, submit to the electors of such municipal corporation, and to the electors residing in the territory proposed by such petition to be annexed to such corporation, the question whether such new territory shall be annexed to, incorporated in, and made a part of such municipal corporation." The act then provides for the election in the municipality and outside territory, upon notice given by the legislative body of the municipality, the canvass of the returns by such body, and further, that "if it shall appear from such canvass that a majority of all the ballots cast in such outside

territory, and a majority of all the ballots cast inside of said municipal corporation are in favor of annexation," a certified statement accordingly must be forwarded to the Secretary of State, for filing by him, and that from such filing the annexation shall be deemed complete. It is further provided that no property in the annexed territory shall ever be taxed to pay any indebtedness of the municipality existing at the date of the annexation, and that no territory forming part of any incorporated town or city shall be annexed under the provisions of the act. It will be observed from the foregoing that no discretionary power whatever is vested in any legislative body with regard to the boundaries of the territory proposed to be annexed. Upon the presentation of a proper petition, signed by the requisite number of electors of the municipality, and exactly describing the territory desired to be annexed, the legislative body of the municipality is compelled to immediately submit the question of annexation to the electors of the town and also to those of the outside territory. The question as to whether the exact territory described by the electors in their petition shall be annexed to and constitute a part of the municipality is made to depend solely upon an affirmative vote of the two bodies of electors, those of the municipality and those of the outside territory.

It is urged, in support of the attack upon the constitutionality of this act, that it delegates to private citizens of the municipality, and not to any legislative body or board recognized by the Constitution, the absolute power to finally determine the boundaries of the territory proposed to be annexed. This, it is said, is a legislative power, which, under our Constitution, could only be delegated to some legislative body. We are of the opinion that there is, under the provisions of our Constitution, no unwarranted delegation of legislative power herein, and that the act, in respect to the objection made, is violative of no constitutional provision. It is expressly provided by our Constitution that corporations for municipal purposes shall not be created by special laws, and that "the Legislature, by general laws, shall provide for the incorporation, organization, and classification in proportion to population, of cities and towns" (article 11, § 6). This provision necessarily includes not only the creation of new municipal corporations, but also the matter of adding new territory to an existing corporation, and the exclusion of territory embraced in such a corporation from further connection therewith. As to all these matters, the Legislature is limited to the enactment of general laws, under which municipal corporations may be created, or changes made in the boundaries of those already created, as local needs may demand. From the nature of things, the Legislature cannot, by general laws, fix the boundaries of municipal corporations. It can do no more than provide the method by which boundaries can be fixed and the territory included therein impressed with the character of municipal territory. When it has done this, it has discharged all its legislative functions in this regard. In the absence of constitutional limitation on its power, it is authorized to adopt any method it sees fit. It has said, in effect, by the act under consideration, that, with certain prescribed limitations, any territory shall become annexed to and a part of any existing city or town, whenever the electors of such territory shall manifest their desire for such annexation by giving a majority vote in favor thereof, and the electors of the city or town have manifested their assent in the same way. All else in the act, including the petition of 20 per cent. of the electors of the town or city, has simply to do with the orderly method of obtaining the expression of the desire of the electors of the respective localities, the town and the outside territory, and the procurement of an official record of that expression. The petition of the electors is merely an initiatory step, making it the duty of a body capable of acting in such a matter to officially submit the proposition made by the petitioners, to the electors of the interested localities. The electors of each locality alone determine whether certain described territory shall become a part of the municipal corporation. If the electors of the outside territory vote in favor of such annexation, they expressly assent to and adopt as their own the boundaries designated in the petition for the election. The question, then, would appear to be simply whether the Legislature, by general laws, may authorize the electors of any territory to determine for themselves whether such territory shall constitute a municipal corporation, or, with the assent of the electors of an existing municipality, constitute a portion of said municipality.

As has already been said, the principal objection to the method here adopted is the one relative to the fixing of the precise boundaries. The fixing of the boundaries of a municipality is ordinarily held to be the exercise of legislative power, but assuming it to be such in its nature, in view of the constitutional provision relative to the creation of municipal corporations, it does not follow that the Legislature may not confer the power to declare the precise boundaries upon the electors of the district to be affected. The conferring of such power is not a delegation of legislative power at all, for the Legislature is expressly prohibited from defining the boundaries. It fully exercised its own legislative power by the enactment of the general law in the matter. Necessarily, for the execution of such general law, the power to define the exact boundary lines of each particular municipality created or enlarged after the adoption of the Constitution must be, by such a law, placed somewhere. We find no provision in our Constitution limiting the right of the Legislature to place this power with any tribunal or person, except so far as such right may be limited by section 1 of article 3, wherein it is provided that the powers of the government of the state of California shall be divided into three separate departments, the legislative, executive, and judicial, "and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except as in this Constitution expressly directed or permitted." Manifestly this provision has no application. And it is as clear that section 13, art. 11, which provides that "the Legislature shall not delegate to any special commission, private corporation, company, association, or individual, any power to make, control, appropriate, supervise, or in any way, interfere with any county, city town, or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments, or perform any municipal functions whatever," has no application here. The fixing of the boundaries of the territory to be annexed is in no sense of the words a "municipal function." See, generally, Fragley v. Phelan, 126 Cal. 383, 58 Pac. 923. There is no constitutional provision that intimates that this power can be conferred only on some legislative body, and not upon the electors of the locality to be affected, and, in the absence of such a provision, the question as to whether it shall be given to the one or the other is purely one of policy, upon which the determination of the Legislature is conclusive. See In re Madera Irr. Dist., 92 Cal. 296, 307, 318, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106.

There are one or two cases from other states, in which a contrary conclusion has been reached upon this question, notably the case of People ex rel. Shumway v. Bennett, 29 Mich. 451, 18 Am. Rep. 107. In regard to that case, it must be observed that the Constitution of Michigan is materially different from ours, in that it does not prohibit the Legislature from creating municipal corporations by special acts, but impliedly authorizes such a course. Article 15, § 1. It also contains a provision expressly empowering the Legislature to confer upon boards of supervisors such powers of a local, legislative, and administrative character as they deem proper. Article 4, § 38. Under such circumstances it might well be contended that, the legislative power of fixing the boundaries of a municipality being in the Legislature, that body must either act itself, or through some inferior legislative body. Some portions of the opinion undoubtedly sustain plaintiff's contention, but they appear to us to be contrary to our well-settled rules relative to attacks upon acts of the Legislature upon the ground of unconstitutionality. With us, the Legislature is supreme in legislative matters, except in so far as it is limited by the Constitution, and he who seeks to overthrow its enactment must clearly point out the limitation which forbids the act. That case has never been approved by this court, except to the limited extent necessary to support its views in Brandenstein v. Hoke, 101 Cal. 131, 35 Pac. 562, where an act requiring the board of supervisors, upon the mere receipt of a petition from persons in possession of more than one-half of the acres of any specified portion of the county, asking that the same be constituted a levee district, to make an order accordingly, was held to be violative of fundamental principles of constitutional law. There is an obvious distinction between such an act, which practially authorizes property owners, without notice, to place burdens upon the property of others, for the sole purpose of improving their own property, and one providing for the annexation of territory to a municipality only by a majority vote of the electors in such territory, given at an election, which is held only after due notice. Assuming any notice of such proceedings to be essential, sufficient notice to all interested parties is here provided for; but we do not understand that the requirement as to due process of law gives a property owner an absolute right to notice and hearing before his property may be included within the limits of a municipality.

In this connection, the language of this court in Re Madera, etc., District, 92 Cal. 296, 323, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106, wherein this court was considering a similar objection to an act relative to irrigation districts, is applicable. The court there said: "The constitutionality of the act in question is further assailed upon the ground that it makes no provision for a hearing from the owners of the land prior to the organization of the district. But the steps provided for the organization of the district are only for the creation of a public corporation to be invested with certain political duties which it is to exercise in behalf of the state. Dean v. Davis, 51 Cal. 406. It has never been held that the inhabitants of a district are entitled to notice and hearing upon a proposition to submit such question to a popular vote. In the absence of constitutional restriction, it would be competent for the Legislature to create such public corporation, even against the will of the inhabitants. It has as much power to create the district in accordance with the will of a majority of such inhabitants. It must be observed that such proceeding does not affect the property of any one within the district, and that he is not by virtue thereof deprived of any property. Such result does not arise until after delinquency on his part in the payment of an assessment that may be levied upon his property, and before that time he has opportunity to be heard as to the correctness of the valuation which is placed upon his property, and made the basis of his assessment. He does not, it is true, have any opportunity to be heard, otherwise than by his vote in determinng the amount of bonds to be issued, or the rate of assessment with which they are to be paid; but in this particular he is in the same condition as is the inhabitant of any municipal organization which incurs a bonded indebtedness, or levies a tax for its payment. His property is not taken from him without due process of law, if he is allowed a hearing at any time before the lien of the assessment thereon becomes final.'" The conclusion we have reached upon this branch of the case is sustained by the cases of People v. Fleming, 10 Colo. 553, 16 Pac. 298, and Ford v. No. Des Moines, 80 Iowa, 626, 45 N. W. 1031, in both of which the matter is exhaustively discussed and many supporting authorities cited.

It is further urged that the statute is unconstitutional because it provides for a judicial determination by the city counsel, without giving the parties affected any notice, knowledge, or day in court. The point of this objection is that inasmuch as it is the implied duty of the city council to determine the existence of the facts essential to its jurisdiction to order an election, viz., that the petition is in fact signed by the requisite number of electors (People v. Los Angeles, 133 Cal. 338, 342, 65 Pac. 749), and also as to whether the boundaries of the territory proposed to be annexed are set forth with sufficient certainty (People v. Oakland, 123 Cal. 598, 606, 56 Pac. 445), the city council, in so doing, makes a determination judicial in nature, without notice to persons whose property, in the event that the proposition is carried at the election, will be brought within the municipality. This may be conceded, but it does not follow that the determination thus made in any way so affects property rights as to make previous notice essential. The utmost effect of such determination is the submission to popular vote of the proposition, and property rights are in no way affected thereby. The quotation from In re Madera, etc., Dist., supra, made in discussing a former objection, is applicable here.

2. Portions of the territory annexed were uninhabited, and it is claimed that there could be no annexation of any such lands except by proceedings taken under the act of 1899, providing for the annexation of uninhabited territory. St. 1899, p. 37, c. 41. Uninhabited land it to be found in probably every settled community in the state, and we cannot conceive of any case of original incorporation or annexation to an existing municipality of inhabited territory that would not almost necessarily include some parcels of land not actually inhabited.

Upon this branch of the case, a full consideration of the acts of the Legislature satisfies us that the act of 1899 was never designed to in any way affect any of the provisions of the act of 1889, but was intended solely to afford a method by which territory absolutely uninhabited, and therefore incapable of annexation under such act, being without electors to vote upon the proposition, might be annexed. It is expressly provided in section 5 of the act of 1899 that "nothing in this act shall be deemed to repeal the provisions of any act now providing for the annexation of inhabited territory." If the "territory" proposed to be annexed, regarded as a unit, is inhabited, the proceedings must be had under the act of 1889, regardless of the number of parcels of land included therein that are uninhabited. Any other construction of the act of 1899 would materially affect the act of 1889, which, it is clearly indicated, was never intended.

3. It is contended that the board of trustees of Ontario never acquired jurisdiction to order an election, for the reason that it never investigated as to the sufficiency of the petition, or made any judicial determination as to whether the petition contained the genuine signatures of the requisite number of electors. The minute entry of the board was as follows, viz.: "A petition was presented to the board signed by 31 of the qualified electors of the town of Ontario, praying that an election be called for the purpose of submitting to the electors the question whether certain territory described in said petition should be annexed to, incorporated in, and made a part of the municipal corporation of the town of Ontario. The petition asking for an election as above stated was taken up and discussed, and the following resolution was passed by a unanimous vote: 'A petition having been presented, signed by more than one-fifth of the qualified electors of the town of Ontario, computed upon the number of votes cast at the last general municipal election, it is therefore carried by the following vote: Ayes, Rothermal, Harper, Miller, Armstrong; noes, none. Resolved and ordered by the board of trustees of the town of Ontario, that a special election be and the same is hereby called to be held on April 15, 1901, in the manner and for the purposes provided in the following notice of election, and the clerk is hereby instructed to have printed the said notice of election according to law.' " And then follows a notice of special election. The duty of a board of trustees to determine whether or not a petition for an annexation election is signed by a sufficient number of electors is entirely implied from the fact that it has no power to order the election except upon a petition signed by that number. The statute nowhere, in terms, prescribes the necessity of such a determination, or requires any record thereof to be made. It is the petition signed by the requisite number that gives the power and creates the duty, and not the determination of the board as to the sufficiency of that petition. And herein, such a case differs from that of Bedell v. Scott, 126 Cal. 675, 59 Pac. 210,

relied on by plaintiff, wherein the statute empowered the board of supervisors to authorize the collection of tolls on a public highway, "whenever in their judgment the expense necessary to operate or maintain such public road or highway as a free public highway is too great to justify the county in so operating or maintaining" it. There the determination or judgment of the board upon the matter specified was the essential to jurisdiction. Here it is the presentation of a petition sufficiently signed that not only gives the power, but requires the board to submit the proposition to the voters. Whatever may be the true rule in cases like that of Bedell v. Scott, supra, we think that in a case of this character it is not essential, in the absence of any statutory provision requiring it, that any record of the determination of the board as to the sufficiency of the petition should be made, other than is evidenced by the order submitting the proposition to the electors. This necessarily implies a finding on the part of the board as to the existence of the facts necessary to confer the power to act. In Freeman on Judgments, § 523, speaking of a similar matter, it is said, quoting approvingly from a decision: "And it is not necessary that the record of the board shall show an express finding upon such facts. Such findings will be presumed in support of the proceedings, if the record shows an order granting the petition, or for the taking of the steps necessary to the accomplishment of the end designed." See, also, Chase v. Trout, 146 Cal. 350, 369, 80 Pac. 81, and cases there cited. In this connection it will, however, be observed that the resolution expressly recites that a petition signed by more than one-fifth of the electors, etc., had been presented, and we know of no good reason why this should not be held to substantially show the determination of the board in regard thereto, assuming the necessity of such showing.

Much of what has been said is also applicable to the contention based upon the fact that the minute entry of the board does not show that the board received sworn evidence as to the genuineness of the signatures, or made any other investigation than such as may reasonably be implied from the words "was taken up and discussed." The statute no more requires the record of the board to affirmatively show the manner in which it satisfies itself as to the sufficiency of the petition, than it requires such record to expressly show the determination of the board as to such sufficiency. The making of the order for the election implies not only the determination, as we have already seen, but also that such determination was reached upon proofs satisfactory to the board. The statute makes no provision as to the character of proof essential in such a case. Whatever may be the rule applicable in certiorari, which is a direct attack upon the particular order alleged to have been in excess of jurisdiction (see Stumpf v. Board of Supervisors, 131 Cal. 364, 63 Pac. 663, 82 Am. St. Rep. 350), the decisions in this state compel us to hold that even an implied finding is conclusive in a quo warranto proceeding, or in any case where the order is collaterally attacked. There is no difference, in this regard, between a finding expressed in the record and one implied from proceeding as though the fact had been ascertained to exist. They are equally conclusive wherever, by the statute, the board or tribunal is vested with authority to determine whether such a petition is sufficiently signed, before proceeding thereon. See Freeman on Judgments, § 531. As said by the same author in the section already quoted (523): "The only difficulty in cases of this class is in deciding whether the board is vested with authority to determine that it is properly signed, or, in other words, whether it is empowered to decide upon its own jurisdiction. This power need not be conferred in express terms." This court has repeatedly held that statutes of a similar character give such power to the tribunal to which the petition is presented, and that the very act under consideration gives such power to the board to which the petition is presented, and that its conclusion thereon is beyond review and final so far as quo warranto proceedings are concerned, was definitely decided in People v. Los Angeles, 133 Cal. 338, 65 Pac. 749. Under the decisions, the order of the board calling the election must here be taken as conclusive evidence that the petition presented, sufficient on its face, was, in effect, sufficiently signed by electors to confer the requisite power, and that the finding of the board to that effect, be it express or implied, was sustained by satisfactory proof.

4. There was sufficient evidence to support the finding of the trial court to the effect that the petition was received and acted upon at a regular adjourned meeting of the board of trustees. The only basis for the objection that the meeting was not a legally assembled one is that the requisite ordinance fixing the time of meetings was not introduced in evidence. The minutes received in evidence purported on their face to be the minutes of certain regular and regular adjourned meetings of said board. The meeting purporting to be a regular meeting and from which the first adjournment was taken was held at the regularly appointed place on the first Tuesday of March, 1901. There was evidence showing that the monthly meetings of the board were held on the first Tuesday of each month, from the time of the organization down to a date subsequent to these proceedings, when the ordinance relative to the time of meeting was changed. There was no pretense on the trial that the meeting was not what the minutes indicated it to be, viz., a regular adjourned meeting. In view of these

facts the finding is sufficiently supported. See section 1920, Code Civ. Proc.

5. All the objections made as to the failure of the board, by order, to appoint election officers, establish election precincts, fix polling places, and prescribe the manner and time of publication of notice, are answered by the resolution shown by the minute entries in evidence. The resolution provides: "It is therefore resolved and ordered by the Board of Trustees of the Town of Ontario, that a special election be and the same is hereby called to be held on April 15, 1901, in the manner and for the purposes provided in the following notice of election, and the clerk is hereby instructed to have printed the said notice of election according to law." Then follows the notice referred to, which is complete in every respect above mentioned. Among other things it specified the papers in which and the time for which it should be published, leaving nothing to the discretion of the clerk, as in the case of People v. Linden, 107 Cal. 94, 100, 40 Pac. 115. This notice was, in effect, made a part of the order or resolution of the board, and whatever was prescribed therein was ordered by the board.

6. The notice of election was given in the manner ordered by the board. It was not necessary that the notice should be signed by the members of the board; the statute simply prescribing that the board shall "cause notice to be given." A notice signed by the acting president of the board and attested by the town clerk and published by order of the board clearly answered every requirement.

7. The statute requires the notice to be published in a newspaper printed and published in the city or town, and "also in a newspaper, if any such there be, printed and published outside of such corporation, but in the county," etc. The evidence was ample to sustain the finding that the Ontario Observer, a newspaper in which the notice was published under the order of the board, was both printed and published outside of the town of Ontario as it existed prior to the annexation.

8. The statute provides that, in the notice, the electors "shall be invited to vote upon such proposition by placing upon their ballots the words 'For annexation' or 'Against annexation,' or words equivalent thereto." The notice simply provided: "All ballots cast at such election shall contain the words 'For annexation' or 'Against annexation,' or words equivalent thereto." The ballots actually used at the election conformed generally to the so-called Australian ballot law, and, so far as material, were as follows, viz.:

"Municipal Election.

"For the Annexation of Territory to the Town of Ontario.

"To vote for the proposition of annexation, stamp a cross (X) in the square opposite and to the right of the word 'Yes'; to vote against the proposition of annexation, stamp a cross opposite and to the right of the word 'No.'

(1) For annexation	Yes	☐
(2) For annexation	No	☐"

These ballots were caused to be printed by the town clerk, and were delivered by him to the election officers appointed by the board.

In regard to the objection made by plaintiff upon these facts, the learned judge of the trial court said, in his opinion filed in deciding the case: "The resolution apparently was drafted in accordance with the language found in the statute as to the general form of the ticket; but, as the statute was passed prior to the adoption of the present ballot law, the resolution contained such language as to make the ballots conformable to such law. As I view it there was no such material and substantial difference between the form of ballot prescribed by the resolution and the form actually used, as to make the cases of City, etc., v. Fitzgerald, 126 Cal. 279, 58 Pac. 699, or Los Angles v. Hance, 130 Cal. 278, 62 Pac. 484, cited by plaintiff's counsel, or the earlier and leading case of Murphy v. San Luis Obispo, 119 Cal. 624, 51 Pac. 1085, 39 L. R. A. 444, not cited by counsel, applicable herein. People v. Los Angeles, 133 Cal. 338, 65 Pac. 749. There was no express direction in the notice in the resolution as to the manner of voting to be adopted, and, therefore, the direction on the ballot that the voter should vote by placing a cross after either 'yes' or 'no,' to indicate his support of or opposition to the annexation, could not be misleading because contrary to the express directions theretofore received. The ballot used was unambiguous, and the voter's intention could easily and plainly be indicated thereon. The court say in the case last cited: 'In the absence of any direction, the manner in which the voter is to indicate his wish may be immaterial so long as his wish can be ascertained.' Here there was no direction as to the manner in which the voter should indicate his wish, and the only direction on the subject at all related to the form of the ballot to be used, and that was substantially complied with. I can see no error in connection with the ballot used." These views and the conclusion expressed are adopted as the views and conclusion of this court. We find nothing in other points made as to the validity of the proceedings before the town council or the election that requires consideration here. We have examined each of the assignments of error, and find no prejudicial error on the part of the trial court.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; LORIGAN, J.; HENSHAW, J.; McFARLAND, J.

I dissent and will file opinion: BEATTY, C. J.

On Rehearing.

ANGELLOTTI, J. The opinion heretofore filed in the above-entitled matter is hereby modified as follows, viz.: The second paragraph of that portion thereof relating to the effect of the act of 1899 (St. 1899, p. 37, c. 41), providing for the annexation of uninhabited territory, commencing with the words "Upon this branch of the case," is stricken out, and the following is inserted in lieu thereof:

"Upon this branch of the case, a full consideration of the acts of the Legislature satisfies us that the act of 1899 was never designed to in any way affect any of the provisions of the act of 1889, so far as territory which, taken as a whole, may fairly be said to be inhabited territory, is concerned, and the evidence in the case at bar was such as to sustain the conclusion of the court below to the effect that the territory here annexed was of that character, notwithstanding the presence of several uninhabited tracts or parcels, each exceeding five acres in area. If the 'territory' proposed to be annexed, regarded as a whole may fairly be said to be inhabited, the proceedings must be had under the act of 1889, regardless of the number of parcels of land included therein that are uninhabited. Any other construction of the act of 1899 would materially affect the act of 1889, which, it is clearly indicated, was never intended. It is expressly provided in section 5 of the act of 1889 that 'nothing in this act shall be deemed to repeal the provisions of any act now providing for the annexation of inhabited territory.'"

We concur: SLOSS, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.; McFARLAND, J.

BEATTY, C. J. (dissenting). The point covered by this modification of the original opinion is that upon which my dissent was principally based. As the opinion stood when filed, it amounted to this: That if one acre of a thousand of the proposed addition was inhabited the whole could be annexed under the act of 1889, regardless of the provisions of the act of 1899. The modification now made restricts the right to annex under the act of 1889 to the territory which, "regarded as a whole, may fairly be said to be inhabited." But when may a tract be fairly said to be inhabited? Must the inhabited part amount to one-half, or will one-fourth or one-tenth or one-hundredth suffice, and where will be found a rule of decision? If one-half of the territory sought to be annexed must be inhabited, this proceeding was invalid. I think, indeed, that not one-fourth of it was inhabited. But in my opinion no inhabited lands can be annexed under the act of 1889. To hold that they can is to nullify the act of 1899. To hold that they cannot is not to nullify, but only to restrict the operation of the act of 1889, and, where the two acts conflict, the later must control. There are, without doubt, many inhabited tracts adjoining existing corporations, and upon them the act of 1889 remains operative. It is therefore not repealed by the act of 1899, and the only restriction which the later act imposes upon itself is that it shall not repeal the earlier act. An act which has any practical operation is not repealed. The court seems to think that a point should be strained to continue the act of 1889 in the full and unrestricted operation which it had before the act of 1899. I think, on the contrary, that the earlier act deserves no favors. It is as gross an instance of improvident legislation as can be found in our statute books, and if it were, what it is not, deprived of all effect by the later act, we could afford to wait with perfect equanimity until the Legislature, by a repeal of both acts, and a revision of the whole subject, put the power of annexation under such restrictions as to prevent the abuses of which the act of 1889, is susceptible, and of which I think these proceedings are a vivid illustration.

148 Cal. 642

In re WIKMAN'S ESTATE. (Sac. 1,414.)

(Supreme Court of California. Feb. 5, 1906.)

1. WILLS — REVOCATION — CANCELLATION OF WORDS.

Under Civ. Code, § 1292, subd. 2, providing that wills may be revoked in whole or in part by being canceled or obliterated, with the intent of revoking the same, by the testator himself or by some person in his presence and by his direction, drawing black ink lines through and over words in a will is sufficient, as a physical fact, to constitute a cancellation of the words over which they appear, if they were put there by the testator, or at his direction, for the purpose of cancellation, although the words are not entirely obliterated by such lines.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 452, 453.]

2. APPEAL—SPECIFICATIONS OF ERROR—QUESTIONS RAISED.

A specification of error that the evidence is insufficient to justify a finding in a certain particular does not raise the question of the sufficiency of the evidence to justify the finding in another particular, nor require the respondent to put any evidence into the statement on that point, but the finding in that respect must be taken as true.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3077.]

3. WILLS — CANCELLATION — POSSESSION BY TESTATOR—SUFFICIENCY OF EVIDENCE.

On the issue of cancellation of a portion of a will, evidence that at the time of the execution of the will testator took it away with him, and that immediately after his death it was found in his trunk among his other effects, is sufficient, in the absence of any showing to the contrary, to justify a finding that testator had possession and control of the will from the time of its execution until his death, notwithstanding testimony that testator several times showed the will to witness and offered to let her keep it and that she had it in her hands.

4. SAME.

Evidence that a will was in testator's possession from the time of its execution until his death, that immediately after his death it was found among his effects in his trunk, and that, when so found, ink lines were drawn over and through certain words, was sufficient to authorize a finding that the cancellation was done by testator with the intent and purpose of revoking the part of the will through which the lines were drawn.

Department 2. Appeal from Superior Court, Butte County; John C. Gray, Judge.

In the matter of the estate of Charles A. Wikman, deceased. Petitions by Mary Heeney to be appointed executrix, and by Solomon Pettit, as public administrator, to be granted letters testamentary. The petitions were heard together, and the court ordered that letters issue to the public administrator as prayed for, and petitioner Heeney appeals from an order denying her motion for a new trial. Affirmed.

Robert P. Troy and Jo. D. Sproul, for appellant. Lon Bond, for respondent.

McFARLAND, J. The above-named Charles A. Wikman, deceased, was in his lifetime a resident of Butte county, Cal., and died there on or about the 1st day of November, 1904, leaving a will which had been duly executed on the 20th day of May, 1904. On November 29, 1904, Solomon Pettit, who was public administrator of Butte county, filed a petition for the probate of the will and for letters testamentary with the will annexed; and a few days later Mary Heeney filed a petition praying that letters testamentary in the estate be granted to her. The petition of the public administrator is based on the claim that there is no executor or executrix named in the will; and the petition of Mary Heeney is based on the claim that she is by the will appointed executrix. Both petitions were heard together, and the court decided in favor of Pettit, and ordered that letters issue to him as prayed for. Mary Heeney moved for a new trial, and her motion having been denied, she appeals from the order denying it. She also appealed from the order granting letters to Pettit, but that appeal was heretofore dismissed.

The undisputed facts are these: When the will was executed it contained an appointment of appellant as executrix—the words used being, "I hereby nominate and appoint Mary Heeney, of Thermalito, Butte county, California, executrix of this my last will and testament." When the will was produced in court there were black ink lines through and over the words "Mary Heeney of Thermalito." By these lines the said words were nearly, although not entirely, obliterated, but they were, beyond doubt, sufficient as a physical fact to constitute a cancellation of the words over which they appear if they were put there by the testator or at his direction for the purpose of cancellation. And by section 1292 of the Civil Code wills may be revoked in whole or in part: "2. By being burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence and by his direction." The court made findings, and those which are included under No. 3 are as follows: "That from the time of the execution of the said will until his death as aforesaid, testator had and kept said will in his possession and under his control; and immediately after his death, the said will was found in his possession; that when so found, the words 'Mary Heeney of Thermalito,' in said will, were found canceled and obliterated." And under No. 4 the court found as follows: "That said cancellation and obliteration was done by testator, after the execution of said will, and was done by him with the intent and for the purpose of revoking the portion of said will appointing Mary Heeney executrix of the said will; and that said testator did thereby revoke the appointment of said Mary Heeney as executrix of said will." And appellant contends that the evidence was insufficient to justify any of said findings. Her counsel argue here in their brief that there is no evidence to support the latter part of finding 3 that when the will was found immediately after the death of the testator the canceling lines above described were then on the will; and there really is no evidence in the record sustaining that finding. But there is no specification of the insufficiency of the evidence to sustain that finding, and no attempt at such specification. The statement on motion for a new trial does not contain much evidence, and ends with the declaration that "the foregoing was a portion of the testimony." It is not necessary to consider to what extent, if any, such a declaration relieves the respondent from seeing that more evidence is put into the statement, for he is certainly in no worse condition in that regard than he would be if there were no such declaration; and in the latter case respondent is only called upon to say that such evidence goes into the statement as is necessary to support findings which are attacked in the specifications as unsupported by the evidence. Now, as to finding 3, the specification is as follows: "That the evidence was insufficient to justify finding 3 in this: There was no evidence showing or tending to show that from the time of the execution of the said will until his death, testator had and kept said will in his possession and under his control, and to the contrary, the only evidence as to that fact was that of Mary Heeney to the effect that decedent did not in August, 1904, have either the possession or control of the will." This specification makes no attack at all upon the finding in No. 3 that immediately after the death of the testator the will was found in his possession and that then the cancellation appeared; and respondent was not called upon to put into the statement any evidence on that point and the finding must be taken as true. As to the finding that from the time of the execution of the will until the death of the testator the latter had possession and control of the will, it was sufficiently supported by the evidence. It appears from the evidence that at the time of the execution of the will the testator took it away with him, and that immediately after his death it was found in his trunk among his other effects; and these facts, in the absence of any showing to the contrary, are sufficient to justify the finding. It is true that the appellant testified that several times testator showed her the will and offered to let her keep it, and that she had it in her hands; but that testimony is not, if taken as true by the trial court, inconsistent with the fact of the testator's possession. The will was not shown to have been in the possession of any other person; and it is certainly not claimed that the appellant, while momentarily having it in her hands, erased her own name as executrix.

The only remaining question is whether the evidence sustains the finding, under No. 4, that the cancellation was done by the testator with the intent and purpose of revoking that part of the will by which appellant was appointed executrix. This is a finding of fact and must be sustained if there is any reasonable amount of evidence supporting it. It appears in this case, as before stated, that the will was in the possession of the testator from the time of its execution until his death; that immediately after his death it was found among his effects in his trunk; and that, when so found, the ink lines were over and through the words as above described. These circumstances were sufficient to warrant the court in making the finding, and it was substantially so held by this court in Estate of Olmsted, 122 Cal. 224, 54 Pac. 745; for although in that case there were circumstances tending to sustain the cancellation in addition to the facts that the will had been constantly in the possession of the testator, and that the cancellations were found on it immediately after his death, still the court, after reciting these facts of possession by the testator, and the cancellation before his death, said: "From these circumstances alone arise the presumptions: (1) That the cancellations were the act of the testator; and (2) that they were performed with the intent and purpose of revoking the instrument." The general authorities are to the same effect. In 4 Kent Com. 532, it is said: "If, however, the will be found canceled, the law infers an intentional revocation, for it is prima facie evidence of it, and the inference stands good until it be rebutted." In Re White's Will, 25 N. J. Eq. 501, where the will had been in the possession of the testatrix during her lifetime and was found among her effects, the court says: "And from the fact that the will was found in the possession of the testatrix, in her repository, thus canceled, a presumption arises that the cancellation was her act, done animo cancellandi." There are numerous other authorities to the same effect, and we have not been referred to any holding differently.

The order appealed from is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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3 Cal. App. 44

RAUER'S LAW & COLLECTION CO., Inc., v. STANDLEY.

(Court of Appeal, Third District, California. Feb. 8, 1906.)

1. TIME — COMPUTATION — EXCLUDING HOLIDAYS.

Under Code Civ. Proc. § 940, requiring an undertaking on appeal to be filed with the clerk within five days after service of the notice of appeal, where notice was served on November 25th, and the 30th of November was a holiday, December 1st was the last day on which the undertaking could be filed.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Time, § 48.]

2. APPEALS — UNDERTAKING — EXTENSION OF TIME FOR FILING—EFFECT OF EXTENSION.

An extension of the time within which an undertaking on appeal might be filed was of no avail to appellant, where no notice of the extension was filed within the time during which the undertaking might ordinarily have been filed.

3. SAME — SETTING ASIDE DEFAULT — APPEALABILITY OF ORDER.

Code Civ. Proc. § 473, authorizes the relief of a party from any order or proceeding taken through inadvertence, surprise, or excusable neglect. Section 963 enumerates various orders from which appeals may be taken, among others, a special order made after final judgment. Section 585 makes it the duty of the clerk in certain cases, upon application of the plaintiff, to enter judgment immediately after the default of defendant is entered, and by section 1963, subd. 15, there is a presumption that the official duty has been regularly performed. *Held*, that an order opening the default of defendant under section 473 was not appealable; it not being one of the orders enumerated in section 963, or a special order after final judgment, no final judgment having been entered on the default when notice of appeal was served, and it being presumable that the action was one in which the clerk was not authorized to enter judgment.

Appeal from Superior Court, Mendocino County; J. O. White, Judge.

Action by the Rauer's Law & Collection Company against J. M. Standley. From an order setting aside a default against defendant, plaintiff appeals. Dismissed.

Macks & Tomsky and Weldon & Held, for appellant. Robert Duncan and Orrin McMurray, for respondent.

CHIPMAN, P. J. Motion to dismiss the appeal. On September 8, 1905, in the absence of defendant's attorney, plaintiff's attorneys appeared in court and moved that the default of defendant be entered, which motion was denied. Thereafter, and on the same day, plaintiff's attorneys "went to the clerk of said court and prevailed upon said clerk to enter a purported or pretended default of the defendant in the action." On the 23d day of September defendant gave notice of motion to set aside and open the default of defendant under section 473 of the Code of Civil Procedure. The motion was heard on the 25th of that month, and the court made an order on the 27th of September granting the motion. Plaintiff appeals from this order.

The notice of appeal was served and filed

November 25, 1905. It appeared at the hearing of the motion to dismiss the appeal that no undertaking was filed until December 5, 1905. Attached to the undertaking was a paper signed by the judge of the superior court, and dated December 1, 1905, granting plaintiff to and including December 6, 1905, in which to file its undertaking on an appeal herein. It appears from the affidavit of the clerk that this paper was never marked filed and was never presented to nor filed with the clerk until December 5, 1905, and then only as a paper attached to the undertaking which latter was marked filed on that day, and that the clerk did not know that this paper was attached to the undertaking until his attention was called to it on January 10, 1906. It appears, also, that there never has been a trial of said action and that no judgment has ever been rendered therein.

Defendant makes two points: First, that no undertaking was filed in time; and, second, that the order is not an appealable order. We think that both of these points must be held to be well taken.

It is provided by section 940, Code Civ. Proc., that "the appeal is ineffectual for any purpose unless within five days after service of the notice of appeal, an undertaking be filed, or a deposit be made with the clerk." The notice of appeal was served on November 25th; the 30th of November, 1905, was a holiday, and December 1st was the last day on which the undertaking could be filed so as to be effectual. It was not filed until December 5th. This was too late to accomplish its object unless the time had been extended. Hoyt v. Stark, 134 Cal. 178, 66 Pac. 223, 86 Am. St. Rep. 246; Rose v. Mesmer, 134 Cal. 459, 66 Pac. 594; Mitchell v. Board of Education, 137 Cal. 373, 70 Pac. 180. It does not appear at what time or place the judge, in fact, signed the order extending the time in which to file the undertaking. If it was signed at chambers or elsewhere on the day of its date, it failed to give to plaintiff the right to file the undertaking on December 5th, because the order was not filed nor presented for filing in the office of the clerk until the time had expired within which the undertaking should have been filed. It was defendant's duty to watch the clerk's office for the five days prescribed by statute should he wish to object to the sufficiency of the sureties. But he was not required to do so thereafter unless the time in which to file the undertaking had been extended by proper order of the court. Schloesser v. Owen, 134 Cal. 546, 66 Pac. 726. And any order extending the time would convey no notice to defendant and would be unavailing unless presented for filing at the office of the clerk before the time for filing the undertaking had expired. Defendant was not bound to look or inquire elsewhere. Hoyt v. Stark, supra.

Upon the second point it is only necessary to say that the order appealed from is not one of the orders enumerated in section 963, Code Civ. Proc. Nor is it "a special order made after final judgment." The default of defendant had been entered, but no final judgment had been entered on the default at the time notice of appeal was served. Section 585 of the Code of Civil Procedure makes it the duty of the clerk in certain cases, "upon application of the plaintiff," to enter judgment immediately after the default of the defendant is entered. In certain other cases the plaintiff may thereafter "apply * * * for the relief demanded in the complaint." We find no statement in the record as to the character of the action, and upon the presumption that "official duty has been regularly performed" (Code Civ. Proc. 1963, subd. 15) by the clerk we must presume that the action was one in which he was not authorized to enter judgment immediately, or at all, upon entering the default, or he would have done so if requested thereto. But, aside from this view, and assuming that the action was one referred to in subdivision 1 of section 963, it appears that no judgment in fact was entered, and hence the order was not one made "after final judgment," and there is no showing that the clerk was requested to enter judgment on the default.

The appeal is dismissed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

3 Cal. App. 34

ROGERS v. MECARTNEY et al.

(Court of Appeal, Second District, California. Feb. 6, 1906.)

VENDOR AND PURCHASER—BONA FIDE PURCHASERS—RECORDS—CONSTRUCTIVE NOTICE.

A deed described the property conveyed as "lot 5, in block 42, at Garvanza, according to a map recorded in book No. 9, pages 45 and 46, Miscellaneous Records." The map recorded in the book at the pages referred to did not contain any block 42, but there was such a block and number in the subdivision recorded in book 15, page 54, which was the only map of Garvanza or of additions or subdivisions of lands adjacent thereto, containing a block numbered 42. Such block 42 was adjacent to the town of Garvanza, and was popularly and generally known and treated as a part of that town. *Held*, that such description was sufficient to give constructive notice to a subsequent innocent purchaser holding under the grantor in such deed.

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by Julia N. Rogers against A. Mecartney and another. From a judgment in favor of defendants and from an order denying plaintiff's motion for a new trial she appeals. Affirmed.

Julius Lyons, for appellant. Charles Cassat Davis, for respondents.

SMITH, J. The suit was brought against various parties to quiet the plaintiff's title to numerous lots of land, comprising, among others, the lot in question; which is described as "lot 5, block 42, Ralph Rogers subdivision of blocks 41 and 42 of the Garvanza Addition No. 1, as per survey, map and record thereof, as appearing in book 15, page 54, Miscellaneous Records of said county." The case was submitted upon an agreed statement of facts, which is substantially embodied in the findings of the court. Judgment was entered in favor of Scharff against the plaintiff and some of the defendants quieting his title to the lot in question. The plaintiff appeals from the judgment and an order denying her motion for a new trial.

From the agreed statement (which was the only evidence) it appears that both parties deraign title from Ralph Rogers, who was formerly the owner of the lot in question; and that on May 12, 1887, Scharff purchased from Rogers, for the sum of $425, the lot described in a deed from Rogers to Scharff of date August 2, 1888, as "lot No. 5 in block 42 at Garvanza, according to a map recorded in book No. 9, pages 45 and 46, Miscellaneous Records." Rogers had previously conveyed to one Childress, "in trust for the various purchasers and their assigns," etc., a number of lots described in a tabular list, among which appears the lot described in the deed; and he had also made to him a power of attorney to execute conveyances of the lots conveyed. The deed in question was signed, "Ralph Rogers [Seal], By A. D. Childress, as trustee and his attorney in fact." It appears, however, that the map recorded in the book at the page referred to does not contain any block 42, but that there is such a block and number in the subdivision and map referred to in the description of the lot in question in the complaint, recorded in book 15, page 54; which is the only map of Garvanza, or of any additions of subdivisions of lands adjacent thereto, containing a block No. 42; and it is further agreed that said block 42 is adjacent to the town of Garvanza and is popularly and generally known and treated as a part of the town or locality of Garvanza. The defendant Scharff has also a deed from Childress as trustee, of date June 29, 1903, correctly describing the lot by reference to the map in book 15, page 54; it being recited that the deed was given to correct errors in the former deed between the same parties.

The plaintiff deraigns title under a deed of January 2, 1892, from Ralph Rogers, to Lydia Conway, to whose title she had succeeded, and a deed from Childress of date December 13, 1902, to herself, in which the lot is described as in the complaint. There is no allegation, evidence, or finding that the plaintiff purchased without notice, or for valuable consideration; and it may be doubted whether, in the absence of the fact appearing, she can avail herself of the claim that she is such purchaser. Alcorn v. Buschke, 133 Cal. 657, 658, 66 Pac. 15, and cases cited; Beattie v. Crewdson, 124 Cal. 579, 57 Pac. 463. But we will assume, with appellant's counsel (for the purposes of the decision only) that the question is whether "the description in said deed to Scharff was sufficient to give constructive notice to an innocent purchaser for a valuable consideration" of the lot correctly described; and this question, we think, must be answered in the affirmative. Upon the agreed facts, there can be no doubt that the lot described in the deed from Rogers to Scharff is the lot more correctly described in the complaint; nor do we think that upon proper inquiry the plaintiff or her grantors could have failed to ascertain this fact.

It follows that the judgment and order appealed from must be affirmed; and it is so ordered.

We concur: GRAY, P. J.; ALLEN, J.

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3 Cal. App. 32

ROBERTS v. WILSON et al.

(Court of Appeal, Second District, California. Feb. 6, 1906.)

1. Judgment — Default — Vacation—Surprise.

Where the only service had on a corporation was on its business agent, and he, on the advice of an attorney, paid no attention thereto, and the corporation itself had no notice of the service of the summons until after the entry of its default, the neglect of such agent was not such as to deprive the corporation of its right to a vacation of the judgment for surprise.

2. Appeal—Exceptions — Decisions Finally Determining Rights.

An order denying an application to set aside a default judgment for surprise, is to be regarded as "an interlocutory order or decision finally determining the rights of the parties, or some of them," within Code Civ. Proc. § 647, providing that such an order or decision shall be deemed to have been excepted to.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Charles Roberts against H. M. Wilson and others. From a judgment in favor of plaintiff, defendant Fidelity & Deposit Company of Maryland appeals. Reversed.

Herbert J. Goudge, for appellant. Henry J. Stevens, H. J. Mercer, and Carlyle Wynn, for respondent.

SMITH, J. This is a suit on the official bond of the defendant Wilson, against him as principal and the corporation defendant as surety, for alleged false imprisonment of the plaintiff by the former. Judgment by default was entered against the defendant corporation for the sum of $1,000, the amount of the bond, leaving the suit still pending against the principal. As appears from the return on the summons, the service of summons was made on one Louis, described as "a business agent of said defendant," personally. The defendant moved to quash the return; and the motion being denied, moved the court to set aside the default and to permit him to file an answer, which was presented in court. This motion was also denied; and the corporation defendant appeals from the judgment.

The last motion, we think, should have been granted. The only service in the case was on Louis, who disregarded the service on the advice of counsel that it was of no effect. Whether this advice was correct need not be considered. Nor, assuming the contrary, need we consider whether the negligence of Louis was excusable. It is sufficient that it appears without contradiction that the appellant itself had no notice of the service of summons until after the entry of the default; and as to it, therefore, the case is obviously one, not "of excusable neglect" of the appellant (for there was no neglect of any kind), but of "surprise." The decision of the court seems to have been rested upon the assumption that the appellant was answerable for the neglect of its soliciting agent; but we know of no principle upon which this can be claimed. It is also claimed by the respondent that the bill of exceptions contains no exception to the order refusing to set aside the default. But assuming, for the purposes of the decision, that the order was not made in the absence of the respondent, we think it must be regarded as "an interlocutory order or decision finally determining the rights of the parties, or some of them," and that, therefore, an exception was unnecessary. Code Civ. Proc. § 647. The clause of the section cited, and also the clause, "an order or decision from which an appeal may be taken," were not contained in the original enactment, but were inserted by the amendment of 1876 (St. 1875–76, p. 91, c. 517), previously to which the court, on an appeal from an order made after judgment, refused to review the order for lack of an exception appearing. Grazidal v. Bastanchure, 47 Cal. 167. The amendment, we think, was intended to cure the defects of the section as originally enacted, and we think in terms, as well as in reason and intention, applies to orders of the character involved here. We have assumed for the purposes of the decision that the provisions of the act of March 17, 1899 (St. 1899, p. 111, c. 94), were not intended to supersede those of subdivision 2, § 411, Code Civ. Proc.; that under the latter provision service may be had on some other than the general managing agent of the company; and that in a suit against the principal and a surety on a bond judgment against the surety alone is permissible. But we are not to be understood as having passed on these questions.

The judgment must therefore be reversed, and the cause remanded, with directions to the lower court to enter an order that the answer of the defendant corporation be filed, and for further proceedings; and it is so ordered.

We concur: GRAY, P. J.; ALLEN, J.

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3 Cal. App. 30

MUSSELMAN v. MUSSELMAN et al.

(Court of Appeal, Second District, California. Feb. 6, 1906. Rehearing Denied by Supreme Court April 4, 1906.)

APPEAL—OBJECTIONS NOT MADE AT TRIAL.

Where evidence with reference to certain property described in an amendment to the complaint was introduced without objection at the trial, defendants could not complain for the first time on appeal that such amendment was not served on them.

Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by Clara Musselman against Hiram Musselman and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Will D. Gould, for appellants. H. C. Millsap, for respondent.

SMITH, J. This is a suit for divorce and was before the Supreme Court on an appeal from a former judgment for the plaintiff for divorce and for allotment of community property. Musselman v. Musselman, 140 Cal. 197, 73 Pac. 824. The appeal resulted in a reversal of "that portion of the judgment which declares that certain property described be allowed the plaintiff and set apart to her for her portion of the community property," and the cause was remanded "for further proceedings in the court below with relation to the interests of the plaintiff in the community property of the spouses." The case was tried on these issues in the court below, and findings and judgment entered for the plaintiff, by which certain property, real and personal, was adjudged to be community property, and an allotment of certain real and personal property to the plaintiff made. The appeal is from the judgment, with bill of exceptions.

The findings are attacked as not supported by the evidence, but this contention, we think, cannot be sustained.

Objection is also made that an amendment to the complaint, in which the real, and part of the personal, property allotted to the plaintiff was for the first time described, was not served upon the defendants; but the evidence with reference to this property was introduced without objection, and we think it is now too late to complain of the omission.

The judgment appealed from is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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3 Cal. App. 28

LAUDER v. CURRIER.

(Court of Appeal, Second District, California. Feb. 6, 1906. Rehearing Denied by Supreme Court April 6, 1906.)

1. DAMAGES—PLEADING—PERSONAL INJURIES —SPECIFIC DISEASES.

Where a complaint for personal injuries alleged that as an effect of the injury plaintiff was "thereby made sick," evidence that plaintiff suffered from a pleurisy caused by the hurt, which developed into pneumonia, was admissible without any further allegations specifically defining the diseases or hurts received by plaintiff.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 441–443.]

2. Negligence — Presumptions—Evidence—Weight and Sufficiency.

Under Code Civ. Proc. § 2061, subd. 2, declaring that jurors are not bound to decide in conformity with the declarations of any number of witnesses against a less number or against a presumption, the question whether the presumption of negligence, arising from an accident to a passenger in an elevator which fell with him, is overcome by uncontradicted evidence that the elevator and machinery were of the best kind in use, and that the elevator was satisfactorily operated, is one for the jury.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by B. S. Lauder against A. T. Currier. From a judgment for plaintiff, defendant appeals. Affirmed.

Stephens & Stephens, George H. Moore, Herbert Cutler Brown, and Frederick B. Braden, for appellant. G. P. Adams and W. B. Matthews, for respondent.

SMITH, J. The suit was brought to recover damages for injuries to the plaintiff caused by the fall of the defendant's elevator. The plaintiff had judgment, from which the defendant appeals.

The points urged by the appellant are: (1) That the evidence was insufficient to justify the verdict as to damages; (2) and, also, in that the proof showed that the injury was the result of inevitable accident, and not of defendant's negligence. Appellant complains also of certain errors in the rulings of the court relating to the two points above specified, which may be conveniently considered in connection with them.

With regard to the first point, the objection, more specifically stated, is: That evidence was admitted of the plaintiff's suffering from an attack of pleurisy immediately following the accident and of pneumonia subsequently developed, which, it is claimed, ought to have been specially pleaded, but were not; and that the recovery should have been limited to the damages otherwise resulting. But the evidence shows that the pleurisy was the direct and immediate effect of the hurt suffered by the plaintiff, or, as otherwise expressed by the medical witness, that it was a traumatic pleurisy, i. e., a pleurisy caused by the hurt; and that the pleurisy, when it became worse, "developed a very severe pneumonia with it." In fact, the complaint alleges, among other effects of the plaintiff's injury, that he was "thereby made sick," etc., which would seem sufficient to meet the appellant's objection. But without this, we think it was unnecessary to allege specifically the nature of the diseases or other hurts received by the plaintiff. This is obviously true with reference to the pleurisy, which was the direct and immediate effect of the hurt as a cause. Nor do we doubt that proof of pneumonia, which was also apparently the effect of the same cause without other cause intervening, was equally admissible.

As to the second point, it appears from the evidence that the defendant's elevator and the machinery by which it was operated were of the best kind in use, and witnesses testified as to the satisfactory character of its operation; and it is claimed that there was no evidence to the contrary other than the presumption arising from the happening of the accident, and, hence, that the accident was inevitable. But this was a question for the jury. Nor can we say, as a matter of law, that the evidence was sufficient to overcome the presumption to the contrary. Code Civ. Proc. § 2061, subd. 2.

The rulings of the court complained of, having regard to the grounds upon which they were made, are not open to objection; and, indeed, the defendant, as he claims in his argument, was permitted to prove the satisfactory character and operation of the elevator and machinery.

The judgment appealed from is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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3 Cal. App. 11

SOUTHERN PAC. R. CO. v. HART et al.

(Court of Appeal, Second District, California. Feb. 5, 1906. Rehearing Denied by Supreme Court April 4, 1906.)

1. Eminent Domain—Value of Property—Instructions.

In a proceeding to condemn a portion of an unsubdivided city block, defendants' witness testified that the property fronting on M. street was worth $12 a foot; that the only way to subdivide the block for residence purposes would be to lay off two lots of 50 foot front on M. street, extending through the tract and to subdivide the balance into three lots fronting on A. street; and that the balance of the land not taken would be diminished in value $1,000. Other witnesses testified that the land was best adapted for small residences and as to the value of the piece taken and the damage to that not taken, while plaintiff's evidence was that the property could be more advantageously subdivided by opening a street through the block, etc. *Held*, that under such evidence, the jury were properly charged to determine the value of the property taken and the damage to the remainder of the property owned by the defendants.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 363–370, 565, 566.]

2. Same.

It was error for the court to charge that, if the land could be more profitably used for residences than business property, the jury should determine the size, shape, and arrangement of the lots into which it could most profitably be divided for that purpose, and then, after finding the market value of the parts taken from any such lots, find the damage to the remainders without allowing any damage to any other lots of which no part was taken; the only rule applicable being that specified by Code Civ. Proc. § 1248, subd. 2, declaring that, if the property sought to be condemned constitutes only part of a larger parcel, the damages accruing to the portion not taken shall be ascertained and allowed.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 363-370.]

3. SAME—IMPAIRMENT OF ACCESS.

Under Code Civ. Proc. § 1248, subd. 2, authorizing the assessment of damages in condemnation proceedings to land not taken by reason of its severance from the portion sought to be condemned and by reason of the construction of the improvement in the manner proposed by plaintiff, evidence of damage to defendants' land not taken by the proposed construction of plaintiff's railroad across a street on which the land fronted was admissible.

Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by the Southern Pacific Railroad Company against Alice McCurdy Hart and another to condemn certain real estate. From a judgment denying defendants' motion for a new trial, they appeal. Reversed.

C. F. Carrier and Richards & Carrier, for appellants. H. P. Starbuck and Canfield & Starbuck, for respondent.

SMITH, J. This is a proceeding to condemn a piece of land of the defendants constituting part of a quarter block of land in the city of Santa Barbara, bounded on the northwest by Mason and on the southwest by Anacapa street. The diagonals of the block lie north and south and east and west. The land sought to be condemned is a small triangular piece taken from the north corner of the defendants' land. On the trial the witness Spader, called by the defendants as an expert witness, testified that the value of the property fronting on Mason street was about $12 a front foot; and he further testified, in effect, that the only way to subdivide the block for residence purposes would be to lay off two lots of 50-foot front on Mason street, extending through the tract, and to subdivide the balance of the quarter block into three lots of 50 and one of 75 feet fronting on Anacapa street; that, after the taking of the land sought to be condemned, the block could be subdivided only into the four lots fronting on Anacapa street; that in the former case the land would be worth $4,500 and in the latter $3,500 only; and that the balance of the land not taken by the plaintiff would thus be diminished in value $1,000. Other witnesses of the defendants testified, in effect, that the defendants' land was best adapted for subdivision for small residences, and they also testified generally "as to the value of the piece taken and to the damage to the part not taken." On the other hand, the plaintiff introduced testimony to the effect that the quarter block could be more advantageously subdivided by opening a street through the block between the quarter block in question and the quarter block lying to the northeast of it, half of the street to be taken from the land of the defendants and half from the other parties.

On this evidence (which is all that is material to this appeal) the jury were rightly instructed, at the instance of the defendants, that they were to determine in this case "the value of the property taken by the railroad and the damage to the remainder of the property owned by the defendants." But at the instance of the plaintiff the jury were instructed: "If you believe that there is a preponderance of evidence that the defendants' land can be more profitably used for residence than business property, then you must determine upon the evidence the size, shape, and arrangement of the lots into which it may most profitably be divided for that purpose, and then, after finding the market value of the part or parts taken from any such lot or lots, you must find the damage to the remainder or remainders of this lot or these lots caused by the severance of this part or these parts and the construction of the railroad thereon. You cannot in such case find any damage to any other lot or lots of which no part is taken." This instruction was excepted to by the defendants, and, notwithstanding the explanation of respondent's counsel, we can conceive of no principle upon which it can be justified. The land taken formed "only a part of a larger parcel," namely, the whole quarter block owned by the defendants, which had not been subdivided by them, and the easement in the street thereunto appertaining. Hence the only rule applicable to the case as to the damage to the balance of the parcel of land not taken by the plaintiff is that given in subdivision 2 of section 1248 of the Code of Civil Procedure. The instruction is also open to the objection that it, in effect, instructed the jury to disregard the evidence of witnesses testifying generally "as to the value of the piece taken and the damage to the part not taken." This conclusion will necessitate a reversal of the order appealed from.

But there is another question involved, which it will be necessary to consider with a view to the further proceedings in the case. This relates to the claim of the defendants for damages to their land by reason of the proposed construction of plaintiff's railroad across Mason street, as to which evidence offered by defendants was excluded. This evidence, we think, was admissible under the express provisions of the statute, which provides not only for the damages to the land not taken "by reason of its severance from the portion sought to be condemned," but also for damages to it by reason "of the construction of the improvement in the manner proposed by the plaintiff." Code Civ. Proc. § 1248, subd. 2; Eachus v. Los Angeles Ry. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149; Eachus v. Los Angeles, 130 Cal. 492, 62 Pac. 829, 80 Am. St. Rep. 147.

The order of the court denying the defendants' motion for a new trial is reversed.

We concur: GRAY, P. J.; ALLEN, J.

(3 Cal. App. 14)

MOREING v. WEBER et al.

(Court of Appeal, Third District, California. Feb. 5, 1906.)

1. CONTRACTS — JOINT AND SEVERAL LIABILITY.

A contract for street improvement recited that whereas plaintiff, as contractor, had offered to do the work for $1,154, "the undersigned property owners" agreed one with the other, and with each other, that they would forthwith have the street graded and would pay therefor on completion and acceptance of the work by the city surveyor the total sum of $1,154, pro rata, as the frontage of their real property bore to the whole work, and that they jointly and severally contracted and agreed with plaintiff that he, with all covenient dispatch and in a good workmanlike manner and to the satisfaction of the city surveyor, etc., should grade the street for the sum of $1,154, payment of which was to be made on the acceptance of the work by the city surveyor. The specifications obligated by plaintiff to pay the engineer's fee in amounts proportioned to the payments made by the property owners, or their agents, in the ratio of payments to the contract price, plus such fee. *Held*, that the signers of the contract, as to the contractor, were jointly and severally liable for the entire price of the work, and not each separately liable for his pro rata share according to his ownership of frontage.

2. SAME—REFERENCE TO OTHER WRITING.

Where a contract for a street improvement between the contractor and owners of frontage referred to specifications for a particular specified purpose, such specifications became a part of the contract for such purpose only, and should be treated as irrelevant for all other purposes.

3. SAME—SUBSEQUENT WRITINGS.

Where a contract between owners of frontage and a contractor for a street improvement was clear and unmistakable as to the intention of the parties at the time it was made, it could not be affected by subsequent notices of the maturity of payments thereunder, sent to the signers by the contractor.

4. SAME—JOINT AND SEVERAL LIABILITY.

Where owners of frontage along a street were jointly and severally liable to a contractor under a contract for improvement of the street, for the contract price, the fact that the contractor received a portion of the amount due from certain of the owners did not debar him from selecting others and recovering the balance of the contract price against them jointly, under Code Civ. Proc. § 383, providing that persons severally liable on the same obligation may all or any of them be included in the same action at the option of the plaintiff.

Appeal from Superior Court, San Joaquin County; F. H. Smith, Judge.

Action by Lewis Moreing against C. M. Weber and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

J. B. Hall, for appellants. Budd & Thompson, for respondent.

BUCKLES, J. This suit is founded on the contract set out in the complaint made and entered into August 10, 1903, between the plaintiff as contractor and the defendants and S. V. Ryland, Julia H. Weber, H. Multharf, Anna Luhrs, Carl Simon, James E. Kidd, Stockton Savings & Loan Society Bank, Carrie Orschler, and the city of Stockton, owners of real property, which contract is as follows:

"This agreement witnesseth: Whereas, the undersigned, owners of real property in the city of Stockton, California, fronting on Fremont street, between the east line of Center street, and the west line of Edison street, are desirous of having said Fremont street, between Center and Edison streets, graded to the official grade of said city; and whereas, Lewis Moreing, as contractor, has offered to do said work of grading for the sum of eleven hundred and fifty-four ($1,154.00) dollars: Now, therefore, we, the undersigned property owners, agree one with the other, and with each other, that we will forthwith have said Fremont street, from the east line of Center street to the west line of Edison street, graded to the official grade of said city of Stockton, and will pay therefor on completion and acceptance of the work by the city surveyor, the total sum of eleven hundred and fifty-four ($1,154.00) dollars pro rata, as the frontage of our real property bears to the whole work. And we jointly and severally contract and agree with Lewis Moreing, as contractor, that he shall with all convenient dispatch, and in a good and workmanlike manner, and to the satisfaction of the city surveyor of said city of Stockton, and in accordance with the plans and specifications therefor, grade to the official city grade Fremont street in said city, from the east line of Center street to the west line of Edison street, and for the sum of eleven hundred and fifty-four ($1,154.00) dollars. Payment of said sum to be made on acceptance of said work by R. C. Tumelty, city surveyor, evidenced by his written certificate of acceptance.

"Dated Stockton, Cal., August 10th, 1903."

"I accept the above contract of grading, on the above terms of payment.

"Lewis Moreing, contractor.

"Dated August 10th, 1903."

The plans and specifications referred to in said contract are set forth in the answer, and are as follows:

"Specifications for Grading Fremont St. from the East Line of Center St. to the West Line of Edison St.

"Grading: The grading is to be done to a roadway width of forty feet. There will be required an embankment of 2,100 cubic yards and an excavation of 1,000 cubic yards to complete the roadway to the proper earth grade to receive the sand as will be shown by marks set by the city surveyor. The embankment other than that made by the excavation must be of sand or earth other than adobe and must be free from vegetable or foreign matter. The grading shall be thoroughly rolled after being well watered. The city steam roller must be used for the rolling and it will be furnished free of charge to the contractor.

"Sanding: The roadway for its entire length and for a width of forty feet shall be sanded by the contractor to a depth of one inch with sand free from earth or clay. This layer of sand shall be applied in the manner and at the time ordered by the city surveyor and the superintendent of streets of the city of Stockton.

"General provisions: All work shall be done in a workmanlike manner to the satisfaction of the superintendent of streets and the city surveyor, and the contractor will be expected to so handle his work as to facilitate the oiling of the roadway by the city of Stockton. The contractor will be expected to pay to R. C. Tumelty, city surveyor of the city of Stockton the sum of six cents per lineal foot, measured along the center line of the roadway, as a fee for his services as engineer of this work. The center line of roadway is 2,836 feet in length and the engineer's fee amounts to $170.16 and is to be paid to him by the contractor in amounts proportioned to the payments made by the property holders or their agents to the contractor in the ratio of those payments to the contract price plus engineer's fee."

There was a demurrer on the ground: (1) Of defect of parties defendant in that S. V. Ryland, Julia H. Weber, H. Multharf, Anna Luhrs, Carl Simon, James E. Kidd, Stockton Savings & Loan Society Bank, Carrie Orschler, and the city of Stockton are not made defendants to the action; and that, upon the facts stated in the complaint, it appears that the plaintiff has no cause of action for a judgment against the defendants jointly or jointly and severally for the sum of $699 or any sum. The demurrer was overruled. The answer avers defendants and the other of said contracting owners should become bound, each to pay to the plaintiff a pro rata part, and no more, of the said sum of $1,154—that is a part bearing the same proportion to the whole sum that the frontage in feet of the property of each of said owners along the entire line of said work bears to the total frontage of all the said owners, on and along the said line; and that said contract was so understood by all the parties, and deny any other obligation. Judgment was for the plaintiff and against all the defendants except the defendant A. Walters. The appeal is from the judgment.

The questions here involved are: (1) Is the contract joint and several, or is it a several contract with a promise to pay pro rata? (2) If joint and several, should all persons signing the contract be made parties?

The court found that the contract was a joint and several one. That plaintiff completed the work mentioned in the contract with all convenient dispatch and in a good and workmanlike manner and in accordance with said plans and specifications, grading to the official grade of said Fremont street from the east line of Center street to the west line of Edison street, and that the work was done to the satisfaction of the city surveyor, on October 22, 1903, and the work was on that day accepted by said city surveyor. The court also found that some of the owners along the line of said work other than the defendants had paid $544.45 of said contract price, leaving a balance due of $609.55 which defendants refuse to pay, and also found there was due from said defendants (except A. Walters) to the plaintiff on said contract the sum of $609.55. The court further found that "it is true that it was the intent and purpose of the property owners signing the contract mentioned in finding 2 * * * that among themselves they should become bound each to pay as specified in said contract the said contract price, to wit, $1,154 pro rata as the frontage of said real property bore to the whole work, but it is not true that it was the intent and purpose of the said entire contract that the defendants and other property owners signing said contract should become bound each to pay to said plaintiff such pro rata and no more of the said sum of $1,154, the contract price, nor is it true that the plaintiff so understood the said contract or believed that the defendants so understood it at the time the same was executed; and it is true that the plaintiff relied and acted on the said contract as set out in finding 2 hereof."

This was not a contract made under the Vrooman act, the law under which most street work is now done, but is a private contract between certain of the owners of frontage on Fremont street, who desired to have that street graded between Center and Edison streets, and the plaintiff. It is joint and several as between these owners and the contractor, made so expressly by the language of the contract. The plaintiff signed said contract under his indorsement thereon as follows: "I accept the above contract of grading on the above terms of payment." And the "above terms of payment" are "for the sum of eleven hundred and fifty-four ($1,154.00) dollars. Payment of said sum to be made on acceptance of said work by R. C. Tumelty, city surveyor, evidenced by his written certificate of acceptance." There are no other terms of payment mentioned in the contract, so far as the plaintiff's compensation was concerned. The signers, owners of the frontage, agreed between themselves, as stated in the contract, that they obligated each to the other that, as between themselves, they would each stand for a pro rata according to what each owned of the frontage; and it must be borne in mind that there was 2,836 feet in length to be graded, and that the owners of only 1,785 frontage feet signed the contract, and the contract recites an important fact tending to show that the contrator did not enter into the contract pleaded with the understanding that he would have to look to each property owner for his individual pro rata according to the front feet he owned. These people had talked the matter over with the contractor evidently before the signatures of the property owners were secured, for it recites: "Whereas, Lewis

Moreing, as contractor, has offered to do said work of grading for the sum of eleven hundred and fifty-four ($1,154.00) dollars." At the time such offer was made he could not have known who or how many of the property owners fronting on Fremont street would pay for such work, and it is not reasonable to suppose that he would make such an offer without knowing to whom he was to look for his pay. The contract then proceeds: "Now, therefore, we, the undersigned property owners, agree one with the other, and with each other, that we will forthwith have said Fremont street from the east line of Center street to the west line of Edison street, graded to the official grade of said city of Stockton, and will pay therefor on completion and acceptance of the work by the city surveyor, the total sum of $1,154.00 pro rata, as the frontage of our real property bears to the whole work." This clause of the contract is a simple, plain agreement, not with the contractor, but with themselves and between themselves, each with the other, that as among themselves they would prorate, and with which the contractor had nothing to do. They immediately follow this with the clause in which the contractor is interested, and to which he became bound by his indorsement of his acceptance of said contract, to wit: "And we jointly and severally contract and agree with Lewis Moreing, as contractor, that he shall with all convenient dispatch and in a good and workmanlike manner, and to the satisfaction of the city surveyor of the city of Stockton and in accordance with the plans and specifications therefor, grade to the official city grade Fremont street [describing the same as above] and for the sum of eleven hundred and fifty-four ($1,154.00) dollars, payment of said sum to be made on acceptance of said work by * * * city surveyor, evidenced by his written certificate of acceptance."

So far as the terms of the contract are concerned there certainly is no question as to the meaning and intent of all the parties when the same was executed, to wit: That the agreement was joint and several as to paying the contractor, and that he should receive the price in one lump sum when the work was completed and properly certified, and that as among themselves (the property owners signing) would collect from each one, and each one promised the other to pay for this contract price a pro rata share. In other words, they were to pay this $1,154 to the contractor, and arranged among themselves as to how they would raise that sum. And this was the interpretation the lower court placed upon it. Appellant lays great stress upon the following clause in the specifications as showing a different meaning, to wit: "The engineer's fee amounts to $170.16 and is to be paid to him by the contractor in amounts proportioned to the payments made by the property holders or their agents to the contractor in the ratio of those payments to the contract price plus engineer's fee." The contract refers to this writing, specifications, for the sole purpose of showing that the grading was to be completed "in accordance with the plans and specifications therefor." The rule seems so well established that it may be said to be elementary, that where, in a contract, reference is made to another writing for a particular specified purpose, such other writing becomes a part of the contract for such specified purpose only, and, therefore, this writing, known as the "specifications," can serve no other purpose than to furnish the plan and specifications as to how the grading should be done, and is foreign to the contract for all other purposes. Neuval v. Cowell, 36 Cal. 648. It was shown by the evidence that the plaintiff had nothing to do with getting the owners to sign said contract, and that out of the total of 2,836 feet frontage the signatures of only 1,785 feet frontage were procured, and that the owners of the other 1,051 feet frontage did not enter into the contract for said grading.

The contract, the specifications and written notices to pay sent by the contractor to C. M. Weber, Rosa D. Creanor, Mrs. H. S. Shippee, C. Buckley, and D. L. Klench, and also a number of receipts for money paid, were all put in evidence. The following is a copy of one of the said notices and the others are the same in substance: "Stockton, December 31, 1903. Mr. C. M. Weber, Stockton, Cal.—Dear Sir: There is now due from you the sum of $258.00, being your proportion of the contract price agreed to be paid to the undersigned for grading Fremont street between Center and Edison streets in the city of Stockton, under your contract for said work with the undersigned, dated the 10th day of August, 1903. You will please call and settle for the above, and oblige, Yours truly, Lewis Moreing." The receipts were in the following form: "$37.00. Stockton, Cal., Jan. 6, 1904. Received of Julia H. Weber, thirty-seven 00/100 Dollars for grading Fremont St. Lewis Moreing, by C. F. C." These notices and receipts were introduced in evidence by the defendants for the purpose of aiding the court to interpret the contract and to show that the intention of the contractor when he took the contract was to hold each owner of frontage for only a proportion of the contract price in the ratio of the number of front feet he might own along the street to be graded. In other words, to show that plaintiff understood the contract to be joint and not joint and several. None of them receiving such notice paid anything.

A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting (Civ. Code, § 1636), and the language of the contract is to govern its interpretation, if the language is clear and explicit and does not involve an absurdity (Civ. Code, § 1638), and the intention of the parties is to be ascertained from the writing alone if possible (Civ.

Code, § 1639), and not from the subsequent actions of one of the parties. (Jackson v. Puget Sound Lumber Company, 123 Cal. 100, 55 Pac. 788; Stockton S. & L. Society v. Purvis, 112 Cal. 236, 44 Pac. 561, 53 Am. St. Rep. 210). As we have shown, the language of the contract is clear and unmistakable as to the intention of the parties at the time it was made, and, therefore, could not be changed by the subsequent acts of the contractor in sending out these notices. Nothing appears in the record showing, or in the least way indicating, how the owners who paid the amount credited, paid the same, whether in proportion to their frontage or otherwise. Having received a portion of the $1,154 from certain of the owners, the contract being a joint and several one, can the contractor select others of the contracting parties and recover from them jointly the balance of the contract price? We think he can, and the authority for so doing is found in section 383 of the Code of Civil Procedure: "Persons severally liable upon the same obligation * * * may all or any of them be included in the same action at the option of the plaintiff." Slater v. McAvoy, 123 Cal. 440, 56 Pac. 49; Heppe v. Johnson, 73 Cal. 265–270, 14 Pac. 833; People v. Love, 25 Cal. 520–526; People v. Evans, 29 Cal. 430. If this was a joint obligation, and not joint and several, then the joint obligors must all be made parties. "When the liability is joint, all the persons upon whom it rests must be united as defendants in an action brought upon the contract. This rule is general and applies to undertakings, obligations, and promises of all possible descriptions." Pomeroy's Code Remedies, § 271; Code Civ. Proc. § 382; Farmers' Exchange Bank v. Morse, 129 Cal. 239, 61 Pac. 1088. But this is not merely a joint contract, but joint and several, and therefore the provisions of section 383, Code Civ. Proc., applies.

The evidence supports the findings, and the findings warrant the judgment.

Judgment and order affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

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3 Cal. App. 22

ANDERSON et al. v. CAUGHEY et al.

(Court of Appeal, Third District, California. Feb. 5, 1906.)

1. Mines and Minerals — Acquisition of Claims — Assessment Work—Sufficiency of Evidence.

In an action to quiet title to quartz mining land, evidence *held* sufficient to sustain a finding that the necessary assessment work for a certain year was done.

2. Same—Notice of Location—Necessity of Recording.

Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], authorizing miners to make regulations governing the location of, and manner of recording, a mining claim does not require the notice of location to be posted or recorded in the absence of a local custom or rule of the miners of a district imposing such requirements.

3. Same—Presumptions.

In the absence of proof of a local custom of miners, requiring a notice of location of a mining claim to be posted or recorded, it must be presumed that the United States law, which does not require such posting or recording, was in force in the mining district in question at the time in question.

4. Same—Assessment Work—Computation.

Work contributed gratuitously to the improvement of a mining claim by one who has no enforceable interest therein is properly computed in determining whether the requisite assessment work has been done or not.

5. Same—Conflicting Locations—Priority.

An attempted location of a mining claim on land which has been subjected to a previous location, made in accordance with law and kept in force by the necessary assessment work, confers no rights on the locator.

Appeal from Superior Court, Lassen County; F. A. Kelly, Judge.

Action by H. P. Anderson and another against William Caughey and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

M. J. Barry, for appellants. J. T. Boyd, for respondents.

CHIPMAN, P. J. Action to quiet title to certain quartz mining land situated in Lassen county. The court found that plaintiff, on February 1, 1901, attempted to locate a quartz mining claim on Hayden Hill, Lassen county, to be known as the "Greenback Quartz Claim," but that at the time the claim was not open to location; that defendants and their grantors had a prior existing, valid location upon the mining claim described in the complaint; that defendants and their grantors located and have been in possession and worked the said mining claim continuously since August 8, 1893, "except a triangular strip along the west side of said mining claim 30 feet in width at the south end, and thence tapering to a point at the north end, the said mining claim being known as and called the Mt. Hope Quartz Mining Claim"; that on September 18, 1900, defendants herein and their grantors, for the purpose of acquiring said described triangular strip of land along the west side of the said Mt. Hope quartz mining claim, relocated the said described mining claim and included therein the said triangular strip of land along the west side of said claim, the said claim as relocated being the mining claim set forth herein and in the plaintiffs' complaint; that all the allegations of the defendants' answer are true. As conclusions of law the court found that defendants are the owners and entitled to possession of said mining claim and that plaintiffs' attempted location thereof on February 1, 1901, was and is void and of no effect and that plaintiffs have no right, title or interest in said mining claim or any part thereof. Judgment passed accordingly for defendants. Plaintiffs appeal from the judgment on bill of exceptions.

There is no brief on file for respondents. It is not fair treatment of the appellate court for the prevailing party to neglect to brief his case. Where appellant is thus neglectful, the court would be justified in affirming the judgment without examining the record. It is the duty of attorneys, whether for appellant or respondent, to give the court their assistance. Plaintiffs challenge the sufficiency of the evidence to sustain the findings and urge reversal of the judgment upon the following grounds: First, that no valid location was ever made by defendants and their predecessors in interest, for the reason that no notice of location was ever posted upon the claim and no notice of location was ever recorded as required by the local customs and usages of miners in the Hayden Hill district; second, the evidence fails to show that $100 worth of assessment work was done upon the claim for the year 1900; third, the court erred in refusing to strike out the evidence of labor performed by George W. McFarling, for the reason that he was not shown to have any interest in the claim other than a parol gift from J. H. McFarling.

There is evidence that this mining claim was located and worked prior to 1893, in which latter year defendant J. H. McFarling, through one S. Lewis, recorded a location which was 600 feet wide at the northerly end, and 570 feet wide at the southerly end, being 30 feet narrower on the west side of the center line at this end than on the west side at the northerly end; there is evidence that it was worked continuously, more or less, up to 1899, and it is admitted that assessment work was done for that year. It appears that in 1899 McFarling, in person, did the necessary assessment work, and he also straightened the westerly line so as to make the claim of equal width at both ends; i. e., 600 feet. He also "straightened up the monuments"—straightened up the stakes that happened to be down. The claim was marked out on the ground so that its boundaries could be readily traced. McFarling returned to the mine in February, 1900, and on September 5, 1900, he and his brother, George W. (one of defendants), commenced to do the assessment work for that year, and were there at work until September 26. They tore down a small cabin, or shop, that was on the west side of the claim and rebuilt at a shaft in which they were working; this shaft had been sunk about 25 feet, and they ran it some six feet further down and timbered it; they also constructed rude hoisting works and did some other work together, and G. W. McFarling also worked a considerable time on the mines, prospecting and otherwise, besides this work done together. There was some conflict in the evidence as to the value of the work done, apart from that done separately by G. W. McFarling. We think, however, that the court was warranted in finding that the assessment work was done, basing its judgment upon the evidence of defendants' witnesses; and beyond doubt, if the work done by G. W. McFarling is considered, as we think it should be, and for reasons appearing hereafter. On October 31, 1900, defendants William Caughey, George W. McFarling, J. H. McFarling, and John McFarling recorded a location of the ground in question. It is in evidence that they were all of them interested in the mine and that they made this relocation for the purpose of taking in this triangular shaped strip which was not included in the earlier location and which was vacant, unoccupied land. The boundaries had been marked upon the ground in the fall of 1899 by one of the partners, and no new markings were made, as the evidence showed that they were then (in October, 1900) plainly visible and easily traced. There was no evidence that the notice of location in 1893 was posted on the claim, but it was recorded in the office of the county recorder; and the same is true of the notice of 1900. As to the local custom, witness Highet testified as follows: "I am acquainted with the local laws and customs on Hayden Hill for years back as to the posting and recording notices. (The trial was in 1903.) At one time it had a local recorder. By the local custom a man would measure off his surface, go and put up his monuments, run out his lines, put up his notice, and he had 20 days in which to record his notice with the local recorder. It was the custom for the notices to be posted upon the claim. If one had discovered no vein he would post the notice at the starting point. That custom prevailed until the year 1896 or '97, when the state law went into effect. After that the notices were sent to the county recorder for record. I don't know what is the custom on Hayden Hill at the present time in regard to posting notices on the claim." Plaintiff Anderson testified that from 1896 to the present time the custom was to post the notice on the mine and record it with the county recorder.

Appellants concede that the judgment should be affirmed if a valid prior location was made and the regular assessment work kept up including the year 1900. The assessment work was admitted to have been done for 1899, and there is sufficient evidence to support the finding that it was done for the year 1900. We do not understand that any point is made as to the work done prior to 1899. The mining law of the United States does not require the notice of location to be posted or recorded (Carter v. Bacigalupi, 83 Cal. 187, 23 Pac. 361; Dwinnell v. Dyer, 145 Cal. 12, 78 Pac. 247); and it is only where the local customs and rules of the miners of the district require these steps that they are necessary. It was said in Adams v. Crawford, 116 Cal. 498, 48 Pac. 488, that a mining location is made by the marking of the ground by monuments so that its boundaries may be readily traced, the posting of a notice thereon, and, where the state or district law requires it, the recording of such notice. So far as posting the notice is concerned, or recording it, the statement must be understood to have in mind local rules or customs. As a statement of requirements under the statute it is in conflict with Adams v. Crawford, supra, and other decisions of our Supreme Court, and is not borne out by the statute. Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426]. See 1 Lindley on Mines, § 351.

The testimony as to the custom of miners at Hayden Hill is not definite as to the time when first in force. The witness Highet did not state at what time the custom began to which he testified; it ended in 1896, but whether it was in force in 1893 he did not state. In the absence of such proof we must presume that the United States law governed all locations at that time. So far, then, as the objections made to the location of 1893 is concerned they are without merit. The objection to the testimony concerning the work performed by George W. McFarling was based upon the fact that the original location was made by J. H. McFarling and that the only interest his brother George had was by a parol agreement, whereas it is claimed that an interest in a mining claim cannot be conveyed by parol; citing Moore v. Hamerstag, 109 Cal. 122, 41 Pac. 805, and several other cases. J. H. McFarling testified that his brother George had a one-fourth interest in the mine in 1899, and he was one of the persons who signed the location in 1900. He was in possession with his brother, and if he did not have a legal title to his interest he apparently had an equitable interest, and, whatever his interest, his labor should be considered in estimating the value of the assessment work done in 1900, whether he was paid for it or not. The question is not what it cost to do the assessment work, but was it worth $100? The work may all have been contributed gratuitously and still it would constitute assessment work under the law.

When the plaintiffs made their location they knew that the mine had been located and worked in previous years and that the defendants were claiming it in good faith and had done what they regarded as sufficient assessment work in 1900. Plaintiffs examined the work that had been done, and, deeming it insufficient, posted their notice claiming by the boundaries of defendants' location; their notice of location was posted near defendants' shaft and hoisting works, and the only discovery work done by plaintiffs was but a few feet away from where defendants had uncovered the ledge.

As the McFarling location in 1893 conformed to the requirements of law and was valid and was kept in force by annual assessment work to and including the year 1900, the attempted location by plaintiffs in the spring of 1901 conferred no right and would seem to fall within the reasoning in Dwinnell v. Dyer, 145 Cal. 12, 78 Pac. 247. It is not necessary to consider the location of 1900, for under it defendants had all of the year 1901 in which to do the necessary assessment work, and they, in fact, were claiming under the location of 1893. Plaintiffs made no point as to the triangular shaped strip included in this latter location and we will not consider it.

The judgment is affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

2 Cal. App. 759

BALLERINO v. SUPERIOR COURT OF LOS ANGELES COUNTY.

(Court of Appeal, Second District, California. Jan. 30, 1906.)

1. JUDGMENT—VACATION—GROUNDS.

Under the express provisions of Code Civ. Proc. § 663, a judgment of the superior court may be vacated for incorrect or erroneous conclusions of law not consistent with, or not supported by, the findings of fact.

2. SAME—IMPEACHMENT OF JUDGMENT ROLL—COURT FILES.

The record or judgment roll may not be impeached for want of jurisdiction by the minutes and files of the court or by other extrinsic evidence.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1826.]

Application by Bartolo Ballerino for a writ of certiorari against the superior court of the county of Los Angeles. Denied.

Geo. S. Hupp, for petitioner. Hugh J. Crawford, for respondent.

SMITH, J. Order for the defendant court to show cause why a writ of certiorari should not be issued reviewing its action "in setting aside and vacating a certain judgment rendered on the 27th day of December, 1905," in the case of Crawford v. Ballerino, appealed from a justice's court. In the certified copy of the judgment roll of the case presented by the defendant two judgments appear: The one entered December 29, 1905, in favor of the plaintiff for the sum of $1 and costs; the other entered January 8, 1906, also in favor of the plaintiff, for the sum of $200 and costs. The former judgment contains the finding that the allegations of the complaint are true and those of the answer untrue, and the conclusion of law that the plaintiff is entitled to the judgment rendered, i. e., for the sum of $1 and costs. The later judgment, it appears from the recitals therein, was entered on the motion of the plaintiff to vacate the earlier judgment, on the ground that the same was not consistent with or supported by the findings of fact, and to enter the proper judgment.

Upon the facts thus appearing, there can be no doubt that these proceedings of the court were within its jurisdiction. Code Civ. Proc. § 663; Galvin v. Palmer, 134 Cal. 426, 66 Pac. 572; Colton L. & W. Co. v. Swartz, 99 Cal. 278, 33 Pac. 878; Tyrrell v. Baldwin, 67 Cal. 1, 6 Pac. 867. But the contention of plaintiff is that another and different judgment from that of December 29th was rendered by the court on the 27th, as evidenced by an opinion of the court dictated on that day and signed and filed by the judge either on that or the following day, and by an entry in the minutes of the court, and that it was not within the jurisdiction of the court to vacate this order. But it is a familiar principle that the record or judgment roll cannot be impeached for want of jurisdiction by evidence aliunde, and, hence, that the minutes and files of the court are inadmissible for that purpose. The case therefore comes directly within the application of the authorities cited above.

The writ is therefore denied.

We concur: GRAY, P. J.; ALLEN, J.

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2 Cal. App. 767

In re NEWELL.

(Court of Appeal, Second District, California. Jan. 30, 1906. Rehearing Denied by Supreme Court March 27, 1906.)

1. MUNICIPAL CORPORATIONS—POLICE POWER—BUILDING REGULATIONS—FIRE LIMITS.

Under Const. art. 11, § 11, authorizing cities to enforce such police regulations as are not in conflict with general laws, it is competent for a city to declare it unlawful for any person to erect or maintain any tent or movable structure within the fire limits of the city.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1334.]

2. SAME—REASONABLENESS OF REGULATIONS—PRESUMPTION.

The legislative body, being the sole judge of the necessities for a police regulation, the same on its face being reasonable, will be so presumed by the courts.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1378.]

3. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—POLICE REGULATIONS.

The constitutional provisions, declaring that property shall not be taken without due process of law, having no application to statutes passed in the exercise of the police power.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, §§ 762–847.]

4. SAME — CLASS LEGISLATION — BUILDING REGULATIONS.

A municipal ordinance, declaring it unlawful to erect a tent or movable structure within the fire limits of the city, is not class legislation, but applies to all persons similarly situated.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, §§ 649, 665.]

Application by N. E. Newell for writ of habeas corpus. Denied.

Emmet H. Wilson, for petitioner. George Beebe, Pros. Atty., for the People.

ALLEN, J. The petitioner is in custody after a conviction of a violation of section 141 of Ordinance No. 10,405, N. S., of the city of Los Angeles, which provides: "It shall be unlawful for any person, firm, or corporation, to erect or maintain any tent or movable structure of any kind whatsoever in that portion of the city of Los Angeles described in section 31 hereof as the fire limits." He claims that such custody is unlawful, because the structure maintained by petitioner is a small tenthouse in which he is, and was at the date of the passage of the ordinance, engaged in business. The authority of the council to adopt an ordinance, either under the charter or otherwise, by which the maintenance of a structure erected before the date of the passage of the ordinance may be made unlawful, is challenged.

There is nothing pleaded dehors the ordinance by virtue of which petitioner claims that the same is unreasonable, oppressive, or void as applying to his property distinguished from other property within the fire limits. The police power of a city is derived from the Constitution (article 11, § 11), and not alone from the charter. The subject-matter of the ordinance is referable to the police power. "In order to protect the property of all its citizens from the ravages of fire [the Council] may establish fire limits, and regulate or prevent the use of wooden buildings within such limits; and, although this may disturb the enjoyment of the rights of an individual, he is, in contemplation of law, compensated by sharing the general benefits derived from it." Ex parte Fiske, 72 Cal. 127, 13 Pac. 310; Ex parte Lacey, 108 Cal. 330, 41 Pac. 411, 38 L. R. A. 640, 49 Am. St. Rep. 93. The legislative body, being the sole judge of the necessities for regulation, the same on its face being reasonable, will be so presumed. In re Smith, 143 Cal. 370, 77 Pac. 180. "It is settled law that all property is held subject to the exercise of police power, and that the provisions of the Constitution, * * * declaring that property shall not be taken without due process of law, have no application in such cases." Odd Fellows' Cem. Ass'n v. San Francisco, 140 Cal. 235, 73 Pac. 987. This ordinance is in no sense class legislation. It applies to all persons similarly situated.

The prayer of the petitioner is denied, and the prisoner remanded.

We concur: GRAY, P. J.; SMITH, J.

2 Cal. App. 760

BOARD OF LIBRARY TRUSTEES OF CITY OF HANFORD et al. v. BOARD OF TRUSTEES OF CITY OF HANFORD et al.

(Court of Appeal, Third District, California. Jan. 30, 1906.)

1. CHARITIES — LIBRARIES — CONSTRUCTION — STATUTES.

St. 1901, p. 557, c. 170, providing for the establishment of free public libraries and reading rooms, creating a board of trustees, and prescribing their duties, does not embrace the construction of a library to be erected with funds donated to a city, unless the gift by its terms and conditions, either expressly or by proper implication, so provides.

2. SAME.

St. 1883, p. 269, c. 49, § 862, amended March 9, 1903 (St. 1903, p. 93, c. 86), provides that trustees of cities of the sixth class may purchase, lease, or receive realty and personalty for municipal purposes and control, and dispose of and convey the same for the city's benefit. Subdivision 12 authorizes such cities to erect and maintain buildings for municipal purposes, and subdivision 13, to acquire, own, construct, maintain, and operate public libraries, and subdivision 16, to do anything necessary to carry out the provisions of the chapter. *Held* that, where a gift was made to a city of such class for the construction of a free public library building, the erection of such building was within the jurisdiction of the board of trustees of the city, as distinguished from the city's board of library trustees.

Appeal from Superior Court, Kings County; H. Z. Austin, Judge.

Suit by the board of library trustees of the city of Hanford and others against the board of trustees of the city of Hanford and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Dixon L. Phillips and H. S. Jacobs, for appellants. H. P. Brown, for respondents.

CHIPMAN, P. J. This is an action to restrain defendants from letting a contract for the erection of a public library building in the city of Hanford; the cost thereof to be paid out of the donation of $12,500 made by Andrew Carnegie. A demurrer was interposed to the complaint for insufficiency of facts, also that plaintiff had not legal capacity to sue, also for uncertainty. The demurrer was sustained without leave to amend, and judgment passed for defendants that plaintiffs take nothing by the action.

It appears from the complaint: That Hanford is a city of the sixth class, organized in January, 1892, under the act of March 13, 1883 (St. 1883, p. 269, c. 49); that pursuant to the act "to establish free public libraries and reading rooms," approved April 26, 1880 (St. 1880, p. 231, c. 126), the defendant board of trustees of the city of Hanford did regularly and duly pass a resolution establishing in said city a free public library and reading room, and did provide for the levy and collection, as in other cases, annually, a tax not to exceed one mill on the dollar for the purpose of maintaining such free public library and reading room in said city; that since April 11, 1900, there has been, and now is, a duly appointed, elected, and qualified board of library trustees of the aforesaid library and free reading room, established as aforesaid, managed and controlled by a board of library trustees consisting of five members; that on April 15, 1903, the plaintiffs above named became, ever since have been, and now are, the duly elected and acting board of library trustees of said city, and are vested with all the rights and powers conferred upon said board under the act of March 23, 1901 (St. 1901, p. 557, c. 170), being "an act to provide for the establishment and maintenance of public libraries within municipalities"; that, "between the 1st day of April, 1903, and the 1st day of July, 1903, one Andrew Carnegie gave and donated the sum of $12,500.00 to the said city of Hanford for the express purpose of defraying the cost and expense of building and constructing in said city of Hanford a building to be used only for the purpose of a public library building in said city of Hanford for the public generally and the inhabitants of said city in particular, and the said city of Hanford thereafter did duly accept said gift and donation; and the said gift and donation was by the said Andrew Carnegie declared and created * * * prior to the commencement of this action and about May 22, 1903." It is then alleged that ever since said sum was so donated "the said board of library trustees of the said city of Hanford, as such board, have in their judgment duly and regularly concluded and determined that no suitable building, or portion thereof, has ever, at any time since the giving and donating of said money by said Carnegie, been provided, or now provided, by the legislative body of said city of Hanford, to wit, the board of trustees of said city of Hanford, for said library therein." The complaint then sets forth that about January 25, 1904, the defendants advertised for plans and specifications and estimates of cost for the "construction of a building for said public library in said city, and such cost to be paid out of and from the money so donated and given by said Carnegie," and that defendants, about February 23, 1904, "adopted plans for such building, to be paid for out of such fund, and are about to award a contract for the construction of said public library building to be paid for out of said donated fund"; that such acts on the part of defendants "were and are unlawful and a usurpation of authority which the complaint alleges properly and legally should of right be done and performed by plaintiffs, as such board of library trustees under said act of March 23, 1901." An injunction is prayed for "restraining defendants from awarding said or any contract for the purposes named, the cost of which it to be paid out of said money so donated by said Carnegie and from interfering with plaintiffs in the discharge of their duties imposed upon them by law."

The principal question argued in the briefs, and calling for decision, is as to which one of these bodies is legally empowered to construct the proposed library building. Respondents set forth some facts in their brief as to the terms and conditions on which Mr. Carnegie made the gift, but they cannot be considered, however proper they might be in an answer. We are confined in our examination to the facts alleged in the complaint and admitted by the demurrer. It appears that the donation was to the city, not to the board of library trustees, to which it might have been legally made by the donor, as the act gives this board power to take property by gift. St. 1901, p. 557, c. 170. The question is narrowed to this: The money having been given to the city "for the express purpose of defraying the cost and expense of building and constructing in said city of Hanford a building to be used only for the purpose of a public library building," have the trustees of the library the exclusive right to spend this money, or may not the trustees of the city do so? The powers of the board of trustees of cities of the sixth class are set forth in section 862 of the municipal government act of 1883 (St. 1883, p. 269, c. 49), amended March 9, 1903 (St. 1903, p. 93, c. 86). Among their enumerated powers are: "Second—To purchase, lease, or receive real estate and personal property as may be necessary or proper for municipal purposes, and to control, dispose of, and convey the same for the benefit of the city or town. * * * Twelfth—To erect and maintain buildings for municipal purposes. Thirteenth—To acquire, own, construct, maintain and operate * * * public libraries. * * * Sixteenth—To do and perform any and all other acts and things necessary or proper to carry out the provisions of this chapter."

The act to establish free public libraries and reading rooms was passed April 26, 1880 (St. 1880, p. 231, c. 126), under which the Hanford public library and reading room was established by the city. This act was repealed by act of March 23, 1901 (St. 1901, p. 557, c. 170), the twelfth section (page 560) of which contains also the proviso "that as to existing libraries this act shall be deemed a continuation thereof, and such libraries shall be governed hereby accordingly"; i. e., the repealing act continues existing libraries established under the act of 1880, but they are to be governed by the act of 1901, to which we must now look for the powers of the board of library trustees. The complaint avers that the trustees (plaintiffs) were appointed and are acting under the act of 1901. This act provides, among other things, as follows: The library is to be managed by the trustees appointed by the executive head of the municipality. Section 3 (p. 558). The board shall have power: First, to make rules for the government of the libraries "and all property belonging thereto"; second, to administer any trust created for such libraries "and receive by gift, devise, or bequest and hold in trust or otherwise," etc.; third, to appoint officers and employés and fix their compensation; fourth, to purchase books and other personal property; fifth, "to purchase such real property, and erect or rent and equip, such building or buildings, room or rooms, as may be necessary, when in their judgment a suitable building, or portion thereof, has not been provided by the legislative body of the municipality for such libraries"; eighth, to do and perform all other acts necessary or proper to carry out the provision of the act. Section 5. The trustees are required to report to the municipality, and the latter is required to levy a tax to maintain the library and to purchase property necessary therefor. Section 8 (page 559), provides: "The revenue derived from said tax, together with all money acquired by gift, devise or bequest, or otherwise for the purposes of the library, shall be apportioned to a fund to be designated the library fund and be applied for the purposes herein authorized. If such payment into the treasury should be inconsistent with the conditions or terms of any such gift, devise, or bequest, the board shall provide for the safety and preservation of the same, and the application thereof to the use of the library, in accordance with the terms and conditions of such gift, devise or bequest. Payments from said fund shall be made in the manner provided for the payment of other demands against the municipality; provided, that demands upon said fund shall be presented to the board of library trustees for allowance rather than to the legislative or other body of the municipality." Section 11 (page 560) provides: "The title to all property acquired for the purposes of such libraries, where not inconsistent with the terms of its acquisition, or otherwise designated, shall rest in the municipalities in which such libraries are, or are to be situated, and in the name of the municipal corporations may be sued for and defended by action at law or otherwise." Section 13 provides for the disestablishment of any library established under the act, upon the petition of one-fourth of the electors of any such municipality.

It is not necessary to enter upon any extended analysis of these various acts to determine the limitations of the several powers of the respective boards of trustees in the case now before us. The acts authorizing the establishing of libraries cannot be held to embrace by their terms a library building to be erected with funds donated to the city of Hanford, unless it be shown that the gift, by its terms and conditions, or by just implication, so provides. It is made the duty of the municipality to provide a suitable building for the library, and it is only when it fails so to do that the board of library trustees are authorized to provide the building. But the statute does not deal with libraries other than those contemplated by the statute. It was said of the act of

1880, in People v. Howard, 94 Cal. 73, 29 Pac. 485: "The act of 1880 does not apply to all libraries, but only to such as may be established under its provisions. It does not give to the trustees elected under it any powers over other libraries"—and the same may be said of the act of 1901. The library act, in terms, excepts from its operation money donated, if the conditions of the gift are inconsistent with the provisions of the act, and the act requires "the application thereof [the money given] to the use of the library in accordance with the terms and conditions of such gift." The complaint shows that the gift here was made to the city of Hanford "for the express purpose of defraying the cost and expense of building and constructing a building to be used only for the purpose of a public library building in said city," but it is nowhere alleged that the donor intended this building to take the place of the building which the municipality might erect under the provisions of the law, or that the money donated was to become a part of the library fund provided for by law. So far as appears, the Carnegie library building is to be used for library purposes entirely independent of the library building and library authorized by the act. The complaint shows a gift to the city for a specific purpose, and no other, and, as the gift is to the city, and not to the library trustees, who might have been named by the donor, it would seem to follow that the city alone could carry out this specific object, namely, erect the building. The allegation that the gift "was by the said Andrew Carnegie declared and created for the public library of the said city of Hanford, and construction and building of a public library building in said city," is not sufficient to show that the money thus donated was made a part of the library fund over which a certain control is given to the library trustees. It will be noticed that the act provides for the disestablishment of the library created by the act upon the petition of one-fourth of the electors of the city. It is not to be presumed that Mr. Carnegie would make a donation the purpose of which could be thus easily thwarted. It is altogether probable that he made ample provision by the conditions of the gift to secure some sort of permanency to the library he was helping to create. The pleader fails to set forth any of the conditions of the gift further than that the money was to be used to erect a library building. As the donor intrusted the fund to the city alone, the city alone can execute the trust. When the city has provided a library building by the expenditure of this money, and has in other respects performed the conditions imposed, whatever they may be, it is probable that there will be nothing found in the terms of the donation to interfere with the library now in use, and as augmented by other books being placed under the management of the board of library trustees.

But, however this may be, we think the complaint fails to show sufficient facts to warrant the court in interfering with the city authorities in their effort to provide a public library building for the city of Hanford out of the Carnegie money given to the city for that purpose.

The judgment is affirmed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

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2 Cal. App. 752

Ex parte HORWITZ.

(Court of Appeal, First District, California. Jan. 27, 1906.)

1. Arrest in Civil Actions — Statutory Provisions—Applicability.

The right to arrest a defendant in a civil action is a part of the remedy accorded plaintiff by the law of the place where the suit is brought without regard to the domicile of the parties, the origin of the right, or place of the commission of the act relied on.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Arrest, § 6.]

2. Money Received—Pleading—Complaint—Sufficiency.

A complaint in the ordinary form of indebitatus assumpsit alleging an indebtedness of defendant to plaintiff in the sum of $6,260 for certain foreign coins delivered to defendant by plaintiff worth $6,260, which sum defendant undertook to pay on demand, states a cause of action, though it does not aver a demand, as the bringing of the action is a sufficient demand.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Money Received, § 36.]

3. Arrest in Civil Actions — Affidavit — Sufficiency.

An affidavit for the arrest of defendant averred that a copy of the verified complaint was annexed thereto and made a part thereof, that the cause of action therein set forth existed in favor of plaintiff against defendant and that the allegations contained therein were true. The copy of the complaint attached to the affidavit stated a cause of action in indebtitatus assumpsit. *Held*, that the affidavit stated a cause of action, within Code Civ. Proc. § 481, providing that before an order of arrest can be made it must appear by affidavit that a cause of action exists.

4. Same — Complaint — Failure to Allege Fraud Relied On—Effect.

Code Civ. Proc. § 479, subd. 4, provides that a defendant may be arrested when he has been guilty of fraud in contracting the debt or incurring the obligation sued on. Section 480, provides that an order for the arrest must be obtained from a judge of the court in which the action is brought. Section 481 provides that the order of arrest may be made when it appears by affidavit that a cause of action mentioned in section 479 exists. *Held*, that the jurisdiction to issue an order of arrest depends on the affidavit required by section 481, and such order is not void because the complaint does not charge the fraud relied on in the affidavit.

5. Same—Affidavit—Averments of Fraud—Sufficiency.

An affidavit for an order for the arrest of defendant in a civil action which avers that defendant in a foreign country presented to plaintiff a forged check, and obtained thereon foreign coin of the value of $6,260, and shortly afterwards took passage for the United States under an assumed name, is sufficient to authorize the court to issue an order for defendant's arrest, under Code Civ. Proc. § 479, subd. 4, providing that defendant may be arrested when he has been guilty of fraud.

Application by Ernest B. Horwitz for a writ of habeas corpus to obtain petitioner's discharge from custody. Petitioner remanded.

Wal. J. Tuska, for petitioner. Chas. P. Eells, for respondent.

HALL, J. Petitioner is in custody under an order of arrest issued in a civil action. The suit is pending in the superior court of the city and county of San Francisco, this state, but it appears from the affidavit upon which the order was made that the cause of action arose at Shanghai, China, and the fraudulent acts set up as warranting the arrest were committed there, and neither of the litigants are citizens or residents of the state of California. For these reasons it is contended that petitioner is not liable to arrest in a civil suit brought in this state.

This contention cannot be sustained. The right to arrest a defendant in a civil action is a part of the remedy accorded the plaintiff. "The form of remedies and the order of judicial proceedings are to be according to the law of the place where the action is instituted, without any regard to the domicile of the parties, the origin of the right, or the country of the act." Story on Conflict of Laws, § 558. Again the same author, in section 571, lays down the same rule with particular regard to the right of arrest. To the same effect are Claflin v. Frenkel, 29 Hun (N. Y.) 288; Brown v. Ashbrough, 40 How. Prac. (N. Y.) 226; City Bank v. Lumley, 28 How. Prac. (N. Y.) 397; Gosline v. Place, 32 Pa. 520. The only cases cited by petitioner in support of his contention—Blason v. Bruno, 33 Barb. (N. Y.) 520, 21 How. Prac. 112 (a decision by a single judge at chambers) —has since been overruled in Claflin v. Frenkel, supra. As appears by the copy of the complaint attached to the affidavit for the arrest of defendant, the complaint is in the ordinary form of indebitatus assumpsit, alleging an indebtedness of defendant to plaintiff in the sum of $6,260 for certain Chinese coins delivered to defendant by plaintiff of the value of $6,260, "which sum the defendant undertook and agreed to pay plaintiff at any time thereafter on demand." It is not alleged that any demand for payment has ever been made upon defendant, and for this reason it is urged that the affidavit does not show the existence of a cause of action, and that, therefore, the order of arrest is void (Code Civ. Proc. § 481). It is well established that a promissory note payable on demand is due at once, and no demand is necessary before suit, the suit itself being a sufficient demand. Ziel v. Dukes, 12 Cal. 482; Cousins v. Partridge, 79 Cal. 224, 21 Pac. 745; O'Neil v. Magner, 81 Cal. 633, 22 Pac. 876, 15 Am. St. Rep. 88; Jones v. Nicholl, 82 Cal. 32, 22 Pac. 878. In Halleck v. Moss, 22 Cal. 278, the same rule was held to apply to ordinary contracts for the payment of money when the action is brought against the principal debtor. The correctness of the rule laid down in Halleck v. Moss, supra, is recognized in Pierce v. Whiting, 63 Cal. 543, where it is held that a demand is necessary before suit where the action is against a surety. Mullally v Townsend, 119 Cal. 47, 50 Pac. 1066, cited by petitioner, was also an action against a surety. Under the rule laid down in Halleck v. Moss, supra, it was not necessary in this case to aver a demand, as the bringing of the action is a sufficient demand. It is urged that it does not appear from the affidavit that a cause of action exists, for the reason that the facts constituting the cause of action are not set out in the affidavit.

Before an order of arrest can be made it must appear by affidavit that a sufficient cause of action exists (Code Civ. Proc. § 481). In this regard the affidavit states, "that a copy of the verified complaint in this action filed today is hereto annexed and made a part of this affidavit; and that the cause of action therein set forth exists in favor of the plaintiff and against said defendant, and affiant avers that the allegations contained therein are true." A copy of the complaint was attached to the affidavit, stating a cause of action in indebitatus assumpsit. In McGilvery v. Morehead, 2 Cal. 607, it was said that it is insufficient to refer to the complaint to show what the affidavit ought itself to disclose, although it is positively averred that such complaint is true; but in this case a copy of the complaint was not attached to the affidavit; and as the statute then required, as it does now, that a copy of the affidavit, together with a copy of the order, should be served upon the defendant when arrested, the purpose of the law would not be complied with by a reference to a document on file simply in the clerk's office. In Ligare v. Cal. S. R. R. Co., 76 Cal. 610, 18 Pac. 777, it was held that an affidavit for the publication of summons could refer to a complaint and adopt its contents so as to make them a part of the affidavit. It is there said: "The affidavit could refer to any document on file, and adopt its contents. In such case the oath to the affidavit is an oath to the truth of the document referred to. The affidavit here did refer to the original complaint and adopt its contents, and this complaint stated a cause of action. *The fact that a cause of action existed, therefore, appeared from the affidavit.*" (The italics are ours.) If the fact that a cause of action existed appears from the affidavit in the case just cited, it equally so appears in the case now before us. A copy of a promissory note attached to a complaint and referred to in the body of the complaint was held to form a part of the complaint in Ward v. Clay, 82 Cal. 502, 23 Pac. 50, 227. The general language used in Mc-

Gilvery v. Morehead, supra, must be read in the light of the facts of that case, which were that no copy of the complaint was annexed to the affidavit. In that case neither the judge nor the defendant, by an examination of the affidavit, could determine whether or not a cause of action existed, or what facts were alleged as constituting the cause of action. Thus the object of the statute in requiring a copy of the affidavit to be served on the defendant when arrested was frustrated in that case.

But in the case at bar a copy of the complaint is annexed to the affidavit, and the affiant makes oath that the allegations contained therein are true. We think that this fully complies with the requirements of the law that it must appear from the affidavit that a cause of action exists. Whether or not the fact that the complaint filed in this action contains no charge that defendant was guilty of a fraud in contracting the debt, for which the action is brought, renders the order of arrest void presents the most serious question in this matter, and one about which, it must be confessed, different views may reasonably be entertained.

Section 479, Code Civ. Proc., provides in what cases the defendant may be arrested. The section is divided into four subdivisions, each subdivision specifying one or more classes of cases in which the defendant may be arrested. The right to arrest in this case is claimed under the provisions of subdivision 4, which is as follows: Section 479: "The defendant may be arrested as hereinafter prescribed, in the following cases: * * * (4) When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought; * * *" and, of course, the facts authorizing a proceeding for arrest must have existed at the time the complaint was filed. Within the provisions of the section, however, are many cases where the acts justifying the arrest may be committed after the action is commenced. Section 480, Code Civ. Proc., provides that "an order for the arrest of the defendant must be obtained from a judge of the court in which the action is brought." The following section (481) provides that "the order may be made whenever it appears to the judge, by the affidavit of the plaintiff or some other person, that a sufficient cause of action exists, and that the cause is one of those mentioned in section four hundred and seventy-nine. The affidavit must be either positive, or upon information and belief, and when upon information and belief it must state the facts upon which the information and belief are founded." Thus it is seen that the procedure for obtaining the order of arrest is the same whether the acts constituting the ground for arrest were committed before or after the action was commenced. In the latter case it is certain that the order may be issued on the affidavit, although the complaint does not aver any grounds for an arrest; and as no different rule is laid down where the fraudulent acts are committed before the complaint is filed it is difficult to see why the court should by construction enforce a different rule in the one case from the other. In either case before final judgment the court has jurisdiction to allow the issue of fraud to be presented by amendment or supplemental pleadings.

Although it has been determined in this state that no judgment of imprisonment can be rendered unless the issue of fraud is presented by the pleadings (Matoon v. Eder, 6 Cal. 58; Davis v. Robinson, 10 Cal. 411), it has never been held that the complaint must charge fraud before mesne process for arrest may be issued. The action in Matoon v. Eder was upon the bail bond given by the defendant, who had been arrested on mesne process in an action for debt where no fraud was alleged in the complaint. The affidavit which did set out the fraud was held to be sufficient to warrant the arrest, although it was held that the bail were discharged, as no final judgment of imprisonment was rendered. No point was made that the arrest was illegal because no charge of fraud was made in the complaint. In Davis v. Robinson, defendant was arrested on an order issued on an affidavit charging fraud although the complaint made no such charge. No point was made as to the regularity of the arrest on mesne process; but as the complaint charged no fraud, it was held that no judgment of imprisonment could be enforced. In New York, it has been determined that, prior to 1879, when the statute was so amended as to expressly require the complaint to charge the fraud in a case such as is now before us, it was not necessary to charge the fraud in the complaint in order to arrest defendant on mesne process. Humphrey v. Hayes, 94 N. Y. 594; Bowery National Bank v. Duryee, 74 N. Y. 491; Sloane v. Livermore, 14 Hun, 29; Taylor v. Faas, 14 Hun, 166. In Baxter v. Drake, 85 N. Y. 502, an appeal had been taken from an order denying a motion to vacate an order of arrest made in an action on a judgment obtained in a foreign state. The order of arrest had been issued on an affidavit that set out fraud in the matter for which the judgment had been obtained. It was held the arrest was lawful. In Taylor v. Faas, supra, it is held that in an action upon contract, it is not necessary to authorize the court to grant an order of arrest on account of fraud in the contracting thereof, that the facts upon which such order is granted should be stated in the complaint.

The provisions of our Code on the subject of arrest upon mesne process are quite similar to the New York statute under which the decisions above cited were rendered. We are of the opinion that the jurisdiction to issue an order of arrest depends upon the affidavit required by section 481, Code Civ. Proc., and such order is not void because the complaint does not charge the fraud relied on in the affidavit. We think that it sufficiently appears from the affidavit that the petitioner was guilty of fraud in incurring the obligation sued on. While the matters tending to show fraud are stated on information and belief the source of the information is stated as the law requires.

It fairly appears from what is stated in the affidavit that defendant, on or about November 11, 1905, presented a forged check to plaintiff at Shanghai, and obtained thereon 9,780.50 taels of the value of $6,260, and shortly afterwards took passage under an assumed name for America. These facts certainly justify the conclusion that the money was fraudulently obtained.

The petitioner is remanded.

We concur: HARRISON, P. J.; COOPER, J.

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2 Cal. App. 737

BERNARD v. SLOAN et al.

(Court of Appeal, First District, California. Jan. 26, 1906. Rehearing Denied Feb. 24, 1906. Denied by Supreme Court March 27, 1906.)

1. SALES—CONTRACTS—ELECTION TO RESCIND.
Where, as part of a contract for the sale of onion seed, it was agreed that the contract should be void if the seller found that identical contracts did not exist between the buyer and certain others, such provision was for the sole benefit of the seller and a breach thereof only rendered the contract void at the seller's election.

2. SAME—BREACH—WAIVER.
Where, after sellers ascertained the breach of a covenant in the contract authorizing rescission, they treated the contract as a vital obligation, accepted the buyer's orders, and acted as though the contract was still in force, they thereby waived their right to rescind the contract.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 267.]

3. SAME—SUBSTANTIAL PERFORMANCE.
Where a contract for the sale of onion seed contained a provision that if the seller found that identical contracts did not exist between the buyer and certain other growers, the contract should become void, the existence of contracts with such other growers "substantially" identical with the contract in question, constituted a compliance with such provision.

4. SAME—FINDINGS—EVIDENCE.
In an action on a contract for the sale of onion seed, evidence *held* to sustain a finding that certain other contracts referred to were identical in all matters of substance with the contract in question, as required by a provision authorizing the seller to terminate the contract if he found that identical contracts did not exist between the buyer and certain other seed growers.

5. PLEADING — ANSWER — INCORPORATION OF PARAGRAPHS BY REFERENCE.
While it is essential that each defense alleged in the answer shall be complete in itself, other paragraphs of the answer may be incorporated in each defense by reference which will have the same effect as though such paragraph were repeated in the defense containing such reference.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 193.]

6. SALES — VALIDITY — PUBLIC POLICY — PLEADING.
Where, in an action on a contract for the sale of onion seed, defendants claimed that the contract was void as tending to create a monopoly in the sale of such seed, and that plaintiff devised a "scheme" for the purpose of accomplishing such results, and that certain seed growers having under their control the greater portion of the seed which was raised in the Santa Clara valley, "entered into said scheme," and for the purpose of enabling plaintiff to accomplish such purposes, "made contracts," with him by which he was given control of all of their seed and of the price thereof, but neither the scheme nor the contracts by which it was alleged to have been carried out by the parties thereto, was alleged, such plea was insufficient to raise the defense that the contract was void as against public policy.

7. REFERENCE—FINDINGS OF FACT—SPECIAL VERDICT.
A finding of fact reported by a referee is equivalent to a special verdict as provided by Code Civ. Proc. § 645.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Reference, §§ 153, 154.]

Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by Milton Bernard against David L. Sloan and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

See 72 Pac. 360.

Joseph Hutchinson, for appellants. C. D. Wright, for respondent.

HARRISON, P. J. Action to recover money from the defendants under a contract executed by them.

In January, 1898, the defendants entered into a contract with the Braslan Seed Growers' Company of Chicago, by which they appointed the latter their selling agents for certain varieties of onion seed of the growth of the years 1896 and 1897. The Braslan Seed Growers' Company was a partnership, of which Charles P. Braslan was a member and the one who conducted the negotiations with the defendant and others, and gave his attention to the matter of the contract. Prior to the commencement of the present action the partnership assigned the contract and its interest therein to the plaintiff, but for convenience the name of Braslan is used herein as the equivalent of the partnership or of the plaintiff. The contract enumerated several different species or descriptions of seed, and opposite each kind was placed a cost price, together with an estimated amount of the seed covered by the contract, and also a selling price therefor. By its terms Braslan was to use his best endeavors to sell the seed at the earliest opportunity, and at as high a price as possible. For that purpose he was to place men on the road for the purpose of soliciting jobbers throughout the country, and all the expense thereof and other expenses incidental to selling the seed were to be borne by him. Both parties to the contract were to agree upon the prices to be quoted to dealers, and they were to keep each other posted as to prevailing conditions. The sales made by Braslan were to be reported to the defendants, who were then to ship the seeds and afterwards receive the money therefor. The defendants agreed to give Braslan, as a commission on all sales made by him which they should accept, 50 per cent. of the profits shown on the sales, above the cost price placed against the respective kinds of seeds. This commission was to be paid from time to time as the defendants should receive payments from the shipments made to the various purchasers. The contract also provided that the defendants might themselves make sales of said seed with the same effect as if made by Braslan, and that any profits arising therefrom should inure to his benefit the same as if the sale had been made by him. Other provisions not necessary to be here recited were also contained therein. The contract bears date January 5, 1898, but it was in fact executed January 7th. After it had been signed, Braslan, at the same interview and at the instance of the defendants, wrote out in the form of a letter to them and signed the following, viz.: "Palo Alto, Cal., Jan. 7, 1898. D. L. Sloan & Son: Gents: It is understood and agreed by us that the contract entered into with you this day will become void if you find that identical contracts does not exist between us and the following: Agnew Bros., Charles Parker, Peter Schwall (with Trumbull & Beebe and us), Trumbull & Beebe, Frances Gallimore, W. H. Metson. Yours truly, Braslan Seed Growers' Co. per Charles P. Braslan." (For matter of convenience the contract above referred to is hereinafter designated as "Exhibit A," and the above letter as "Exhibit B.") The court found in effect that these two instruments were parts of the same transaction and together constituted the contract between Braslan and the defendants.

All the seed covered by the contract having been sold, the present action was commenced in July, 1900, to recover from the defendants the amount which Braslan was entitled to receive by virtue of the provisions of the contract, the form of the action being for money had and received to his use. To this complaint the defendants in their answer presented several distinct and separate defenses, their first defense being a denial of all the allegations in the complaint. In their second defense they set forth the aforesaid Exhibits A and B, alleging that the parties named in Exhibit B were growers of onion seed, and had, prior to January 7, 1898, entered into contracts with Braslan for the sale of said seed; that these contracts were not identical with the one entered into by them with Braslan; that at the time of the execution of their contract, viz.: January 7, 1898, or at any other time, contracts identical with Exhibit A did not exist between Braslan and the parties named in Exhibit B or any of them, and that subsequent to said 7th day of January they discovered this fact; that the claim for which this action is brought is for moneys claimed to have been received by them under the terms of said Exhibit A and not otherwise. Their next defense is based upon a false representation made to them by Braslan as an inducement for them to enter into the contract, in which he claimed that identical contracts then existed between him and the parties named in Exhibit B. During the trial the answer was amended by adding another special defense, in which the defendants, after alleging the facts set forth in this defense, added the allegation that upon discovering that such identical contracts did not exist they thereupon, and for that reason, elected to and did declare said contract void, and notified Braslan to that effect. Their fourth defense is based upon other false representations claimed to have been made to them by Braslan, to the effect that he had a financial backing of $3,000,000 by the International Trust Company of Boston. Their fifth defense is that Braslan himself violated the contract by selling seed at less than the minimum price agreed upon. Other defenses made by them are that the contract between them and Braslan was against public policy, and therefore void.

At the trial the order of proof was varied from the usual form, and before any evidence was offered on behalf of the plaintiff the validity of the contract set up by the defendants was submitted to the court for its decision, for the reason that if the court should hold that this contract was invalid there would be no occasion for an accounting. Inasmuch as in each of the above defenses there was included a denial of all the allegations of the complaint, there was no opportunity for a demurrer to the answer or to either of the several defenses therein; and when, after proving the execution of Exhibits A and B, the defendants offered the same in evidence the plaintiff objected thereto on the ground that they were irrelevant and immaterial; that the answer does not set forth any defense to the plaintiff's claim, and therefore no testimony in support of its allegations is admissible. Upon the suggestion of the court, the sufficiency of this objection was thereupon directed to the special defenses in the form of a demurrer ore tenus, and, after considering the argument thereon, the court held that Exhibits A and B were admissible in evidence as parts of the same contract; that proof that Braslan did not have identical contracts with the parties named in Exhibit B would defeat the plaintiff's right of action; that proof of the alleged false representations as to the financial backing of Braslan would be an available defense to the action; that the defense of false representations as to identical contracts was defective in not alleging that the defendants were prevented from ascertaining that the representations were false; that the defense that the contract was against public policy was insufficiently pleaded.

The trial of the cause was then proceeded with, and at its close the court held: That, by virtue of the provisions of Exhibit B, the parties had agreed that Exhibit A should become voidable if defendants should find that contracts identical with Exhibit A did not at the date thereof, viz., January 7, 1898, exist between Braslan and the parties named in Exhibit B. That defendants could at any day thereafter have ascertained by inquiry from said parties whether such contracts did exist. That they did not make any such inquiry until more than three months thereafter, and that that was an unreasonable delay therein. That contracts substantially identical with Exhibit A did at that date exist between Braslan and said parties. That the defendants did not at any time notify Braslan that they elected or desired to terminate or rescind their contract with him, or treat the same as void or voidable, on the ground that such identical contracts did not exist. That the defendants did not at any time cancel said contract or the employment of Braslan thereunder. That the only notice relating to any rescission or repudiation of said contract, or of any desire to avoid or terminate the same, was a letter addressed to Braslan from New York, bearing date June 6, 1898, as follows: "Mr. Charles P. Braslan—Dear Sir: We have had doubts about the representations that were made in connection with the association you claim to be manager of, and, since coming east, those doubts have been more than confirmed, in consequence of which we deem it best to handle our own seed. Yours truly, D. L. Sloan & Son." That Braslan did not represent to the defendants that his firm was financially backed in the sum of $3,000,000 or any other sum, by the International Trust Company of Boston. That the defendants did not ascertain that any representation made by him was false or untrue. That all the statements and representations made to them by him affecting, or that could affect, the contract (Exhibit A and B), or the performance thereof, or the interest of the defendants thereunder, were true. That Braslan did not at any time violate the terms of his contract with the defendants. That under the provisions of the said contract with Braslan the defendants had received to his use the sum of $1,651.28, of which no part had been paid. Judgment accordingly was thereupon rendered, a motion for a new trial was denied, and from that order and judgment the defendants have taken the present appeal.

The finding of the court upon the issues of fraudulent or false representations by Braslan as to his financial backing were made upon a direct conflict between the testimony of Sloan and Braslan, in which the court accepted the testimony of the latter as correct. Upon well established principles, this finding is conclusive of the fact. There is no evidence in the record that Braslan had violated any of the terms of his contract with the defendants, and this finding is not open to review. The argument in behalf of the appellants is chiefly directed against the finding of the court that the provisions of Exhibit B were satisfied if the contracts of Braslan with the several parties named therein were "substantially" identical with his contract with them; and they contend that, under the provisions therein that if those contracts were not identical their contract with Braslan should become void, any variance therein defeated the plaintiff's right of recovery.

This provision is to be interpreted in view of the evident purpose of the parties in entering into the contract and the object of incorporating the provision therein. The object of the contract, as shown by its terms, was to effect a sale of the onion seed of the defendants upon terms that would be advantageous to both parties; and the provision regarding contracts between Braslan and other seed growers was shown to have been inserted at the instance of the defendants, and may reasonably be assumed to have been for the purpose of placing them upon as favorable a footing as the others in the disposition of their seed. It is not to be assumed that it was their intention that Braslan might treat the contract as void against their will, upon his merely showing that his contracts with the others were not identical with that with them; or that they should not be at liberty to enforce their contract against him if they should so desire, notwithstanding any variance between it and the other contracts. This provision would not have the effect to make the contract void in the extreme sense or ipso facto void by reason of such want of identity, but merely voidable at the election of the defendants. The language of the provision, viz.: "The contract entered into with you this day will become void if you find that identical contracts do not exist" indicates that this was the intention of the parties, and that they contemplated not only a future investigation in reference thereto by the defendants, but also that, until the defendants should find upon such investigation that the other contracts were not identical with theirs, the contract between them and Braslan would not be affected. But, as above stated, the mere ascertainment of such want of identity would not vitiate their contract or render its provisions null. The provision having been inserted for their benefit, its observance could be waived by them, and they still be at liberty to insist upon the performance of the contract on the part of Braslan. The contract being, therefore, voidable on this ground, only at their election, it was incumbent upon them, as soon as they ascertained the facts upon which they could exercise such election. to determine whether they would abide by its terms or treat it as null; and, if they should elect the latter course, immediately thereon notify Braslan of such election; otherwise he would have the right to proceed with it according to its terms. Upon the ascertainment of facts showing that the consideration on which they had entered into the contract, or any part thereof, had failed they could elect to rescind the contract; and, under the rules governing rescission, such election and notice thereof should be given promptly (Civ. Code, § 1691). Instead of doing so, no notice of their election to rescind the contract on this ground was ever given by them. Mr. Sloan testified that he had an interview with Mr. Wright in April, 1898, in which he was informed by him that the contract of Braslan with Schwall was entirely different from the one held by the defendants, and that upon that interview he determined to rescind his contract with Braslan; that from that time he felt at liberty to repudiate the contract at any time; and that he was not under any obligation or bound by it. He did not, however, manifest his election or claim to have given any notice thereof prior to June 6, 1898, when he wrote the above letter to Braslan, and in this letter he made no reference to this ground for a rescission. Meanwhile he had visited Braslan in Chicago; conferred with him in reference to the contract, accepted from him orders for the sale of the seed to various purchasers, and in other respects acted with him upon the theory that the contract was still in force. By thus treating the contract as a vital obligation and acting under its provisions he waived all right to rescind it upon the ground of having discovered that the contracts were not identical. The finding of the court that the other contracts of Braslan were substantially identical with that of the defendants, is equivalent to a finding that they were identical in all matters of substance. The meaning of the word "identical" as here used is to be determined by the context and by the apparent purpose for which it is used. Manifestly it was not the intention of the parties that those other contracts should be identical in date, or in the names of the parties, or in the amount or description of the seed contracted for, but identical merely in matters pertaining to the purpose of the contract and in the terms upon which it was entered into.

It is contended, however, by the defendants that this finding is not sustained by the evidence. In considering this exception to the finding it must be born in mind that the defense to the plaintiff's right of action here relied upon—the right to repudiate their contract upon the ground set forth in this portion of their answer—is a matter to be affirmatively shown by the defendants; that it is in the nature of a forfeiture, and that it was incumbent upon them to establish, by evidence clear and satisfactory to the court, that the contracts of Braslan with the other parties varied from that with them in some material and substantial respect. The contracts with Parker, Gallimore, Metson, Agnew, and the defendants were in evidence before the court, and in all substantial respects are identical. The character of the others was shown by secondary evidence. Mr. Braslan testified that they were all identical; that their form was first dictated to a stenographer and that the several contracts were then typewritten from his notes. From the appearance of those in the record it is evident that blank spaces were left in the form for the names of the parties, the date of execution and the amount and description of seed to be covered by the several instruments. The contract with Schwall related to seed of the growth of 1897 only. Mr. Schwall testified that it was executed at the Baldwin Hotel in January, 1898; that Mr. Braslan and Mr. Wright, his attorney, were present; that he left the management of the transaction to his attorney; that he [Mr.Wright] handed the contract to him and said that it was correct; that he depended upon his attorney and signed it; that he did not read it and did not remember its terms; that he gave it to Mr. Wright after he had signed it and had not seen it since. He was shown the contract with the defendants, and after saying, "I don't know the contents of the contract we had," was asked if he ever entered into a contract with Braslan on similar terms, and replied, "I don't remember that I have." The defendant D. L. Sloan testified that in April, 1898, at the direction of Mr. Schwall, he called upon Mr. Wright for the purpose of seeing the contract; that he did not know whether he had his own contract with him at that time, and could not say whether he showed it to Mr. Wright; that he was told by Mr. Wright that the contract with Schwall had been mislaid and that it was not like his contract at all and that in Schwall's contract Braslan had only an option. This testimony of what Wright told him was merely hearsay, and not entitled to any consideration in determining the character of the Schwall contract. Mr. Wright, however, testified that he never made any such statement to Sloan. The fact that Mr. Braslan did not remember that a contract was made by him with Schwall, or thought that the contract with Schwall was the same as that with Trumbull & Beebe, did not overcome the positive testimony of both Schwall and Wright that such contract was made. Mr. Beebe, of the firm of Trumbull & Beebe, was called as a witness on behalf of the defendants, and testified that the contract with Trumbull & Beebe related to the seed of the growth of 1896 only, but he was unable to say whether it was like the contract of the defendants; and there was no evidence that it differed therefrom in any respect. "Agnew Bros." consisted of J. B. Agnew and H. C. Agnew. They were not associated in business in 1898, but each of them was engaged in growing onion seed for his own account in

Santa Clara county. At that time J. B. Agnew had sold all of the seed that he had grown and had no seed for sale, and made no contract on his own account with Braslan. He met Braslan at the Baldwin Hotel in San Francisco, and negotiated with him, in behalf of his brother, H. C. Agnew, in reference to the sale of his brother's onion seed. As the result of this negotiation a contract bearing date January 4, 1898, was prepared for execution by H. C. Agnew, and was taken to San Jose by J. B. Agnew to be executed by his brother, and in a few days was returned to Braslan with an interlineation made by or at the instance of H. C. Agnew. This contract was introduced in evidence, and, except in the description and quantity of seed, is identical with that of the defendants. The lettuce seed therein contracted for is not of the same description as that contracted for by the defendants. It contains, however, a clause providing that it shall terminate August 1, 1898, or whenever the seed therein named should be sold if sold before that date. With reference to this clause, Mr. Braslan testified that it was inserted after it had been taken from him and before it was returned, and that in the meantime the contract with the defendants had been executed. There was no evidence that this change in the instrument was assented to by Braslan, and in the absence of clear testimony to that effect the court was at liberty to find that he had not so assented. The fact that the contract was entered into with H. C. Agnew instead of Agnew Bros. was insufficient to prevent it from being identical with the contract of the defendants in all matters of substance. It was as efficient for all the purposes of the defendants as if it had been made with both of the Agnews. J. B. Agnew had no seed; and if the contract had been executed by both of them it would not have changed its subject-matter or character, or embraced any seed other than that described therein, or affected the result which the defendants sought to obtain by means of their contract with Braslan. None of the contracts purport to cover all of the seed held by the parties thereto; and it was shown that H. C. Agnew and Trumbull & Beebe had other seed than that covered by their contracts. Whether the defendants had other seed than that covered by their contract is uncertain; the defendant J. E. Sloan having testified at one time during the trial that they did, and at another time that they did not. It must be held, therefore, that the foregoing finding of the court was sustained by the evidence, and that the defendants failed to establish their defense to the plaintiff's cause of action upon the ground herein discussed.

The claim of the defendants that their contract with Braslan is illegal, by reason of being in restraint of trade and against public policy, is not pleaded in their answer in such a mode as to present such defense. Parties are allowed great latitude and freedom of action in making contracts with each other, and no presumption can be indulged that a contract which has no illegal semblance in its terms is violative of any law. Especially must a party who would upon this ground repudiate a contract into which he has entered, and which has been fully executed by the other party, make his right to such defense manifest, not only by alleging the facts constituting its illegality, but also, if its terms do not disclose its illegality, by negativing the existence of any facts or circumstances under which the contract could be held valid. In the present case this defense is set forth in the answer in four forms, each of which is pleaded as a defense to the complaint separate and distinct from all the others. It is therefore essential that each shall be complete in itself, and, either by direct allegations therein, or by proper reference to other portions of the answer, set forth facts sufficient to show such defense. The reference by the defendants to certain paragraphs in other portions of their answer has the same effect as if those paragraphs had been repeated in each of these defenses, and the sufficiency of each of the defenses is to be measured as if so repeated and set forth therein. In those portions of the answer, which are thus incorporated by reference, the defendants allege that in January, 1898, they and certain other parties (naming them) were engaged in raising onion seed in the Santa Clara valley and elsewhere in the state of California and in the United States, and had on hand the greater portion of such seed of the crops of 1896 and 1897; that such seed raised in the Santa Clara valley is of a peculiar quality, and in great demand by the farmers of California and elsewhere in the United States, and cannot be obtained of the same quality elsewhere, and that the farmers then depended upon the seed so raised for the supply of seeds of the growth of those years; that at the time Braslan devised a scheme to control the sale and purchase of all of said onion seed for the purpose of increasing the price thereof and of limiting the number of dealers from whom such seed could be obtained, and compelling said farmers to purchase said seed from him or only at prices controlled by him; that said seed growers (naming them) other than the defendants entered into said scheme, and in pursuance thereof, and for the purpose of enabling Braslan to accomplish the objects above set forth, made contracts with him, under and by which he was given control of all their product of onion seed of the growth of 1896 and 1897 and of the prices thereof. The further averments in support of this defense to the plaintiff's cause of action are set forth in four separate forms; but without considering each of these forms as disconnected with the others, and combining their several allegations as if pleaded in the same defense, it is alleged, in addition to the matters incorporated by reference, that the purpose of "said scheme" and the sole and only purpose and consideration on the part of Braslan in obtaining from the defendants "said contract" was to form a combination as aforesaid so as to enable him to control said onion seed, and secure for him exclusive control thereof, remove all competition among the owners thereof, prevent competition in the sale thereof, fix and raise prices therefor, and compel parties who might require said seed to purchase the same from him, or at prices controlled and fixed by him, and to pay therefor such prices as he might demand and such as would be in excess of their real value; that "said contract" is an agreement restraining trade, and is unlawful and void; that "said contract" is against public policy and is illegal and void in this, viz., that the only purpose and consideration therefor on the part of Braslan was to form a combination among the said seed growers for the purpose of limiting the amount of seed put into the market, controlling the prices thereof, and raising the price to a figure unnaturally high, and giving to him control of the same.

The defendants have thus alleged that Braslan "devised a scheme" for the purpose of accomplishing certain results claimed to be contrary to public policy; but they have not set forth the terms or character of the scheme, from which the court could determine that such results would follow from its adoption, and have only asked the court to accept their opinion of its effect as the basis of its judgment. They have also alleged that certain seed growers, who had under their control the greater portion of the seed which was raised in the Santa Clara valley, "entered into said scheme," and, for the purpose of enabling Braslan to accomplish said purposes, "made contracts" with him, by which he was given all control of their seed "and of the price thereof"; but they have not set forth these contracts, or alleged their character, or stated any fact in reference thereto from which the court could determine whether said contracts or either of them were unlawful. For all that appears from their allegations their contracts with Braslan may have been for the direct sale of their seed to him. It would violate no rule of law for him to purchase from the different owners thereof all of their seed; and after such purchase he would be entitled to sell as much or little of it as he chose, and at such price as he might fix. There is, moreover, no allegation in this defense, either directly or by way of reference, that the defendants entered into any contract with Braslan, or were in any way connected with the scheme devised by him. They have alleged that the only purpose on the part of Braslan "in obtaining from defendants said contract" was to form a combination to control the seed and to prevent competition in the sale thereof; but the contract thus referred to is not set forth, nor do they allege that Braslan obtained any contract from them. Unless it be alleged that the defendants entered into a contract with Braslan, and the terms of such contract are set forth, the court could not determine whether any contract between them was lawful or unlawful or against public policy, and the scheme or purpose of Braslan in entering into contracts with others became immaterial.

Upon the consent of the parties, the court appointed a referee "to examine the books of account of the defendants, and take such other testimony, oral or documentary, as may be offered by the parties thereto, and report such testimony to the court, together with his findings of fact therefrom as to the state of account between plaintiff and defendants"; and in pursuance thereof the referee made his report to the court in accordance with the directions given him. Upon the coming in of this report the defendants made certain objections thereto, and the court thereupon sent it back to the referee with directions to take further testimony. Upon the coming in of his second report the defendants renewed their objections and made others some of which were allowed, and others overruled, by the court. It is now urged that the court erred in thus overruling the objections made by the defendants. The finding of facts reported by the referee was equivalent to a special verdict (Code Civ. Proc. § 645) or the findings of fact made by the court upon its trial of a cause; and a review of his decision upon a question of fact is subject to the same rules as is the action of a jury in a special verdict, or of a court upon its finding of facts. The weight of evidence, the resolution of any conflict in the evidence, the credibility of the witnesses, the character of their testimony, are matters upon which he is required to exercise his judgment, and wherein his judgment will be accepted by the court as correct, unless clearly shown to be erroneous. In the present case the referee was called upon to examine the books of account kept by the defendants, including the completeness of the entries therein and the manner in which they had been kept. From this examination he ascertained the amount of the commissions to which plaintiff was entitled as disclosed thereby. Oral testimony was also given by the defendant J. E. Sloan, consisting chiefly of his recollection of transactions that had taken place four years before, or of some inference or conjecture therefrom. The referee states in his report that "this testimony is not based upon any written evidence or record, either in the books, or outside of them, and is admitted to be solely a matter of memory." In considering it (which was manifestly given for the purpose of showing that the books were imperfect and incomplete and did not contain full entries of the several transactions) the referee had an opportunity to observe his manner of testifying, the clearness or hesitancy with which he was able to exercise his memory, and to determine whether he was entitled to credit or should be disbelieved. The contradictory statements of the witness above referred to respecting the amount of seed covered by their contract indicated that his memory was not at all times infallible. After hearing the testimony, and giving it due consideration, the referee reported to the court that in his opinion it was of insufficient weight to change the findings which he had first made. The court, after argument upon the exceptions to these findings, at which it must be assumed that the referee, in accordance with his directions, had reported all the testimony taken by him, and after due consideration by it of the evidence in their support, declined to set aside his findings of fact; and we cannot say that the appellants have shown that in so doing the court committed error.

The judgment and order are affirmed.

We concur: COOPER, J.; HALL, J.

2 Cal. App. 733

DAVIDSON v. BALDWIN, County Superintendent of Schools of San Diego County.

(Court of Appeal, Second District, California. Jan. 25, 1906.)

1. SCHOOLS AND SCHOOL DISTRICTS — OFFICERS—CITY SUPERINTENDENT.

The municipal corporation act confers on cities the power to employ a superintendent of schools, which power has in effect been affirmed in Pol. Code, §§ 1533, 1550, 1560, 1616, 1617, 1714, 1788, 1858, 1874, and St. 1903, p. 388, c. 270, §§ 3, 5, 8.

2. JUDGMENT — RES JUDICATA — MATTER INVOLVED IN DECISION.

The opinion that Pol. Code, § 1793, as amended in 1891, authorizes the board of education of a city to elect a city superintendent of schools, rendered in a suit wherein the city was plaintiff and the county treasurer defendant, and the county and state represented by the district attorney, is res judicata in a subsequent suit by the city superintendent to compel the county superintendent to draw a requisition on the county auditor against the special school fund in favor of the city superintendent as salary due him.

3. SCHOOLS AND SCHOOL DISTRICTS — CITY SUPERINTENDENT—ELECTION.

St. 1905, p. 918, c. 11, amending the city charter of San Diego, by providing generally for the school system of the city, and for the constitution of a board of education, in which "the government" of the school district shall be vested, authorizes the school board to elect a city superintendent of schools, whose salary may be fixed as authorized by Pol. Code, § 1793.

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Application for a writ of mandate by F. P. Davidson against Hugh J. Baldwin, as county superintendent of schools of San Diego County. From a judgment for plaintiff, defendant appeals. Affirmed.

Cassius Carter, Dist. Atty., and Albert Schoonover, Deputy Dist. Atty., for appellant. Stearns & Sweet, for respondent.

SMITH, J. Application in the court below for a writ of mandate to the county superintendent of schools requiring him to draw a requisition on the county auditor against the special school fund in favor of the plaintiff for the sum of $166.66, claimed by the plaintiff as salary due him for the month of June, 1905. The plaintiff had judgment, and the defendant appeals.

The case is this: By the charter of the city of San Diego, adopted under the constitutional provision in 1889, the board of education was authorized by subdivision 2 of article 7 "to appoint and employ a superintendent of schools," etc. (St. 1889, pp. 643, 712, 713, c. 20), and under this provision the plaintiff was elected as such on the 5th day of May, 1902, for the term of four years, at which time the salary of the office had been fixed at $2,000 a year. But by an amendment to the charter February 3, 1905, article 7 was amended so as to contain three sections only—the first providing generally for the school system of the city; the second for the constitution of a board of education, in which "the government of the San Diego school district shall be vested"; and the third as follows: "The duties and powers of the board of education shall be such as are now or may hereafter be enjoined and conferred on boards of education in city and school districts by the laws of the state of California." St. 1905, p. 918, c. 11. It is recited in the findings and judgment that it was agreed by the counsel in open court "that the only issue in the case is as to the effect" of the resolution of the board of May 5, 1902, by which the plaintiff was originally elected superintendent, as to which it is found by the court, in effect, that the plaintiff was by the resolution duly elected superintendent, and that he has ever since been and is such. It is now urged by the appellant's counsel (1) that there was no statutory authority for the original election; (2) that, if the power to elect given to the board of education by the original charter was valid, the plaintiff's election could not survive the repeal of the provision giving that power; and (3) that, in the absence of statutory provisions vesting the power of election in the board, there was no such implied power. The questions thus raised will be considered in the order stated.

1. As to the first, the position of the respondent is that the power of the board to elect a school superintendent was conferred by the provisions of section 1793 of the Political Code; and, indeed, both parties, in effect, assume that the provision of the original charter, conferring upon the board of education the "sole power * * * to appoint and employ a superintendent of schools," was invalid or nugatory. But similar powers are conferred by the municipal corporation act, and by charters under the Constitution; and powers thus conferred have now been in common use for over 20 years, and have been constantly referred to, and in effect

affirmed, in numerous statutory provisions. Pol. Code, §§ 1616, 1617, 1533, 1550, 1560, 1714, 1788 et seq., 1858, subd. 5, 1874; St. 1903, p. 388, c. 270, §§ 3, 5, 8. Nor, unless it be in the case of San Diego v. Dauer, 97 Cal. 444, 32 Pac. 561, to be considered presently, has the validity of these powers ever been questioned.

2. As to the second point, if it be assumed that the authority of the board of education to elect a superintendent rested exclusively upon the provision of the charter, it would seem to follow that the plaintiff's term of office terminated with the repeal of the charter provision. But on this point the position of the respondent is that the power of election was conferred by the provisions of section 1793 of the Political Code, and hence continued to exist after the repeal. It also appears from the record that after the amendment took effect the plaintiff, by a resolution of date May 1, 1905, was recognized by the board of education as superintendent of schools, and directed and authorized to perform the duties of that office, which was, in effect, a reappointment or reelection; and it is claimed by the respondent that the board was authorized to pass this resolution by the provisions of the section cited. In support of this contention the decision in San Diego v. Dauer, supra, is cited as a conclusive authority; and this contention seems to be supported by the language of the decision, which is that the section cited, as amended in 1891, "authorizes the board of education of a city to elect a city superintendent of schools, and also to fix the salary of its employees." It was, indeed, immaterial to the case whether the validity of the superintendent's election by the board of education rested upon the charter provision, or that of section 1793 of the Political Code. But the question seems to have been considered by the court, and from what is said in the opinion it must be inferred that it was the opinion of court that upon the principles announced in the case, and in Kennedy v. Miller, 97 Cal. 429, 32 Pac. 558, the charter provision was nugatory; for otherwise there would have been no necessity for the reference to the Code provision. The opinion cited must, therefore, be regarded as giving the ground of the decision of the court, and it therefore cannot be treated as not involved in the decision. But in the present case it will be unnecessary to pass upon the general question of the construction of section 1793. The judgment of a competent court has effect, not only as a precedent for other cases, but also as an adjudication of the matter in controversy between the parties, and it remains to consider what effect is to be given to it in this aspect. Here the city of San Diego was itself the plaintiff and the defendant was the treasurer, and as such the authorized agent of the county and of the state; and, in fact, the county and also the state was represented by the district attorney, whose duty it was, under the laws of the state, to represent them. We are of the opinion, therefore, that the judgment must be regarded as conclusive upon the real parties to the suit, and as res judicata of the question now involved. The parties here are but the agents of the city and of the county and state, and are therefore equally bound by the judgment. Code Civ. Proc. § 1908; Loftis v. Marshall, 134 Cal. 394, 66 Pac. 571, 86 Am. St. Rep. 286; 1 Greenleaf on Ev. § 523; Freeman on Judg. §§ 249, 352. And for discussion of the principle, see Sheehan v. Osborne (Cal.) 69 Pac. 842.

3. We are of the opinion, also, if there be any doubt as to the last proposition, and the board was not otherwise authorized to appoint a superintendent, that the power, and, when the necessity occurs (of which it is the judge), the duty to make such appointment is conferred or imposed upon the board, as necessarily implied in "the government of the school district," with which it is expressly invested; and, such being the case, the power of fixing the salary of the superintendent is conferred upon the board by the provision of section 1793 of the Political Code.

The judgment appealed from must therefore be affirmed, and it is so ordered.

I concur: ALLEN, J.

GRAY, P. J. I concur in the foregoing opinion on the third and last ground stated therein. I am also of opinion that the case of San Diego v. Dauer places the proper construction upon section 1793 of the Political Code, and upon the authority of that case, also, I concur on the judgment.

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2 Cal. App. 720

MERCED FALLS GAS & ELECTRIC CO. v. TURNER et al.

(Court of Appeal, Third District, California. Jan. 24, 1906.)

1. MUNICIPAL CORPORATIONS — GRANT OF RIGHTS IN STREETS—EXTENT OF RIGHTS ACQUIRED.

Where a gas and electric company had been granted a franchise to construct and maintain its poles in the streets of a city, the original location of the poles by the city's permission created no absolute indefeasible right or irrevocable license to maintain each pole at its particular location for all time.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1482–1485; vol. 45, Cent. Dig. Telegraphs and Telephones, § 6.]

2. SAME — PRESCRIPTIVE RIGHT — PUBLIC PROPERTY.

Mere lapse of time is insufficient to create a prescriptive right in a gas and electric company to maintain its poles in city streets in the identical spot in which they were located.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1482–1485, 1490.]

3. Injunction—Bill—Irreparable Injury.

The mere allegation of irreparable injury is insufficient in actions for an injunction.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 232.]

4. Municipal Corporations — Grant of Rights in Streets—Electric Polls—Location—Removal.

Political Code. §§ 4354, 4408, 4410, 4411, 4413, under which the city of M. is incorporated, vests in the city's board of trustees full power to establish, alter, open, improve and repair streets, remove obstructions therefrom, and generally manage and control the same. Const. art. 11 gives every city power to make and enforce within its limits all local, sanitary, police and other regulations not in conflict with general laws, and the fundamental law of the state also declares that franchises to use the streets shall be exercised under the direction of the superintendent of streets or other officer in control thereof. *Held*, that where complainant erected certain electric light poles in the streets of a city, it acquired no exclusive right to maintain the same in their original positions, and could not restrain the city from removing them to new locations.

[Ed. Note.—For cases in point. see vol. 36, Cent. Dig. Municipal Corporations, §§ 1482–1485, 1490.]

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Suit by the Merced Falls Gas & Electric Company against W. H. Turner and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Morrison & Cope and Frank H. Farrar, for appellant. F. W. Henderson, for respondents.

McLAUGHLIN, J. Action for an injunction restraining the board of trustees and superintendent of the streets of the city of Merced from changing the position of certain electric light poles on M street in said city. The city has never owned or controlled public works for supplying artificial light, and, for 10 years prior to the commencement of this action, the appellant corporation had been, and then was, furnishing the city and its inhabitants with electric light, and in so doing had maintained nine electric light poles, at as many different corners on the street mentioned, by permission of the city trustees, and without hinderance from the defendants or their predecessors in office. On June 6, 1904, the board of trustees, by resolution, ordered that said poles be changed to other positions than those previously occupied, and appellant failing to remove the poles as directed and required by the resolution, the superintendent of streets, by another resolution, was ordered to make the change, and proceeded to do so, whereupon this action was commenced. The trial court sustained general demurrers to the complaint, and plaintiff declining to amend, two separate judgments were entered, one in favor of the trustees and the other in favor of the superintendent of streets. The plaintiff thereupon appealed from both of said judgments.

The sole contention of appellant in both appeals involves the power of the city authorities to compel or make the change in question. Under the Constitution of this state, the appellant enjoys and is exercising a franchise giving it the privilege, under the direction of the superintendent of streets, or other officers in control thereof, of using the public streets, so far as may be necessary, for introducing and supplying such city with electric lights. Const. art. 11, § 19; Stockton G. & E. Co. v. San Joaquin (Cal.) 83 Pac. 54; People v. Stephens, 62 Cal. 236; In re Johnston, 137 Cal. 119, 69 Pac. 973. The constitutional provision cited does not expressly confer upon persons exercising such franchises an absolute right to erect poles of any kind on the streets of a city. Indeed, it might be said that a franchise to use the streets for any purpose mentioned in the section, may be confined to "laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gas light or other illuminating light," etc. It is, however, unnecessary in this decision to go to the extent of holding that no such right may be enjoyed, for, if it be conceded that judicial precedents and legislative enactment, establish or declare such right, still the judgment in the case at bar must be sustained. The act under which the city of Merced was incorporated vests in the board of trustees full power to establish, alter, open, improve and repair streets and sidewalks, remove obstructions therefrom, and generally to manage and control the same. St. 1883, p. 268, c. 49; Pol. Code, §§ 4354, 4408, 4410, 4411, 4413, and the Constitution gives every city power to make and enforce within its limits all local sanitary, police and other regulations not in conflict with general laws. Const. art. 11; Dobbins v. City of Los Angeles, 139 Cal. 179, 72 Pac. 970, 96 Am. St. Rep. 95. An industrious search has failed to reveal a general law prohibiting the regulation of the use of streets by holders of a franchise. On the contrary, the fundamental law of this state, in conferring the franchise here in question, expressly provides that any individual or company "shall, under the direction of the superintendent of streets, or other officer in control thereof * * * have the privilege of using the public streets." The power to make needful and reasonable regulations touching the use of streets has long been recognized. Mutual Electric, etc., Co. v. Ashworth, 118 Cal. 6, 50 Pac. 10; Ex parte Taylor, 87 Cal. 94, 25 Pac. 258; Ex parte Casinello, 62 Cal. 541; Vanderhurst v. Tholcke, 113 Cal. 150, 45 Pac. 266, 35 L. R. A. 267; De Baker v. Railroad Company, 106 Cal. 282, 39 Pac. 610, 46 Am. St. Rep. 237; In re Johnston, 137 Cal. 120, 69 Pac. 973; Ex parte Fiske, 72 Cal. 125, 13 Pac. 310; Monongahela City v. Monongahela Electric L. Company, 4 Am. Electrical Cas. 56; Am., etc., Co. v. Hess (N. Y.) 26 N. E. 919, 13 L. R. A. 454, 21 Am. St. Rep. 764; Den-

ver v. Girard (Colo. Sup.) 42 Pac. 662. The city authorities will not be allowed to enforce regulations which are tantamount to a denial of appellant's right to use the streets, or are arbitrary, capricious, unreasonable, or prohibitory in their nature or effect. In re Johnston, supra; Pereria v. Wallace, 129 Cal. 403, 62 Pac. 61; Santa Rosa Lighting Company v. Woodward, 119 Cal. 30, 50 Pac. 1025. But the Constitution in providing for the exercise and enjoyment of the franchise owned by appellant did not grant an absolute indefeasible right or easement in the particular spots of earth where its poles were planted originally, nor does the grant contain a hint that the superintendent of streets, or other officer in control thereof, exhausted his jurisdiction or power to direct or control the use of the streets by appellant, when the poles were located in the first instance. True, the section provides for general regulations for "damages and indemnity for damages," but this is clearly for the protection of the city (In re Johnston, 137 Cal. 120,69 Pac. 973,) and therefore such regulations, or the absence of them, cannot limit or annul the general power granted to the municipality, to direct and control the manner in which the streets shall be used, and the franchise exercised. Courts will not hesitate to stay the arm of municipal power when any attempt to curtail or deny the constitutional right is made manifest or a clear abuse of discretion is shown. But they will as unhesitatingly frown upon the doctrine that the constitutional provision in question must be construed as an abdication or denial of power on the part of cities to widen, straighten, beautify and improve streets and sidewalks, and to compel property owners of every class and kind to conform to all reasonable regulations redounding to the general good. It is therefore incumbent upon litigants seeking to restrain the exercise of municipal power in this behalf to show by their pleadings that the regulation in question is an unnecessary and unreasonable exercise of the discretion reposed in the municipal authorities. The applicant for a restraining order must show by a plain statement of substantive facts that the regulation complained of is unreasonable, arbitrary, confiscatory or prohibitory. If the complaint before us contained such statement, nay, if it appeared therefrom that the sole purpose of the regulation was to harass or annoy appellant in the enjoyment of its franchise, the relief demanded would not be withheld. But there is nothing in the complaint to show the purpose of the city authorities in making the change, and hence it cannot be determined therefrom whether the regulation is reasonable or unreasonable, just or unjust, wise or otherwise.

The contention of appellant frankly stated and ably advocated, is, that the city authorities are absolutely without power to change the poles from the positions they have occupied for so many years. We cannot concur in this view. The original location of the poles by permission of the city authorities created no absolute, indefeasible right, or irrevocable license, to have each pole remain at the particular spot for all time; and it is well settled that lapse of time creates no prescriptive right to public property. City of Visalia v. Jacob, 65 Cal. 435, 4 Pac. 433, 52 Am. St. Rep. 303; Orena v. Santa Barbara, 91 Cal. 631, 28 Pac. 268; Oakland v. Oakland W. F. Co., 118 Cal. 160, 50 Pac. 277; Home v. San Francisco, 119 Cal. 534, 57 Pac. 950. It may be contended that the averment of irreparable injury sufficiently shows that the regulation is unreasonable and confiscatory. The damage which has already accrued is estimated at $1,000, and it is difficult to guess why the sum total of damage resulting from the removal of all of the poles may not be as easily estimated and compensated. It is also difficult to imagine how a mere change in the location of the poles could be fraught with such grave consequences. But, waiving these considerations, it is the established law of this state that the mere allegation of irreparable injury is insufficient in actions for an injunction. California, etc., Co. v. Union, etc., Co., 122 Cal. 643, 55 Pac. 591. The allegation touching inconvenience and deprival of use in the manner theretofore enjoyed by the inhabitants of the city, certainly does not tend to show an arbitrary or unreasonable exercise of power on the part of the city authorities. All municipal regulations cause more or less inconvenience, and it frequently happens that they forbid the use of streets, and even of private property, in a manner theretofore enjoyed, but the law clearly sanctions such regulations. Respondent's brief contains the statement that a change in the location of the poles is rendered necessary by the construction of artificial stone sidewalks on M street. This statement cannot be considered as a fact in the case, but it serves to illustrate the consequences which would inevitably follow the application of the doctrine for which appellant contends. A village may, perchance, become a city. In such event the footpath or narrow sidewalk which was all sufficient in bygone days may prove entirely inadequate for the accommodation of an increased and increasing population. If poles upon which telegraph, telephone and other wires are strung, must be allowed to remain where they were first located, public improvements and conveniences, made necessary by changed conditions, may be hindered or rendered impossible. Again, the growing needs of a city may invite many to avail themselves of the right to use the streets for purposes enumerated in the section of the Constitution under which appellant acquired an equal but not a superior right. If those already using the streets for such purposes cannot be compelled to submit to reasonable regulations touching the location of poles and wires, then the advent of many competitors may be prevented, and the very purpose of the framers of the Constitution thwarted, unless danger and inconvenience to the general public be totally ignored.

All laws must be so construed as to avoid absurd and incongruous results, and the doctrine which appellant would have us announce would certainly lead to consequences which it is the general object of laws to prevent. All citizens must conform to needful regulations controlling the exercise of personal and property rights, and holders of a franchise constitute no exception to this general rule.

The judgments are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

2 Cal. App. 731

PEOPLE v. SING.

(Court of Appeal, Third District, California. Jan. 24, 1906.)

CRIMINAL LAW—APPEAL—REVIEW—DEFAULT IN APPEARANCE.

Where a criminal case does not involve capital punishment, the appellate court is under no duty to examine the record for errors of law, in the absence of any appearance by defendant or the filing of any brief for him.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3011, 3012.]

Appeal from Superior Court, Butte County; John C. Gray, Judge.

One Sing was convicted for statutory rape, and appeals. Affirmed.

Jo. D. Sproul, Park Henshaw, and John Gale, for appellant. U. S. Webb, Atty. Gen., for the People.

CHIPMAN, P. J. Information for rape upon a female child under the age of 16. Defendant was convicted and sentenced to 20 years' imprisonment at San Quentin. The transcript was filed February 25, 1905, and the cause has been placed upon three different calendars of this court. Defendant has made no appearance, and has filed no brief. The Attorney General, at the calling of the case for the January calendar, asked that the cause be submitted on the transcript and that the judgment be affirmed. We have given the evidence a careful examination and are satisfied that there was sufficient to justify the jury in finding the defendant guilty as charged. We do not feel called upon to examine the record for errors of law. In a case involving capital punishment the Supreme Court has felt itself under some duty to examine the record, in the absence of aid by counsel by brief, or in case of failure of counsel to appear. In cases of lesser felonies, however, we understand the practice is otherwise. People v. Clark, 121 Cal. 633, 54 Pac. 147. In the case of People v. Busby, 113 Cal. 181, 45 Pac. 191, the judgment was affirmed in a murder case where the penalty was life imprisonment, for want of appearance or brief in behalf of defendant, without an examination of the record.

The judgment is affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

2 Cal. App. 726

Ex parte WHITE.

(Court of Appeal, Third District, California. Jan. 24, 1906.)

HABEAS CORPUS—APPEAL—FINAL DETERMINATION.

An order in habeas corpus proceedings discharging petitioner is not of such final character as to be appealable.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, § 104.]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

In the matter of the application of Bud White for writ of habeas corpus. From an order discharging petitioner, appeal is taken. Dismissed.

Robert Duncan, Dist. Atty., for appellant. Weldon & Held, for respondent.

CHIPMAN, P. J. Petitioner, one Bud White, was convicted of the crime of petit larceny and was sentenced to "pay a fine of $500 or be imprisoned in the county jail one day for each dollar of said fine." He was subsequently discharged on writ of habeas corpus heard by the judge of the superior court of Mendocino county. Thereafter the district attorney of said county served notice on the attorney for petitioner directing him to "take notice that the people of the state of California ex rel. J. H. Smith, sheriff of the county of Mendocino, state of California, and J. H. Smith, as sheriff of the said county of Mendocino, hereby appeal to the District Court of Appeal for the Third District, state of California, from the order and judgment in the above-entitled action in the above-entitled court and entered on the 6th day of July, A. D. 1905, in favor of Bud White, and from the whole thereof." Whether the district attorney or sheriff could use the name of the people of the state without the consent of the Attorney General first obtained is a question raised, but we will not consider it.

Will an appeal lie to this court from the order or judgment? The question arose in 1852, in Matter of Perkins, 2 Cal. 424. The court said: "The act concerning 'Writ of Habeas Corpus,' passed April 20, 1850 (St. 1850, p. 334, c. 122) has vested the power of hearing and determining writs of habeas corpus in the judge of every court of record in the state; it is a mere chamber proceeding, a summary mode of determining whether a party be properly held in custody. The final determination is not that of a court, but the simple order of a judge, and is not appealable from or subject to review.

The doctrine of res adjudicata cannot apply to such determinations. * * * The statute never contemplated that a judgment upon one writ should be a bar to any further proceeding, but looks to a different result; and any prisoner may pursue his remedy of habeas corpus until he has exhausted the whole judicial power of the state." The question again arose in 1865 in Matter of Edward Ring, 28 Cal. 248. The Constitution and the statute had undergone no changes in habeas corpus proceedings up to this time and the doctrine of the Perkins Case was approved. Again, in 1871, People v. Schuster, 40 Cal. 627, the people appealed from an order admitting the prisoner to bail on habeas corpus proceedings. The court said: "There is no provision in the habeas corpus act permitting an appeal from the order of the judge, in proceedings had under that act; and it is apparent from the nature of that remedy, that none was intended. Nor is there anything in section 481 of the criminal practice act, regulating appeals in criminal cases, which will authorize an appeal from such an order." If the question has since been before the Supreme Court we have not been able to discover it, and no more recent case has been cited. It is perhaps not far from the truth that the concensus of opinion of the bar and bench of this state has, for a third of a century, been that there was no appeal allowable from an order either granting or refusing a discharge on habeas corpus and the practice has conformed to that view of the law.

But it is contended by appellant that this doctrine has been changed by the recent amendment to the Constitution conferring jurisdiction on the district courts of appeal (Const. art. 6, § 4), and by the amendment of section 1475, Pen. Code (St. 1905, p. 706, c. 544); that habeas corpus is a civil proceeding whether regarded as a civil action or a special proceeding of a civil nature. Ex parte Tom Tong, 108 U. S. 556, 2 Sup. Ct. 871, 27 L. Ed. 826; Ex parte Milligan, 4 Wall. 142, 18 L. Ed. 281; State ex rel. Durner v. Huegin, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700; Cross v. Burke, 146 U. S. 82, 13 Sup. Ct. 22, 36 L. Ed. 896. The argument is that remedies by the Code of Civil Procedure are divided into two classes—actions and special proceedings (section 21); that an action is a legal proceeding "for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense" (section 22); that "every other remedy is a special proceeding" (section 23); that there are only two kinds of actions, civil and criminal (section 24); that a civil action arises out of * * * 2. "An injury"; that a civil action "is prosecuted * * * for the enforcement or protection of a right, or the redress or prevention of a wrong"; that the fact that the provisions of our law relating to habeas corpus are found in the Criminal Code, is entitled to no weight. Lewis v. Dunne, 134 Cal. 294, 66 Pac. 478, 55 L. R. A. 833, 86 Am. St. Rep. 257. From these premises appellant reaches the conclusion that the writ of habeas corpus, whether a civil action or a special proceeding of a civil nature, is governed by the provisions of the Code of Civil Procedure relative to appeals. The next step in the argument is that this court is given appellate jurisdiction by the Constitution "in proceedings of mandamus, certiorari and prohibition, usurpation of office, contesting elections and eminent domain, and in such other special proceedings as may be provided by law." Article 6, § 4. And that section 939, Code of Civil Procedure, provides for an appeal "from a final judgment in an action or special proceeding commenced in the court in which the same is rendered within six months after the entry of judgment." Finally, it is claimed that a judgment in a habeas corpus case is a final judgment, hence the appeal must lie. That the judgment is final is grounded on the amendment of section 1475, Pen. Code (St. 1905, p. 706, c. 544) which provides that the writ may be granted: * * * "2. By the superior court, or a judge thereof. * * * *If the writ has been granted by any superior court or judge, and after the hearing thereof the prisoner has been remanded, he shall not be discharged from custody by the same or any other superior court or judge, unless upon some ground not existing at the issuing of the prior writ, or unless upon some point of law not raised at the hearing upon the return of the prior writ.*" The amendment is in italics. We have thus stated at some length the grounds urged in support of the appeal, first, because they seem to cover in outline about all that can be suggested on that side of the question; and, secondly, because the point has not arisen in the Supreme Court in recent years and is now based upon an alleged changed condition of the law. The question was suggested incidentally in the Culp Case (decided by this court) 83 Pac. 89, but not definitely passed upon. There is nothing in the changes which have taken place in our Constitution and statutes in recent years indicating that the order or judgment made in a habeas corpus case is any more final than formerly when it was held that such a judgment was not res adjudicata or final. If final, it would follow that it could be pleaded in bar; but the statute relied on by appellant still leaves the remedy open and unrestricted in the district appellate court and in the supreme court by original writ where a plea in bar would be unavailing. The only change made in the statute is that where a superior court or judge thereof has at the hearing remanded the prisoner he shall not be discharged by the same or other superior court or judge except upon some new ground not existing at the time the writ issued or upon some point of law not raised at the hearing of the return of the writ. The statute is careful to omit the case where the prisoner is discharged, and it applies in a limited way only to the case where he is remanded. See notes of Code Commissioners to amendments, St. 1905, p. 1140. Under the former universally accepted practice in this state (which was in conformity with the rule at common law) the prisoner, if remanded, could apply to every superior court in the state as well as to the Supreme Court on an identical petition, and, as was said in the Perkins Case, supra, "until he has exhausted the whole judicial power of the state." The court said in Grady v. Superior Court, 64 Cal. 155, 30 Pac. 613: "We wish it to be distinctly understood that we express no opinion with respect to the correctness of the judgment of the superior judge in habeas corpus. His view of the law is not authority binding upon any other judge or court should the same question arise in another case upon the same or similar facts." If the prisoner be "discharged from custody on a criminal charge" the judgment cannot be used in a plea in bar of a prosecution if he "is afterwards committed for the same offense by legal process or order," or, if the discharge is "for defect of proof, or for any defect of the process, warrant, or commitment in a criminal case, the prisoner is again arrested on sufficient proof and committed by legal process for the same offense." Section 1496, Pen. Code. In Re Begerow, 136 Cal. 293, 68 Pac. 773, 56 L. R. A. 528, it was said: "The petitioner's formal discharge upon habeas corpus was determinative therefore of but two things: (1) That the pending prosecution against him must be dismissed; and (2) that because of said dismissal he was entitled to his present liberty." In that case, Begerow applied for a dismissal of the action under subdivision 2 of section 1382, Pen. Code, and was refused. Subsequently, he was discharged upon a writ sued out before the Supreme Court. He was rearrested upon a warrant based upon a complaint charging him with the same crime as that for which he had been previously arrested. He again applied for a writ to the Supreme Court, contending that his discharge upon the former hearing estopped the state from the right to further prosecute him for the alleged crime. The court in the opinion referred both to sections 1487 and 1496 of the Penal Code as showing that the discharge under the writ was not a bar to further prosecution on another information or indictment for the same offense. This being true, the judgment or order of discharge cannot be held to constitute such final judgment as would be appealable under any provision of the Code of Civil Procedure, and it is not claimed that any provision is elsewhere found, either in the habeas corpus act or in the provisions of the Penal Code for appeal from such order or judgment. We are aware that in some jurisdictions it has been held that an appeal may be taken or a writ of error sued out and the habeas corpus proceedings thus be reviewed. But in the great majority of cases this was allowable under statutory provision, and where not so directly the decisions were more or less affected by existing statutes. Independent of statutory provisions, the better doctrine is that a decision in habeas corpus is not of such conclusive character as to support a writ of error, and that no right of appeal exists. 9 Am. & Eng. Ency. of Law, p. 1072; Church on Habeas Corpus, § 386.

Having in mind the original purpose of the writ, it is difficult for us to perceive the wisdom or reason upon which statutes are based which allow an appeal in cases where the prisoner has been discharged or that deny the right altogether of making a second application to any other court when once remanded. The delay which might and generally would attend the appeal would in many cases work a denial of the very object of the writ which is to secure the present discharge of the prisoner, and in most cases the value of this bulwark of personal liberty would be so impaired as to lose the distinctive character and office with which it has been clothed ever since King John met the Barons at Runnymeade in 1215, and instead of being the safeguard of human liberty it might become a means of oppression.

In the reply brief appellant contends that the action of the superior court was in excess of its jurisdiction. This contention is based upon the provisions of sections 1486 and 1487 of the Penal Code. There being no appeal from the order of the court, the question cannot be reviewed.

The appeal is dismissed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

2 Cal. App. 703

CASTOR v. BERNSTEIN.

(Court of Appeal, First District, California. Jan. 23, 1906. Rehearing Denied by Supreme Court March 24, 1906.)

1. EVIDENCE—HANDWRITING—GENUINENESS.

Under Code Civ. Proc. § 1944, providing that evidence respecting handwriting may be given by comparison made by the witness or the jury with writings admitted or treated as genuine by the party against whom the evidence is offered or proved to be genuine to the satisfaction of the judge, where an assignment of the claim sued on to plaintiff had been offered in evidence, defendant was entitled to offer a release without proof, by means other than a comparison by the jury with the assignor's signature on the assignment, that such release also contained the assignor's genuine signature.

2. RELEASE — EXECUTION — GENUINENESS — QUESTION FOR JURY.

Whether the signature to a release, relied on as a defense to an assigned claim, was genuine was a question of fact for the jury.

3. EVIDENCE — HANDWRITING — EXPERTS — WEIGHT OF TESTIMONY.

A jury is not required to follow the opinion of experts with reference to the genuineness of handwriting, but may disregard such opinions and determine the matter on their own judgment.

4. SAME—BEST EVIDENCE.

In an action on an assigned claim, it was not necessary for defendant to prove the genuineness of the signature of plaintiff's assignor to an alleged release, by the testimony of the subscribing witness, or to account for his absence before resorting to proof of the genuineness of such signature, by comparison with the signature of the assignor to such assignment.

5. ASSIGNMENTS — DEFENSE BETWEEN ORIGINAL PARTIES—RELEASE.

Where a release of a claim was executed by plaintiff's assignor for defendant's benefit before the assignment, it was available as a defense against plaintiff's action on the claim, under Civ. Code, § 1559, providing that a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it.

6. SAME—CONSIDERATION—BURDEN OF PROOF.

Where a release was in writing, it was presumptive evidence of a consideration, and the burden of proving want of consideration therefor was on the party seeking to avoid it, as provided by Civ. Code, § 1615.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Release, §§ 94–97.]

7. NEW TRIAL—GROUNDS.

Where a verdict was the result of a comparison of the signatures attached to an assignment of a claim sued on and an alleged release, and necessarily found that the release was a forgery, and the court was of the opinion that the jury erred in its conclusion, it was proper to set the verdict aside and grant a new trial.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3871, 3872; vol. 37, Cent. Dig. New Trial, §§ 135–137.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Joseph Castor against Joe Bernstein. From an order granting defendant's motion for a new trial, plaintiff appeals. Affirmed.

Otto Irving Wise and Crittenden Thornton, for appellant. George D. Collins, for respondent.

HARRISON, P. J. The plaintiff seeks by this action to recover damages from the defendant for the breach of a contract entered into between him and the plaintiff's assignor. In his answer the defendant sets up several defenses, one of which is that prior to the assignment to the plaintiff his assignor, by an instrument executed by him, released the defendant from all claims arising out of the contract alleged in the complaint. At the trial the plaintiff offered in evidence the assignment to him and rested. The defendant then offered in evidence the written instrument of release alleged in his answer. The plaintiff objected to its introduction, upon the ground that there had been no proof of its execution, or of the signature of the maker thereof, or of the subscribing witness. The defendant then stating that he proposed to submit the paper to the jury for comparison with the signature to the assignment to the plaintiff already in evidence, as proof of its execution, the plaintiff made the further objection that proof by comparison of writings could not be made entirely by the jury; that the genuineness of the disputed writing must be first shown by a witness. The court overruled these objections, and admitted the paper in evidence, saying that he would let the jury look at it and determine from an inspection whether, in their opinion, the signature was genuine. To this ruling the plaintiff excepted. The defendant then rested, and the court instructed the jury, in substance, that they should find for the plaintiff or for the defendant according as they should find whether the signature to the writing offered by the defendant was genuine or not. The jury rendered a verdict for the plaintiff. Upon motion of the defendant the court granted a new trial, and from this order the present appeal has been taken.

1. The court did not err in admitting in evidence, without any previous testimony of experts thereon, the purported release, and allowing the jury to determine its genuineness by a comparison of the signature thereon with the signature upon the assignment to the plaintiff. To the general rule of the common law that the genuineness of disputed handwriting could not be determined by the court or jury by comparing it with other handwriting of the party, there was one well settled exception, viz., that if a paper admitted to be in the handwriting of the party, or to have been subscribed by him, is in evidence for some other purpose in the cause, the signature or paper in question may be compared with it by the jury. Moore v. United States, 91 U. S. 270, 23 L. Ed. 346. The restriction which the rules at common law placed upon the mode of proving the genuineness of handwriting has in modern days been greatly removed, and in this state the Legislature has declared, in section 1944, Code Civ. Proc., that "evidence respecting the handwriting may also be given by a comparison made by the witness or the jury with writings admitted or treated as genuine by the party against whom the evidence is offered or proved to be genuine to the satisfaction of the judge." Similar statutory provisions have been enacted in other states in this country, and also in England, and, being remedial in their nature, are to be liberally construed. In People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, the court entered into an elaborate discussion of the law respecting the proof of handwriting by comparison and other modes (pages 318–330, 168 N. Y., pages 304–308, 61 N. E. [62 L. R. A. 193]), and held that the object of these statutes is to enlarge, and not to narrow, the rules of the common law. The defendant was not seeking to establish the genuineness of the release by a comparison with exemplars which were irrelevant to the issue before the court, and authorities involving

the common-law rule in such cases are inapplicable; but he was availing himself of the means authorized by section 1944 for making proof of its genuineness. The exemplar with which the jury were directed to make the comparison was already before them and admitted by the plaintiff to be genuine, and, under the definition of evidence in section 1823, Code Civ. Proc., a comparison made by the jury between the two signatures was a "means sanctioned by law for ascertaining the truth" respecting the question of fact presented for their determination—the genuineness of the signature to the release. Such comparison by the jury is in itself legal evidence, upon which alone they may render a verdict. Williams v. Drexel, 14 Md. 566.

Whether the signature to the release was genuine or not was a question of fact to be determined by the jury, and not by the judge; nor could the judge, by refusing to allow the writing to be submitted to the jury, preclude the defendant from having the jury determine that question of fact. If the defendant had so desired, he could have offered the testimony of experts for the purpose of adding weight to his claim that it was genuine; but he was not required to do so. It is not to be assumed that he would submit the writing to them for comparison, unless there was, at least, a colorable resemblance to the exemplar already in evidence; but, if he was so disposed, he was entitled to have the jury pass upon the question of its genuineness without the aid of any corroborative testimony. The rule is of long standing that a jury is not required to follow the opinion of experts, but may disregard them entirely and exercise its own judgment in matters of this nature, and by section 612, Code Civ. Proc., they may, upon retiring for deliberation, take with them all papers that have been received in evidence in the case, except depositions. But while they will give proper weight to the testimony of experts, as was said by Lord Denman in Doe v. Newton, 5 Ad. & E. 514, "no human power can prevent the jury from comparing the documents with a view to the question of genuineness," and they will determine the question according to their own judgment. See, also, People v. Storke, 128 Cal. 486, 60 Pac. 1090. The provision of section 1944, that "Evidence respecting the handwriting may also be given by a comparison made by the witness or the jury," clearly indicates that the jury may make the comparison without any previous testimony of a witness. Mr. Greenleaf says (section 578) that, when other writings admitted to be genuine are already in the case, the comparison may be made by the jury "with or without the aid of experts." The same rule is given in Wharton on Ev. § 713; 1 Rice on Ev. 344; Taylor on Ev. (9th Ed.) § 870; Williams v. Drexel, 14 Md. 566; Rogers v. Tyley, 144 Ill. 652, 32 N. E. 393; People v. Molineux, 168 N. Y. 264, 330, 61 N. E. 286, 308, 62 L. R. A. 193; Cobbett v. Kilminster, 4 Fost. & Fin. 490.

2. It was not necessary for the defendant to prove the genuineness of the signature to the release by the testimony of the subscribing witness, or to account for his absence, before resorting to the mode adopted by him. The Code makes no distinction in rank between the various modes in which a writing may be proved, and the provision of section 1944, authorizing the proof of handwriting by a comparison made by the jury, is of equal force with the provisions in section 1940, authorizing it to be made by a subscribing witness. Landers v. Bolton, 26 Cal. 406, cited by the appellant, was tried before there was any statute in this state on the subject, and the opinion therein, while referring to the English rule then prevailing, questions its correctness.

3. The release executed by the plaintiff's assignor is by its terms executed for the benefit of the defendant, and is available for him against the plaintiff's claim herein. Civ. Code, § 1559. The instrument itself, being in writing was presumptive of a consideration, and, if the plaintiff would avoid it for want of consideration, the burden was upon him to make such proof. Civ. Code, § 1615.

4. The aforesaid assignment and release constituted the only evidence submitted to the jury. Their verdict was the result of a comparison made by them of the signatures to the respective instruments. These writings were separate pieces of evidence upon the issue presented by the defendant, and the conflict between them as to the genuineness of the signature of the release was, in legal effect, the same as would have been a conflict between testimony of witnesses in reference thereto. If the court was of the opinion that in its determination of this conflict the jury did not give sufficient consideration to the signature upon the release, and that its verdict—which, in effect, found that this signature was a forgery—was not justified by the evidence, it was its duty to set the verdict aside and grant a new trial. Bjorman v. Ft. Bragg Redwood Co., 92 Cal. 500, 28 Pac. 591; Domico v. Casassa, 101 Cal. 411, 35 Pac. 1024; Mills v. Oregon Ry. Co., 102 Cal. 387, 36 Pac. 772; Newman v. Overland P. R. Co., 132 Cal. 73, 64 Pac. 110. The court had the same opportunity as the jury to compare the signatures, and to determine whether the one in question was genuine or false; and its determination that the jury had erred in its conclusion, and that its verdict was contrary to the evidence before it, was a matter peculiarly within its province, and is not subject to review.

The order is affirmed.

I concur: HALL, J.

COOPER, J. (concurring). The instrument claimed to be a release was admitted in evidence by the trial court, and was thus a part of the record upon which the jury rendered its verdict. The court therefore, on the motion for a new trial, had the right to review the evidence, and to set aside the verdict of the jury if it believed such verdict was not supported thereby. The court did review the evidence; and, believing that the verdict was contrary thereto, granted the new trial. There was no abuse of discretion in making the order. Conceding that the court erroneously admitted the release in evidence, that would not change the result, although it would have been ground of complaint if the verdict had been against plaintiff. But the plaintiff cannot, on an appeal from the order granting a new trial, claim that because of an erroneous ruling there was no evidence at all upon which a verdict or judgment could have been rendered for the defendant. If the objection of the plaintiff to the release had been sustained, then the defendant might have proved the execution of the release by other evidence. An order granting a new trial must be affirmed, unless there is a clear abuse of discretion, Hausmann v. Sutter St. R. Co., 139 Cal. 174, 72 Pac. 905. I do not, however, agree with what is said by the presiding justice as to the admission of the release without any preliminary proof.

The release offered and received in evidence is as follows: "New York, March 2nd, 1900. Agreement entered into this second day of March, 1900, between John T. Dougherty, of the first part, and Joseph E. Howard of the second part. That the party of the first part agrees to release Joe Bernstein, so that this man, namely, Joe Bernstein, can go with the theatrical production known as 'The New York Girl,' and that he signs away all claims against said Joe Bernstein. [Signed] John T. Dougherty. Witness: Julius Liberman." This is a writing which defendant desired to prove and introduce in evidence.

It is provided (Code Civ. Proc. § 1940) that a writing may be proved: "(1) by any one who saw the writing executed; or (2) by evidence of the genuineness of the handwriting of the maker; or (3) by a subscribing witness." It is further provided (Code Civ. Proc. § 1942) that evidence may be given that the party against whom the writing is offered has admitted its execution; or (section 1945), where it is more than 30 years old, comparisons may be made with writings purporting to be genuine and generally respected and acted upon as much by persons having an interest in knowing the fact; or (section 1942) when it is produced from the custody of the adverse party and has been acted upon by him as genuine; or (section 1943) the handwriting of a person may be proved by one who believes it to be his, and who has seen him write, or has seen writings purporting to be his upon which he has acted or been charged, and who has thus acquired a knowledge of his handwriting; or (section 1948) it may be acknowledged or proved and certified in the manner provided for the acknowledgment or proof of conveyances of real property, and the certificate of acknowledgement or proof is prima facie evidence of the execution of the writing.

In this case the paper purporting to be a release was admitted in evidence without any attempt to prove it in any of the methods referred to. It was contended, and the court held, that it might be admitted in evidence and the jury might pass upon it by comparison with a paper already in evidence as part of plaintiff's case. I do not think such is the correct construction of section 1944, cited in the opinion of the presiding justice. That section provides that evidence may be given respecting the handwriting by a comparison, made by the witness or the jury, with writings admitted to be genuine by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the judge. The section does not provide that the instrument may be proven in this way. It simply says that evidence respecting the handwriting may be given by comparison. Such comparison, evidently, may be made by a witness, either before or after the instrument is received in evidence. The witness by comparison may give evidence respecting the handwriting. The statements made by the witness after such comparison as to the handwriting are evidence which the jury may consider. The jury may also, after the instrument has been prima facie in some legal way proven and admitted in evidence, look at the handwriting and compare it, and such comparison is evidence. Evidence is the legal means, sanctioned by law, for proving or disproving some material fact in issue. When the handwriting is in issue, the jurors may, by comparison with the documents before them, and by the use of their eyes, look at the characters made on the two instruments, and in this way receive evidence by comparison. But this does not, in my opinion, mean that the jury are entitled to have admitted in evidence every paper offered without any proof whatever, so that they may compare it. The question as to whether or not a paper or document is admissible in evidence is for the court, and not for the jury. The court must surely have some evidence as to its execution or the signature thereto before it can admit it. The section provides that evidence may be given by comparison made by the witness. If this means that the document may be admitted in evidence without any other proof, it would be admissible for the witness as well as for the jury. This would lead to endless documents being introduced in evidence without any restraint by the court. A plaintiff might bring an action upon a written instrument the genuineness of which is in issue. The defendant answers and signs and verifies his answer. Such answer is a writing admitted and treated as genuine by the defendant. The plaintiff, under the ruling here, could introduce the instrument without a word of preliminary proof, relying upon the chances that the jury might say it was genuine by comparing it with the answer. In this case the error in the ruling is manifest by the result. The release was admitted, and the jury were, in effect, to say by comparison whether or not it was admissible, and when they retired to deliberate they found that the signature was not genuine, and hence that it was not admissible. The trial court by an inspection thinks it was genuine, and made an order granting a new trial. Hence a new trial is granted because an instrument is thought by the trial judge to be genuine without a word of evidence of any kind except by comparison, and such comparison was for the jury, and it found that the instrument was not genuine. The learned judge was not satisfied with the ruling, for in the order granting a new trial he said: "I think that in the interest of justice a new trial should be granted, in order to enable the defendant to sustain the so-called release, if he can, by the testimony of Dougherty, or himself, or of the person whose name is subscribed as witness thereto. There should be no serious difficulty in procuring the testimony of at least one of these parties." The Code does not provide that the evidence by comparison may be made by the judge. I have carefully examined all the cases cited by the presiding justice, and I do not find one that is directly in point. They use general language to the effect that, when other writings admitted to be genuine are already in the case, the comparison may be made by the jury, with or without the aid of experts; but that means that the evidence by comparison may be taken, and not that the instrument may be proved in this way. It is only evidence or a means to be used by the jury in arriving at the ultimate fact. The rule is thus given in Phillips on Evidence (C. H. & E. notes) vol. 2, p. 616: "Within a recent period a rule has been established which amounts to a considerable relaxation of the strictness of the law in regard to the direct comparison of handwriting. Upon a question respecting the identity of handwriting, the jury may be allowed to take other papers which have been proved to be the writing of the party whose handwriting is disputed, provided they are part of the proofs in the cause, and may compare them with the disputed writing for the purpose of forming their opinion whether the disputed writing is genuine." The author says the comparison may be made upon a question respecting the identity of handwriting, and that is what Greenleaf means when he says the "comparison may be made with or without the aid of experts," and is what the Code means when it says evidence respecting the handwriting may be given by a comparison. It does not seem plausible that the section means that the document may be proven by a comparison made by the jury. Such is not one of the ways of proving a written instrument.

In Verzan v. McGregor, 23 Cal. 343, it is said: "And the rule is that, if there be no evidence of authenticity, the instrument cannot be read to the jury; but, if there be any fact or circumstances tending to prove the authenticity from which it might be presumed, then the instrument is to be read to the jury, and the question, like other matters of fact, is for their decision." In Adams v. Field, Ex'r, 21 Vt. 264, it is said: "In England it was long held that a comparison of handwriting was not admissible, but I think that rule has been modified by modern decisions, and at the present day it would seem their courts admit in evidence comparison of hands, but confine it to documents which are proved to be genuine, and which are in evidence on the trial of the cause for other purposes." In Allport v. Meek, 4 Carr & Payne, 509, it was sought to prove a bill of exchange to the jury by comparison with the written acceptance which the defendant acknowledged to be his. Tindall, C. J., said: "I think you must call some witness to lay some evidence before the jury on which they may decide." In Doe ex dem. Henderson v. Roe and Hackney et al., 16 Ga. 524, the court said: "The court or jury may compare two documents together when properly in evidence, and from that comparison form a judgment upon the genuineness of the handwriting or the identity of the writer." The case of Myers v. Toscan, 3 N. H. 47, is very much like the case at bar as to the facts. The defendant relied upon a sale of the property (for which suit had been brought) to him by the plaintiff, and produced a paper purporting to be signed by the plaintiff, acknowledging the receipt of payment for the articles. The trial court permitted the jury to compare the signature to the receipt with another paper containing the genuine signature of the plaintiff, and instructed them that they might compare the signatures, and, if satisfied from the comparison that the receipt was genuine, they must return a verdict for the defendant. On such instruction the jury returned a verdict for the defendant, and the plaintiff made a motion for a new trial, upon the ground that the jury had been misdirected. The opinion prepared by the chief justice states the rule thus: "We take it to be a well-settled principle of law that it cannot be left to a jury to determine whether a signature is genuine or not merely by comparing it with other signatures proved to be genuine. * * * But, where witnesses acquainted with the handwriting in question have been called and examined, other signatures, proved to be genuine, may be submitted to the jury, to corroborate or weaken the testimony of such witnesses. * * * As it was submitted to the jury in this case to decide by a mere comparison of handwriting, we entertain no doubt that there must be a new trial granted." In Graham v. Nesmith, 24 S. C. 289, the witness Cooper testified that, upon examining and comparing a statement and the signature thereto "Sarah Nesmith," and comparing it with her signature to the original agreement and with acknowledged signatures of hers, he was "satisfied that this instrument is genuine, and that the signature is hers." Sarah Nesmith, although a witness, refused to say whether the signature was hers or not. The court said: "There was some testimony by the plaintiff, Tucker, tending to show, although possibly not sufficient to show, that the paper in question was signed by Mrs. Nesmith, and that makes just such a case as lets in proof by comparison of handwriting."

I am confirmed in my views as to the meaning of the section, by section 1943, which precedes it. It is there said: "The handwriting of a person may be proved by any one who believes it to be his, or who has seen him write, or has seen writings purporting to be his upon which he has acted or been charged, and who has thus acquired a knowledge of his handwriting." When section 1944 speaks of evidence respecting "the handwriting," it means, in my opinion, that the jury may compare the writing in evidence with writings admitted or treated as genuine by the party against whom the evidence is offered. The case of Williams v. Drexel, 14 Md. 566, cited by the presiding justice, presents an entirely different case from the case at bar. The court held in that case that it was not error for the court to refuse to instruct "the jury to find a verdict for defendant because there was no evidence of the indorsement of the bill to the payee." The court said: "The bill of exceptions states that the plaintiff offered in evidence to the jury the following paper writing, purporting to be a bill of exchange, acceptance, and protest, which are there set forth; no objection to their admissibility appearing to have been made. The record, as amended, shows the bill of exchange to have the name of the drawer, the name of the payee, and that of the payee as indorser, all written in the same name, appearing to be the name of the same person, and all apparently in the same handwriting. The acceptance is fully proved, which, admits the signature of the drawer. It is also shown that, whilst the indorsement on the bill was in blank, the defendant acknowledged the acceptance to be hers. Where in addition to these circumstances we have before us the whole conversation between the defendant and Mr. Marshall, as detailed by him, we are not prepared to say there was no evidence to prove the indorsement of the bill to the payee." It will readily be seen that in that case the bill of exchange was in evidence with the name of the payee, the name of the drawee, and the payee as indorser, all written upon it. No objection had been made as to the indorsement. As no such objection had been made, and the indorsement was in evidence, the jury then had the right to compare the signatures.

I therefore dissent from what is said by the presiding justice as to the admission in evidence of the release.

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2 Cal. App. 715

SCHAADT et al. v. MUTUAL LIFE INS. CO. OF NEW YORK et al.

(Court of Appeal, First District, California. Jan. 23, 1906.)

1. SPECIFIC PERFORMANCE — CONTRACTS ENFORCEABLE—TESTAMENTARY DISPOSITION OF PROPERTY.

An agreement to dispose of a definite part or the whole of an estate in a particular manner by will may be specifically enforced, if it is definite, certain, and founded upon a valuable consideration.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 223, 224.]

2. PLEADING—CONSTRUCTION—PRESUMPTIONS.

It must be presumed that a pleader has stated his case as strongly in his favor as the facts will warrant.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 66.]

3. HUSBAND AND WIFE—COMMUNITY PROPERTY—CONTROL OF HUSBAND.

A husband has the right to the control and disposition of community property.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 918.]

4. WILLS—CONTRACT TO MAKE — CONSIDERATION—BENEFIT TO PROMISOR.

Under Civ. Code, § 1605, defining a consideration as any benefit conferred upon the promisor, "to which the promisor is not lawfully entitled," the fact that a wife had possession of and paid the premiums on an insurance policy on the life of her husband payable to his representatives, and delivered the policy to the husband to enable him to have it changed to a paid-up policy, constituted no consideration for a promise of the husband, on receiving the policy, to dispose of the proceeds thereof by will in a certain manner, in the absence of anything to show that the wife had the right to the possession of the policy or was in any way bound to pay the premiums thereon, or that she paid them on the faith of any such promise.

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by Bertha Schaadt and others against the Mutual Life Insurance Company of New York and others. From the judgment rendered, and from an order denying a new trial, a certain defendant appeals. Reversed.

Walter Gallagher and J. J. Guilfoyle (R. M. Royce, of counsel), for appellants. Joseph Hutchinson, for respondents.

HALL, J. This is an action in equity to specifically enforce an agreement to make a will, whereby the plaintiffs Bertha Schaadt and Hermina Curieux should receive from the proceeds of a policy of insurance upon the life of January Pfaff each the sum of $1,000 upon his death. The defendant, the Mutual Life Insurance Co. of New York, defaulted, and upon the order of the court paid the amount of the policy as follows: $2,590 to defendant Charles Jansen, guardian of Annie E. and Frankie Pfaff, minors, and the balance of $2,000 to the clerk of the court to abide the determination of the action. The plaintiffs Bertha Schaadt and Hermina Curieux recovered judgment against Charles

Jansen as guardian of the estates of said minors for $2,000, payable only out of the money so deposited with the clerk of the court. The defendant Jansen, as such guardian, moved for a new trial, his motion was denied, and he thereupon appealed from the judgment and the order denying his motion for a new trial. The action was tried upon an amended complaint and the answer of appellants.

The plaintiffs Bertha Schaadt and Hermina Curieux are daughters of the plaintiff Ernestine Pfaff. January Pfaff and Ernestine Pfaff were husband and wife from November, 1863, until February 7, 1889, when they were divorced at the suit of Ernestine Pfaff for willful neglect by January Pfaff. Annie E. and Frankie Pfaff are the children of Frank S. Pfaff, a deceased son of Ernestine and January Pfaff. It is alleged in the amended complaint, in substance, that on the 18th day of March, 1865, which was after the marriage of Ernestine and January Pfaff, the defendant corporation issued its policy of life insurance for $10,000 upon the life of January Pfaff, payable to his representatives upon his death; that all the premiums thereon from and including the year 1865 to and including the year 1880, amounting to $3,302, were paid by Ernestine Pfaff out of her separate property; that the plaintiff Ernestine Pfaff held the said policy in her own possession; that just prior to the 8th day of April, 1881, "the said January Pfaff, through the defendant Charles Curieux, obtained said policy from said Ernestine Pfaff to have it changed to a paid-up policy and upon his promise to make provision by will, or, by the terms of the policy, to have the proceeds of the policy, in case of his death, disposed of as follows, to wit, $1,000 thereof to plaintiff Hermina Curieux, $1,000 thereof to plaintiff Bertha Schaadt, and the balance to Frank S. Pfaff." The policy was changed to a paid-up policy for $4,590, payable to the representatives of January Pfaff at his death, and returned to Charles Curieux, together with a will executed by January Pfaff, wherein he provided for the payment out of the proceeds of said policy of $1,000 each to Bertha Schaadt and Hermina Curieux. Subsequently, after the death of Frank S. Pfaff, January Pfaff obtained the said policy from Charles Curieux by representing to him that he wanted to have it made payable to Bertha Schaadt and Hermina Curieux and the children of Frank S. Pfaff, Annie E. and Frankie Pfaff. January Pfaff caused the policy to be made payable to Annie E. and Frankie Pfaff, and made a new will which did not make any disposition of the proceeds of the policy, but which (as appears from the evidence in the case) gives to the plaintiffs Bertha Schaadt and Hermina Curieux each from the estate of January Pfaff about $1,500.

That an agreement to dispose by will of a definite part or the whole of the promisor's estate in a particular manner may be enforced in equity does not admit of doubt. The law on this question has been discussed and the principle above stated affirmed in Owens v. McNally, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369; McCabe v. Healy, 138 Cal. 81, 70 Pac. 1008, and the numerous cases from other jurisdictions cited in the opinions in said two cases. In the vast majority of the cases reported in the books the agreement to make a will in favor of the plaintiff has been upon the consideration that plaintiff live with the promisor, and perform such duties as are usually performed by a child to a parent. Before a contract of this kind can be enforced in a court of equity it must be definite, certain, and founded upon a valuable consideration. Thus in Owens v. McNally, supra, it is said, "Where a contract such as this, resting in parol and sought to be enforced after the death of the other party to it, comes before a court of equity for review, it is scrutinized, and should be scrutinized, with particular care, and only upon a satisfactory showing that it is definite and certain and just will it be enforced. The proofs of the contract should be clear, and the acts of the claimant referable alone to the contract"—citing Ackerman v. Ackerman's Ex'rs, 24 N. J. Eq. 587. An agreement that is not supported by a valuable consideration will not be enforced. Waterman, Spec. Perf. § 186; Pom. Spec. Perf. (2d Ed.) § 57. Speaking of contracts to dispose of property by will Waterman says: "But such a contract, especially when it is attempted to be established by parol, is regarded with suspicion, and not sustained excepting upon the strongest evidence that it was founded upon a valuable consideration and deliberately entered into by the decedent." Waterman, Spec. Perf. § 41.

With the above stated principles in mind we enter upon an examination of the complaint upon which this action was tried. It appears from the complaint that January Pfaff "obtained said policy from Ernestine Pfaff, to have it changed to a paid-up policy, and upon his promise to make provision by will, or by the terms of the policy to have the proceeds of said policy, in case of death, disposed of as follows, to wit: $1,000 thereof to plaintiff Hermina Curieux, $1,000 thereof to plaintiff Bertha Schaadt, etc." In other words, the only consideration directly alleged for the promise of January Pfaff was the delivery to him by Ernestine Pfaff of the original policy. Whether or not this was a sufficient consideration for his promise depends upon whether or not the allegations of the complaint show that Ernestine Pfaff had a right to the possession of said policy as against her husband January Pfaff. "Any benefit conferred, or agreed to be conferred, upon the promisor by any other person to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise." Civ. Code, § 1605. The converse of the above rule is equally true, that a benefit conferred to which the promisor is already lawfully entitled is not a good consideration for a promise. From the statement in the complaint we must assume that the original policy belonged to January Pfaff. It is not directly stated who obtained the policy, or to whom it was issued, but it is stated that it was payable to the representatives of January Pfaff, and as we must presume that the pleader has stated her case as strongly in her favor as the facts will warrant it appears that the policy was his. Indeed the entire proceeding is based on the theory that the policy belonged to January Pfaff, and was subject to his disposition either by will or by act inter vivos. A husband has the right to the control and disposition of community property. It is true that it is alleged that Mrs. Pfaff paid out of her separate property the premiums upon the policy, but why she did so is not alleged. It is simply stated historically that she did so. It is not attempted to be alleged that the promise to make the will had any connection with such payments, or that such payments were made upon the faith of any such promise. In the absence of any allegation to the contrary we must presume that such payments were purely voluntary.

It is also alleged that Mrs. Pfaff held the policy in her possession, but no right to such possession is set up. The bald fact that she paid the premiums on the policy would give her no right to the possession nor any lien on the policy. How she obtained possession of the policy is not alleged, nor is any attempt made to connect such possession with the payment of premiums. The two things are simply stated as historical facts without any explanation whatever. We thus see that when Mrs. Pfaff delivered the policy to January Pfaff she gave him only what he appears to have been lawfully entitled to. Such delivery is not a sufficient consideration for the promise relied on. Civ. Code, § 1605.

For the foregoing reasons we do not think the amended complaint states a cause of action.

The judgment and order are therefore reversed.

We concur: COOPER, J.; HARRISON, P. J.

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2 Cal. App. 699

CAMP et al. v. BEHLOW.

(Court of Appeal, First District, California. Jan. 20, 1906. Rehearing Denied by Supreme Court March 21, 1906.)

1. CONTRACTS — BUILDING CONTRACT — FAILURE TO RECORD—EFFECT.

In assumpsit, a building contract which has not been recorded, and hence is void as against subcontractors and materialmen, nevertheless constitutes the measure and test of the right to recover, the contract being valid as between the parties, and the contractor must show a substantial compliance with the terms of the contract, which limits the measure of his recovery.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 1768.]

2. SAME—SUBSTANTIAL PERFORMANCE—SUFFICIENCY OF EVIDENCE.

In an action to recover for certain extra work which a building contract provided was to be paid for in accordance with the contract price of other work, there was evidence showing the amount of extra work performed by plaintiffs; that the work was first class; that the reasonable value thereof was 15 cents per cubic foot, which was the contract price. Defendant alleged that the work was not done in accordance with the contract and specifications, but furnished no copy of either. *Held*, sufficient prima facie to show substantial compliance with the contract.

3. DAMAGES—BREACH OF CONTRACT.

A contractor under a written contract in excess of $1,000, is not limited in his recovery against the owner to the amount actually paid out by such contractor for labor and material by the fact that the contract was not recorded, and is therefore invalid as to subcontractors and materialmen; but, the contract being valid as between the parties, is the measure of compensation.

4. EVIDENCE—OPINIONS — QUALIFICATION OF WITNESS.

In an action to recover for concrete work done by plaintiff for defendant, a witness stating that he knew what was charged by concrete men for similar work, and that he had spoken to contractors about it, was qualified to testify to the value of such work.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2216.]

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by William Camp and another against Bertha Behlow. Judgment for plaintiff, and defendant appeals. Affirmed.

John T. York and Bell, York & Bell, for appellant. Otto tum Suden, for respondents.

COOPER, J. This action was brought to recover a balance of $863 for the performance of certain concrete work on the basement of a stone building. The court made findings, upon which judgment was ordered and entered for plaintiff in the sum of $663, and costs. This appeal is from the judgment and order denying the defendant's motion for a new trial.

The complaint alleges that in August, 1900, the plaintiffs entered into a contract with defendant by which they agreed to furnish the labor and material and complete the concrete work of a certain two-story building, in conformity with certain plans and specifications, for the sum of $1,449, in four equal installments of $362.25 each, payable at certain designated times as the work progressed; that for additional and extra work the price per cubic foot of concrete should be in accordance with the contract price for the other work, and that the extra work so done amounted to $238.50; that defendant has paid plaintiff on account the sum of $924.50, and no more, leaving a balance of $863 due and owing on the contract. The complaint further alleges in a separate paragraph that the reasonable value of the work done and performed by the plaintiffs for the defendant under the terms of the contract is $1,787.50, and that defendant has paid plaintiff $825 thereon, and no more, and that the sum of $863 remains wholly unpaid. Defendant denied most of the allegations of the complaint, and alleged "that the plaintiffs wholly failed, refused and neglected to perform the said work in accordance with the said alleged contract, or plans, or specifications. That said specifications provided that, as shown on plans and sections, all the walls were to be plastered on the outside with one-inch thick cement mortar, also the bottom and sides of foundation were to have one-inch thick of plastering of said mortar, to be in equal thickness and smooth to make a perfectly water-tight basement." It is further alleged in the answer that the walls of the building were not made water-tight, and that by reason thereof, and by reason of the failure to place upon the outside thereof a plaster of cement mortar, the building has been greatly damaged. Upon the issues thus made the case was tried. The contract was not recorded before the commencement of the work, and hence was void as to laborers and materialmen; but as no question is involved as to any laborers' or materialmen's claims, or any lien of any kind, the fact that the contract was not recorded becomes immaterial. The court found that the defendant was indebted to the plaintiffs in the sum of $663 for labor performed and materials furnished in the erection and construction of the concrete work on the basement of the building described in the complaint, all at the special instance and request of the defendant.

The defendant's first point is that the plaintiffs cannot recover because they have not shown a substantial compliance with their contract. In on action of assumpsit a building contract, which has not been recorded, and hence is void as against subcontractors and materialmen, nevertheless constitutes the measure and test of the right to recover, and the contractor must show a substantial compliance with the terms of the contract, and the measure of his recovery must be limited by the terms of the contract. Laidlaw v. Marye, 133 Cal. 170, 65 Pac. 391. That the work in this case was done under a written contract is not denied in the answer. The evidence shows that 9,660 cubic feet of concrete work under the contract, and 1,590 feet of extra work, were performed by plaintiffs for defendant. The bill for the extra work, 1,590 cubic feet at 15 cents per cubic foot, amounting to $238.50, was certified to as being correct by defendant's architects. The witness Zimmerman testified that the work was first class. There was evidence that the reasonable value of concrete work was 15 cents per cubic foot. The evidence in connection with the contract, as alleged and not denied, is sufficient to show that plaintiffs performed the amount of concrete work called for by the contract, that the price does not exceed that called for by the contract, and that the amount found to be due is within the limits of the amount agreed to be paid. The defendant claims that the walls were not properly covered with cement mortar, and were not water-tight, and hence that the plaintiffs did not comply with the contract and specifications; but she has not furnished us with the contract or the specifications. She asks us to measure the work done by the standard furnished by the contract and specifications, and yet does not furnish in the record any copy of the plans or specifications. Without the contract and specifications, or that portion of them bearing upon the question, we cannot say that they required any outside coat of cement mortar one inch thick, or that the walls were required to be water-tight. The evidence is sufficient prima facie to show that plaintiffs substantially complied with their contract.

The second point claimed by defendant is "that the owner cannot be held liable to them (plaintiffs) for the value of the materials and labor furnished in a greater amount than they paid for them." If we apprehend correctly the argument of defendant's counsel on this point, it is that in case a written contract in excess of $1,000 is not recorded, the contractor cannot recover of the owner any greater amount than such contractor has actually paid out for labor and materials. We know of no such rule. On the contrary, it is expressly held in Laidlaw v. Marye, supra, otherwise. It is there said: "Therefore, as between him and the owner, the contract must remain, not the basis of his recovery, but the measure and test of his right to recover. He must still show a substantial compliance with its terms to warrant any recovery at all, and under implied assumpsit must be limited, as to him, by the contract price." The remarks of the court in Kuhlman v. Burns, 117 Cal. 469, 49 Pac. 585, were made upon the theory that the contract when not recorded was void even as between the owner and contractor. Such is not the law as shown in Laidlaw v. Marye. Not only this, but in Kuhlman v. Burns the plaintiff, treating the contract as absolutely void sought to recover the reasonable value of materials and labor furnished, for which the defendant had paid. It was properly held in an action for the reasonable value of such labor and materials (treating the contract as void) that the plaintiff could not recover a larger price for such labor and materials than had been paid. But as it has since been held that such contract is not void as between the parties, and is the measure of compensation in an action brought upon it, the doctrine of Kuhlman v. Burns is no longer the law. It was not error for the court to admit the testimony of plaintiff Carillon to the effect that the reasonable value of the concrete work done was 15 cents per cubic foot. The objection to the question was upon the ground "that the witness had not shown himself qualified to testify upon that subject, and upon the further ground that the testimony was immaterial and incompetent, and that plaintiff could only recover in this action, if at all, the money actually expended by them in the performance of the work." After the objection was made the witness, in answer to questions by the presiding judge, stated that he knew what is charged by concrete men for similar work, and that he had spoken to contractors about it. Therefore defendant does not insist upon this point of the objection. In fact the argument of defendant's counsel is directed to the claim that the evidence was not admissible under Kuhlman v. Burns, supra. What has been said under the second point disposes of this, and it is not necessary to repeat it. The testimony was relevant and material under the claim in assumpsit.

This disposes of all the questions argued by defendant in her brief.

The judgment and order are affirmed.

We concur: HARRISON, P. J.; HALL, J.

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2 Cal. App. 690

FIREMAN'S FUND INS. CO. v. AACHEN & MUNICH FIRE INS. CO.

(Court of Appeal, First District, California. Jan. 20, 1906.)

1. Insurance — Reinsurance —Reinsurer's Liability.

The liability of a reinsurer depends on the terms of the policy of reinsurance, and not on the question of whether insured suffered a legal loss on the original policy.

2. Same—Construction.

A reinsurance policy insured plaintiffs "against all direct loss or damage by fire * * * to the following described property, while located and contained as described herein, and not elsewhere," followed by a clause, "Two thousand dollars on their interest as insurers under their policy," issued to K., covering "$7,000 on 14,000 bushels of wheat while contained in warehouse of Salem Flouring Mills Company, at Salem, Marion county, Oregon. Property known and marked as bulk wheat." *Held*, that such policy was on the wheat described, and not on the risk assumed by the reinsured.

3. Evidence — Parol Testimony — Latent Ambiguities.

Where maps and ratebooks on which a contract of reinsurance was made distinguished between a certain warehouse and elevator and fixed different rates for insurance of property stored in each, a provision in the policy that the insurance covered certain wheat while contained in a warehouse specified contained a latent ambiguity which was subject to explanation by parol.

4. Insurance — Reinsurance — Additional Clauses—Effect.

Where defendant reinsured wheat alleged to have been contained in a certain warehouse, when, in fact, it was an elevator, subject to a higher rate of premium, a subsequent clause in the policy that it was subject to the same risks, valuations, conditions, and adjustments as might have been taken by the reinsured did not render defendant liable on such policy.

5. Same — Misrepresentations—Materiality.

Where maps and ratebooks on which a policy of reinsurance was based showed a warehouse and an elevator, and prescribed different rates of premium for property insured in such buildings, a representation in the application for such reinsurance that the property insured was contained in the warehouse, which was entitled to the lower rate of insurance, when, in fact, it was in the elevator, was a material misrepresentation avoiding the policy.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Fireman's Fund Insurance Company against the Aachen & Munich Fire Insurance Company. From a judgment in favor of defendant and from an order denying plaintiff's motion for a new trial, plaintiff appeals. Affirmed.

Page, McCutchen, Harding & Knight, and Page, McCutchen & Knight, for appellant. W. S. Goodfellow and Van Ness & Redman, for respondent.

HALL, J. There are two appeals in this case, one from the judgment in favor of defendant, and one from the order denying plaintiff's motion for a new trial. The two appeals come before us on one record.

The action was brought to recover on a policy of reinsurance issued by the defendant to plaintiff. From the record in the case it appears that plaintiff and defendant were engaged in the business of fire insurance in the states of California, Oregon, and elsewhere at all the times mentioned in the complaint. The court found: "That at all of said times there were situated upon the premises of the Salem Flour Mills Company, at Salem, in the county of Marion, state of Oregon, divers separate buildings, and the same were known and designated by distinctive names. That plaintiff and defendant, and certain other fire insurance companies, at all of said times, had and used certain ratebooks and maps in the conduct of their business, and the same were used by plaintiff and defendant in the negotiations for the policy of reinsurance sued on in this action. That in the said ratebook one of the said several buildings above referred to was named, designated, and described as 'Warehouse,' and another thereof was named, designated, and described as 'Elevator.' That upon the said maps the said several buildings were delineated and the said building above referred to and described as 'Warehouse' was upon said maps marked 'Flour W. Ho. Wheat Storage 1st,' meaning 'Flour Warehouse. Wheat storage on first floor,' and the other of said buildings hereinabove referred to and described as 'Elevator' was on said maps marked 'Elevator.' That at all said times the said buildings were known to and designated and described by the plaintiff and defendant herein and said other fire insurance companies doing business in said states as the Salem Flouring Mills Company 'Warehouse' and the Salem Flouring Mills Company 'Elevator,' respectively. That the said two buildings were at a distance of about two hundred (200) feet apart. That the rate of premium charged by said companies for insurance upon the contents of the said elevator was greater than the rate of premium upon the contents of said warehouse. That said rates were fixed and designated in said ratebooks, and the same were uniformly charged by the plaintiff and defendant and said other fire insurance companies in the states of California and Oregon. That both of said buildings were generally known and designated in Salem, Oregon, and thereabouts, as 'Warehouses,' said building first hereinabove referred to sometimes being called the 'Flour Warehouse,' and sometimes the 'River Warehouse'; but among insurance men in said community said building designated in said books and maps as 'Elevator' was known as the 'Elevator Warehouse.'" There was ample evidence to support this finding.

Plaintiff had an agent at Halsey, in the state of Oregon, with power to issue policies of fire insurance. This agent, whose name is M. V. Koontz, owned some 14,000 bushels of wheat stored in the said "Elevator," and as agent of plaintiff issued to himself a policy of fire insurance, numbered W48,505, against loss or damage by fire to an amount not exceeding $7,000 "on fourteen thousand bushels of wheat, marked ——— while in Salem Flouring Mills Co. warehouse or in sheds or on platform thereto attached, at Salem, county of Marion, state of Oregon," for the term of three months, expiring at noon October 15, 1899. The issuance of this policy was reported by Koontz to the plaintiff at San Francisco, and plaintiff approved the same, but in so doing and until after the fire occurred understood and believed the "warehouse" mentioned in the policy to be the building designated in said ratebooks and maps as "Warehouse." The rate of premium payable on said policy was the rate fixed for said building, and not the higher rate fixed for said "elevator." Plaintiff (except by its agent Koontz) never saw the policy until after the fire.

After the issuance of said policy by plaintiff it applied to defendant, in San Francisco, Cal., for reinsurance. This application was made by a clerk, whose duty it was to procure reinsurance. At the time of this application the defendant and plaintiff referred to the ratebook and maps before mentioned, and the clerk of plaintiff pointed out and designated the building delineated thereon as the "Warehouse" aforesaid as the building in which the wheat was situated. The original policy was not exhibited to defendant. Defendant thereupon gave to plaintiff a temporary covering note "for an amount not exceeding $2,500 on wheat in Flour Whse situate S. S. Trade St. Salem, Oregon," and shortly thereafter issued to plaintiff the policy sued on in this action, the pertinent parts of which are as follows: "The Aachen & Munich Fire Insurance Company of Aix La Chapelle, Germany. In consideration of the stipulation herein named and of sixteen dollars premium, does insure Fireman's Fund Insurance Company for the term of 3 months from the 15th day of July, A. D. 1899, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding two thousand dollars, to the following described property while located and contained as described herein, and not elsewhere, to wit: $2,000.00 on their interest as insurers, under their policy No. W48,505, issued to M. V. Koontz, covering $7,000.00, viz.: $7,000.00 on 14,000 bushels of wheat while contained in warehouse of Salem Flouring Mills Co. at Salem, Marion county, Oregon. Property known and marked as bulk wheat. This policy is subject to the same risks, valuations, conditions and adjustments as or may be taken by the re-insured, and loss, if any thereunder is payable pro rata with the re-insured, and at the same time and place." The rate of premium payable on this policy was based on the rate for the "warehouse," and not on the rate for the "elevator," and at the time of issuing the policy and until after the fire occurred both plaintiff and defendant believed and understood that the wheat was stored in the "warehouse" and not in the "elevator." The "elevator" was burned during the life of the policy and the wheat damaged. After the fire for the first time the officers of the plaintiff at San Francisco and the defendant learned that the wheat was in the "elevator" and not in the "warehouse." Plaintiff paid the loss to Koontz, but defendant refused to pay plaintiff under the policy of reinsurance, but offered to return the premium it had received.

Defendant takes the position, first, that under the facts plaintiff was not liable to Koontz, and its payment to Koontz was merely a voluntary payment, and therefore defendant is not liable on the policy of reinsurance; and, second, that, even if it be that plaintiff was liable on its contract with Koontz, defendant's contract with plaintiff was to indemnify it against loss or damage to the wheat while contained in the "warehouse," and not elsewhere, and that the "Warehouse" referred to in its contract is the building so designated in the ratebook and maps before mentioned, and therefore defendant is not liable to plaintiff. Plaintiff, on the other hand, contends that plaintiff was liable to Koontz, and that by the contract of reinsurance defendant agreed to indemnify it against loss under the "risk" it had taken under its contract with Koontz.

The propositions contended for by appellant are raised by various objections to the admission of testimony tending to explain the meaning of the word "warehouse" in the policy of reinsurance, as well as by objections to the sufficiency of the evidence to sustain the findings, and of the findings to sustain the judgment. In determining these questions appellant takes the position that "there are but the two questions to be discussed: First, was the plaintiff bound under its policy to pay the loss incurred by Koontz? and, second, if it was so bound, can the defendant relieve itself from liability on the policy of reinsurance by reason of anything occurring between it and the plaintiff?" Under the view we take of this case, we do not think that it is important to determine whether or not plaintiff was liable to Koontz, and for the purposes of this opinion we may assume that plaintiff was liable to Koontz. While it is perfectly true that, if plaintiff was not liable to Koontz, it suffered no legal loss, and defendant would not be liable to plaintiff, it does not necessarily follow that, where the first insurer is liable, the reinsurer is also liable. Whether or not the reinsurer is liable depends upon the terms of the contract of reinsurance.

Plaintiff insists that the subject-matter of the reinsurance was the risk assumed by plaintiff under its policy with Koontz, and cites us to Jackson v. St. Paul Fire & Marine Ins. Co., 99 N. Y. 124, 1 N. E. 539, where it was held that the policy of reinsurance sued on in that case was an insurance against a "risk." In the case in 99 N. Y., 1 N. E., the language of the policy, as set out in the report of the case, seems to be directed to the risk as contradistinguished from the property covered by the first policy. The language was: "The St. Paul do reinsure" to Paterson Company "against loss or damage by fire to the amount of $1,500 on their interest as insurers under their policy No. 582 issued to E. Sherwood." The report of the case then continues, saying: "Then follows, in the language of the application, a statement as to the amount and distribution of insurance and description of the property insured under that policy." In Faneuil Hall Ins. Co. v. L. & L. & G. Ins. Co., 153 Mass. 63, 26 N. E, 244, 10 L. R. A. 423, cited by appellant, the contract of reinsurance was plainly by the terms of the contract a reinsurance against numerous risks described in a schedule attached. In Manufacturers', etc., Ins. Co. v. Western Assur. Co., 145 Mass. 419, 14 N. E. 632, the reinsurance was in terms "on its liability as insurers, etc."; and the question determined was that the first insurer could consent to an assignment of the interest of the first assured which does not materially affect the risk. In 1 May on Insurance, § 98, referring to reinsurance, it is said: "The subject-matter of the insurance in each case is the same, but the interests are different. In the first case the owner's interest is that which is protected, in the latter it is the insurer's interest in the preservation of the property by reason of the fact that he is under obligation to pay for it in case of loss." In any event, the liability of a reinsurer like that of a party to any other contract, must depend upon the terms of his contract.

By the contract sued on in this case defendant insured plaintiff "against all direct loss or damage by fire * * * to the following described property while located and contained as described herein, and not elsewhere." This language clearly indicates that the subject-matter of the insurance was tangible property that could be located somewhere and contained in some thing. The language, "$2,000.00 on their interest as insurers, under their policy No. W48,505 issued to M. V. Koontz, covering $7,000.00, viz: $7,000.00 on 14,000 bushels of wheat while contained in warehouse of Salem Flouring Mills Co. at Salem, Marion county, Oregon. Property known and marked bulk wheat"—clearly indicates that the property, the loss of which was insured against, was the wheat, and the whole contract shows that this was only covered while contained in the warehouse, and not elsewhere.

In this connection appellant urges that as the term "warehouse" was applicable to the elevator, as well as to the flour warehouse, the policy by its terms covered the wheat in either place, and that no parol testimony could be given to explain the meaning of the word. We regard this, however, as a case of latent ambiguity, which can be explained by parol testimony. 1 Greenl. on Ev. § 288; Bryce v. Ins. Co., 55 N. Y. 240, 14 Am. Rep. 249; Melcher v. Ocean Ins. Co., 59 Me. 217; Burr v. Ins. Co., 16 N. Y. 267; Jenny Lind v. Bower, 11 Cal. 194; Auzerais v. Naglee, 74 Cal. 60, 15 Pac. 371; Balfour v. Fresno, etc., Co., 109 Cal. 221, 41 Pac. 876. In Melcher v. Ocean Ins. Co., supra, an insurance had been effected on a "charter" of a vessel. The vessel at the time was sailing under two charters, and it was held that parol testimony was admissible to show which charter was intended. We think that the policy sued on in effect provided that the wheat, which was the primary subject of the insurance, was insured only while contained in the "warehouse" as designated in the ratebooks. As the wheat was not in such "warehouse," but was in the "elevator," a different building, where the hazard and rate were greater, the defendant is not liable on its contract of reinsurance. Green v. L. & L. & G. Ins. Co., 91 Iowa, 615, 60 N. W. 189; Benicia Agr. Works v. Ins. Co., 97 Cal. 468, 32 Pac. 512; Mawhinney v. Ins. Co., 98 Cal. 184, 32 Pac. 945, 20 L. R. A. 87; Slinkard v. Ins. Co., 122 Cal. 595, 55 Pac. 417; Bryce v. Lorillard F. Ins. Co., 55 N. Y. 240, 14 Am. Rep. 249.

We do not think the clause in the policy, "This policy is subject to the same risks, valuations, conditions and adjustments as or may be taken by the re-insured, etc.," aids the plaintiff. Under such a clause it is said in Manf. Ins. Co. v. Western Assur. Co., 145 Mass. 419, 14 N. E. 632: "It did not authorize the plaintiff to charge the defendant by the assumption of a new risk of a different character, or to materially enlarge the existing one. But it covered whatever an insurance company, in accordance with the general usage of such companies in like cases, would do, in the proper performance of its duty, for the continuation of the same risk, having due regard to the rights and interests of both insurer and insured." The words "subject to the same risks," etc., cannot be made to defeat a vital and material requirement expressly stipulated in the contract such as that the subject of insurance shall be contained in a given building. The policy also expressly provided that it should be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof. Defendant, as a separate defense, pleaded this provision of the policy, and that plaintiff in procuring the reinsurance had misrepresented a material matter concerning the insurance and the subject thereof, to wit, the location of the wheat. The facts are set forth in detail. On applying for the reinsurance plaintiff presented a written application, wherein it asked for reinsurance "on their interest as insurers, under their policy No. W49,505, issued to M. V. Koontz, covering $7,000.00. * * * $7,000.00 on 14,000 bushels of wheat while contained in 'Warehouse' of Salem Flouring Mill Co. at Salem, Oregon," etc.

As we have already seen, the clerk who applied for the reinsurance pointed to the "warehouse," as shown on the maps, as the building in which the wheat was stored; but in this connection it is urged by plaintiff that the clerk had no authority to make any representations, and that his action in this regard was not within the scope of his employment; citing Dolliver v. St. Joseph Ins. Co., 131 Mass. 39, but see contra Arff v. Ins. Co., 125 N. Y. 57, 25 N. E. 1073, 10 L. R. A. 609, 21 Am. St. Rep. 721. But, however this may be, it is perfectly clear that the word "Warehouse" in the written application was intended to mean by plaintiff, and was understood to mean by defendant, the building designated as such on the maps and ratebooks before mentioned, and not the building known to them as "elevator," where the rate and hazard were greater. This application in effect represented that the wheat, which was the primary subject-matter of the insurance, was in the "warehouse" as distinguished from the "elevator." This was a misrepresentation as to a material matter. Bryce v. Ins. Co., 55 N. Y. 240, 14 Am. Rep. 249; Harris v. Ins. Co., 53 Iowa, 236, 5 N. W. 124; Severance v. Ins. Co., 5 Biss, U. S. 156, Fed. Cas. No. 12,-680; Benicia Agr. Wks. v. Ins. Co., 97 Cal. 468, 32 Pac. 512; Slinkard v. Ins. Co., 122 Cal. 595, 55 Pac. 417; Columbia Ins. Co. v. Lawrence, 10 Pet. 507, 9 L. Ed. 512.

The judgment and order are affirmed.

We concur: HARRISON, P.J.; COOPER, J.

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2 Cal. App. 674

BIRD v. UTICA GOLD MINING CO. et al.

(Court of Appeal, First District, California. Jan. 18, 1906. Rehearing Denied Feb. 16, 1906; Denied by Supreme Court March 19, 1906.)

1. Master and Servant—Injuries to Servant—Complaint.

In an action for injuries to a miner by the fall of a portion of the roof, a complaint, alleging that defendants in excavating the mine negligently maintained a chamber without supports in order to prevent the roof and walls from falling, though water percolated through the same, causing the roof to become softened, disintegrated, and loosened, that defendants failed to supply props so that the chamber became an unsafe and dangerous place for men to work in, of which defendants had knowledge, was not objectionable as showing that the defects causing the accident were patent to plaintiff.

2. Same—Safe Place to Work—Duty of Master—Presumptions.

It is the personal duty of a master to exercise reasonable care to furnish his employés a reasonably safe place to work, and, in the absence of knowledge to the contrary, the servant may rely on the presumption that the master has performed such duty.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 179, 713.]

3. Same—Complaint—Character of Employment.

In an action for injuries to a miner by the fall of a portion of the roof of the mine, it was not necessary that he should allege the character of the work in which he was engaged at the time and place of the accident.

4. Appeal — Witnesses — Competency — Abuse of Discretion.

Where a witness testified that he had worked for two years off and on in a mine where timbering was done, and for 23 days in the mine where the accident in question occurred by the fall of a portion of the roof which was unsupported, a ruling permitting the witness to testify as an expert as to what circumstances rendered timbering necessary, and what were the conditions in the mine in question that made timbering necessary, was not such an abuse of the trial court's discretion as required a reversal on appeal.

5. Same—Harmless Error.

Where defendants had objected to a question when put, and had taken an exception to the ruling allowing the question, they were not substantially injured by the court's erroneous refusal to strike out a nonresponsive answer, under Code Civ. Proc. § 475, providing that a judgment shall not be reversed unless it appears that the complaining party has suffered substantial injury.

6. Evidence—Experts—Subjects of Expert Testimony.

In an action for injuries to a miner by the fall of a portion of the roof of the mine, an expert was properly permitted to testify as to what conditions rendered it necessary to timber a mine in order to make it safe.

7. Trial—Reception of Evidence—Objections.

Where a hypothetical question is objected to as calling for conditions not borne out by the evidence, it is the duty of the objector to point out the particular defects.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 198.]

8. Evidence—Hypothetical Questions.

Where there was evidence that a certain stope in a mine in which plaintiff was injured "had been opened throughout its entire length, breadth, and height," a hypothetical question describing the stope and stating that it "had been opened throughout its entire length, breadth, and height" was not objectionable, because there was no evidence that it was so open at the time of the accident.

9. Appeal—Objections to Evidence—Estoppel.

Where, on objection to the exhibition of a picture to the jury, plaintiff immediately withdrew it, though the objection was overruled, and defendants did not request an instruction that the jury disregard any evidence offered by the picture, defendants were not in a position to take advantage of their exception.

10. Master and Servant—Injuries to Servant—Safe Place—Duty of Master.

The duty of a master to supply a safe place for his servants to work does not exist, where the servants are engaged in a work that in itself constantly changes the character for safety of the place where they are working or where they are employed in making the place safe.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 179.]

11. Same—Cause of Injury—Question for Jury.

In an action for injuries to a miner by the falling of a portion of the mine roof, which was not timbered, evidence *held* to require submission to the jury of the question whether the dangerous condition of the place was the result of changing conditions produced by the operations of the workmen, or was the result of the percolation of water through the slate formation in the roof.

12. Same—Contributory Negligence—Question for Jury.

Where, in an action for injuries to a miner by the fall of an untimbered portion of the roof, it was shown that plaintiff was a mere common laborer engaged in moving rock and ore with a wheelbarrow, and that the matter of timbering the mine was in charge of the underground mine manager, whether plaintiff was guilty of contributory negligence was for the jury, though he knew that the rock at the point in question was cracked, and that water percolated through the same.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1089–1132.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Antone Bird against the Utica Gold Mining Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Page, McCutchen, Harding & Knight, for appellants. Martin Stevens, for respondent.

HALL, J. This is an appeal from a judgment in favor of plaintiff for damages received while working in a mine operated by defendants, taken within 60 days from verdict and entry of judgment, and comes before us upon the judgment roll and a bill of exceptions.

The first point raised by appellant is that "The amended complaint does not state facts sufficient to constitute a cause of action against either defendant, inasmuch as the alleged defects causing the accident were patent, not latent." It is alleged in the amended complaint that defendants did not furnish, or exercise reasonable care to furnish, their employé, said plaintiff, a safe place in which to perform the work for which he was employed; but, on the contrary, the said defendants, in excavating their said mine, did negligently open and maintain a certain stope or chamber, in this, "that by reason of the percolation of water through the ground immediately above said stope or chamber, the said ground, on and before said day, had become softened, disintegrated, and loosened, and it therefore had become, on and before said day, necessary to furnish the said stope or chamber with props, supports, and timbers, in order to prevent the roof and walls thereof from falling." This is followed by allegations that defendants negligently failed to supply any props whatever for said chamber, so that said stope became and was an unsafe and dangerous place for men to work in, and that defendants had full notice and knowledge of all of said facts before the day of the accident, and that plaintiff had no notice or knowledge or means of knowledge of the unsafe or dangerous condition of said stope, or of the causes thereof. We cannot say, from the allegations of this complaint, that the unsafe condition of the stope was so plainly apparent that a workman must be held to have had knowledge thereof. It is the personal duty of an employer to exercise reasonable care to furnish his employés a reasonably safe place to work. In the absence of knowledge to the contrary, the servant has the right to rely on the presumption that the master has performed his duty. Powley v. Swensen, 146 Cal. 471, 80 Pac. 722. If we assume in this case that plaintiff must have seen that water percolated through the ground above the chamber, it does not necessarily follow that it was patent to him that the place was unsafe. Similar complaints were held good in Southwest Improvement Co. v. Andrews, 86 Va. 270, 9 S. E. 1015; Laporte v. Cook (R. I.) 38 Atl. 700; Lewis v. City of Montgomery (Ala.) 16 South. 34. See, also, 13 Ency. of Pl. & Pr. 904; Bedford Belt R. Co. v. Brown, 142 Ind. 659, 42 N. E. 359; Mullin v. Cal. Horseshoe Co., 105 Cal. 77, 38 Pac. 535; Nofsinger v. Goldman, 122 Cal. 609, 55 Pac. 425.

It is further contended that the complaint is insufficient and defective "in omitting to state the character of work in which respondent was engaged at the time and place of the accident." In this regard it is contended that plaintiff may have been employed to perform such work as required him to assume the risk incident to the dangerous condition of the chamber, as that he may have been employed in excavating the roof, or in barring down loose rock for the purpose of removing the danger, or in preparing the place for timbering for the same purpose. It is the general rule that an employer is liable to his servant for negligence in failing to furnish the servant with a safe place to work. It is sufficient to allege negligence in general terms. Cunningham v. Los Angeles, etc., Co., 115 Cal. 561, 47 Pac. 452, and cases there cited. If the particular employment of plaintiff was such that he must be deemed to have assumed the risk of working in a dangerous place, we think this was an affirmative defense to be shown by defendants. One who relies upon an exception to a general rule must state the facts which bring his case within it. Senter v. Davis, 38 Cal. 450. It is the general rule that an employer is liable to his servant for injuries resulting from the employer's negligent failure to provide a safe place to work. To this there may be exceptions, as where the servant is employed to make the place safe. A defense founded on such an exception is an affirmative defense, and need not be negatived by the plaintiff. The court did not err in overruling defendants' demurrer to the amended complaint.

It is insisted by appellants that the court erred in permitting the plaintiff to answer questions as to what circumstances render timbering necessary in a stope or chamber, and what were the conditions in this stope in this mine that made it necessary to timber. It was objected that the witness had not been shown to be qualified to give an opinion on the subject embraced in the question. The witness had testified that he had worked for two years off and on in a mine in Arizona where timbering was done to render the mine safe, and for 23 days in the mine where the accident occurred. It must be confessed that his qualifications to speak on this subject were not of a high order, and the court would have been justified in refusing to permit him to answer the questions; but we do not think that we can say that the court abused its discretion in allowing the witness to answer. Whether a witness is qualified to testify as an expert is a question of fact to be determined in the first instance by the trial court; and, if there be any substantial evidence to support the ruling of the trial court, the appellate court will not interfere. This court will not disturb the ruling of the trial court unless error clearly appears. Sowden v. Idaho Quartz Mining Co., 55 Cal. 443; Howland v. Oakland Cons. Ry. Co., 110 Cal. 513, 42 Pac. 983; People v. McCarthy, 115 Cal. 255, 46 Pac. 1073. One of the answers was not responsive to the question asked, and appellants moved to strike it out. This motion should have been granted, but we do not think the error was such as to justify a reversal of the case. Defendants had objected to the question when put, and had obtained the benefit of an exception to the ruling allowing the question. If the answer had been stricken out, another question could properly have been put that would have called forth the testimony contained in the answer. We think this a proper case for invoking the rule contained in section 475, Code Civ. Proc., that this court should not reverse a judgment unless it appear that the complaining party has suffered substantial injury.

Objections were also made to questions to the witness Bouse, examined as an expert by plaintiff. He was abundantly qualified to speak as an expert, and it was proper to permit him to give general testimony as to what conditions make it necessary to timber a mine in order to make it safe. This sort of evidence may properly be given in order to aid the court and jury in arriving at a conclusion as to whether or not timbering or other artificial support was necessary in the mine in question. Plaintiff asked the following question of the witness Bouse: "Suppose there was a stope in the mine of the kind described by you, about 150 feet long and about 16 feet wide, and the height was such that a man 5 feet 6½ inches high, with a miners' lamp in his cap, could not see the roof when looking up, and there was a slate formation in various parts of the stope, and the stope was very moist in certain parts, and the stope had been opened throughout its entire length, breadth, and height, was that, in your opinion, a safe place for the men to work in?" Appellants objected to this question on the ground that "it called for conditions which are not borne out by the evidence," and also upon other grounds touching the qualifications of the witness, not necessary to state now, as we already said that the witness had qualified as an expert. In the objection it was not pointed out in what particular or particulars the conditions called for by the question were not borne out by the evidence. We think that, where an objection is made to a question upon this ground, good practice, as well as fairness to the trial court and the opposite party, demand that the particular defects be pointed out; and, where this is not done, this court should not be overdiligent in searching for assumptions in the question not sustained by the evidence. But passing this criticism of the objection, as well as some points as to the definitness of the assumptions contained in the question, which we do not think of sufficient importance to merit discussion, we come to the point principally relied on under this objection that "the stope was not, at the time of the accident, open throughout its entire length, breadth, and height." It would seem that it is a sufficient answer to this point to say that the question does not necessarily or at all mean that the stope at the time in question was open throughout its entire length, breadth, and height, but only that it "had been opened," which is entirely consistent with the theory now advanced by appellant that the evidence shows that as ore and rock were taken from one part of the stope other parts were filled with the same rock. If there be any doubt as to the meaning of the question, or vagueness in its meaning, in the absence of any special objection on that ground at the time of the ruling made by the trial court, we should interpret the question so as to support the ruling of the court rather than to defeat it. This stope had been open for several years, and at the time of the accident its entire length was over 150 feet; one witness putting it at 185 feet. While the plaintiff testified that he had been employed filling in various parts of the stope, we are unable to find that it is made to appear that in any part of the stope this filling was so complete as to reach to the roof of the stope and thus support it. It is true that it might be inferred from the evidence that such filling had occurred, but it is equally true, we think, from all the evidence, including the diagrams attached to the record, that it may be that this had not been done. At any rate, it is perfectly clear that the stope described in the question had been opened "throughout its entire length, breadth, and height," which is the assumption of the question. The court did not err in overruling the objection to the question under discussion.

It is also insisted that the court erred in permitting plaintiff to exhibit to the jury a certain picture or illustration of timbers in another mine. In this regard the record shows that, after evidence had been given without objection as to what the illustration represented, counsel for plaintiff exhibited the picture to the jury. Counsel for defendants thereupon objected, and, though the court overruled the objection, counsel for plaintiff at once said: "I will withdraw it for the present." It was not again offered. Under this state of the record we do not think that defendants are in a position to take advantage of their exception, as the evidence was at once withdrawn. Defendants, if they thought the matter of any consequence, or feared any injury to their cause, should have asked the court to instruct the jury to disregard any evidence afforded by the picture that had been thus withdrawn from the case.

It is urged that the evidence is insufficient to support the verdict, and that the verdict is contrary to the trial court's instructions, which two propositions we think may be most conveniently considered together. The court instructed the jury as follows: "If you find from the evidence that plaintiff or any of his fellow servants, at the time of the falling of the rock from the roof or wall of the stope, were engaged in a work that necessarily changed the character for safety of the place in which he was, or they were, working as the work progressed, the hazard of the dangerous place, and the increased hazard of the place made dangerous by the work, are the ordinary and known dangers of such a place; and by his acceptance of the employment the plaintiff necessarily assumed them as a part of the risk of his employment, and for any injuries sustained in consequence of such risks the plaintiff cannot recover."

We are cited to various cases in support of the doctrine that the duty by the employer to supply a safe place for his servants to work does not exist where the servants are engaged in a work that in itself constantly changes the character for safety of the place where they are working, or where they are employed in making the place safe. Callan v. Bull, 113 Cal. 593, 45 Pac. 1017; Finalyson v. Utica Mining & M. Co., 67 Fed. 507, 14 C. C. A. 492; Browne v. King et al., 100 Fed. 561, 40 C. C. A. 545; City of Minneapolis v. Lundin, 58 Fed. 525, 7 C. C. A. 344; Anderson v. Daly Mining Co. (Utah) 50 Pac. 815; Petaja v. Aurora Iron M. Co. (Mich.) 64 N. W. 335, 66 N. W. 951, 32 L. R. A. 435; Mielke v. Chicago & N. W. Ry. Co. (Wis.) 79 N. W. 22, 74 Am. St. Rep. 834; Perry v. Rogers (N. Y.) 51 N. E. 1021; Capasso v. Woolfolk (N. Y.) 57 N. E. 760. In Callan v. Bull, supra, the plaintiff and his fellow workmen themselves constructed the structure which gave way and caused the injury. In Finalyson v. Utica Mining & Milling Co., the workman was prying off a piece of rock preparatory to putting in supports. In Browne v. King, Anderson v. Daly Mining Co., and City of Minneapolis v. Lundin, the workman was injured by "missed shots," charges of powder that had failed to explode at the proper time. In Petaja v. Aurora Iron M. Co., the workmen were opening up a drift and, as they progressed, putting in supports. The accident happened before debris had been cleared away to put in the next set of supports. In Mielke v. Chicago & N. W. Ry. Co., it was held that the workman had full notice of the danger. In Perry v. Rogers and in Capasso v. Woolfolk the workmen were injured while clearing off a ledge immediately after blasting.

The above cases seem to illustrate the scope of the rule as to the exception to the rule of a "safe place." This brings us to an examination of the evidence. It appears from the record that the stope where the accident occurred had been opened for several years and had never been timbered. It was upwards of 150 feet in length, and varied in width from, say, 8 to 10 feet to perhaps 18 feet. There were places where water percolated through the roof, and where the accident happened the roof was composed of slate, and was wet with percolating water, so much so that near by buckets were kept to collect the water for the use of the miners. Testimony was given that this sort of formation was specially liable to fall when not supported, particularly when wet. Plaintiff and the other miners had been in the habit of passing along and under the place where the roof finally fell to get water to drink. It was and had been used as a passageway by them. Just how long the stope had been opened at the point of the accident does not appear, but the place of the accident, as appears from the diagram in the record, was about one-fourth the length of the stope from the nearest end. Blasting was being done, and ore and rock being taken from various parts of the stope. Blasting had been done near the place of the accident shortly before. At the time of the accident plaintiff had gone to the place where the water collected and in returning along the stope a large mass of rock fell from the roof and wall of the stope upon him, breaking his leg and otherwise injuring him.

From the foregoing statement of the evidence it appears to us that the jury might fairly determine that the dangerous condition of the place was not the result of changing conditions produced by the operations of the workmen, but rather was the result of permanent and extraneous causes, to wit, the percolating of water through a slate formation. In this aspect of the evidence the case at bar is quite similar to the case of Union Pac. Ry. Co. v. Jarvi, 53 Fed. 65, 3 C. C. A. 433, referred to as giving the correct rule in Finalyson v. Utica M. & M. Co., supra. In Union Pacific Co. v. Jarvi, a workman was injured by the falling of rock from the roof of a dip stope in a coal mine. The portion of the roof from which the rock fell was wet and of a treacherous character. The court held that it was a question for the jury whether the failure to support or remove such rock was a lack of ordinary care in providing a safe place for the miners to work in. Powley v. Swensen, 146 Cal. 471, 80 Pac. 722, is also a case that in its essential facts bears a striking analogy to the case at bar. In this latter case Powley was the foreman of a gang of workmen engaged in running a tunnel. By reason of the leaking of a sewer a portion of the earth above the tunnel became softened, and in consequence the tunnel caved in and killed Powley. A judgment in favor of his heirs against the contractors building the tunnel was sustained. See, also, Kelley v. Fourth of July M. Co., 16 Mont. 484, 41 Pac. 273; Elledge v. Railway Co., 100 Cal. 282, 34 Pac. 720, 38 Am. St. Rep. 290; and Hennessey v. Boston, 161 Mass. 502, 37 N. E. 668. There was evidence given to the effect that the stope where the accident occurred was used as a passageway by the workmen. In this aspect of the evidence the case is similar to Hancock v. Keene, 5 Ind. App. 408, 32 N. E. 329, where the defendant was held liable for injury to a workman in a mine caused by the fall of a portion of the untimbered roof of a passageway. The points that the evidence is insufficient to support the verdict, and that the verdict is contrary to the court's instructions, are not well taken.

It is also urged that plaintiff knew of the dangerous condition of the roof of the stope, and was therefore guilty of contributory negligence, or with knowledge of the danger assumed the risk of continuing in his employment. It is true that plaintiff knew that water came from the place where the cave occurred, and that the rock at that point was cracked; but the question of contributory negligence or knowledge of danger on the part of the workman is peculiarly a question for the jury to decide. It was for the jury to say whether the facts known to plaintiff ought to have brought home to him knowledge of the danger. Habishaw v. Standard Quicksilver Co., 131 Cal. 430, 63 Pac. 728; Sanborn v. Madera Flume, etc., Co., 70 Cal. 261, 11 Pac. 710; Magee v. N. P. C. R. R. Co., 78 Cal. 430, 21 Pac. 114, 12 Am. St. Rep. 69; Martin v. Cal. Cent. Ry. Co., 94 Cal. 326, 29 Pac. 645; and Union Pac. Ry. Co. v. Jarvi, supra. In this last-mentioned case it is said: "Of course the master is required to exercise a care and a diligence in the preparation and subsequent inspection of such a place as a room in a mine that is not in the first instance demanded of the servant. * * * The degrees of care required of the master and the servant also differ, because defects in a piece of machinery or in the roof of a mine that, to the eye of a competent inspector such as the master employs, portend unnecessary and unreasonable risks and great danger, may have no such significance to a laborer or miner who has had no experience in watching or caring for machinery or roofs of stopes in a mine." In the case at bar plaintiff was a "mucker," that is, a common laborer engaged in moving rock and ore by the aid of a wheelbarrow; and the matter of timbering was in charge of an underground mine manager.

The judgment is affirmed.

We concur: HARRISON, P. J.; COOPER, J.

2 Cal. App. 684

McKEE v. CUNNINGHAM et ux.

(Court of Appeal, Second District, California. Jan. 18, 1906.)

1. Husband and Wife — Husband's Liability—Necessity.

By the express provisions of Civ. Code, § 175, a husband is not liable for the support of his wife when she is living separate from him by agreement.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 126.]

2. Trial—Findings—Effect.

In an action against two defendants jointly, a finding that only one is liable is not without the issues, but sustains a judgment against him.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 772.]

3. CONTRACTS—JOINT PROMISE—EFFECT—PRESUMPTIONS.

By the express provisions of Civ. Code, § 1659, where all the parties who unite in a promise receive some benefit from the consideration, either past or present, the promise is presumed to be joint and several.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 780.]

4. CORPORATIONS—ASSIGNMENTS — ACTION BY ASSIGNEE—BURDEN OF PROOF.

In an action by the assignee of a corporation on a contract with the corporation, the burden of showing want of authority to make the assignment is upon defendant.

5. SAME—SUFFICIENCY OF EVIDENCE.

Where, in an action by the assignee of a corporation on a contract with the corporation, it appeared that a written assignment was executed under the corporate seal, the mere fact that the record of the board of directors did not disclose authority to make the assignment did not show want of authority as the general custom of business or authority of the board not entered of record would be sufficient warrant upon the part of the secretary for attaching the seal.

6. PRINCIPAL AND AGENT — UNDISCLOSED PRINCIPAL—ACTION AGAINST.

Where goods are sold to an agent acting for an undisclosed principal, the seller may recover from the principal on discovering him though the goods had been charged to the agent.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 515.]

7. SAME—PROOF OF AGENCY—SUFFICIENCY OF EVIDENCE.

Where goods were sold to a wife and the seller subsequently sought to hold the husband as an undisclosed principal, the wife's written statement after the commencement of the action that she owned the goods did not conclude plaintiff from establishing the ownership of the husband.

8. APPEAL—HARMLESS ERROR—JUDGMENT.

Where, in an action against two persons jointly on a contract, it appeared that only one was liable, the irregularity of rendering a judgment against the other was not such as to warrant a reversal of judgment against the one liable, Code Civ. Proc. § 475, providing that no judgment shall be reversed for any error not causing substantial injury to the party complaining.

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by C. E. McKee against M. Cunningham and wife. From a judgment in favor of plaintiff, defendant M. Cunningham appeals. Affirmed.

Rehearing denied by Supreme Court, March 19, 1906.

J. H. Shankland (Jeff Paul Chandler, of counsel), for appellant. F. E. Davis and H. C. Millsap, for respondent.

ALLEN, J. The suit was brought by the plaintiff as assignee of the Los Angeles Furniture Company upon the alleged contract set out in the complaint, of date November 20, 1903; which is that on the day named, at the city of Los Angeles, "the said Los Angeles Furniture Company sold and delivered to the said defendants, and the said defendants had and received from the said Los Angeles Furniture Company, certain goods, wares, and merchandise, for which the said defendants then and there agreed to pay the sum of $752.90"; which they have ever since refused to pay, etc. The answer denies the allegations of the complaint, and it is further pleaded, in separate defenses, in effect, among other things: That for many years the defendants have been living separate and apart by agreement; that the defendant appellant has never neglected to make adequate provision for the support of his wife; and that the debt sued upon is now secured by a mortgage, executed by Mrs. Cunningham since the beginning of the suit, upon the property alleged to have been sold to the defendants, and some other property, as her separate property, which was accepted and recorded by the plaintiff. The court finds the contract of sale sued upon as alleged in the complaint. But it is further found that the appellant defendant "authorized the purchase of said goods, wares, and merchandise from the Los Angeles Furniture Company, and the delivery thereof to Mary E. Cunningham, his wife, * * * and agreed to pay therefor the sum of $752.90."

As to the mortgage, the facts are found as alleged; but it is found that a portion of the mortgaged property, consisting of the goods in question, was community property, and the rest his separate property, and that the mortgage was made without the husband's knowledge or consent and without consideration of any kind, and was therefore void. The other facts set up by the defendant are found as alleged. The conclusion of the court was that the plaintiff is entitled to judgment against the defendants, and each of them, for the sum alleged in the complaint, with interest, from which judgment the defendant M. Cunningham appeals, bringing up the evidence in a bill of exceptions.

It is clear upon the facts found that any claim of plaintiff to recover against defendant on the ground that the goods sold were necessaries cannot be maintained. Civ. Code, §§ 174, 175.

The main contention on the part of appellant is that the action being joint against the two defendants, the finding that only one is liable is outside the issues, and cannot sustain the judgment. Our Supreme Court in Dobbs v. Purington, 136 Cal. 70, 58 Pac. 323, has determined this question adversely to appellant's contention, it being there declared that the rule at common law is not the rule under our Code. The fact that the judgment was also rendered against the wife, who is not here complaining in regard thereto, does not concern the appellant, and does not prejudice him. The presumption is that the contract sued upon was a joint and several one. Civ. Code, § 1659. The effect of the contract, therefore, is not varied by the additional finding that the appellant defendant authorized the purchase and agreed to pay therefor the sum of $752.90. Nor can the contention of appellant be sustained that the finding that the furniture company assigned and transferred the claim to the plaintiff herein before the bringing of the suit has no support in the testimony. The record discloses that a written assignment was executed under the seal of the corporation. This seal is its signature and presumably authorized, until the contrary is made to appear. The burden of showing want of authority was upon the defendant. The mere fact that the record of the board of directors does not disclose such authority is not of itself conclusive proof in that regard. The general custom of business, or authority of the board not entered of record, would be sufficient warrant upon the part of the secretary for attaching such seal.

In relation to the finding of the court that the appellant defendant authorized the purchase of the goods from the Los Angeles Furniture Company and the delivery thereof to Mary E. Cunningham, his wife, and agreed to pay therefor the purchase price, there was great conflict in the testimony. The trial court, however, seems to have accepted the testimony of the daughters in relation to the incidents of the transaction, from which it appears that the defendant stated to the daughters that if they would procure the mother, who was living separate from the defendant, but who seems to have charge of the daughters, maintaining a home with them, to remove to Pasadena, that appellant defendant would furnish the house, and if the furnishings could not be bought cheaper in Chicago than in Los Angeles, they, the daughters, were to purchase the necessary furniture in Los Angeles—the defendant, however, to be furnished a list before such purchase was made. Upon appellant's notifying his daughters that it was not practicable to buy in Chicago, one of the daughters visited the furniture company's rooms, selected the goods, and made out a list thereof, and sent to the father, and subsequently the mother ordered the goods delivered; that, upon the defendant's return to California, he expressed himself as satisfied with the price at which the goods had been bought, and said that he would pay for them if the bill could be discounted. There is nothing in the record indicating that the mother ever promised to pay for the goods, or represented that she was able or willing to pay therefor, nor anything said tending to disclose the fact that the mother was acting for the husband in the purchase; nor is there anything in the record indicating the fact that the name of the principal was disclosed until after the delivery of the goods, when from the record it seems the wife said that they would pay for the goods upon the return of the husband from Chicago. The mere fact that the furniture company charged the sale to Mrs. Cunningham without authority from her, and in the absence of a contract, that she would pay for them individually, would not of itself preclude the plaintiff's assignor from recovering the value of the furniture so sold from the real purchaser after the principal's name was disclosed. Ferguson v. McBean, 91 Cal. 63, 27 Pac. 518, 14 L. R. A. 65; Puget Sound Lumber Co. v. Krug, 89 Cal. 237, 26 Pac. 902; Bergtholdt v. Porter Bros. Co., 114 Cal. 688, 46 Pac. 738. From the findings, the goods so purchased became and remained the property of the appellant, and he retains them, and should in law and morals pay therefor. Thomas v. Moody, 57 Cal. 219. Nor would the written statement of the wife, after the commencement of the action, that she was the owner of the goods, conclude the plaintiff in an effort to establish the real purchaser and ownership. Were it even conceded to be an irregularity in the proceedings to render a judgment against the wife under the evidence, it is not such an irregularity as would warrant a reversal of the judgment against the husband under section 475, Code Civ. Proc.

We find no prejudicial error in the record, and the judgment is affirmed.

I concur: GRAY, P. J.

SMITH, J. I concur in the judgment, though with some hesitation. The complaint alleges a sale by the plaintiff's assignor "to the defendants," and the finding and judgment is in accordance with this allegation. There is no evidence tending to support this allegation or finding. But the evidence of the daughters of the defendants tends to prove that the defendant appellant authorized them and their mother, or one of them, to purchase the furniture on his account; and though their testimony is not altogether satisfactory, yet it would perhaps have justified the court in finding that the furniture was purchased by the appellant defendant. Were there such a finding, the case would come within the application of the decision in Dobbs v. Purington, 136 Cal. 70, 68 Pac. 323; but in the absence of such a finding, it is difficult to bring the case within that ruling. It is clear, however, that the joint sale to the defendants found by the court was also several; and the court finds that the appellant defendant "authorized the purchase of [the goods] and the delivery thereof" to Mrs. Cunningham, which would seem, in effect, to find that the purchase was on account of Cunningham. In support of the judgment, therefore, we may perhaps assume that there is a finding of a purchase by the appellant defendant, and disregard the finding as to Mrs. Cunningham's participation in the sale as being an erroneous conclusion of law from the evidence, and immaterial. Upon this construction of the findings, the case would come within the application of Dobbs v. Purington, supra.

But here another difficulty presents itself. There is, as I have said, absolutely no evidence tending to show a joint purchase. The apparent transaction, as shown by the evidence without contradiction, was a sale by the plaintiff's assignor to Mrs. Cunningham personally. Nor is there any evidence in the record tending to show that the transaction was different, except that of the daughters. Assuming this to be true, the transaction presented by the evidence was that of a purchase by an agent of an undisclosed principal in her own name. Such being the case, according to what seems to be the preponderating weight of authority, the plaintiff's assignor would have been put to its election, either to pursue the agent as the apparent principal or to pursue the real principal when disclosed. Thomas v. Moody, 57 Cal. 215; Puget Sound Lumber Co. v. Krug, 89 Cal. 244, 26 Pac. 902; 40 Am. Dig. col. 1276, § 499; Story's Agency, § 291; Anson on Contracts, 462; 1 Parsons on Contracts, 63, 549. Here the evidence of the election upon the part of the plaintiff's assignor, after a full knowledge of the transaction, to pursue Mrs. Cunningham as the purchaser, is clear and uncontradicted; and even after the commencement of the suit a chattel mortgage was taken by the plaintiff from Mrs. Cunningham on the furniture. The plaintiff, therefore, stands in the position of at once asserting an interest in the furniture by virtue of this mortgage, and of pursuing also the appellant defendant. This, under the rule cited, is not permissible, and assuming the rule to be as expressed, his election to pursue Mrs. Cunningham operated as a discharge of his claim, if any, to sue the appellant defendant. But I am not altogether satisfied of the propriety of the rule.

In this state of doubt, in support of the action of the court below, and upon the authority of Dobbs v. Purington, I feel constrained to concur in the conclusion of the majority of the court.

2 Cal. App. 665

FLYNN v. SEALE.

(Court of Appeal, First District, California. Jan. 16, 1906. Rehearing Denied Feb. 16, 1906.)

1. WITNESSES—COMPETENCY—PARTNERSHIP — ACCOUNTING.

Where a firm was dissolved by the death of one of its members, after which the deceased member's distributee became a partner, the surviving partner, in an action against such distributee for an accounting, was competent to testify to the existence of the partnership between himself and the deceased, as well as to the terms of the partnership agreement.

2. PARTNERSHIP—ACCOUNTING—PAYMENTS.

Where a partnership agreement obligated plaintiff's deceased partner to procure funds to conduct the partnership business, the payment of money by deceased to a bank, to liquidate his obligation to the bank for money borrowed to carry out a firm contract, was not an advancement for plaintiff's benefit.

3. SAME—LIMITATIONS.

Payments claimed to have been made by plaintiff's deceased partner for the benefit of the firm, more than two years before an action for an accounting, were barred by limitations.

4. LIMITATION OF ACTIONS — MUTUAL ACCOUNT.

A mutual account, within Code Civ. Proc. § 344, providing that an action thereon is deemed to have accrued from the time of the last item proved in the account on either side, implies an account in which there is a reciprocity of dealing between the parties made up of matters of set-off, whereon each party has a right of action against the other.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 295–298.]

5. PARTNERSHIP—ACCOUNTING—SET-OFF.

An individual obligation is not a proper matter of set-off to a partnership claim, or to a claim by plaintiff in a representative capacity, nor can a partnership debt be set off to a claim by one of the members of the firm.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, § 734.]

6. PAYMENT—APPLICATION OF PAYMENTS.

Where a payment was applied in accordance with defendant's directions, he could not thereafter direct a different application.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Payment, § 103.]

7. PLEADING—BILL OF PARTICULARS—INSUFFICIENCY.

Where plaintiff delivered a bill of items to defendant several months before trial, it was defendant's duty, if not satisfied therewith, to have objected before trial.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1421.]

8. SAME — FAILURE TO FURNISH — OBJECTION TO TESTIMONY.

Where plaintiff sued for an accounting as well as on an account for labor performed, his failure to deliver a required bill of items of the account would not preclude him from testifying with reference to his cause of action for an accounting.

9. APPEAL—HARMLESS ERROR.

Where, in an action for an accounting, and on an account for labor performed, the court did not allow plaintiff anything on his cause of action for labor, defendant was not prejudiced by the court's overruling defendant's objection to plaintiff's evidence, concerning his account for work and labor, because of plaintiff's failure to furnish a sufficient bill of items.

10. PARTNERSHIP — PARTNERSHIP PROPERTY—INCOME—ACCOUNTING.

Plaintiff and his deceased partner, who were tenants in common of a certain quarry, entered into a partnership to operate the same, by which each was to have half of the rents and profits. After decedent's death, defendant, in his capacity as executor and as distributee of decedent's interest in the firm, collected and retained all of the rents and profits belonging to the quarry. *Held*, that one-half of such rents and profits only belonged to defendant or the estate, and that he held the other half as a bailee for plaintiff.

Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by Thomas Flynn against Thomas Seale. From a judgment for plaintiff, defendant appeals. Affirmed.

Nicholas Bowden and William A. Bowden, for appellant. Roger Johnson, H. E. Wilcox, and D. M. Burnett, for respondent.

HARRISON, P. J. The plaintiff and Henry W. Seale were for many years tenants in common of a tract of land in the county of Santa Clara, each owning an undivided half thereof, upon which there was a valuable quarry of building stone, and on September 6, 1888, said Henry W. Seale died, leaving a last will and testament, by which he devised the said land to the defendant herein, and since said date the plaintiff and the defendant have been co-tenants thereof. The interest of said Henry W. Seale in said land was distributed to the defendant by an order of the superior court May 23, 1890, and on March 25, 1892, a final distribution of the estate was made to the defendant as the residuary legatee of said decedent. In his complaint herein filed September 10, 1895, the plaintiff alleges that since October 1, 1888, the said tract of land has yielded certain rents and profits, the greater portion whereof has been collected and received by the defendant; and that he (the plaintiff) has during said time made certain expenditures in the care and preservation of the property, and he asks that an account be taken and stated between them, and that he have judgment for the amount ascertained thereby to be due to him from the defendant. The cause came on for trial in 1900, and upon the trial the court found that between October 1, 1888, and January 17, 1900, the land had yielded rents amounting to the sum of $5,905.40, of which $5,705.40 had been received by the defendant and $200 by the plaintiff; that the defendant had paid to the plaintiff $175; that the defendant had paid for state and county taxes thereon the sum of $2,587.45; that during said time the plaintiff had paid out and expended for improvements upon said property $96.60, and the defendant the sum of $88.30. The court thereupon held that the plaintiff was entitled to recover from the defendant the sum of $1,288.12½, and rendered judgment accordingly. In his answer to the complaint the defendant, in addition to traversing its allegations, pleaded as counterclaims against the plaintiff that Henry W. Seale, shortly prior to his death, paid for and on account of the plaintiff various sums of money, amounting in the aggregate to $8,000, which had not been repaid, and that at the request of the plaintiff he had become responsible and guarantied to pay other moneys amounting to $2,523 for and on account of the plaintiff, and that since his death the defendant had been compelled to pay this latter sum in order to protect his title to the aforesaid land; that subsequent to October 1, 1888, the plaintiff, under a contract made by him prior to the death of Henry W. Seale, furnished to one McClerie building stone from the quarry on the land, of the value of $10,500, and sold from said quarry other quantities of stone, for which he received in the aggregate the sum of $21,000, which he had converted to his own use. The same matters were also pleaded by the defendant by way of cross-complaint against the plaintiff.

Upon the issues joined on these allegations, the court found that prior to 1887 the plaintiff quarried from the premises certain building stone, under an agreement between him and Henry W. Seale, at his own cost and expense, and that said Seale gave to him all his right, title, and interest in the stone so quarried; that in July, 1887, they agreed to develop the quarry and enter into contracts for the construction of buildings from stone quarried therefrom, and to share equally in the losses and profits resulting therefrom, and entered into and formed a partnership for such purposes, by the terms of which it was agreed that the plaintiff should give his personal time and attention to the service of said partnership and should receive a reasonable sum in payment therefor, and that said Henry W. Seale should advance or procure to be advanced moneys sufficient to develop the quarry and to carry out the contracts that might be entered into; that thereupon they opened an account with the bank of Wells, Fargo & Co. in San Francisco in the name of Seale & Flynn, under an agreement between them and the bank that the moneys necessary to carry on said partnership business should be drawn by the plaintiff against said account; and that the profits of the business, if any, should be deposited by him to the credit of the account. That thereupon, about the 1st day of August, 1887, the plaintiff commenced the development of said quarry under said agreement, and, for the payment of the costs and expenses thereof, obtained money from said bank on said account by checks signed by him with the name of Seale & Flynn. In July, 1888, he entered into a contract on behalf of the partnership with one McClerie to furnish stone from the quarry for the erection of a building in San Francisco, and to dress and place the same therein, for the sum of $10,500. Before its completion Seale died, and after his death the plaintiff, as the surviving partner and with the consent of the defendant, carried on the contract and completed the same March 13, 1889. While said contract was being executed, the plaintiff drew from the bank on said account $3,669.30 in the lifetime of Henry W. Seale, and after his death, with the consent of the defendant, the sum of $1,475, all of which was used in completing the McClerie contract. On December 3, 1888, the balance due the bank on said account amounted to $1,644.33, which the defendant paid to it February 21, 1891. There was at that time a charge against the account upon the books of the bank of $292.15 for interest, but the bank remitted the same, and the defendant did not pay any part of it. September 24, 1888, after the death of Henry W. Seale, plaintiff drew from the bank the sum of $587, not included in the above account, which he expended in completing the McClerie contract, but by a mistake of the bank this amount was charged to the account of the estate of Henry W. Seale, and on March 25, 1892, when the mistake was discovered, the defendant paid that amount to the bank. While the plaintiff was carrying out the McClerie contract, and prior to its completion, he sold to divers individuals some of the stone quarried by him under the agreement made by him prior to 1887 with Henry W. Seale, and also some that was quarried after the partnership agreement was entered into. For that which was quarried during the partnership, the court finds that the plaintiff received about $50 more than the expense of quarrying it. It finds, however, that the plaintiff expended all that he thus received in the completion of the McClerie contract, and that the sale of said stone was a part of the operation of the quarry for the purpose of carrying out this contract. The court, moreover, found that there was no profit in the McClerie contract, that the partnership resulted in a loss, and that the plaintiff never received any compensation for the time and services devoted by him to its business.

The above findings are amply sustained by the evidence. The plaintiff was a competent witness to establish the fact of the partnership between him and Henry W. Seale, as well as the terms of such partnership, and his testimony thereon was direct and positive, and the finding of the court must be accepted as conclusive. There is no evidence in the record, or any finding by the court, that Henry W. Seale paid out in his lifetime any money for the plaintiff, or that the defendant after his death advanced to or paid out for the plaintiff any money on account of said lands or for their improvement or preservation. The $2,523 alleged by him to have been paid out includes, with the two items of $1,644.33 and $587 paid to the bank, the sum of $292 charged by the bank for interest, but which the court finds the defendant did not pay. The moneys which were thus paid by him were not an advancement to the plaintiff, but were paid to the bank for the purpose of liquidating and discharging an obligation of Henry W. Seale in favor of the bank, which had been incurred in the execution of the McClerie contract, and which, as between the plaintiff and Henry W. Seale, was the obligation of the latter under the terms of their partnership agreement, wherein he agreed to advance or procure to be advanced the moneys necessary to develop the quarry and carry out its contracts. As these payments were made more than two years prior to the commencement of the action, the court found that the defendant's right of action therefor was barred by the statute of limitations, and consequently could not be the basis of a counterclaim or of a cross-complaint.

It is urged by the appellant that these transactions between the 6th of September, 1888, and the commencement of the action, constituted a mutual, open, and current account between him and plaintiff, and by reason thereof, under section 344, Code Civ. Proc., the statute of limitations is not a defense. A mutual account implies a reciprocity of dealing between the parties to the account, and is made up of matters of set-off wherein each party has a right of action against the other; and a set-off can be pleaded only when the right of action is against the plaintiff in the same capacity as that in which he is prosecuting his claim. An individual obligation is not a matter of set-off to a partnership claim or to a claim by the plaintiff in a representative capacity; nor can a partnership debt be a set-off to a claim by one of the members of the partnership.

After the death of Henry W. Seale, the only transactions with which the plaintiff and the defendant were connected, or in which each of them had an interest or relation, aside from the receipt and expenditure by them respectively of money in connection with the land of which they were tenants in common, were the completion by the plaintiff of the McClerie contract and the payment by the defendant to the bank of Wells, Fargo & Co. of its claim against the firm of Seale & Flynn. The defendant had no claim against the plaintiff for the proceeds of the sale of the stone which he had quarried under the agreement with Henry W. Seale prior to 1887, and the proceeds from the sale of stone subsequently quarried were shown to have been applied to the completion of the McClerie contract. As already shown, the payment to the bank was not upon any account or transaction between the defendant and the plaintiff, or for any matter for which the defendant could have maintained an action against the plaintiff. The payment was made for the specific purpose of discharging the claim of the bank against the estate of Henry W. Seale; and the defendant, when he made the payment, directed that it be applied for that purpose. The payment having then been applied in accordance with his directions, it was not competent for him thereafter to direct a different application. Even if it had been a general payment on an open account between them, the account would not for that reason have been rendered mutual, since the mere payment of money upon an account does not have that effect, but operates simply as a reduction pro tanto of the claim.

After the trial of the cause had commenced, the plaintiff was called as a witness in his own behalf, whereupon the defendant objected to his being permitted to testify, and asked for an order excluding all evidence on his behalf upon the ground that, after a demand had been made upon him by the defendant for a bill of items of the account sued upon, he had failed to deliver the same, and, in support of this motion and objection, read the demand, together with a bill of items which had been delivered in response thereto, but which he claimed to be insufficient. The court overruled the objection and denied the motion, and this ruling is assigned as error. The action by the plaintiff is not only upon an account for labor performed by him, but also for an accounting by the defendant for moneys received by him to the use of the plaintiff, and his failure to deliver the bill of items would not preclude him from giving testimony upon this portion of his complaint. It was shown that he did deliver a bill of items to the defendant several months before the trial began, and, if the defendant was not satisfied therewith, he should have made his objection sooner and given to the plaintiff an opportunity to obviate it. McCarthy v. Mt. Tecarte L. & W. Co., 110 Cal. 687, 43 Pac. 391. As, however, the court in its judgment did not include any allowance to the plaintiff for his claim upon the account for labor, its ruling upon the motion became inconsequent.

The court properly sustained the objection to the question asked of the plaintiff in reference to the $250 check, upon the ground that it was not proper cross-examination. The defendant could have shown that the plaintiff had received the money represented thereby as a part of his defense, if he had so desired, but it does not appear that such offer was made.

The claim of the appellant that he cannot be required to account for the rents collected by him during the period that he was executor of the will of Henry W. Seale, and prior to the distribution of the land to him, cannot be sustained. During this time the estate of Henry W. Seale was entitled to only one-half of the rents, and the defendant was required to account to it for only that half; the other half belonged to the plaintiff, and was received by the defendant, not for the estate of which he was executor, but as bailiff in possession for the plaintiff and the estate. His liability to account to the plaintiff is the same as if he had himself been the co-tenant during that period.

The judgment and order are affirmed.

We concur: COOPER, J.; HALL, J.

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2 Cal. App. 642

LAMBERT v. CUMMINGS et al.

(Court of Appeal, First District, California. Jan. 15, 1906.)

1. MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS—RESOLUTIONS.

St. 1891, p. 196, c. 147, provides that before ordering any improvement, the city council shall pass a resolution of intent so to do, describing the work. An ordinance adopting specifications for macadamizing and guttering public streets divided macadam into A, B, and C classes, and described the latter to consist of rock approved by the board of trustees of the town from time to time, etc., declaring that all rock used in macadamizing, designated as class C, should include any rock classified as belonging to classes A, B, and C, as classified in section 1 of the ordinance. *Held*, that where no rock had been approved by the board of trustees as class C rock, a resolution of intention declaring that a certain street should be macadamized with class C macadam, as classified by the ordinance was fatally defective for failure to sufficiently describe the work to be done.

2. SAME—GUTTERS.

A resolution of intention to improve a street, merely declaring that the gutters should be concrete gutters four feet wide, was defective, for failure to sufficiently describe the work to be done.

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by D. Lambert against Charlotte Cummings and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Alexander G. Eells and H. K. Eells, for appellant. A. E. Bolton, for respondents.

COOPER, J. Action to foreclose the lien of a street assessment alleged to exist by virtue of proceedings instituted by the council of the town of Berkeley. Defendants had judgment, from which the plaintiff prosecutes this appeal. The question is as to whether the resolution of intention was sufficient to give the board jurisdiction to let the contract, order the work done, and assess the property for such work. Section 3 of the street assessment act (St. 1891, p. 196, c. 147) provides: "Before ordering any work done or improvement made, which is authorized by section two of this act, the city council shall pass a resolution of intention so to do, and describing the work."

The resolution of intention is the initial step, and by it alone the council acquires jurisdiction to subsequently make the assessment and order the work done. Schwiesau v. Mahon, 128 Cal. 116, 60 Pac. 683; McDonnell v. Gillon, 134 Cal. 330, 66 Pac. 314. The resolution of intention, so far as material here, was as follows: "That Prince street in said town from the westerly line of Grove street to the easterly line of Sacremento street be macadamized and guttered to the official lines and grades. * * * The macadam shall be class 'C' as classified in Ordinance No. 62A."

Ordinance No. 62A, adopting specifications for macadamizing and guttering the public streets in said town, provides:

"Section 1. Classifications of macadamizing rock used in macadamizing and constructing gutters in the streets of the town of Berkeley shall be classified into three classes, and shall be designated as 'Class A,' 'Class B,' and 'Class C.'

"Class A. Class A shall be such rock as shall lose by abrasion and fracture not more than 15 per cent. of its original weight when subjected to the test known as the rattler test.

"Class B. Class B shall be such rock as shall lose by abrasion and fracture not more than 20 per cent. of its original weight when subjected to the said rattler test.

"Class C. Class C shall be such rock as shall be approved by the board of trustees of the town of Berkeley from time to time, a sample of which rock shall be presented for such approval. One sample of such rock having been approved, it shall be deemed sufficient for all subsequent work in said class C until approval shall be withdrawn by said board.

"Section 2. Macadamizing. The macadam shall be of three classes, to be designated as 'Class A,' 'Class B,' and 'Class C.' All macadamizing shall be of the class called for in the resolution of intention.

"Sec. 7. Macadamizing, class C. All rock used in macadamizing designated as class C shall be any rock classified as belonging to 'Class A,' 'Class B,' or 'Class C,' as classified in section 1 of this ordinance. * * *"

No rock was approved by the board of trustees as class C rock.

It seems clear to us that the resolution of intention did not describe the work to be done. It did not specify the kind or quality of rock to be used. The ordinance provides that class C shall be such rock as shall be approved by the board of trustees from time to time by sample, and it may consist of rock belonging to class A or class B, or such other kind of rock as may be approved by the board of trustees, but there can be no class C rock until it is approved and made so by the board of trustees. It is thus plain that when the resolution of intention provided that the macadam should be class C, the board of trustees might have determined by their order of approval the kind of rock that would constitute class C, which might have been a much more costly rock than class A or class B, or it might have been rock of class A or class B, or it might have been a rock much inferior and cheaper than rock classified as class A or class B. The effect of the resolution of intention was that the street be macadamized with class A rock if approved by the board of trustees, or class B rock, if approved by the board of trustees, or any other kind of rock that might be approved by the board of trustees. It is at once evident that a contractor bidding for the work must have done so upon the probability of being compelled to use the most expensive rock for macadamizing, unless he had been assured in some way by some private arrangement that he might use other or different rock. The board of trustees were thus enabled to favor one contractor and discriminate against another. Whether the contractor could do the work for the amount of his bid, or whether he could make a fair profit, or a very large profit, in such case, would depend entirely upon the will of the board of trustees. The owner has a right to know, by the resolution of intention, the nature of the work contemplated so that he, in common with other owners, may determine whether or not he will favor the contemplated improvement, or file written objections thereto. He has the right to have the work described so that the contractor may calculate the cost of the work, and that there may be fair competition among bidders. A resolution of intention, followed by a notice of letting a contract to macadamize a certain street with such rock as may be approved by the board of trustees, does not describe the work to be done. The contractor may be required to use marble or soft sandstone or cobbles. In Grant v. Barber, 135 Cal. 188, 67 Pac. 127, the specifications annexed to the resolution of intention, as a part thereof, provided that the contractor "shall put in such culverts as the street superintendent shall direct." It was held that the resolution did not sufficiently describe the work. It was there said in regard to the contract: "The price at which it would be awarded would vary according to the uncertainty of the work to be done, and competition among bidders would be materially affected. Under such a condition the bidder would naturally make his proposal in view of the most expensive material that might be required by the superintendent, and whether he did or not the uncertainty of the number of culverts, and the materials from which they were to be constructed, would prevent the owner from electing to do the work at the price it might be awarded." See, further, Bolton v. Gilleran, 105 Cal. 245, 38 Pac. 881, 45 Am. St. Rep. 33; San Jose I. Co. v. Auzerais, 106 Cal. 498, 39 Pac. 859; Fay v. Reed, 128 Cal. 359, 60 Pac. 927; Chase v. Scheerer, 136 Cal. 251, 68 Pac. 768.

The resolution of intention was equally defective as to the gutters. It provided: "The gutters shall be concrete gutters four feet wide. The macadam shall be class 'C' as classified in ordinance No. 62A."

The judgment is affirmed.

We concur: HARRISON, P. J.; HALL, J.

2 Cal. App. 646

CARTY v. BOESEKE-DAWE CO.

(Court of Appeal, Second District, California. Jan. 15, 1906. Rehearing Denied by Supreme Court March 14, 1906.)

1. Municipal Corporations—Streets—Obstructions—Negligence.

Where defendant excavated two trenches in a street at right angles to each other and maintained only a single lantern at night on one of the arms of the ditch, and the absence of signal lights properly placed so as to mark the line of excavation was the proximate cause of plaintiff's injury by driving into the ditch, defendant was guilty of actionable negligence.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1657.]

2. Same—Contributory Negligence.

Where an excavation opened in a street into which plaintiff drove at night was a recent one unknown to plaintiff, and the ditch was not properly protected by lights, plaintiff was not guilty of contributory negligence.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1677.]

3. Same—Evidence.

In an action for injuries to plaintiff by driving into a ditch in a street improperly protected at night by signal lights, evidence of the nonoccurrence of other accidents at the same place or under similar circumstances was inadmissible.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1731.]

4. EVIDENCE — SUBJECTS OF EXPERT TESTIMONY.

In an action for injuries alleged to have been caused by defendant's failure to guard an excavation in a street, the sufficiency of the light maintained was not a proper subject of expert testimony.

5. APPEAL—HARMLESS ERROR.

Where, in an action for personal injuries, the damages assessed were not large, defendant was not prejudiced by the exclusion of evidence of plaintiff's habits in respect to the use of intoxicating liquors a year or more preceding the accident.

6. TRIAL — JURY—TAKING EXHIBITS TO JURY ROOM.

In an action for injuries, it was not an abuse of the trial court's discretion to refuse to permit the jury to take with them on retirement a map that was before them during the trial.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 732–737.]

Appeal from Superior Court, Santa Barbara County; James W. Taggart, Judge.

Action by Charles Carty against the Boeseke-Dawe Company. From a judgment for plaintiff, defendant appeals. Affirmed.

H. P. Starbuck and Canfield & Starbuck, for appellant. Henley C. Booth and William G. Griffith, for respondent.

ALLEN, J. Action on account of alleged negligence. Verdict and judgment for plaintiff. Defendant appeals.

The record discloses that De La Vina street is a public street running northerly and southerly through the city of Santa Barbara; that defendant under authority from the municipality entered upon such street, near its intersection with Ortega street, and made an excavation in the center line of De La Vina street a distance of eight feet, which excavation had a width of two feet and a uniform depth of six feet, the same having been made for the purpose of locating a sewer connection. From this sewer connection when located, which appears to have been near the middle of the excavation, a ditch was dug easterly at an angle of about 45 degrees from the line of the first excavation to the curb line of the street, with a depth varying from six feet at the street center to three feet at the curb. From these excavations dirt was thrown upon the banks upon either side, elevating the surfaces adjacent nearly three feet. On the evening of October 22, 1903, the workmen in defendant's employ ceased labor for the day; and evidence appears tending to show that there was placed on the westerly side of the center line excavation, near its middle, a lighted lantern, fastened upon a stick stuck in the loose earth on the westerly side of the embankment, which stick slanted away from the ditch. This lantern was lighted and the light maintained all night. No other light or danger signal was placed on or about the excavation, except a lighted lantern placed near the curb at the easterly end of the ditch. This lantern is shown to have been extinguished within a short time after being placed in position, and was not maintained as a danger signal during the night. Plaintiff, before daybreak on October 23d, seated in a buggy drawn by a single horse, drove down De La Vina street northerly without seeing the lighted lantern, or having knowledge of the excavation, and his horse fell into the center line excavation from the east side, near its junction with the ditch and about six feet east of the lighted lantern. The horse received injuries from which it died, and plaintiff suffered serious injury.

It is contended by appellant, under this state of facts, that no negligence on the part of defendant is shown. With this contention we cannot agree. To our mind, the defendant was shown to have been exceedingly careless in the manner of placing the precautionary signals; in fact, the only signal maintained was so placed west of the center line of the excavation and in a position which, if seen by a traveler upon the street, would probably indicate to him that the safe route of travel was east of the center line of the street. The duty of defendant under the circumstances of this case is defined by the trial court in one of its charges: "It is the legal duty of one who maintains an excavation in a public street to use such care as an ordinary prudent and careful person would use under like circumstances in maintaining in or around said excavation such guard or barrier or light or lights as will warn one who is lawfully using said street in the night time of the existence, location and limits of such excavation." It is insisted by appellant that this charge is misleading under the peculiar facts of this case. We do not so consider it. The excavation was continuous, although made for different purposes. The effect was to render travel on the east side of the street dangerous. Notice of this fact should have been maintained by defendant. The omission in that regard was negligence. That plaintiff did not see the signal light is no proof of the fact that he would not have observed a number of lights placed along the line of the ditch. The proximate cause of the injury was the absence of these signal lights properly placed so as to mark the line of the excavation. If a light had been maintained at the curb, it would have tended to indicate the limits of the excavation, and would have served as a partial warning that the whole east side of the street was impassable. It was therefore connected with the transaction and important, although its situation was remote from the scene of the accident. No contributory negligence is shown. There was testimony tending to show that the single, improperly-placed light was dim, and no other light maintained. The excavation was a recent one, unknown to plaintiff, and he had a right to proceed upon a public street in the usual way, relying upon proper safeguards and notices of dangerous obstructions had been created in the street. As we have before said, had he seen the single light and driven to the east of it the distance he did, such act would not have been negligence as a matter of law; that he was not negligent as a matter of fact has been determined by a jury, and there is testimony in the record sufficient to support it. It is next urged that the court erred in rejecting evidence of the nonoccurrence of other accidents at the same place or under similar circumstances, and in rejecting expert evidence of the sufficiency of the lights. We are not impressed with the force of these objections. That other persons saw the obstructions and thereby avoided injury, or that light signals proved effective under similar circumstances, is of little consequence when considered in connection with the clearly established invasion of plaintiff's rights and his consequent injury. They were not effective as to respondent under the circumstances connected with his injury. In relation to the expert testimony, we think it sufficient to say that one who has violated a plain duty will not be excused from the consequences because other persons are of the opinion that the act performed in lieu of the legal duty was the equivalent. The jury were called to pass upon the question of negligence, and that duty should not be given into the hands of expert witnesses. There is nothing in Kahn v. Triest, etc., Co., 139 Cal. 346, 73 Pac. 164, or Chico Bridge Co. v. Sacramento Tr. Co., 123 Cal. 180, 55 Pac. 780, or in the other California cases cited, in conflict herewith. It is finally urged that it was error to reject the evidence of plaintiff's habits in respect to the use of intoxicating liquors a year or so preceding the accident, and in refusing to permit the jury to take with them when they retired for deliberation a certain map that was before them during the trial.

As to the first objection, the specification of the purpose was not disclosed, and had it been and such evidence were conceded to be admissible, we perceive no prejudicial error in its exclusion. The full extent to which such testimony would be considered, if admissible at all, would be in mitigation of damages. When we consider the nature and extent of the injury and loss of property in connection with the verdict of $650, we are led to the conclusion that all possible mitigating circumstances were resolved by the jury in defendant's favor. No abuse of discretion is apparent in the order of the court declining to permit the jury to have the map during their retirement.

A careful examination of the record in this case convinces us that the judgment should be affirmed, and it is so ordered.

We concur: GRAY, P. J.; SMITH, J.

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2 Cal. App. 640

COYNE v. BAKER.

(Court of Appeal, Second District, California. Jan. 11, 1906.)

1. PHYSICIANS AND SURGEONS—ACTION FOR SERVICES—ANSWER—SUFFICIENCY.

In an action for the services of a physician, on a contract whereby he was to make an examination of defendant and give his opinion as a medical expert in evidence, an answer that plaintiff in testifying, by reason of ignorance and negligence, damaged defendant by testifying that defendant was insane, which was untrue, was sufficient, and it was error to strike it out.

2. APPEAL—HARMLESS ERROR.

There was no available error in sustaining a demurrer to a cross-complaint, where the matter set up therein could be shown under the answer.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4092.]

Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by John P. Coyne against Samuel Baker. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Will D. Gould, for appellant. A. D. Laughlin and Fred E. Burlew, for respondent.

SMITH, J. Appeal from a judgment for the plaintiff and an order denying the defendant's motion for a new trial. The plaintiff sues as assignee of H. G. Brainerd, a physician; but it appears from his testimony that the claim was assigned to him for collection only, and that he has no interest therein except for such commission as he may be entitled to for collection. The complaint contains two counts, the first on a quantum meruit for the sum of $400 "for services as a physican rendered and performed by said Brainerd to said defendant," etc., and the second for the same sum on a parol contract, whereby it was agreed that Brainerd, "as such physician, was to make examination of said defendant as to his physical and mental condition, consult with other physicians with reference thereto, and give his opinion thereof as a medical expert in evidence" before a commissioner. In the answer it was pleaded to the first count "that the alleged cause of action arose out of an implied contract for the payment of witness' fees in a matter wherein said * * * Brainerd appeared as a witness," etc., "* * * wherein in testifying as such witness, and by reason of gross negligence, ignorance, and carelessness in diagnosing the case, said Brainerd testified that this defendant was technically insane, or words to that effect, all of which was untrue, and thereby greatly injured and damaged said defendant," etc., "* * * and that by reason of such gross negligence, ignorance, and carelessness the testimony of said * * * Brainerd was of no value, but, on the contrary, was of great damage to this defendant, to wit, the sum of a thousand dollars," etc. The same defense was interposed to the second count; but, on the motion of the plaintiff, was stricken out by the court.

Why the defense, which was equally admissible or inadmissible as to both counts, was allowed as to the one and excluded as to the other is not explained by the record. But, if the defense to the second count was good, it was error to strike it out, and we are of the opinion that the defense was, in fact, sufficient, and that the defendant should have been allowed to prove it.

There was also a cross-complaint in the suit setting up substantially the facts set up in the answer, to which a demurrer was sustained. But, as the defense could be made fully available by answer, the ruling on the demurrer, if erroneous, was immaterial.

The judgment and order appealed from are reversed.

We concur: GRAY, P. J.; ALLEN, J.

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2 Cal. App. 638

GAVIN v. PACIFIC COAST MARINE FIREMEN'S UNION OF SAN FRANCISCO et al.

(Court of Appeal, First District, California. Jan. 11, 1906.)

MANDAMUS—BOOKS OF CORPORATION—INSPECTION.

Civ. Code, § 378, provides that corporations for profit must keep stock transfer books, etc., and that benevolent corporations must by bylaws require the keeping of such books as may be necessary. Const. art. 12, § 14, declares that every corporation other than religious, educational, or benevolent ones shall keep books in which shall be recorded the amount of capital stock subscribed, assets, and liabilities, etc. *Held*, that where plaintiff, seeking a mandamus to compel a corporation to permit an examination of its books alleged facts bringing himself within the general rule, and defendant set up that it was a benevolent corporation, but failed to offer any proof in support of such averment and the facts in evidence were in accordance with the averments of the complaint a mandamus was properly awarded.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, § 264.]

Appeal from Superior Court of City and County of San Francisco; J. M. Seawell, Judge.

Mandamus by John Gavin against the Pacific Coast Marine Firemen's Union of San Francisco, to permit plaintiff to examine copies of the books and records of respondent. From a judgment awarding a peremptory writ, respondent appeals. Affirmed.

W. W. Foote, J. J. Lermen, for appellant. Geo. D. Collins, for respondent.

COOPER, J. This appeal is from a judgment awarding a peremptory writ of mandate to plaintiff, commanding the defendant, its officers, and agents, to permit plaintiff, and any one he desires to assist him, to examine, take copies of, and inspect the books, records, and papers of defendant corporation. The court found that the plaintiff was at the times mentioned in his petition and now is "a member of said defendant corporation and in good standing therein; that on the 11th day of March, A. D. 1902, and at the office of the said corporation in the said city and county of San Francisco, and during office hours of the said corporation, the said petitioner, John Gavin, demanded of the said corporation and of the said defendant, John Bell, the secretary of said corporation, an inspection and an opportunity to take a copy of the said books and papers of the said corporation, and for the purpose of making an examination thereof. That thereupon and in response to the said demand, said John Bell, secretary of the corporation as aforesaid, knowingly and willfully refused to give your petitioner, John Gavin, a reasonable or any opportunity to inspect or take a copy of any of the said books and papers of the said corporation."

We have examined the evidence and are of opinion that it is sufficient to support the findings. It has been held, upon a review of the authorities, that a stockholder in a corporation has the right to inspect the books, records, and journals of the corporation, and that upon refusal mandamus will lie to compel such examination. Johnson v. Langdon, 135 Cal. 624, 67 Pac. 1050, 87 Am. St. Rep. 156. Appellant claims that section 378 of the Civil Code, and the doctrine of the above case, give the rule applicable to corporations organized for profit only, and not to benevolent or charitable corporations. But we do not think the rights of the parties to this action depend upon said section alone, but also upon section 14, art. 12, of the Constitution, which provides that "every corporation other than religious, educational, or benevolent * * * shall have and maintain an office or place in this state for the transaction of its business, where transfers of stock shall be made, and in which shall be kept, for inspection by every person having an interest therein * * * books, in which shall be recorded the amount of capital stock subscribed, * * * the amount of its assets and liabilities," etc. Johnson v. Langdon, supra. In this provision a general rule is stated, giving a right to an inspection, to which there are certain exceptions, namely, in the case of religious, educational, and benevolent corporations. Under this provision, and the rule that one who relies upon an exception to the general rule must state the facts which bring his case within it (Senter v. Davis, 38 Cal. 450), a party denying the right to inspect would be required to plead the facts bringing his case within the exception. The parties to this action, in framing their pleadings, seem to have correctly apprehended the rule. Plaintiff, by his averments, brought himself within the general rule as laid down in the section of the Constitution above referred to; while the defendants in their answer, to avoid the effect of plaintiff's averments, set up that the defendant corporation was and is organized for benevolent purposes, but failed to offer any proof in support of this averment.

The judgment in this case awards an inspection of such books as should show the assets and liabilities of the corporation defendant. The findings are in accord with the averments of the complaint, and for the reasons above set forth support the judgment.

The judgment and order denying the motion for a new trial are affirmed.

We concur: HARRISON, P. J.; HALL, J.

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2 Cal. App. 624

BORNSTEIN v. DISTRICT GRAND LODGE NO. 4, INDEPENDENT ORDER B'NAI B'RITH.

(Court of Appeal, First District, California. Jan. 9, 1906.)

1. CORPORATIONS—BY-LAWS—SCOPE.

The function of a by-law of a private corporation is to prescribe the rights and duties of the members with reference to the internal government of the corporation, the management of its affairs, and the rights and duties existing between the members inter se.

2. SAME — EXTENT OF POWER — REASONABLENESS.

While a private corporation's power to enact by-laws for the internal management of its affairs is inherent and incident to its existence, the power is subject to the condition that the by-laws must be reasonable and not contravene or be inconsistent with the corporation's charter or any existing state law.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 153, 154.]

3. SAME — CONSTRUCTION — RETROACTIVE OPERATION—VESTED RIGHTS—IMPAIRMENT.

A by-law of a corporation will not be construed to operate retrospectively unless expressly so provided, when, if its effect is to annul or impair an existing obligation of the corporation, it will be held unreasonable and in contravention of existing laws.

4. INSURANCE—MUTUAL BENEFIT SOCIETIES—CERTIFICATES OF INSURANCE.

A beneficiary certificate of a fraternal association is a contract of insurance which can neither be impaired in its obligation nor changed in its terms by either party without the assent of the other.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1848–1855.]

5. SAME—CONTRACTS—CONSTRUCTION.

A certificate in a mutual benefit association, requiring that members should comply with all laws, rules, and regulations governing the society, or that might be thereafter enacted for its government, related to by-laws enacted to control the internal management of the association, and did not include a by-law by which the society attempted to limit its liability on all outstanding certificates to an amount not exceeding one-half of the amount the association had contracted to pay on the death of members in good standing.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1854, 1855.]

6. CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—BENEFIT ASSOCIATION—BY-LAW.

Where a mutual benefit association absolutely agreed to pay to a beneficiary, on the death of a member in good standing, $2,000, etc., a by-law subsequently enacted by which the society attempted, without the member's consent, to scale its obligation on such certificate one-half, was void as impairing the obligation of the member's contract.

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by Rosalie Bornstein against District Grand Lodge No. 4, Independent Order B'nai B'rith. From a judgment in favor of defendant, and from an order denying plaintiff's motion for a new trial, she appeals. Reversed.

Sullivan & Sullivan, for appellant. Lucius L. Solomons, for respondent.

HARRISON, P. J. The defendant is a beneficial association incorporated under the laws of this state, of which Sigmund Bornstein was a member from November 11, 1875, until his death, March 6, 1901. December 1, 1891, the defendant issued to said Bornstein its "beneficiary certificate," by which it agreed that, upon condition that the said Bornstein should comply with the laws, rules, and regulations then governing the defendant or that thereafter might be enacted for its government, and should be in good standing at the time of his death, and a contributor to the widows' and orphans' beneficiary fund of the defendant, it would pay to Rosalie Bornstein (the plaintiff herein), wife of said Sigmund, the sum of $2,000, upon satisfactory proof by her of his death and the surrender of said certificate. At the time of the issuance of said certificate it was provided by the by-laws of the defendant that upon the death of a member in good standing in its widows' and orphans' beneficiary fund the sum of $2,000 should be paid to his widow, and that every applicant for a beneficiary certificate in said fund, if a married man, should in his application designate his wife as his sole beneficiary. From the time of the issuance to him of said certificate until his death Bornstein regularly paid the assessments and dues required of him as a contributor to said fund. February 20, 1901, the defendant enacted as follows: "The beneficiary membership shall be divided into two grades, to be designated as 'first grade' and 'second grade,' respectively. First grade shall include all members holding beneficiary certificates in the sum of one thousand dollars, and second grade shall include all members holding beneficiary certificates in the sum of five hundred dollars. All beneficiary certificates now outstanding in the sum of two thousand dollars shall become and be void for any sum in excess of one thousand dollars on the first day of March, 1901, and all certificates now outstanding in the sum of two thousand dollars shall be and the same are hereby recalled, and the Grand Secretary is hereby authorized and directed to cancel the same, and to issue in lieu of each such certificate a first grade certificate for the sum of one thousand dollars or a second grade certificate for the sum of five hundred dollars, as the beneficiary may elect; provided that in the event that such election shall not be made at or prior to the 1st day of March, 1901, then and in that event for all purposes until such election shall be made the said beneficiary shall be rated as a first grade beneficiary member, and be charged with premiums accordingly." Bornstein died March 6, 1901, and, upon the demand of the plaintiff for the amount named in the aforesaid certificate, the defendant refused to comply therewith, but offered to pay her the sum of $1,000 and no more, and she thereupon commenced the present action. The court found that all the conditions required by the terms of the certificate to be performed on the part of the plaintiff, or on the part of her husband, had been fully and duly performed, and that her husband had fully and duly performed all and singular his agreements and covenants with the defendant "except as to the requirements of the aforesaid enactment" of February 20, 1901. It also found that the assets in the widows' and orphans' beneficiary fund were greatly in excess of the amount required to pay the plaintiff's claim. It held, however, that by virtue of the aforesaid action of the defendant in February, 1901, the plaintiff was entitled to receive only the sum of $1,000, and rendered judgment accordingly. The plaintiff moved for a new trial, and from the order denying her motion, and from the aforesaid judgment, she has appealed.

The question presented upon the appeal is the effect of the proceedings by the defendant in February, 1901, upon the beneficiary certificate issued by it to Sigmund Bornstein in December, 1891; the appellant contending that upon the issuance of the certificate a contract was entered into between the defendant and her husband whose terms could not be varied without his assent; and the respondent contending on the other hand, as was held by the superior court, that the aforesaid proceeding was the enactment by the defendant of a by-law which was binding upon all of its members, and that upon its enactment the contract with her husband was thereafter subject to its terms. The function of a by-law of a private corporation is to prescribe the rights and duties of the members in reference to the internal government of the corporation and the management of its affairs; and in reference also to the rights and duties which exist between the members themselves by virtue of their membership in the same corporate body. The right of a private corporation to enact such by-laws is inherent and incident to its existence. This power is subject to the condition that the by-law must be reasonable, and not contravene or be inconsistent with the charter or any existing law of the state. People's Home Savings Bank v. Sadler (Cal. App.) 81 Pac. 1029; Civ. Code, § 354, subd. 6. "The power to make by-laws is to make such as are not inconsistent with the Constitution and the law; and the power to alter has the same limit, so that no alteration could be made which would infringe a right already given and secured by the contract of the corporation. An alteration is a pro tanto repeal; but no private corporation can repeal a by-law so as to impair rights which have been given and become vested by virtue of the by-law afterwards repealed. All by-laws must be reasonable and consistent with the general principles of the laws of the land, which are to be determined by the courts when a case is properly before them. Master, etc., v. Green, 1 Ld. Raym. 113. The alteration of a by-law is but the making of another upon the same matter. If the first must be reasonable and in accord with principles of law, so must that which alters it. If, then, the power is reserved to alter, amend, or repeal, and that reservation enters into the contract, the power reserved is to pass reasonable by-laws agreeable to law, but a by-law which will disturb a vested right is not such (see Gray v. Portland Bank, 3 Mass. 364, 3 Am. Dec. 156); and it differs not that the power to make and alter by-laws is expressly given to a majority of the stockholders, and that the obnoxious ordinance is passed in due form." Kent v. Quicksilver Mining Co., 78 N. Y. 159. A by-law, like a statute, will not be construed as intended to operate retrospectively unless express provision is found therefor in its terms; and if its language is such that by giving it a retrospective operation it would have the effect to annul or impair an existing obligation on the part of the corporation, such by-law will be held unreasonable and in contravention of existing laws. Knights Templar, etc., Co. v. Jarman, 104 Fed. 638, 44 C. C. A. 93; Carnes v. Iowa State T. M. Ass'n, 106 Iowa, 281, 76 N. W. 683, 68 Am. St. Rep. 306; Covenant M. L. Ass'n. v. Kentner, 188 Ill. 431, 58 N. E. 966; Wist v. Grand Lodge A. O. U. W., 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603.

The relation of Bornstein to the defendant was of a dual character. As one of its members he submitted his wishes respecting its government and the management of its affairs to the will of the majority, and was bound by the action that such majority should take within the scope of the charter, even though protested against by him. He also, by virtue of the beneficiary certificate, held a contractual relation with the defendant, in which the rights of the respective parties are to be measured by the terms of the contract itself. A beneficiary certificate of a fraternal association is a contract of insurance (Commonwealth v. Wetherbee, 105 Mass. 149; Goodman v. Jedidjah Lodge, 67 Md. 117, 9 Atl. 13, 13 Atl. 627; Civ. Code, § 2527), subject to the same rules of interpretation as are other contracts, and, as in the case of any other contract, can be neither impaired in its obligation or changed in its terms by either party without the assent of the other. The certificate issued by the defendant is an absolute contract on its part to pay to the plaintiff herein the sum of $2,000 upon the performance by her husband of certain conditions during his lifetime; and the finding of the court that he performed all of these conditions "except as to the requirements of the enactment" of February 20, 1901, entitles her to a recovery unless that enactment contains "requirements" which he was under obligation to perform as a condition precedent to the liability of the defendant upon its contract. The clause in the certificate relied upon by the defendant as containing such "requirement" is the condition that Bornstein "comply with the laws, rules and regulations now governing the defendant, or that may be hereafter enacted for its government." The enactment of February 20, 1901, is not, however, a rule or regulation for the "government" of the defendant, and has no relation to such government except as its application might be invoked with reference to certificates thereafter to be issued. As to all certificates then outstanding in the amount of $2,000 it was an attempt to deprive the holders thereof of one-half the amount of its obligation, and was a direct repudiation of its contract. If it could thus limit its liability to one-half of its obligation, it could, by a similar enactment, declare that it should be under no obligation upon any of its outstanding certificates. Not only does the record fail to show that Mr. Bornstein assented to such enactment, or that he even had any knowledge of it, but the court finds that the defendant never requested him to comply with its terms. His agreement, as a member of the defendant, to comply with the regulations for its "government" that might be adopted by a majority of its members is not to be construed as authorizing that majority to deprive him, without his special consent, of the benefits of a contract for which he had given full consideration. Supreme Council, etc., v. Getz, 112 Fed. 119, 50 C. C. A. 153; Hale v. Aid Union, 168 Pa. 377, 31 Atl. 1066; Newhall v. American Legion of Honor, 181 Mass. 111, 63 N. E. 1; Weiler v. Equitable Aid Union, 92 Hun, 277, 36 N. Y. Supp. 734; Deuble v. Grand Lodge, 66 App. Div. 323, 72 N. Y. Supp. 755; Knights Templar, etc., v. Jarman, 23 Sup. Ct. 108, 47 L. Ed. 139; Parish v. Produce Exchange, 169 N. Y. 34, 61 N. E. 977, 56 L. R. A. 149; Weber v. Supreme Tent of K. of M., 172 N. Y. 490, 65 N. E. 258, 92 Am. St. Rep. 753; Langan v. Supreme Council, 174 N. Y. 266, 66 N. E. 932; Gaut v. American Legion of Honor, 107 Tenn. 613, 64 S. W. 1070, 55 L. R. A. 465; Pokrefky v. Fireman's Fund Ass'n, 121 Mich. 456, 80 N. W. 240; Morton v. Supreme Council, 100 Mo. App. 76, 73 S. W. 259; Campbell v. American Benefit Club, 100 Mo. App. 249, 73 S. W. 342. In Pokrefky v. Fireman's Fund Ass'n, supra, the by-laws of the defendant, at the time the plaintiff's decedent became a member, provided that upon the death of a member an assessment of $5 should be collected from each surviving member and paid to his beneficiary. Some years after the decedent became a member of the defendant the by-law was amended against his protest by reducing the amount so to be paid. In an action to recover the full amount collected upon the assessment, the court said: "The by-laws as they existed at the time he became a member constituted a part of the contract. If the trustees had the power to limit the amount of payment to be made to $1,500, they could limit it to a much less amount. The act under which the company was organized permitted the trustees to change the by-laws at pleasure; but it cannot be said that this was intended to place it within the power of the trustees to adopt by-laws that would have a retroactive operation upon the contracts of the company made before new by-laws were adopted. While the trustees undoubtedly had the power to pass or change by-laws necessary for the well government of the affairs of the company, it cannot be said that it was intended to clothe them with the arbitrary power to reduce the amount due beneficiaries under contracts made before new by-laws were passed." In Weiler v. Equitable Aid Union, 92 Hun, 277, 36 N. Y. Supp. 734, the defendant in July, 1882, issued a certificate to the plaintiff, in which it agreed in effect to pay him the sum of $400 at the expiration of 11 years if he should then be alive and in good standing. A few months before the expiration of the 11 years it passed a by-law, by which benefit certificates like the one held by the plaintiff should be payable only in case the member became totally disabled, and then only one-tenth part each year. In an action upon the certificate the defendant pleaded this by-law as a defense, upon the ground that the plaintiff, in his application for the certificate, had agreed to accept it subject to such laws and regulations as then existed or which might be adopted by the corporation. The court held, however, that the right of the plaintiff to payment upon the contingency named in the certificate was in the nature of a vested right; and that the by-law as to him was simply the repudiation of a positive contract and illegal and void. In Newhall v. American Legion of Honor, 181 Mass. 111, 63 N. E. 1, the defendant issued a certificate to one of its members for the sum of $5,000 in consideration of his "full compliance with all the by-laws now existing or hereafter adopted." It was held that this condition referred to the by-laws only so far as to require payment of assessments in accordance with them; that "compliance" in this connection means "doing what the by-laws may require the member to do—not submission to seeing his only inducement to do it destroyed; that it does not extend to permitting direct deduction from the sum which, on the face of the certificate, any ordinary man would be led to suppose secure." In this case the defendant, about two years after issuing the certificate, passed a by-law declaring, in effect, that $2,000 should be the limit of payment upon any benefit certificate theretofore or thereafter issued. The court held that this by-law was inoperative upon the certificate held by the plaintiff, and that she was entitled to recover the full amount of her claim. Upon a similar state of facts, in Langan v. American Legion of Honor (Sup.) 70 N. Y. Supp. 663 the court said: "The agreement by the plaintiff in the application for membership and in the benefit certificate to comply with all laws that might thereafter be adopted, as well as the power reserved in the by-laws to change them, had reference to changes which should not impair the substance of the contract. Nothing beyond this will be implied on the theory that it is reasonable. The amended by-law abrogates the contract to pay $5,000, and substitutes an obligation to pay only $2,000, and is therefore void." In Morton v. Supreme Council, 100 Mo. App. 76, 73 S. W. 259, the court declared the rule to be that such bylaws cannot alter or impair prior contracts of insurance, and that such provision in the certificate in reference to future by-laws is to bind the insured simply by administrative or regulative amendments, and not such as go to the reduction or withdrawal of the consideration for which the assessment is charged. And in Campbell v. American Benefit Club, 100 Mo. App. 249, 73 S. W. 342, the same court held that the true intent of such agreement was "to render obligatory upon the insured only after adopted laws for the conduct of the order, duties of the members and the like, but not such as sought to impair or affect the existing contract of insurance." In Stohr v. S. F. Musical Fund Society, 82 Cal. 557, 22 Pac. 1125, cited by the respondent, the right of the plaintiff to receive sick benefits was not based upon a special contract, but depended upon a by-law, which the plaintiff, by joining the society, had agreed might be changed at the will of the defendant. Such change was, however, regarded as prospective in its operation, and until the changed by-law went into effect the plaintiff was held entitled to all the benefits that accrued under its original terms; but the court held that he had no vested right to benefits for any sickness which might exist after the change in the by-law became operative.

It must be held, therefore, that the certificate issued by the defendant to the plaintiff's husband was not affected by the enactment of February, 1901, and that the plaintiff is entitled to recover its full amount.

The judgment and order appealed from are reversed, and the superior court is directed to enter a judgment in favor of the plaintiff and against the defendant for the sum of $2,000, with interest thereon from January 7, 1902, together with her costs of suit.

We concur: COOPER, J.; HALL, J.

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2 Cal. App. 622

OWEN et al. v. HERZIKOFF.

(Court of Appeal, Second District, California. Jan. 8, 1906.)

1. PAYMENT—MODE OF PAYMENT—DEPOSITS IN BANK.

Under Civ. Code, § 1500, providing that an obligation for the payment of money is extinguished by a due offer of payment if the amount is deposited in the name of the creditor with a bank and notice of the deposit is given to the creditor, the fact that, after demand for rent and nonpayment thereof, the tenant deposits the amount of the rent in bank is not an extinguishment of the obligation for rent in the absence of any offer of payment or notice of or acquiescence in the deposit by the landlord.

2. LANDLORD AND TENANT—TERMINATION OF TENANCY—JUDGMENT OF FORFEITURE—SATISFACTION—PAYMENT OF RENT.

Civ. Code, § 1946, provides for the termination of an implied tenancy from month to month by the giving of a month's notice. Code Civ. Proc. § 1174, provides that when a lease has not expired by its terms and the forfeiture is on account of nonpayment of rent, the judgment shall be satisfied and the tenant restored to his estate on the payment into court of the amount of rent with interest and costs. *Held*, that where a tenancy from month to month was terminated by a judgment of forfeiture in forcible detainer for nonpayment of rent, and not by the giving of notice to quit or by act of the parties, the tenant, by paying into court the amount of rent with interest and costs within the period allowed him for a stay of execution, was entitled to a satisfaction of the judgment which was for treble the rent found due.

3. STIPULATIONS—EFFECT—STIPULATIONS AS TO LAW.

A stipulation in the record that a lease has "expired by its terms" is a stipulation as to the legal effect of a contract and if erroneous should be disregarded.

4. LANDLORD AND TENANT—FORFEITURE OF TERM—RESTORATION TO ESTATE—WAIVER OF RIGHT.

The right given a tenant by Code Civ. Proc. § 1174, to be restored to his estate after a forfeiture for nonpayment of rent upon payment into court of the amount of rent with interest and costs is waived by his surrendering possession before paying into court the amount of rent due.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by T. P. Owen and another against J. Herzikoff. From a judgment for plaintiffs, and from a judgment denying a motion for an order directing satisfaction of the judgment, defendant appeals. First judgment affirmed; second, reversed.

H. C. Millsap and D. H. Laubersheimer, for appellant. Earle & Creede, for respondents.

ALLEN, J. The first appeal is from a judgment for plaintiffs in forcible detainer, from which defendant appeals. The second is an appeal by defendant from a judgment denying a motion for an order directing satisfaction of the first judgment upon payment of the amount of rent found due, together with costs.

The record on the first appeal (Civil No. 132) shows that the tenancy was one from month to month, with rent payable monthly in advance; that demand was made on August 1st for the rent of that month, which was refused, and thereafter, on August 17th, demand in writing for the amount of the rent, with notice to quit, if payment be not made within three days, was made and given. The service of this notice to quit is conceded by the answer. The findings are sufficient to support the judgment. The mere fact that after the demand for rent and nonpayment, the defendant deposited in bank the amount of such rent was not an extinguishment thereof under section 1500, Civ. Code. The offer, which is a prerequisite to such deposit under this section, was not shown. There is nothing in the record to indicate that plaintiffs had actual notice of such deposit, or ever acquiesced therein, or availed themselves thereof, or did any act which could be held as waiving the forfeiture on account of nonpayment of the rent. We find no error in the record upon this appeal, and the judgment is ordered affirmed.

On the second appeal, it appears that within five days after the rendition of the judgment defendant paid into court for plaintiffs $50, the amount of the rent found due, together with costs; that defendant had previously, on September 30th, surrendered possession of the said premises to plaintiffs; and he moved the court for an order directing satisfaction of the judgment theretofore rendered for treble the amount of the rent found due. This motion was denied, which we think was error. "In the case of a lease from month to month, the estate does not terminate by the mere lapse of time." Stoppelkamp v. Mangeot, 42 Cal. 323. Such tenancy may be terminated by the notice under section 1946, Civ. Code. Corson v. Berson, 86 Cal. 439, 25 Pac. 7. This notice in a month to month tenancy must be for one month. No notice of this character was given; hence, the lease did not expire by its terms, nor had it been terminated by act of the parties, nor otherwise than by the judgment of forfeiture for nonpayment of rent. Section 1174, Code Civ. Proc., provides that when the lease has not expired by its terms, and the forfeiture is on account of nonpayment of rent, upon the payment into court of the amount of rent, with interest thereon and costs, the judgment shall be satisfied and the tenant restored to his estate. The stipulation in the record that "the lease had expired by its terms," in our opinion, being a stipulation as to an erroneous interpretation of the legal effect of the contract, should be disregarded. This right of restoration to the estate the tenant waived by the surrender of possession; but the right given him by virtue of the terms of the lease entitled him to a stay of execution for five days and the right to extinguishment of the judgment by the payment of the actual sum due.

The judgment in case Civil No. 141 is reversed, with directions to the lower court to order satisfaction of the judgment theretofore rendered in the case of forcible detainer.

I concur: GRAY, P. J.

SMITH, J. I concur in the judgment, and also with what is said in the opinion with reference to the second appeal. As to the first appeal, I am not clear as to the correctness of the judgment for treble damages; but, as the same result is effected by the reversal of the second appeal, the questions involved in the first need not be considered.

2 Cal. App. 611

BURKE v. MODERN WOODMEN OF AMERICA.

(Court of Appeal, First District, California. Jan. 5, 1906.)

1. MUTUAL BENEFIT SOCIETIES — BENEFICIARIES—CHANGE—DESIGNATION BY WILL.

Where a member of a mutual benefit association was insured under a certificate payable to "his legal heirs related to such member in relationship of heirs," and the by-laws of the society authorizing a change of beneficiaries did not permit of a change by the member's will, a bequest of the proceeds of the certificate to the member's wife was ineffectual to entitle her to the entire proceeds of the certificate.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1953.]

2. EXECUTORS AND ADMINISTRATORS—ASSETS—BENEFIT CERTIFICATES.

Where a mutual benefit certificate was payable to the member's "legal heirs," the beneficiaries took by virtue of the contract, and not by succession; and hence the certificate was not an asset of the member's estate.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1460, 1973–1975.]

3. INSURANCE —BENEFICIARIES—DESIGNATION —WHAT LAW GOVERNS.

Where a mutual benefit certificate was payable to the member's legal heirs, resort might be had to the intestate laws of the state under which the descent was cast for the purpose of determining who were the heirs, but not to determine their rights under the contract.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1969.]

4. SAME—SHARES OF HEIRS.

Where a mutual benefit certificate was payable to the member's legal heirs, and he died leaving 10 heirs, consisting of his widow, brothers, sisters, nephews, and nieces, they were each entitled to one-tenth of the proceeds of the certificate.

Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by Alice S. Burke against the Modern Woodmen of America. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Reversed.

F. B. Brown, for appellant. William A. Bowden, for respondent.

COOPER, J. In March, 1900, R. H. Burke, then a single man, became a member of the local camp of the Modern Woodmen of America, and took a benefit certificate for $2,000, payable on his death to "his legal heirs related to said member in relationship of heirs." He afterwards married the plaintiff, and after such marriage he made a will which contained the following clause: "I hereby expressly give, devise, and bequeath unto my said wife, Alice S. Burke, all sums of money that may be due at my death upon policy No. 621,457, issued by the Modern Woodmen of America, dated March 8, 1900, and I hereby authorize her to collect said sum of money therein mentioned." In October, 1901, the said Burke died without having made any change of beneficiary under said certificate, as required by the rules and by-laws of the said order of Modern Woodmen. His will was duly admitted to probate, and letters of administration with the will annexed issued to one Snitjer. This action was brought to recover the sum of $2,000, the amount of the said benefit certificate. The court found that at the time of the death of Burke he left ten heirs, consisting of the plaintiff, brothers, sisters, nephews, and nieces, whose names are stated. Judgment was given to plaintiff for $1,000 being the amount which she would inherit under the laws of succession of the state if the benefit certificate had been assets of the estate. Defendant appeals from the judgment and from an order denying its motion to set aside and vacate the judgment and to enter in lieu thereof a different judgment.

The trial court correctly held that the attempted change and substitution of plaintiff as beneficiary by the will was not valid, because not made in accordance with the laws of the defendant corporation. The designation of the beneficiaries made by deceased in his lifetime was valid when made, and not having been legally changed by deceased in his lifetime, was valid at his death, and the $2,000 was payable to his legal heirs, Sheehan v. Butchers', etc., Ass'n, 142 Cal. 489, 76 Pac. 238. The beneficiaries are entitled to take by virtue of the contract and not by succession. The certificate did not become the assets of the estate by the death of Burke. The defendant made a contract with Burke in his lifetime by which, for certain considerations, it agreed to pay to certain parties the sum of $2,000 upon the death of Burke. If the names of the ten heirs had been inserted in the contract as the beneficiaries, it would be plain that they would each take an equal one-tenth of the $2,000; but as the class of persons is designated in the certificate, it only remained for the court to determine and find who were the persons constituting the designated class. It did so find. For the purpose of determining who are the heirs of a deceased person, resort is to be had to the laws of the state under which the descent is cast. Caldwell v. Miller, 44 Kan. 12, 23 Pac. 946; Wittenbrock v. Wheadon, 128 Cal. 150, 60 Pac. 664, 79 Am. St. Rep. 32. The heirs of a person are those whom the law appoints to succeed to his estate in case he dies without disposing of it by will. Hochstein v. Berghauser, 123 Cal. 681, 56 Pac. 547. Then, when the heirs were ascertained, they were each entitled to one-tenth of the sum to be collected from defendant.

The rule is thus stated in Niblack on Accident Insurance and Benefit Societies (2d Ed.) § 210: "For the purpose of ascertaining the persons who are the beneficiaries under a designation of 'my heirs,' it is necessary to consult the statutes of the state which cast the descent of the property of an intestate. But from this it does not follow that the statute determines the proportion of the fund which each heir shall take. Where a member has made his certificate payable to his heirs, they do not take the fund by descent, but by contract. The statutes of descent and distribution cease to be of use, therefore, at the very moment when the heirs at law of the intestate have been found according to their provisions. They point out the persons whom the contract declares shall be the beneficiaries, but they do not determine the rights of such persons under the contract. The rights of the beneficiaries in a certificate taken out by a member are such as the contract confers, and are not rights arising by operation of statutory rules. The contract, and not the statute, fixes their rights, and they have such rights only as the contract of insurance vests in them. We are, therefore, to look to the terms of the agreement, and not to the provisions of the statute, to ascertain the rights of the parties." In Cooper v. Wilder, 111 Cal. 196, 43 Pac. 591, 52 Am. St. Rep. 163, a patent had been issued by the United States to the heirs of David Cooper. Mr. Justice Temple, in delivering the opinion of the court, said: "The grant is to the heirs of David Cooper, but they do not take by inheritance. The heirs will, therefore, take equally, regardless of the proportions in which they would have taken under the law of succession of the state. The United States has no general law of succession; the heirs must, therefore, be found by the law of the state or territory in which the land is situated." The above principles are supported by the following cases: Sheehy v. Miles, 93 Cal. 288, 28 Pac. 1046; Hochstein v. Berghauser, 123 Cal. 681, 56 Pac. 547; Felix v. A. O. U. W., 31 Kan. 81, 1 Pac. 281, 47 Am. Rep. 479; Wilburn v. Wilburn, 83 Ind. 55; Jackman v. Nelson, 147 Mass. 300, 17 N. E. 529; Reed v. Painter, 129 Mo. 674, 31 S. W. 919; Cov. Mut. Ben. Ass'n v. Hoffman, 110 Ill. 603.

The judgment and order are reversed, and the court below directed to order judgment for plaintiff for $200 upon the findings, in accordance with the views herein expressed.

We concur: HARRISON, P. J.; HALL, J.

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2 Cal. App. 614

PLACER COUNTY v. WHITNEY ESTATE CO.

(Court of Appeal, Third District, California. Jan. 5, 1906.)

1. Licenses—Statutes—Repeal.

St. 1891, p. 306, c. 216, § 25, subd. 27, and County Government Act 1897, § 25, empowering boards of supervisors to license business generally for the purpose of both "regulation and revenue," were repealed by implication by Pol. Code, § 3366, as amended by St. 1901, p. 635, c. 209, granting boards of supervisors power to license all and every business not prohibited, for purposes of "regulation and not otherwise."

2. Same — Sheep Herding — Ordinances — Validity.

A county ordinance imposing a license on sheep herders equal to three cents for each head of sheep and goats herded or pastured in the county per annum, requiring the license collector to collect the license fees and after deducting 25 per cent. for collection, to pay the excess into the county treasury, and declaring that every herder who shall refuse or neglect to pay such license fees shall be guilty of a misdemeanor, imposed a license tax for mere purposes of revenue, and not for regulation of the business of sheep herding, and was, therefore, not within the jurisdiction of the board, under Pol. Code, § 3366, authorizing the licensing of business for the purpose of regulation only.

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by Placer County against the Whitney Estate Company. From a judgment for plaintiff, defendant appeals. Reversed.

Tuttle & Tuttle and F. A. Duryea, for appellant. A. K. Robinson, for respondent.

BUCKLES, J. This is an action to collect $360 from the appellant as a license tax for the business of raising, grazing, herding, and pasturing sheep. The right to collect this license tax is claimed to be under an ordinance of the board of supervisors of Placer county. The ordinance reads as follows:

"Section 1. Every person, company or corporation engaged in or who shall hereafter engage in the business of raising, grazing, herding or pasturing sheep or goats within the county of Placer, state of California, shall procure and pay for a license therefor, from the license Collector of the county of Placer, of five cents per head per annum (later changed to three cents per head) for each head of sheep and goats, grazed, herded or pastured within said county of Placer by such person, company or corporation. No license shall be issued under this ordinance for any term or period less than one year.

"Sec. 2. It is the duty of the license collector to collect the licenses under the ordinance, and as compensation for collecting the same he may retain for his own use an amount equal to twenty-five per cent. of the moneys collected for licenses under this ordinance, and shall pay into the treasury of Placer county all sums so collected in excess of his said compensation of twenty-five per cent., which amount shall be placed in the general road fund of Placer county. He may enforce the collection of such licenses in the manner provided by section 3360 of the Political Code of the state of California.

"Sec. 3. Every person, company or corporation who shall neglect or refuse to procure the license provided for in section 1 of this ordinance, at the time or before the commencement of the business in this ordinance named, is guilty of a misdemeanor, and upon conviction thereof shall be fined, in addition to the amount of the license herein levied, the sum of one hundred dollars, to be recovered in any court of competent jurisdiction in the county of Placer.

"Sec. 4. This ordinance shall take effect and be in force on and after thirty days from its passage."

The ordinance was passed April 13, 1892. Its due passage is admitted and the liability for the license tax conceded, providing the ordinance is a valid one. The defendant demurred to the complaint upon the ground the same did not state facts sufficient to constitute a cause of action. Demurrer overruled and the defendant declining to answer, judgment was rendered against it and in favor of plaintiff, from which judgment defendant appeals.

The question to be determined is, "Is the ordinance in question intended to regulate the business of sheep raising, grazing, herding, and pasturing, or is it for revenue only?" When the ordinance was passed the board of supervisors had the power to license business generally for the purpose of both regulation and revenue. Subdivision 27, § 25, Act March 31, 1891; St. 1891, p. 306, c. 216. This grant of power is also found in subdivision 25, § 25, County Government Act 1897 (St. 1897, p. 465, c. 277), but is repealed by implication by section 3366, Pol. Code, as amended in 1901. St. 1901, p. 635, c. 209. Ex parte Pfirrmann, 134 Cal. 143, 66 Pac. 205. Section 3366, supra, as amended, grants to the board of supervisors "in the exercise of their police powers," power to license all and every business, not prohibited, for purposes of regulation and not otherwise. So that whatever power the board possesses to impose a license tax on business is found in section 3366, Pol. Code, and, as has been seen, this power is limited to license for regulation alone. The ordinance does not by any word or expression indicate that the business of sheep raising, grazing, herding, and pasturing is to be regulated thereby in any way. There is no privilege to be enjoyed by paying the license, further than the immunity against arrest and fine if the license be not paid, to any sheep business in the county, no protection to the business, and no protection or advantage secured to anyone owning property in the county. It is claimed that as the power is in the board to pass an ordinance imposing a license tax for the purpose of regulation, and an ordinance having been passed imposing a license tax and is silent as to the purpose, it must be presumed the board had no other purpose in view. But we think no such presumption could be indulged as to this ordinance, for it was passed when the board had the power to license for the purposes of regulation and for revenue both. All presumptions in favor of the validity of the ordinance must have existed when the power was exercised, and, there being nothing upon the face of the ordinance or in the law granting the power to pass it, which would indicate its purpose to be for regulation only, it cannot be said now under the changed conditions, the restriction of the power of the board, that the license tax is for regulation alone or at all. In Ex parte Dickey, 144 Cal. 235, 77 Pac. 924, 103 Am. St. Rep. 82, 66 L. R. A. 928, the court says: "Large discretion is necessarily vested in the Legislature to determine not only what the public requires, but what measures are necessary for the public interest." This, no doubt, applies to the legislative body of the county, the board of supervisors. But we understand when a power is granted to such board, and the discretion in using it, such discretion must be exercised within the power possessed by such board. Dobbins v. City of Los Angeles, 139 Cal. 183, 72 Pac. 970, 96 Am. St. Rep. 95. The keeping, herding and grazing of large bands of sheep and the driving of them from place to place surely is a business calling for the exercise of the police power of the board to regulate. Flanigan v. Sierra County, 196 U. S. 553, 25 Sup. Ct. 314, 49 L. Ed. 597 decided at the October term, 1904, and cited by appellant, contained the same questions involved in this appeal. An ordinance passed by the board of supervisors of Sierra county provided that all persons "engaged in the business of raising, grazing, herding or pasturing sheep in the county of Sierra" must pay a license tax at the rate of 10 cents for each sheep. Flanigan refused to pay the license tax and suit was brought to collect the same. The Supreme Court of the United States held that subdivision 25 of section 25 of the county government act of 1897 (giving power to boards of supervisors to license for revenue and regulation) was repealed by the enactment of the amendment to section 3366, Pol. Code, of March 23, 1901. The court further says: "Under the authority of the California cases, it must be regarded as a revenue measure." Lassen County v. Cone, 72 Cal. 387, 14 Pac. 100; Ex parte Mirande, 73 Cal. 365, 14 Pac. 888; City of Sonora v. Curtin, 137 Cal. 583, 70 Pac. 674; Santa Monica v. Guidinger, 137 Cal. 658, 70 Pac. 732. Under the authorities quoted, and especially that of 196 U. S. 553, 25 Sup. Ct. 314, 49 L. Ed. 597, we conclude that the ordinance under consideration is for revenue only, and that the power of the board of supervisors to pass such an ordinance which was found in subdivision 25 of section 25 of the county government act of 1897 was repealed by the amendment of section 3366, Pol. Code, made March 23, 1901.

The judgment is reversed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

2 Cal. App. 609

MANNIX v. TRYON et al.

(Court of Appeal, Third District, California. Jan. 3, 1906.)

APPEAL—MOTION TO DISMISS—CONTINUANCE.

Where a motion to dismiss an appeal for failure to serve notice of appeal on a party defendant, involved the examination of the transcript containing 76 pages, it would be continued to the hearing of the appeal.

Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Action by D. J. Mannix against William H. Tryon and others. From a judgment in favor of plaintiff, defendant Tryon appeals. On motion to dismiss. Continued to hearing.

A. L. Shinn and R. L. Shinn, for appellant. R. Platnauer, for respondent.

McLAUGHLIN, J. This is a motion to dismiss an appeal from a judgment foreclosing the lien of a subcontractor. The appeal is prosecuted by the owner of the premises, and respondent bases the pending motion on the ground that no notice of appeal was served upon the original contractor, who was a party defendant. Appellant, resisting the motion, contends that such contractor is not an adverse party, because reversal will aid instead of injuring him. This contention rests on the proposition that as the judgment against the original contractor is for the sum of $187 it must fall if the lien is declared invalid. Niller v. Carlisle, 127 Cal. 327, 59 Pac. 785. Of course, this would depend upon the reasons which rendered reversal necessary. Reversal for mere error would simply add the expenses of a new trial to the burdens of the original contractor, while reversal for reasons which destroyed the lien would probably have the effect claimed by appellant.

The point involves the examination of the transcript, which contains 76 pages, and upon the authority of Hibernia S. & L. Society v. Behnke, 118 Cal. 498, 50 Pac. 666, the motion is continued until the hearing upon the appeal, with permission to respondent to include the points in support of the motion in his brief, to which appellant may reply.

We concur: CHIPMAN, P. J.; BUCKLES, J.

2 Cal. App. 602

O. L. SHAFTER ESTATE CO. v. ALVORD et al.

(Court of Appeal, First District, California. Jan. 3, 1906. Rehearing denied by Sureme Court Feb. 28, 1906.)

1. LANDLORD AND TENANT—CONTRACTS—CONSTRUCTION—LEASES.

Where an instrument granted to defendants the use of and the right to occupy certain lands described as a game preserve, and provided that it was understood that any failure on defendants' part to perform any of the agreements expressed should work "a forfeiture of this lease," and plaintiff in its complaint alleged that it "entered into a certain indenture of lease," and that "at the time of the commission of said acts last aforesaid such defendants were tenants of said plaintiff under and by virtue of said lease, and for the purposes therein mentioned," the instrument would be regarded as a lease, creating the relation of landlord and tenant.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 61–65.]

2. FIXTURES—RIGHT TO REMOVE—LANDLORD AND TENANT.

Civ. Code, § 1019, declares that a tenant may remove from the demised premises during the continuance of his term anything affixed thereto for the purpose of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises, unless the thing has become an integral part of the premises. *Held*, that where defendants rented certain property from plaintiff to be used as a game preserve, and erected thereon a house and barn built on mudsills for the use of guests and the keeper of the preserve, which buildings could be removed without injury to the land, defendants were entitled to remove the same during the term of the lease.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fixtures, §§ 22–31.]

3. EVIDENCE—OPINION—CONCLUSIONS.

Where, in an action by a landlord to recover damages against his tenant for the removal of certain buildings, a witness described the house in question in detail, and its manner of construction, it was not error to sustain an objection to a question as to whether the house, when completed, "was a substantial structure."

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2256–2263.]

Appeal from Superior Court, Marin County; F. M. Angellotti, Judge.

Action by the O. L. Shafter Estate Company against W. Alvord and others. From a judgment for defendants, plaintiff appeals. Affirmed.

M. B. Kellogg and A. E. Shaw, for appellant. Bishop, Wheeler & Hoefler, for respondents.

COOPER, J. This action was brought to recover damages for the removal of a house and barn upon an alleged breach of a covenant to maintain fixtures. The trial court granted a nonsuit, and judgment was entered for defendants. This appeal is from the judgment. The facts are substantially as follows: On the 19th of August, 1890, the plaintiff, by an instrument in writing, let to defendants the rights of fishing, hunting, and shooting upon the lands described in the instrument for the term of five years from the said date, with the privilege to defendants of renewal for another five years, which renewal was made, extending the original agreement and the rights thereunder to August 19, 1900. As a consideration for the privileges granted, the defendants agreed to protect the property from fire; keep off trespassers; to prosecute all trespassers at their own expense; to hold inviolable the rights of other tenants; not to destroy fences, and in case of injury thereto to repair the same; to keep the gates closed; to maintain the fixtures, and protect the trees, shrubbery, and growing crops. The defendants entered upon the property under the contract, and, for their own uses and purposes, erected a small house and barn. The house was occupied by their gamekeeper, and they used the rooms in the house for sleeping purposes when staying over night on the premises. The barn was used for keeping the horse of the gamekeeper and the horses of the defendants when desired by them. The house was a substantial structure resting upon the ground. When the house was being built, the ground was removed in places and the mudsills let in, or partly in, the soil. The house and barn were structures necessary to the full enjoyment by defendants of the privileges granted, and were erected by defendants at their own expense and for their own uses and purposes. Prior to the termination of the agreement, the house and barn were removed by defendants without injury to the premises. The question is as to whether the house and barn belonged to plaintiff as fixtures at the time of their removal.

Appellant contends that the instrument was not a lease, but a mere license, and that therefore the relation of landlord and tenant did not exist between plaintiff and defendants. We are of opinion that the instrument was a lease, and that the relation of landlord and tenant was created by it. It granted to the defendants the use of and the right to occupy the lands therein described for certain named purposes. The term was fixed in the instrument. The defendants entered thereunder and for the purposes therein specified. The entry was by permission of the owner. The conditions and covenants defining the rights of the parties were set forth in the instrument. The last clause is as follows: "It is further mutually understood and agreed that any failure on the part of the party of the second part to perform any of the agreements expressed herein shall work a forfeiture of this lease." In the complaint the plaintiff alleges than it "entered into a certain indenture of lease," and that "at the time of the commission of said acts last aforesaid said defendants were tenants of said plaintiff under and by virtue of said lease and for the purposes therein mentioned." In Security, etc., Co. v. Willamette, etc., Co., 99 Cal. 636, 34 Pac. 321, the lease was for certain defined purposes, and not exclusive, yet it was held that the relation of landlord and tenant existed. In Kellogg v. King, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74, it was held that the lessee of the hunting privileges on certain lands could maintain ejectment as to those lands, and that the reservation of the right of pasturage in the lessors "in no way affects or militates against the exclusiveness of plaintiff's rights in the premises as a hunting preserve, which the lease clearly contemplates." In Conrad v. Saginaw Mining Co., 54 Mich. 249, 20 N. W. 39, 52 Am. Rep. 817, it was held that an instrument granting to defendant the right to enter upon lands and prospect, mine, and quarry on the same for 15 years, created the relation of landlord and tenant. It therefore follows that the rights and liabilities of plaintiff and defendants as to the privileges granted were those of landlord and tenant.

The next question is as to whether the defendants had the right to remove the house and barn under section 1019 of the Civil Code, which provides: "A tenant may remove from the demised premises any time during the continuance of his term anything affixed thereto for the purpose of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises." The above section is broad in its terms, and includes everything that the tenant may affix to the premises for the purposes therein designated. Whatever the rule may have been at common law the modern decisions, both in this country and in England, in regard to the removal of fixtures, as between landlord and tenant, most liberally construe the right in favor of the tenant. In all cases, where the improvements are erected at the expense of the tenant for his own uses and purposes under the lease, policy and justice demand that the tenant should be allowed, before the expiration of the lease, to remove them, provided that the removal does not injure the freehold nor operate to the injury of the inheritance. The landlord pays nothing for the fixtures, and there would be no justice in allowing him to take them from the tenant without consideration. If the lessee pays the hire of the property, or performs the other covenants of his lease, and returns it in as good a condition as he found it, the landlord should be satisfied. In Wiggins Ferry Co. v. O. & M. Ry. Co., 142 U. S. 415, 12 Sup. Ct. 194, 35 L. Ed. 1055, the court said: "As between landlord and tenant, or one in temporary possession of lands under any agreement whatever for the use of the same, the law is extremely indulgent to the latter with respect to the fixtures annexed for a purpose connected with such temporary possession." If we apply the above elementary principles to the case at bar the judgment must be affirmed. The defendants leased the premises for the purposes of hunting and fishing thereon. Whether we call hunting and fishing a business or trade makes no difference in principle. The house and barn were erected by defendants for the purposes of, and to enable them to, hunt and fish upon the premises. The principle here decided was applied in Van Ness v. Pacard, 2 Pet. 137, 7 L. Ed. 374, in a case where a tenant, with the view of carrying on his business as a dairyman, and for a residence of his family and servants engaged in that business, erected a building larger and more valuable than the building in controversy here. It was held that the size of the building or the materials of which it was built were unimportant, and that the tenant had the right to remove it. In Security, etc., Co. v. Willamette, etc., Co., supra, it was held that a building erected by a tenant as an office and place for its employés to sleep was a trade fixture, and that it could be removed by the tenant before the expiration of his lease. In McDonough v. Starbird, 105 Cal. 15, 38 Pac. 510, it was held that an office, erected by a tenant of a lumber yard and resting upon mudsills, might be removed by the tenant as a trade fixture during his term. In Mears v. Callender, L. R. Ch. Div. 388 (1901), it was held that a conservatory erected for the purposes of trade, as by a flower vendor, is removable; and so as to a building erected on a vacant lot for the purpose of a livery stable (Firth v. Rowe, 53 N. J. Eq. 520, 32 Atl. 1064); and a building erected to cover or to contain machinery (Carr v. Georgia Railroad Co., 74 Ga. 74); and a building erected for the purpose of a saloon (Lewis v. Ocean Nav., etc., Co., 125 N. Y. 341, 26 N. E. 301).

It was not error to sustain defendants' objection to the plaintiff's question asked of the witness Howe, as to whether the house when completed was a substantial structure. The witness described the house in detail and its manner of construction, and the court could tell as to whether or not it was substantial; besides we have treated it as a substantial structure in the discussion of the case.

The judgment and order are affirmed.

We concur: HARRISON, P. J.; HALL, J.

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2 Cal. App. 653

GRAY et al. v. MAIER & ZOBELEIN BREWERY et al.

(Court of Appeal, Second District, California. Jan. 3, 1906.)

1. Vendor and Purchaser—Bona Fide Purchasers—Notice.

Plaintiff's predecessor in title as "party of the first part" executed a lease of certain premises to defendant "as party of the second part" for a term of two years, which contained a clause that at the expiration of the lease the party of the "first part" should have the privilege of leasing the premises for a further term of one year, etc. *Held*, that the words "party of the first part" used in such renewal clause were so plainly a clerical error, used in the place of party of the "second part" intended, as to put a purchaser of the property on inquiry as to the tenant's right to renew.

2. LANDLORD AND TENANT—LEASE—OPTION TO RENEW—MISTAKE.

Where the words "party of the first part" used in a renewal clause in a lease were plainly a mutual clerical error, the clause being intended to give the "tenant," who was the party of the second part, the right to a renewal, it was the duty of the parties to so read the lease, and hence there was no necessity for any action on the part of either as preliminary to the exercise of the tenant's option to renew, and no delay on the part of either in calling attention to the mistake would impair such rights.

3. SAME—FORCIBLE DETAINER—EQUITABLE RELIEF—FORFEITURE OF LEASE—REFORMATION OF INSTRUMENT.

Where, in an action of forcible detainer, plaintiff seeks to have a forfeiture declared, because of default in conditions of the lease, the exercise of the court's equitable powers may be extended to a full examination of all equities involved and to the granting of a decree reforming the lease.

4. APPEAL—FINDINGS—REVIEW.

A finding that a condition in a lease against subletting without the consent of the landlord had been waived will not be reversed on appeal, where there is some evidence to sustain it.

5. LANDLORD AND TENANT—LEASES—RENEWAL—COVENANTS—NOTICE.

Where a lease provided that, at the expiration thereof, the tenant should have the privilege of leasing the privileges for a further term of one year, commencing on the day the lease expired, such covenant was a contract for a "renewal" and not an "extension" of the lease, and required notice in order to entitle the lessee to exercise its right.

6. SAME—TIME OF ELECTION.

A lease provided that it should extend for a term of two years ending on October 1, 1903, and declared that "at" the expiration of the lease the lessee should have the privilege of leasing the premises for a further term of a year, commencing on the 1st day of October, 1903. *Held* that, though the lease expired at midnight on September 30, 1903, the tenant had the entire day of October 1st on which to give notice of his election to renew.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Harry Gray and another against the Maier & Zobelein Brewery. From a judgment in favor of defendants, and from an order denying a new trial, plaintiffs appeal. Affirmed.

Percy R. Wilson and Denis & Loewenthal, for appellants. Anderson & Anderson and Edw. F. Wehrle, for respondents.

ALLEN, J. Proceedings in unlawful detainer. Judgment for defendants, from which, and an order denying a new trial, plaintiffs appeal.

It appears from the record that plaintiffs' predecessor in title, as party of the first part, on September 28, 1901, executed to defendants a lease for the premises described for the term of two years, commencing on the 1st day of October, 1901, and ending on the 1st day of October, 1903; which lease contained a clause that the second party should not let or underlet the whole or any part of the premises without the consent of the first party, and a further provision that, at the expiration of the lease, the party of the "first part" should have the privilege of leasing the said premises for a further term of one year, commencing on the 1st day of October, 1903, and ending on the 1st day of October, 1904. The court finds that defendants sublet said premises shortly after the commencement of the term, which was known to plaintiffs' grantor and acquiesced in by her thereafter until she transferred the same to plaintiffs; that plaintiffs' predecessor in interest and plaintiffs at all times acquiesced therein and received rent, knowing of such subtenancy. Before the 1st of October, 1903, plaintiffs served notice upon defendants that they would not exercise the option of leasing the premises for another year, and demanded possession at the expiration of such lease. On October 1, 1903, defendants notified plaintiffs in writing of their election to hold said premises for a year, commencing October 1, 1903. Afterwards plaintiffs served another notice, claiming possession on account of such subletting, followed by a three-day notice to quit. The court, in its final judgment, found that the words "first party," used in said lease in connection with the option, were inadvertently used, and the words "second party" were intended; and ordered that said lease be corrected accordingly, and gave judgment for defendants.

The first contention of appellants is that the mistake was not shown to be mutual; and further, that defendants had knowledge thereof for nearly two years, and that such mistake is not available as against the plaintiffs; and further, that a defense based upon such mistake could not be set up in a special proceeding. A most casual reading of the lease will demonstrate that an error was made in the designation of the parties to whom the option was granted. Reading the lease literally, it sought to confer an optional right upon the first party which she possessed under all circumstances; one needs no optional or other contract right to confer the privilege to grant a lease of his own. In addition, the right "to lease" by the ordinarily accepted meaning of terms is unto the lessee. The owner, or first party, grants the lease, lets or demises the leased premises, and it is the second party who leases. These considerations would lead any one examining the lease to see at once that the intention was to grant an optional right to the second party, and that the word "first" was an error of the scrivener. Assuming this proposition, then, appellants and their predecessor, when acquiring this property, were bound by all of the equities existing between the vendors and the tenants, and, having knowledge of a tenant's possession, to act upon the inquiry suggested thereby and ascertain the tenant's rights and equities. Security, etc., Co. v.

Willamette, etc., Co., 99 Cal. 641, 34 Pac. 321. It is true that the record is not constructive notice of a mistake. Davis v. Ward, 109 Cal. 189, 41 Pac. 1010, 50 Am. St. Rep. 29. And it is also true that an examination of the original lease of itself imparted no notice other than that which would be imparted by a record had it been recorded. But an instrument, in either event, imparts such notice as a fair and reasonable construction thereof would indicate as the meaning of the terms employed. The strictness of the rule announced in Davis v. Ward, supra, should be relaxed in cases where the mistake is so obvious that the actual intent may be gathered from the instrument imparting notice. The lease in this case was so worded as to put the purchaser upon inquiry in reference to the true meaning and intent. That an option to lease for another year was the subject of the contract is evident; that to give such option to the first party would be meaningless. To give it effect as a contract, therefore, it would necessarily follow that the intention was to give the option to the party who alone could be affected in his status with relation to the property by such option. "It is not the practice of courts of justice to divest persons of their estates * * * by a strict interpretation of the language of an instrument, when the sense in which the words were used is apparent from other portions of the instrument, viewed in the light of attending facts. To ascertain the real intention of the parties, we view the whole contract and all of its provisions, together with the relations of the parties towards each other * * * and effect will be given to the intent thus ascertained, however clumsily the instrument may be worded" (Sprague v. Edwards, 48 Cal. 249); "and will be so read in an action at law, and resort need not be had to a court of equity for reformation." (Sprague v. Edwards, supra. See, also, Weil v. Jones, 53 Cal. 46.) These cases last cited were dealing with mistakes where the rights of the original contracting parties only were involved; yet it seems to us that all parties to a contract, in its examination as to rights thereunder, being bound by the obvious intent made evident by the instrument, any one dealing with the subject-matter whose interests are affected and controlled by the instrument should be subject to the effect of a like reading. That which is a duty devolving upon the court when considering a contract should be a duty devolving upon the parties when performing a like act. If, therefore, this duty was upon the parties in reading this lease, there was no necessity for any action upon the part of either party as preliminary to the exercise of their rights, and no delay in calling attention to the mistake by either would impair rights; and the fact that the defect was so glaring of itself to suggest the error would establish the mutual character of the error.

Entertaining these views, it is unnecessary to notice the specifications of error in relation to the action of the court in a special proceeding reforming an instrument. It may be said, however, in passing this point—which is an open question in this state—that the power of a court of equity is invoked by plaintiff in every action in forcible detainer, when he seeks in his complaint to have a forfeiture declared on account of default in conditions of the lease. In this case, a forfeiture is sought on account of a default in the subletting condition. If such an equitable power is in a court in cases of this class, of which we have no doubt, no reason is apparent why such equitable power may not be extended into a full examination of all the equities involved, to the end that exact justice be done. In relation to the claim of appellants that the lease had been forfeited by a violation of the obligation not to sublet, it is sufficient to say that the court has found that all parties knew of the subletting and acquiesced therein, and received rent with such knowledge. There is some testimony in the record which supports this finding even as to the plaintiffs, and such finding, therefore, cannot be disturbed by us; and the effect thereof is a waiver of any rights theretofore existing on account of such violation of the obligation.

The remaining point necessary for consideration presented by appellants is that the language in the lease, giving it the effect of extending the option to the second party, was a contract for a renewal, and not an extension of the lease. With this contention we agree. The proposition seems to be determined in Shamp v. White, 106 Cal. 222, 39 Pac. 537; which, being accepted, signifies that notice is requisite to entitle the lessee to such renewal. Appellants insist that such notice being requisite, the original lease being in terms for two years, fixes the tenure, notwithstanding the specified dates given as the commencement and ending, which are, in effect, two years and one day. We think that the determination of this matter is not necessary. The lease provides that at the termination of the lease the option should be exercised. The notice was given October 1st. The original lease, even upon appellant's theory, expired at midnight of September 30th. The notice given on the 1st of October was at the termination. The law knows no parts of a day, and will consider the notice given on that day as being operative the entire day, which would give the notice effect the first moment of the 1st day of October, which was the precise time of the expiration of the old lease; and the notice, therefore, was strictly in accord with the terms of the lease.

Notwithstanding the very able presentation of the points involved by counsel, we are constrained to the opinion that no error is apparent in the record, and that the judgment and order appealed from should be affirmed, and it is so ordered.

We concur: GRAY, P. J.; SMITH, J.

2 Cal. App. 650

WAY v. SHAVER et al.

(Court of Appeal, Second District, California. Jan. 3, 1906.)

1. TRUSTS—DECLARATION—PLEADING.

A complaint in an action to declare a trust for the benefit of creditors which failed to allege that defendants had denied the trust, that the trustee had ever declined or refused to carry out the same according to its terms, or that defendants had notice or knowledge of plaintiff's claim, was defective.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 589–593.]

2. SAME—DEFECTS CURED BY ANSWER.

In an action to declare a trust, the complaint averred that plaintiff's debtor, prior to her decease, conveyed the property in question to the grantee on an express trust to pay all the expenses incurred by the debtor during her sickness which included plaintiff's claim, and alleged that the grantor died leaving no estate, and that the property had been decreed to be held in trust for decedent's minor children. *Held*, that the defects in the complaint for failure to charge that defendants' had denied the trust, that they had knowledge of plaintiff's claim, and that the trustee had refused to carry out the trust according to its terms, were cured by defendants' answer denying the trust, the indebtedness and notice thereof by the guardian and alleging payment of a sum in satisfaction of plaintiff's claim.

3. SAME — ENFORCEMENT — PRESENTATION OF CLAIMS.

Where the residue of certain property of a decedent which had been conveyed to a trustee had been determined to be the property of certain defendant minors, the presentation of a creditor's claim against the estate of the grantor was not a condition precedent to his right to maintain a bill to enforce such trust, alleged to have been made for his benefit, no action being sought against the estate, nor against any property belonging thereto.

Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by E. Henry Way against Maybelle F. Shaver and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

William G. Randall, for appellant. C. L. McFarland and Purington & Adair, for respondents.

ALLEN, J. Action to declare a certain instrument a deed of trust executed to secure an indebtedness, and for an order of sale. Judgment for defendants upon the pleadings, from which plaintiff appeals.

The complaint avers certain unpaid indebtedness due plaintiff from one Amy Robsart Shaver contracted during the last illness of the latter; that after the same was contracted, to wit, on February 3, 1903, said Shaver conveyed the premises described by deed to defendant Helen Byron Griffiths, upon an express trust "that out of the proceeds of the said property the said Helen Byron Griffiths should pay all the expenses incurred by the said Amy Robsart Shaver during her sickness"; that on February 9th following said grantor died, leaving no estate; that thereafter, by proceedings regularly had in the superior court of Riverside county, upon the complaint of defendant Morrison, guardian of the minor children of said decedent, to which proceedings plaintiff was not a party, such property was declared to be held in trust by said Griffiths for said children; and under order of court a special commissioner conveyed the same to said guardian defendant, who, it is alleged, took such conveyance with notice of the trust in favor of the creditors. Plaintiff, therefore, prays that a trust be declared in favor of plaintiff for the amount of his claim, and that the premises be sold in satisfaction thereof. An answer was filed by defendants, denying the trust, the indebtedness, and notice of the trust by the guardian; and payment of a sum in satisfaction of plaintiff's claim was alleged.

It is claimed, upon the authority of Hibernia Savings & Loan Society v. Thoronton, 117 Cal. 481, 49 Pac. 573, that on a motion for judgment on the pleadings the allegations of the answer must be ignored and the complaint tested as upon general demurrer. Applying this test to the complaint alone, it is insufficient to authorize the interposition of a court of equity to declare a trust; for the defendants are not averred to have denied the same, nor were there any averments that defendants had notice or knowledge of the plaintiff's claim, nor that the trustee had ever declined or refused to carry out the trust according to its terms. But the case of Hibernia Savings & Loan Soc. v. Thoronton, however, may be easily distinguished from the case under consideration. The doctrine of that case must be considered in the light of the facts under which the court was applying rules of law and practice. There the action was at law upon a promissory note. The answer set up the fact that it was secured by mortgage, thereby pleading, under section 726, Code of Civil Procedure, a complete defense at law, and the court determined that on a motion for judgment upon the pleadings the averments in relation to the mortgage found only in the answer could not be considered. The reason is obvious; the effect of the allegations of the answer were such, if true, to defeat the action, and evidence was necessary to establish the same. In this case the allegations are in aid of the complaint. In the absence of allegations that the trustee denied the trust, jurisdiction in equity to declare the same would not appear by the complaint alone; yet by this motion the court was bound to consider such admissions of the answer as would have the effect to obviate proof of particular matters on plaintiff's part, and if the complaint, coupled with such admissions, conferred jurisdiction in equity to declare a trust, the motion for a judgment should have been denied. Treating the complaint as one for the foreclosure of a deed of trust given to secure an indebtedness, and applying the same rules, we find that there was no demand upon the trustee to enforce the trust, nor any refusal so to do, nor any facts from which it might be inferred, nor any notice or knowledge of plaintiff's claim is averred, without which averments a complaint would be insufficient in an action brought by a beneficiary to enforce a trust. Citizens' Bank v. Los Angeles, etc. Co., 131 Cal. 190, 63 Pac. 462, 82 Am. St. Rep. 341. Yet the answer again comes to the relief of the complaint and admits knowledge of the claim, denies the validity thereof and pleads payment, the effect of which allegations is to admit that a formal demand would have been unavailing, and therefore not an essential prerequisite. Smith v. Dorn, 96 Cal. 73, 30 Pac. 1024.

The position of counsel for respondent that the claim should be presented against the estate as a condition precedent to the action cannot be maintained, as the action is not sought against the estate, or any property belonging thereto. It affirmatively appears from the complaint that the proceeds were to be applied in a certain direction, which of necessity gives authority for a sale that such proceeds might be produced; hence no interest in the specific property was retained. And it further appears from the complaint that any excess has been determined the property of the defendant minors; so, under no condition can the estate of the grantor be affected by the judgment. Hence, no presentation of the claim was necessary.

We are of opinion that the court erred in granting judgment upon the pleadings, and the judgment is reversed and cause remanded for further proceedings.

We concur: GRAY, P. J.; SMITH, J.

2 Cal. App. 606

ESCONDIDO LUMBER, HAY & GRAIN CO. v. BALDWIN.

(Court of Appeal, Second District, California. Jan. 3, 1906. Rehearing Denied by Supreme Court Feb. 28, 1906.)

1. SCHOOLS AND SCHOOL DISTRICTS — CONTRACTS—INDIVIDUAL INTEREST OF TRUSTEE.

Where a contract for the construction of a schoolhouse was properly let to a solvent contractor, and was fully completed, the fact that the contractor purchased the lumber required from a corporation in which one of the trustees of the school district was a stockholder, and thereafter assigned the orders drawn for the amount due under the contract through an attorney to such corporation, was not a violation of Pol. Code, § 1876, declaring that no school trustee shall be interested in any contract made by the board of which he is a member, etc.

2. PLEADINGS—ISSUES AND PROOF.

Where the complaint in a proceeding to compel payment of certain school orders alleged that the orders were in due form, and such allegation was not controverted by the answer, proof and findings of such fact were unnecessary.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1228.]

3. APPEAL—ADMISSION OF EVIDENCE—PREJUDICE.

Where a contract for the construction of a schoolhouse was free from vice, but payment was denied because the contractor purchased materials from a corporation in which a school trustee was a stockholder, the school district was not prejudiced by the admission of evidence of the remoteness of other lumber yards than that from which the materials were purchased from the place where the building was erected.

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Mandamus on petition of Escondido Lumber, Hay & Grain Company against H. J. Baldwin. From a judgment in favor of petitioner, defendant appeals. Affirmed.

Casius Carter, Dist. Atty., W. R. Andrews, Deputy Dist. Atty., and F. P. Willard, for appellant. W. H. Francis and Haines & Haines, for respondent.

ALLEN, J. Petition for writ of mandate. Findings and judgment in favor of petitioner, from which the respondent to the writ appeals.

From the record it appears that G. V. Thomas was on July 12, 1904, one of the trustees of the Escondido school district, and at the same time was a stockholder in and director and general manager of the plaintiff corporation; that on said date the school district entered into a contract with one S. M. Stewart to construct a schoolhouse for the sum of $750; that Stewart was at the time solvent and with means to pay for the materials necessary for use in such house otherwise than from money to arise upon such contract; that when said contract was entered into no agreement, express or implied, existed between Stewart and said trustees, or either of them, with reference to the furnishing of the materials, or any portion of them, necessary for use in such construction; that after the execution of such contract, Stewart purchased from plaintiff corporation certain of the lumber used in said building, and said Thomas knew of its intended use when delivered. The schoolhouse was regularly and properly constructed, and by said trustees accepted; and orders were drawn in due form of law on Hugh J. Baldwin, the county superintendent of schools, for the amount of the contract price and certain extras furnished by Stewart; that said orders were assigned by the contractor to one Francis, acting as attorney for plaintiff, who, before the bringing of this proceeding, assigned the same to plaintiff; that such orders were presented to the superintendent of schools of San Diego county, who refused to draw requisitions on the county auditor therefor; that sufficient funds were on hand in the county treasury to the credit of the school district from which said orders could be paid.

The refusal of the school superintendent to draw such requisitions is based on the proposition that the contract was void because in violation of section 1876 of the Political Code, which reads: "No school trustee or member of any board of education must be interested in any contract made by the board of which he is a member; and any contract made in violation of this provision is void." This contention is untenable. The contract was valid under the findings of the court when executed. The mere fact that the contractor, without previous arrangement or agreement, saw fit to buy of a corporation for which one of the trustees was an agent certain materials used in the construction of the house would not render the contract void, voidable, or ordinarily subject it to merited criticism. The only possible conflicting interest which could in any sense be said to exist, whereby the trustees' act could be influenced, would be in connection with the acceptance of the building when completed. But it is not pretended or claimed that the building was not properly constructed, from which the formal acceptance would be imperative. It must be borne in mind that the plaintiff corporation had no particular interest in the acceptance of the house. It had a claim against a solvent purchaser of the lumber. It was not necessary for it even to serve the statutory notices which are said to amount to an equitable garnishment under the lien law. We are unable to perceive even a slight interest on the part of a stockholder of plaintiff corporation, as was the case in Wickersham v. Crittenden, 93 Cal. 29, 28 Pac. 788. The Supreme Court of the United States in Bank v. Owens, 2 Pet. 529, 7 L. Ed. 508, has said that "no court of justice can in its nature be the handmaid of iniquity." That office would be performed were the court, under the circumstances of this case, to refuse its aid in enforcing the demands of a "laborer worthy of his hire" against a public corporation, which has received all to which it was entitled, and which seeks to avoid the payment of an honest obligation on account of a mere surmise that the possibility of profit from a subsequent independent contract had an influence upon the minds of the officials connected with the execution of the original contract. "A bare suspicion that under the stimulus of such a contract a party might do some prohibited act would not be sufficient to justify a court in declaring it void. There must be something in it to indicate that its natural tendency would be to produce such an effect." Casserleigh v. Wood (Colo. App.) 59 Pac. 1028.

It is unnecessary to notice the specifications in reference to the form of the account for which the orders were drawn. The complaint alleges that these orders were in due form, which is not controverted by the answer. Proofs or findings in that regard were unnecessary. Nor was there any prejudicial error in permitting proof as to the locality of the nearest lumber yard to Escondido. The contractor having a right to purchase his materials in the open market, and the contract being free from vice, we are unable to see wherein appellant was in anywise prejudiced by proof of the remoteness of other lumber yards from the place of the construction.

We find no error in the record, and the judgment is affirmed.

We concur: GRAY, P. J.; SMITH, J.

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2 Cal. App. 593

SAN JOAQUIN & K. R. CANAL & IRRIGATION CO. v. MERCED COUNTY.

(Court of Appeal, Third District. California. Jan. 2, 1906.)

1. Taxation — Situs of Property — Corporate Franchise.

A corporation's franchise to be and act as a corporation merely gives the corporation life as a person which bears the same relation to the taxing power as is borne by natural persons, having its situs for the purpose of taxation only at the place where the corporation's principal place of business is situated.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 453.]

2. Corporations — Special Franchises — Merger.

The mere fact that a corporation is organized for the specific purpose of acquiring, and is given power to acquire, public uses or franchises, does not make such franchises "when acquired" a part of the corporation's general franchise to be and act as a corporation.

3. Taxation — Situs of Property — Corporate Franchise.

Where a corporation was authorized to acquire property, appropriate and distribute water, construct canals, and establish, collect, and receive rates, water rents, and tolls, and was authorized to exercise the right of eminent domain, the actual exercise of such powers by the construction of canals in a county other than that in which the corporation's principal place of business was located, constituted the use of a franchise by the corporation in such county which was there subject to taxation.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by the San Joaquin & Kings River Canal & Irrigation Company against the county of Merced. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Mastick, Van Fleet & Mastick, for appellant. E. H. Hoar, Dist. Atty., for respondent.

McLAUGHLIN, J. This is an action to recover taxes paid under protest. The complaint contains a concise statement of the following facts: (1) That on September 1, 1871, the plaintiff was incorporated under an act entitled "An act to authorize the incorporation of canal companies," approved May 14, 1862. (2) That ever since said date it has been and now is a corporation organized and doing business under the laws of this state, and has had its principal place of business in the city and county of San Francisco. (3) That it was incorporated "for the purposes of the construction of canals for the transportation of passengers and freight, and for the purpose of irrigation and water power, and for the conveyance of water for mining and manufacturing purposes." (4) That it has never owned, possessed, or held any franchise granted by the authorities of Merced county, or any municipal corporation or body within the limits of said county. (5) That on the first Monday in March, 1903, the only franchise or franchises it owned, held, or possessed were those obtained by virtue of its incorporation, and the exercise of powers conferred by its charter, and the law under which it was incorporated. (6) That on said first Monday in March, 1903, it "was the owner of certain canals in the county of Merced, used for the conveying and distribution of water, and constructed and operated by said plaintiff in pursuance of the provisions of the act of the Legislature above mentioned, and for the purposes for which said company was incorporated as aforesaid." (7) That the property of plaintiff, including the canals above mentioned, was assessed by the assessor of Merced county for the fiscal year 1903–04, and said assessment contained the following item: "Franchise on above described canals $15,000." (8) That in due time the tax collector of Merced county demanded the payment of $367.50 as taxes levied upon the property designated on the assessment roll as "Franchise on above-described canals," and said sum was paid under protest duly and regularly made and filed at the time such tax was paid. The court sustained a general demurrer to the complaint, and judgment was thereupon entered in favor of the defendant.

The question presented by this appeal is whether or not the plaintiff owned a franchise connected with its canals and corporate business, which was assessable in Merced county. The question is as complex as its proper solution is important. It involves the consideration of principles upon which taxation is based, and invites a careful study of corporate organization and powers, as distinguished from corporate ownership of property, tangible and intangible. It will, doubtless, be conceded that all property, corporeal and incorporeal, whether owned by natural or artificial persons, should bear its just and proper proportion of the burdens of government. This concession necessarily involves the admission that corporations, in common with natural persons, should be willing, and, if unwilling, should be compelled, to pay taxes upon all property owned by them, according to the situs and value of such property. Under the Constitution of this state franchises must be classed as property subject to taxation. Const. art. 13, §§ 1–10; S. V. W. W. v. Schottler, 62 Cal. 108; Bank v. San Francisco, 142 Cal. 277, 75 Pac. 832, 64 L. R. A. 918, 100 Am. St. Rep. 130; Stockton G. & E. Co. v. San Joaquin Co., 83 Pac. 54. The franchises so assessable may be classified as creative and special. The creation of a corporation, the grant of power to exist and act as such is, in itself, a franchise, and it has been distinctly decided that such franchise is assessable as property. Bank v. San Francisco, 142 Cal. 279, 75 Pac. 832, 64 L. R. A. 918, 100 Am. St. Rep. 130 et seq. This creative franchise is inseparable from the being or personality of the corporate body, and hence it must have its situs wherever the corporate entity has its domicile or residence, and this, in law, is the place where its principal place of business is situated. Trezevant v. Strong Co., 102 Cal. 48, 36 Pac. 395; Whitney v. Sellers Com. Co., 130 Cal. 189, 62 Pac. 472. This being true, it follows under the express mandate of the Constitution that such franchise must be assessed and taxed in the county where its principal place of business is located. But this franchise to be and act as a corporation, simply gives the corporation life as a person, bearing the same relation to the taxing power borne by natural persons. It is thus endowed with capacity to hold property, and, within the limits of corporate power and life, to do the acts and things a natural person may of right do. Property acquired and held by corporations is subject to the same burdens imposed upon property held by natural persons. There is no difference, as far as taxation is concerned, between the artificial person, born of the law, and the being whose life and powers are given and measured by Omnipotence. Each steps upon the stage of human activity to acquire, possess, and hold property on the same terms and conditions. If a particular right or thing is taxable when owned or held by an individual, it is likewise taxable when owned or held by a corporation, and the place where it may be taxed will be fixed by the same rules in both instances. The natural person has an inherent right to engage in any line of human activity, not dependent on special grant of privilege or power from the municipality or state. He may be merchant or mariner, banker or baker, teacher or tailor, according to his fancy, and this right to engage in any of the varied pursuits of man cannot be taxed as property. These same rights pertain to a corporation, within its limited sphere, and are included in the franchise to exist and act as a corporation. But this creative or corporate franchise confers upon the aggregation of individuals composing a corporation no greater measure of inherent right than is enjoyed by each individual citizen. In fact the rights it may enjoy, in common with natural persons, are limited by the express powers conferred upon it. The enumeration of powers in its charter is a limitation on corporate capacity, and not an enlargement of inherent rights, attaching to the legal person thus created. All natural persons have the right to acquire, own, and exercise franchises resting in special grant from some authoritative source. But this power, like the power to hold other property, may never be exercised, and hence the power is, obviously, distinct from the property interest which vests only when the franchise is acquired by acceptance or purchase, or, in other words, when the power is exercised. And so it is with corporations. A corporation may have power to acquire realty, and yet never own such property. Its corporate franchise, its charter, may grant the power to acquire and exercise separate, distinct and varied franchises, but none may ever be acquired or owned.

This distinction between the power to own, and ownership, is very important when we come to consider the difference between the creative franchise, vesting the power to acquire, and other franchises which it may subsequently acquire by purchase or acceptance. It points the difference between the general, creative franchise to be, and the special franchises which, when accepted or purchased, vest privileges or franchises resting in special grant from governmental sources. Above all things, it eliminates the heresy that all special franchises, enjoyed and exercised by a corporation, whether acquired by acceptance or purchase, are merged in the general franchise which creates the corporation, and endows it with enumerated powers. The mere fact that a corporation is organized for the specific purpose of acquiring, and is given power to acquire public uses or franchises, does not carry with it the idea that such franchises, when acquired, be they many or few, are merged in, and must be assessed as part and parcel of the general corporate franchise. This idea would absolutely destroy the equality, enjoyed by natural and artificial persons alike, in matters of taxation. If a natural person should purchase a dozen franchises to supply water or light to the inhabitants of as many different cities, none would question the proposition that each franchise so held could be assessed in each particular city, according to its value and kind. And if such person purchased a single franchise of either character, nobody would have the hardihood to contend that his purchase was merged in his identity as an individual, or in his right to acquire that particular kind of property. If this be true of franchises acquired by purchase, it certainly cannot be said that franchises acquired by acceptance are governed by a different rule, for it must be admitted that all franchises originally vest by acceptance of a special grant. If, then, a natural person may be compelled to pay taxes on each separate franchise held and exercised, there is no principle of law, logic, or justice, sustaining the view that immunity from such taxation is enjoyed by corporations, because, forsooth, it requires another and very different franchise to give them life and power. The unfairness and injustice of such a rule is apparent when the status of corporations owning such franchises is contrasted with the status of banking or other purely private corporations. All corporations enjoy corporate franchises, but only a comparative few can or do acquire special privileges denominated franchises, and as an incident thereto enjoy the right or franchise to take private property as public agents. All corporate franchises, under our system, may be taxed, and it would be extremely unjust if corporations owning and enjoying additional and valuable franchises could not be assessed therefor aside from any assessment levied upon the corporate franchise, held and assessed in common with all other corporations debarred from owning or exercising such privileges. It would be strange indeed if these particular creatures of the law could find in their creation the source of immunity not enjoyed by citizens, who, in the aggregate, constitute the source from which all laws proceed. The distinction between the corporate or creative franchise, and other special franchises which the corporate entity may acquire and exercise, has long been recognized by our courts. S. F. v. Spring V. W. W., 48 Cal. 493; San Jose v. January, 57 Cal. 616; S. V. W. W. v. Schottler, 62 Cal. 107; Bank v. San Francisco, 142 Cal. 277, 75 Pac. 832, 64 L. R. A. 918, 100 Am. St. Rep. 130; Stockton G. & E. Co. v. County of San Joaquin, 83 Pac. 54. In the light of these decisions, and the constitutional mandate compelling the assessment of all franchises, it must be considered as the settled law of this state that each separate franchise owned and exercised by any person, natural or artificial, may be assessed and taxed. And as a matter of abstract justice, as well as of logic and law, it must also be considered as settled that the existence of each franchise as a separate and distinct entity, is in no way dependent upon the nature or origin of the legal person by whom it is owned or exercised. Justice and fairness demand that all persons, natural and artificial, should bear the burdens of taxation equally, and, therefore, if a person of either class owns franchises to collect tolls on many different roads or ferries, or to use the streets of many cities for tracks, or poles, or mains, the taxation of each franchise so owned cannot be evaded under the pretense that ownership of this class of property is included in the right or power to acquire it. The great franchise of natural life carries with it no right to enjoy special franchises or privileges without taxation, and the law confers upon its corporate creatures no such immunity.

In the case at bar, the appellant is a corporation, and its franchise to exist and act as such is, unquestionably, assessable only in the city and county of San Francisco. It only remains, therefore, to determine whether it owns and exercises any other franchise, connected with, or incident to, its canals and water system which is assessable in Merced county. The powers conferred by the act under which appellant was incorporated are comprehensive and important. These powers it has, admittedly, exercised and is still exercising. It was thereby clothed with power to acquire property, appropriate and distribute water, construct canals, and to establish, collect and receive rates, water rents, and tolls. As an incident to the public uses and franchises it might exercise and acquire, by acceptance or otherwise, it was given the right of eminent domain as a public agent in charge of public uses and franchises. When its corporate organization was completed, before it had acquired any property or done any corporate act, it held only the single corporate franchise to exist with enumerated powers. Any other franchise which was offered in the grant of powers, and which by proper manifestation of acceptance, or exercise of power, it might acquire, was inchoate. Stockton, etc., v. County of San Joaquin, 83 Pac. 54. It might, at will, accept or reject such franchise. But when it accepted the offer, and had manifested such acceptance by the construction of canals, the appropriation and distribution of water, and the collection of water rents or rates, the inchoate franchise became complete. The right to collect rates or compensation for the use of its water, thus dedicated to the public use, then became existent as a separate entity or franchise, and vested in appellant as a valuable property right. Stockton, etc., v. County, 83 Pac. 54.

The doctrine that the right to collect rates for water distributed or furnished is a franchise independent of the creative or corporate franchise is by no means new or strange. This rule and other analogous rules find support in many well considered cases. Spring V. W. W. v. Schottler, supra; San Francisco v. S. V. W. W., 48 Cal. 493; San Jose G. Co. v. January, 57 Cal. 616; San Francisco v. Oakland & C. C. Water Cos., 83 Pac. 61; Stockton G. & E. Co. v. San Joaquin, 82 Pac. 54; San Benito v. S. P. R. R., 77 Cal. 520, 19 Pac. 827; San Luis W. Co. v. Estrada, 117 Cal. 177, 48 Pac. 1075; Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528; Robinson v. S. P. R. R. Co., 105 Cal. 526, 38 Pac. 94, 722, 28 L. R. A. 773; Adams Express Co. v. Ohio, 166 U. S. 217, 17 Sup. Ct. 604, 41 L. Ed. 965; State of California v. C. P. R. R. Co., 127 U. S. 40, 8 Sup. Ct. 1073, 32 L. Ed. 150; N. O., etc., R. Co. v. Delamore, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. Ed. 244; Hall v. Sullivan R. Co., 21 Am. Law Rep. 138. As was well said in a case recently decided: "The corporate franchise is considered as property, separate and distinct from the so-called franchises which the corporation may acquire subsequent to its incorporation." Bank v. San Francisco, supra. The Constitution of this state expressly provides that the right to collect rates or compensation for the use of water supplied to any county, city or town, or the inhabitants thereof, is a franchise, and therefore the rule under discussion applies with peculiar force to corporations exercising such rights. Const. art. 14, § 2; S. V. W. W. v. Schottler, supra. As pointing to the reason for this distinction between corporate and special franchises, as well as illustrating the importance of such distinction in reaching a proper solution of the question presented, we may for the moment dwell upon the effect of the constitutional provision just mentioned. A corporation or natural person may own canals, ditches, pipes, or mains conveying water, and yet no franchise may be incident to or connected with such ownership. As long as the water conveyed is devoted to the private use of the owner, no right of eminent domain, nor right to use public streets or thoroughfares, incident to public franchises, exists. But the moment that water is distributed and sold or rented to others, a public use arises, and the franchise to collect rates fixed by the proper authorities, with all its important attributes and privileges, springs into existence. The use to which the water is dedicated creates the franchise with all its attendant privileges.

It follows from the application of the principles above discussed that the appellant owns and is exercising a franchise growing out of, and incident to the operation of, its canals, which may be assessed and taxed as separate and distinct from its corporate franchise. And it seems clear to us that recent decisions of the Supreme Court are determinative of all questions touching the situs of such franchise for purposes of taxation. Stockton, etc., v. San Joaquin Co., supra; San Francisco v. Water Companies, 83 Pac. 61. As the franchise to collect rates for water distributed arises out of the use to which the water is devoted, it follows as a logical sequence that such franchise can only be exercised where the water is distributed and the rates are collected. The corporeal substance, the water, from the particular use of which the franchise arises, being situated in Merced county, and the franchise being there exercised, it follows under the authorities last cited that the situs of the franchise is in Merced county, and that it must be there assessed. While the description of the franchise might be more specific, it is as definite as the description upheld in San Francisco v. Water Companies, supra, and as no objection is made or urged on that ground it must be held that it fairly includes the franchise to collect water rates in connection with the operation of the canals. The record before us contains no hint that the canals are operated or the franchise exercised in any other county than Merced, and, while it is said in the briefs that the canal system extends to two other counties, it is manifest that, under the rules governing appellate practice and supporting the action of the trial court, such statement cannot be considered. It may, however, be remarked that the mere fact that the canals extend to three counties instead of one can hardly render them, or rights growing out of them, immune from taxation. Nor can such fact give rise to any insuperable difficulty under any reasonable and unstrained construction of the constitutional provision creating such franchises, and the laws relating to taxation.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

2 Cal. App. 582

JAMESON v. SIMONDS SAW CO. et al.

(Court of Appeal, First District, California. Jan. 2, 1906. Rehearing Denied Jan. 31, 1906.)

1. CORPORATIONS — RESIDENCE — FOREIGN CORPORATIONS—COURTS—JURISDICTION.

The residence of a corporation is within the state in which it is created, and so long as it confines the exercise of its powers within that state it is beyond the reach of the process of courts of other states.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 2568, 2569.]

2. SAME — "DOING BUSINESS" IN OTHER STATES.

A single transaction by a foreign corporation does not constitute "doing business" within the state, within Code Civ. Proc. § 411, authorizing service of summons in a suit against a foreign corporation "doing business" and having a managing and business agent, cashier, or secretary within the state, by delivering a copy to such agent, cashier, or secretary.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 2526.]

3. SAME—BURDEN OF PROOF.

Where in an action against a foreign corporation, plaintiff alleged that defendant was a foreign corporation doing business within the state, and an issue thereon was created by the affidavit of the corporation's president read at the hearing of a motion to quash the service, the burden was on plaintiff to show that at the time of the service the corporation was in fact "doing business" within the state.

4. SAME—EVIDENCE.

Facts *held* insufficient to establish that a foreign corporation was "doing business" in California, so as to render it subject to the jurisdiction of the California courts.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by W. D. Jameson against the Simonds Saw Company and others. From a judgment for plaintiff, defendant Simonds Manufacturing Company appeals. Reversed.

See 77 Pac. 662.

Charles E. Naylor (William P. Hubbard, of counsel), for appellant. W. J. Herrin, for respondent.

HARRISON, C. J. Action to recover from the defendants for services alleged to have been rendered them by the plaintiff, under employment as traveling salesman to introduce and sell their wares in this state. The Simonds Saw Company is a corporation organized under the laws of this state, and engaged in the sale of merchandise consisting chiefly of articles manufactured elsewhere. The Simonds Manufacturing Company, the appellant herein, is a foreign corporation, organized under the laws of Massachusetts, and engaged in the manufacture of saws and other articles in that state. Proof of the service of the summons upon the appellant, as set forth in the judgment roll, was made by the affidavit of E. J. Hanson, who states: "That on the 12th day of February, 1903, at the city and county of San Francisco, state of California, he personally served the summons issued in the above-entitled action on John Simonds, the business agent of the defendant Simonds Manufacturing Company, by then and there delivering to and leaving with John Simonds, the business agent of said defendant, personally a copy of said summons (together with a copy of the complaint); that John Simonds, the business agent of the said defendant, the Simonds Manufacturing Company, was at the time of the said service upon him, a resident of the city and county of San Francisco, state of California." The said defendant, appearing specially for that purpose, moved to set aside and quash this service upon the ground that at the time thereof it was not doing business within this state, and that the said John Simonds was not a managing or business agent or cashier or secretary of said defendant, and that said defendant had never designated him as a person upon whom process might be served in this state. The motion was heard upon affidavits and oral testimony, and was denied. Judgment upon its default was thereupon entered against the said defendant as prayed for in the complaint; from which it has appealed upon the ground that by such service the court did not acquire jurisdiction over its person. The appeal is presented upon the judgment roll, including a bill of exceptions containing the evidence upon which the motion to set aside the service was heard and determined.

At common law, jurisdiction in an action at law could not be obtained over a foreign corporation except by its voluntary appearance. Under the wide extension of business and commercial intercourse in modern days, corporations formed for such business are accustomed to establish agencies and branches in countries other than that of their creation, and it is now held by the English courts that a foreign corporation, by establishing an office in England and carrying on business there, is to be considered as a resident of England, and may be sued in its courts. Newby v. Colts Patent Firearms Co., Law Rep. 7 Q. B. 293; Haggin v. Comptoir d'Escompte de Paris, Law Rep. 23 Q. B. Div. 519. Under the system prevailing in this country, corporations are regarded as citizens of the state in which they are created; but in other state are regarded as foreign corporations, and their right to transact business therein is subject to such conditions and restrictions as the Legislatures of those states may prescribe. For the purpose of enabling their courts to acquire jurisdiction over foreign corporations statutory provisions for the service of process upon them are enacted, and must be strictly followed in order to give validity to their judgments. The residence of a corporation is within the state in which it is created, and, so long as it confines the exercise of its corporate powers within that state, it is beyond the reach of the process of courts of other states. In order that those courts may acquire jurisdiction to render a personal judgment against such foreign corporation otherwise than by its voluntary appearance, its presence in those states must be manifested by the transaction of its corporate business therein, or by such acts as will indicate the exercise therein of its corporate powers. A fundamental requisite for acquiring such jurisdiction is that the foreign corporation shall be doing business within the state at the time the process of the court is served upon it. In St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222, Mr. Justice Field, in giving the opinion of the court, said: "When service is made within the state upon an agent of a foreign corporation it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record, either in the application for the writ, or accompanying its service, or in the pleadings or the findings of the court, that the corporation was engaged in business in the state." In Doe v. Springfield Boiler & M. Co., 104 Fed. 684, 44 C. C. A. 128, the Circuit Court of Appeals for this circuit said, in construing section 411, Code of Civil Procedure: "Legal service of process upon a corporation which will give a court jurisdiction over it can be made only in the state where it resides by the law of its creation, or in a state in which it is actually doing business at the time of service, in the manner prescribed by the statutes of that state or of the United States. The question as to what kind of business by a foreign corporation within a state will justify a finding that it is engaged in business therein, and validate a service upon its agent, has been very thoroughly and elaborately discussed in the Circuit and Supreme Courts of the United States, and the general consensus of opinion is that the corporation must transact within the state some substantial part of its ordinary business by its officers or agents appointed and selected for that purpose, and that the transaction of an isolated business act is not the carrying on or doing business in a state" (citing several cases). That a single transaction does not constitute "doing business" within the state see Cooper Manufacturing Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137; United States v. American Bell Telephone Co. (C. C.) 29 Fed. 17; St. Louis Wire M. Co. v. Consolidated Barb Wire Co. (C. C.) 32 Fed. 802; Clews v. Woodstock Iron Co. (C. C.) 44 Fed. 31; nor will service upon an officer of a corporation not doing business within the state, and not having authorized anyone to represent it, who may be casually within the state, give jurisdiction over such corporation. Goldey v. Morning News, 150 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517.

Section 411, Code of Civil Procedure, declares that the summons in a civil action must be served by delivering a copy thereof. "(2) If the suit is against a foreign corporation doing business in this state, and having a managing or business agent, cashier or secretary within this state of such agent, cashier or secretary." Under the provisions of this section, in order that the court may get jurisdiction over a foreign corporation it is requisite that such corporation shall be "doing business" within the state at the time the summons is served, and that the service shall be made upon its agent who is managing that business, or upon its cashier or secretary. We are of the opinion that upon the evidence before the court it was clearly shown that the appellant was not doing business within this state at the time the summons was served, and that the court should have granted the motion to set the service aside.

By reason of the allegation in the complaint that the appellant is a foreign corporation, it became incumbent upon the plaintiff to show that at the time of the service it was doing business within the state. He alleged that fact in his complaint, but an issue thereon was created by the affidavit of the president of the appellant read at the hearing of the motion, and the burden of sustaining his allegation was therefore cast upon the plaintiff. One of the facts upon which he relied to show that the appellant was doing business in this state is that he was employed by it to sell wares, which it manufactured, and that his salary was paid by it. He was in Oregon at the time of his employment, and his employment was made by a letter written from San Francisco in the name of the Simonds Saw Company, and signed by John Simonds, who was president of that corporation, in which an offer of the plaintiff to enter the employment of the saw company was accepted. Although he testified that he was employed by the appellant, he presented no direct evidence of such employment or of any employment other than the said letter written by John Simonds, or that Simonds had any authority from the appellant to employ him. It was clearly shown that he was not employed for the appellant, but that he was employed by the Simonds Saw Company to travel as a salesman for the goods that that company carries; and while it might be held that a traveling salesman engaged in selling goods for a foreign corporation for its account would be regarded as the transaction of business by such corporation, the employment under a delegated authority from such corporation to act as such salesman would not of itself be regarded as "doing business" by the corporation. In the present case, however, the plaintiff was employed to sell the goods of the Simonds Saw Company, and not the goods of the appellant, nor was he at any time engaged in selling the goods of the appellant. The appellant had neither property nor a place of business within this state, nor did it sell any of its wares here. The goods which the plaintiff was employed to sell, and which he sold, were the goods of the saw company, and he was at all times under its direction, and his expenses were paid by that company. The Simonds saw company was a dealer in manufactured articles of various kinds, which it purchased from different manufacturers, of whom the appellant was one. Its business was in no respect connected with that of the appellant; its only relation with it being that of a purchaser by orders sent through the mail of goods manufactured by it. The goods when thus purchased by the saw company became its own property, and were sold by it for its own account, and the plaintiff was employed by it to sell them for its account, and accounted to it for whatever sales he made. The payment of his salary by the appellant was explained at the hearing of the motion to have been in the nature of an allowance or rebate made by it to the saw company of the amount of the plaintiff's salary, so that the saw company might be to that extent aided in meeting the expenses of pushing its goods, and thus make a profit while competing with others; and was made in this form rather than by a deduction or credit of the same amount of money upon the bills of merchandise which the saw company should purchase from it in order that the appellant might preserve a uniform price in the sale of its goods in different places.

Another fact relied on by the plaintiff was that certain letterheads of the Simonds Saw Company were introduced in evidence, upon which was printed a list of articles of different manufactures in which it dealt, and underneath the name of the appellant was the word "Agencies," beneath which there were printed several places of address in different states, the last of which was "Simonds Saw Company, San Francisco, Cal."

The printing and use of these letterheads was the act of the Simonds Saw Company, and not of the appellant. The saw company could not thus constitute itself the agent of the appellant, nor would the knowledge of the appellant that it had so styled itself make the saw company its agent, or, in the absence of any showing that it had acted as such agent with its approval or assent, be the transaction of any business by the appellant. It is a matter of common knowledge that frequently the manufacturer of articles gives to some person or firm the exclusive right to sell such article within a designated territory, and that such person or firm styles itself the exclusive agent for the sale of such article. The goods thus dealt in by the agent are purchased by him from the manufacturer, but the manufacturer is not doing business within that territory by reason of the sale of its wares by such self-styled exclusive agent. It may be added that if the Simonds Saw Company was the agent of the appellant the service on "John Simonds" was insufficient.

Gottschalk Co. v. Distilling & Cattle Feeding Co. (C. C.) 50 Fed. 681, was a case in many respects similiar to the present one. In that case an Illinois corporation selected persons in different states to whom it sold its products exclusively, and whom it designated in its printed circulars as "distributing agents." In the state of Maryland it designated one Webb as such "distributing agent," to whom it sold its wares and by whom they were resold in that state. The Maryland Code provided that any foreign corporation which should transact business in the state should be liable to suit for any cause of action, and that process might be served upon it by service upon any agent or other person in the service of such corporation. The process in the above suit was served upon Webb, and, upon motion of the defendant, the court set aside the service upon the ground that the Illinois corporation did not transact business within the state, saying: "The defendant did not transact business in Maryland in an other sense than any foreign corporation does when it sells goods at its home office and ships to a resident of Maryland. The defendant, according to the proof, has no office in Maryland, and it has no goods in Maryland, and it receives no money in Maryland, and has no agent here authorized either to sell goods for it or to receive any money for it. The goods purchased from the defendant by Webb, and by the plaintiff, were absolutely their own, and subject to their own control and at their own risk." In reference to the argument drawn from the fact that in its published circulars the corporation designated Webb as its distributing agent, the court said: "The mere name, however, cannot give a representative capacity to a person who does not in fact have it and never attempts to exercise it. These so-called distributing agents were such only in the sense that any wholesale house or commission merchant who handles the goods of a manufacturer may be said to be a distributor of its products, and there is nothing unusual in a manufacturer selling exclusively to one person in a given territory and insisting that such person shall sell only at fixed prices and on fixed terms to his customers."

In Doe v. Springfield Boiler & M. Co., supra, the contract with the defendant was entered into through one Smallman, who was a commission broker at San Francisco. Smallman procured from the corporation certain letterheads with its name and business lithographed thereon, to which he added his own place of business in San Francisco, and his name as "agent." The contract was made by an offer of sale on the part of the corporation and an acceptance signed by the plaintiff written upon these letterheads. In a suit against the defendant the plaintiff caused the summons to be served upon Smallman, but the service was set aside upon the ground that Smallman was not a business agent of the defendant. In affirming this order the circuit court of appeal, after quoting the provisions of section 411, Code Civ. Proc., said: "The service of process under the provisions of this statute is jurisdictional, and must always be such as to constitute due process of law. The term 'business agent' as used in the statute does not mean every man who is entrusted with a commission or an employment by a foreign corporation. It does not mean any man who does any kind of business for a corporation. The statute was never intended to include under the term 'business agent' every person who might incidentally or occasionally transact some business for a foreign corporation. Its meaning must be drawn from the general context of the language used. The business agent mentioned in the statute means one bearing a close relation to the duties of managing agent, cashier, or secretary of the corporation. It must be an agent who is appointed, designated, or authorized to transact and manage one or more distinct branches of business which may be and is conducted and carried on by the corporation within the state where the service is made—one who stands in the shoes of the corporation in relation to the particular business managed, conducted, and controlled by him for his corporation. To constitute a managing or business agent upon whom service of summons could be made the agent must be one having in fact a representative capacity and derivative authority, and not one created, by construction or implication, contrary to the intention of the parties" (citing several cases).

The judgment is reversed.

We concur: COOPER, J.; HALL, J.

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2 Cal. App. 590

CARLIN v. LIFUR.

(Court of Appeal, Second District, California. Jan. 2, 1906. Rehearing Denied Feb. 1, 1906; Denied by Supreme Court Feb. 28, 1906.)

1. Brokers — Commission — Completion of Sale.

Where defendant authorized plaintiff to sell certain land on certain terms, and plaintiff procured a purchaser, who not only offered to take the land on the terms prescribed, but offered to permit defendant to remove the growing crops thereon, and defendant refused to complete the sale he was liable for commissions.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, §§ 94–96.]

2. Same—Tender of Price.

Where a broker obtained a purchaser who in good faith offered to buy at defendant's price, a formal tender of the price was unnecessary until defendant evinced some disposition to accept it in order to entitle the broker to commissions.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, §§ 75, 94–96.]

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by W. H. Carlin against M. Lifur. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Lee, Scott, Bailey & Chase, for appellant. McNutt & Hannon, for appellee.

GRAY, P. J. This action is brought to recover $1,000 as commission on the sale of certain land. The findings and judgment were in favor of the plaintiff in the sum claimed, and the defendant appeals from said judgment, and from an order denying him a new trial.

The complaint was based upon a written contract quoted as follows: "Los Angeles, Cal., Jan. 14, 1903. "Mr. W. H. Carlin. "Dear Sir—I hereby authorize you to sell my land in section 17 and 18, Twp. 1 S., R. 12 W., S.B.M., containing 309 acres, at $125 per acre, and if sold by February 1, 1903, will give you a commission of $1,000. Yours, etc., "M. Lifur." The findings of the court are to the effect that the plaintiff found a purchaser for the land in the firm of Clark & Bryan, who offered within the time limited in the contract to purchase the land on the terms named, and received from that firm their check in favor of defendant for $1,000 as evidence of their good faith in agreeing to buy the property; but the defendant refused to accept the check and refused to carry out the written contract.

The main contention of appellant is that the contract recited in the complaint was modified and changed by subsequent oral agreement so that defendant was to reserve the growing crops and somewhere from 10 to 25 acres of land out of the 309 acres, together with the house and other improvements thereon. The findings were against defendant upon this point, as they were upon all others. And the contention is that the trial court drew an improper deduction from the evidence in so finding. We cannot concur in this contention. We think it is more reasonable to say that all the talk between the parties as to reservations of crops, improvements, and a small acreage of the land was had in connection with a much less cash offer for the property than the price named in the written contract, and that there was no suggestion on the part of the defendant that he did not consider himself bound by the terms of the written contract until after he had learned that Clark & Bryan were willing to take the property and pay for it according to those terms. It would illustrate no proposition of law and would serve no useful purpose to here quote the evidence at large or attempt to answer appellant's arguments based on his view of it. We deem it sufficient to say that we have carefully examined the evidence and are satisfied with the construction placed upon it by the trial judge. In our view, the findings are each and all amply supported by the evidence. Clark & Bryan gave every evidence that a firm could well give that they wanted the property and were willing and anxious to take it on the terms stated in the written contract. They were dealing in real estate and were worth over half a million dollars. When the defendant found that he could get his price he wanted more, as men frequently do, and then he endeavored to evade the written contract and add to it the numerous reservations that he had previously suggested in connection with oral offers of a less amount for the property.

It was not necessary for plaintiff to make an actual sale to earn his commission. He couldn't do that without the concurrence of defendant. When he found and brought to defendant parties ready, able, willing, and anxious to buy and who orally offered in good faith to buy at defendant's price, named in the written contract, plaintiff was entitled to his commission as agreed. A formal tender of the price was unnecessary until defendant should evince some disposition to accept it. This he did not do, but rejected the check and insisted on all these reservations and would not accept the offer of the written price even when the intending purchasers offered to allow him to take off the growing crop. The fact is the defendant spoiled a trade that the plaintiff had already made for him and had no defense to the suit for commissions. There was no evidence whatever of bad faith on the part of plaintiff.

Some complaint is made as to the rulings of the court in the admission and rejection of evidence. We have examined these and do not think they are of sufficient importance to warrant further discussion.

The judgment and order are affirmed.

We concur: ALLEN, J.; SMITH, J.

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2 Cal. App. 570

WILSON v. ARNOT, Judge.

(Court of Appeal, Third District, California. Dec. 20, 1905. Rehearing Denied by Supreme Court Feb. 28, 1906.)

1. Exceptions, Bill of—Signing—Time—Extension—Conditions—Compliance.

An order extending the time for presenting and signing a bill of exceptions in an election contest was conditional on petitioner's surrendering the office to contestant on the latter's executing a bond to return the emoluments in case of reversal, and on petitioner's permitting contestant to receive and enjoy the emoluments of the office pending appeal and executing a bond for costs. After such order was affirmed on appeal, petitioner offered to surrender the office on contestant's executing a bond as provided in the order. *Held*, that such offer did not comply with all the terms of the order, and was not sufficient to entitle petitioner to the signing of his bill within the time as extended.

2. Elections—Contest—Appeal—Time of Taking.

Code Civ. Proc. § 1127, provides that whenever an election is annulled or set aside by the judgment of the superior court, and no appeal has been taken within 10 days thereafter, the commission, if any has been issued, is void, and the office vacant. *Held*, that where, in an election contest, no appeal was taken from a judgment in favor of contestant within 10 days, the judgment became final, and the subsequent signing of a bill of exceptions on a petition of the contestee would have been ineffectual.

Appeal from Superior Court, El Dorado County.

Mandamus, on petition of S. B. Wilson, against Hon. N. D. Arnot, superior judge of El Dorado county, to compel the latter to certify and sign a bill of exceptions. Writ denied.

W. F. Bray and W. C. Burgess, for petitioner. Charles A. Swissler and Abe Darlington, for respondent.

BUCKLES, J. The petitioner is contestee in a contested election case for the office of superintendent of schools in El Dorado county. The case was tried in the superior court of said county and on June 12, 1905, judgment was entered in favor of the contestant, T. E. McCarty, and against the petitioner here. Notice of the judgment was duly given petitioner on June 17, 1905, and on June 29, 1905, the county clerk issued to the said McCarty a certificate of election as superintendent of schools, and McCarty duly qualified on the last mentioned date and demanded possession of the office. Thereafter, and on the same day (June 29th), petitioner filed his notice of appeal from said judgment and on July 1, 1905, filed an undertaking on appeal. Petitioner did not prepare and serve his bill of exceptions on said appeal within 10 days after notice to him of the rendition and entry of said judgment. Neither did he apply for an extension of time, nor was any granted during the 10 days. After the expiration of 10 days, as aforesaid, the petitioner applied to said respondent, the Hon. N. D. Arnot, for further time in which to prepare, serve, and present his bill of exceptions in said appeal, and thereafter, and on July 7, 1905, the respondent made the following order: "The motion of the respondent Wilson for an order of the court extending his time to file and serve a bill of exceptions in said cause is granted upon the following terms, to wit: The respondent shall within eight days let the contestant into the possession of the office in controversy and permit the contestant to fully enjoy the emoluments thereof pending an appeal of this case to the District Court of Appeal and to the Supreme Court of the United States should said last named appeal be taken. Before surrendering said office, as here required, the contestant McCarty shall give security to the respondent Wilson that if said appeals, or either of them, are successful that the contestant will pay to the respondent within 10 days after the coming down of the remittitur therein the same emoluments of the said office that the respondent would have been entitled to had he remained in said office during the time contestant shall have been in possession thereof, together with respondent's costs on appeal. If said appeals, or either of them, are unsuccessful, respondent shall pay to the contestant, contestant's costs on appeal. The respondent to give security to contestant for the payment of these costs. "If respondent shall fail within eight days to do this, his motion for time to file and serve a bill of exceptions herein will be denied. Doing this, he will be granted 10 days, and such additional time as may be necessary, within which to file and serve his bill of exceptions."

On July 8, 1905, being dissatisfied with the terms imposed in said order, the petitioner appealed therefrom to this court on the ground of abuse of discretion on the part of the judge in imposing the terms he did. Pending that appeal and on July 15, 1905, petitioner presented his proposed bill of exceptions to the respondent for settlement, and the respondent refused to allow the same and indorsed thereon his refusal in the following words and figures: "I hereby certify that the foregoing bill of exceptions is correct; but I refuse to allow the same on the ground that the same was not filed and served within the statutory time, and that the conditions fixed by the court as terms upon which an extension of time to file and serve said bill of exceptions might be had have been declined and refused by contestee." On November 9, 1905, this court affirmed said order appealed from McCarty v. Wilson, 84 Pac. 295. Whereupon the petitioner served the said McCarty with a written notice, offering to comply with the terms imposed in said order, to wit: to surrender the said office of superintendent of schools upon McCarty executing a bond, as in said order set forth. The contestant, McCarty, refused to give the bond referred to, whereupon the petitioner gave notice that he would apply to the court and move to have his said bill of exceptions allowed. It will be observed that petitioner's offer is not an offer to comply with all the terms of said order. The order required Wilson to not only let McCarty have the possession of the office, but permit McCarty to enjoy the emoluments thereof and also to give him security for his costs on appeal. All that petitioner offered to do was to let McCarty have possession of the office. The application to have the said bill settled and allowed came on to be heard on December 2, 1905, when the court denied the application in the following words: "We cannot see that any useful purpose would be subserved by settling the bill of exceptions in this proceeding as now asked for. The terms heretofore imposed by us were not agreed to, and though counsel for the contestee are now willing to accept the terms imposed, the conditions now existing have so changed that the contestee is now unable to comply with the terms imposed in July last either in the letter or the spirit thereof. The application to settle the bill of exceptions is denied."

Prior to the determination of the appeal from said order of July 7, 1905, by this court, and on September 29, 1905, petitioner, who was holding the said office of superintendent of schools, applied to the Supreme Court for a writ of mandate to compel the county auditor to draw his warrant for the salary of himself as superintendent of schools for the month of July, 1905. The writ was denied. Wilson v. Fisher, Auditor (Cal.) 82 Pac. 421. If the conditions had changed in December, 1905, so that the terms imposed in the order of July 7th could not be carried out, the changed conditions were brought about through petitioner's own acts. He was in default in not presenting his bill of exceptions within 10 days after judgment, and in the light of section 1127, Code of Civil Procedure, was not entitled to have it settled and allowed at all. He applied for an order extending his time and was granted such time upon terms that did not please him. He appealed from the order; meantime, as has been seen, he went to the Supreme Court asking a writ of mandate against the county auditor commanding that officer to issue a warrant for his July salary. The Supreme Court denied the writ, on the ground that because no appeal was taken by petitioner within 10 days after the judgment of June 12, 1905, annulling and setting aside his certificate of election, the said judgment became final and he had no title to the office, and that under the provisions of section 936, Pol. Code, he was not entitled to salary for July. In McCarty v. Wilson, 83 Pac. 170, decided by this court November 9, 1905, the only question decided, and the only one submitted, was that relative to the terms the respondent exacted for granting further time, in the order of July 7th, and we held the terms imposed were not unreasonable and that there was no abuse of discretion on the part of the judge in imposing such terms. It is difficult now to understand what could be accomplished by settling and allowing petitioner's bill of exceptions, because under section 1127, Code of Civil Procedure, the judgment annulling petitioner's certificate of election became final when he failed to take his appeal within 10 days. The section is as follows: "Whenever an election is annulled or set aside by the judgment of the superior court, and no appeal has been taken within 10 days thereafter, the commission, if any has issued, is void and the office vacant." This is a special rule applying only to contest of election cases, and in my opinion the respondent had no power to grant further time when no appeal had been taken within the ten days, so that the order of July 7th, if attacked upon that ground, would be held void as having been made without jurisdiction. If, however, it could be considered a valid order, then it was clearly petitioner's fault that he had not complied with the terms therein, and if conditions had so changed on December 2d that he could not comply, he is still responsible for such conditions.

There is no legal obligation resting upon the respondent to settle and allow said bill of exceptions, therefore the writ is denied.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

McCARTY v. WILSON.

(Court of Appeal, Third District, California. Jan. 30, 1906. Rehearing Denied March 1, 1906; Denied by Supreme Court March 27, 1906.)

Appeal from Superior Court, El Dorado County; N. D. Arnot, Judge.

Election contest by T. E. McCarty against S. B. Wilson. From a judgment in favor of contestant, contestee appeals. Affirmed.

William F. Bray and W. C. Burgess, for appellant. Charles A. Swissler and Abe Darlington, for respondent.

McLAUGHLIN, J. At the general election of 1902 the parties hereto were candidates for superintendent of schools of El Dorado county. Upon a canvass of the votes appellant was declared elected. Respondent contested said election, and a judgment in favor of appellant was reversed on a former appeal. McCarty v. Wilson, 146 Cal. 324, 82 Pac. 243. The retrial resulted in a judgment annulling and setting aside the election of appellant and vacating and setting aside the certificate of election issued to him, and declaring respondent elected to said office. From such judgment this appeal is prosecuted.

The bill of exceptions printed in the transcript cannot be considered for reasons fully stated in two decisions of this court. McCarty v. Wilson, 83 Pac. 170; Wilson v. Arnot, 84 Pac. 293. The bill of exceptions being eliminated, and the findings being sufficient to support the judgment, it results that the judgment must be affirmed. and it is so ordered.

We concur: CHIPMAN, P. J.; BUCKLES, J.

2 Cal. App. 537

PEOPLE v. SALAS.

(Court of Appeal, Second District, California. December 29, 1905.)

1. Criminal Law — Appeal — Notice — Service—Sufficiency.

The service on the district attorney of a notice of appeal from an order denying a new trial, after the expiration of more than 60 days after the denial of the new trial, is ineffectual.

2. Witnesses — Examination — Appointment of Interpreters — Authority of Court.

An Indian understood some of the language addressed to him in English, but he could not understand all. He had through association with Spanish companions acquired a slight knowledge of that language, which was used in his conversation with defendant on the occasion of the commission of a crime. *Held*, that the court did not abuse its discretion in appointing an Indian interpreter, a resident of the county, for the Indian when testifying as witness on defendant's trial; Code Civ. Proc. § 1884, authorizing the appointment of a resident of the county as interpreter when a witness does not understand the English language.

3. Robbery—Evidence—Admissibility.

Where, on a trial for robbery, a witness stated that defendant shortly after the offense visited her and showed her money of the kind and character taken from the prosecutor, it was not error to permit the state to ask the witness as to the length of time she had known defendant, though it appeared that she was a prostitute.

4. Criminal Law—Argument of Prosecuting Attorney—Comment on Evidence.

It was not improper for the prosecuting attorney on a criminal trial to assert that defendant had added perjury to his other crimes, when such conclusion was a fair inference from the testimony.

5. Same—Improper Argument—Action of Court.

The error arising from the argument of the prosecuting attorney on a criminal trial with respect to the character and extent of the punishment which the court might inflict was cured by the court advising the jury that they had nothing to do with the punishment.

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

John Salas was convicted of larceny from the person, and he appeals. Affirmed.

Frank C. Prescott and Prescott & Morris, for appellant. U. S. Webb, Atty. Gen., J. C. Daly, Deputy Atty. Gen., for the People.

ALLEN, J. Defendant was found guilty of larceny from the person of another on November 7, 1904. His motion for a new trial was denied, and on the same day judgment was made and entered by which he was sentenced to the state prison for 3½ years. On January 11, 1905, notice of appeal from the judgment and order denying a new trial was as filed in the office of the clerk of the court, but was not served upon the adverse party or his attorney, or any other person, except it be said that the service by the clerk of the printed transcript containing such notice of appeal, which was served upon the district attorney on January 19, 1905, is such service. Conceding, without deciding, that the service of such transcript and the acknowledgment of the district attorney of its receipt were the equivalent of a notice of appeal, more than 60 days having elapsed, however, before even this notice was served, the same was ineffctual under any view as an appeal from the order denying a new trial. Treating the appeal from the judgment as perfected, we have examined all orders and rulings involving the merits, or which may have affected the judgment.

Appellant contends that prejudicial error is shown throughout the rulings of the court in permitting the district attorney to lead the prosecuting witness. None of these questions objected to are subject to the criticism made;

nor is there any merit in the claim that irrelevant matter was introduced and received in evidence.

It is further insisted that the court erred in permitting an interpreter. It was shown that, while the witness understood some of the language addressed to him in English, he could not understand it all. The witness was an Indian, who had, through association with Spanish companions, acquired a slight knowledge of that language, and which was used in his conversation with the defendant upon the occasion of the robbery. The interpretation was through an Indian interpreter. The court was warranted, under section 1884, Code of Civil Procedure, in permitting an interpreter, a resident of the county; the propriety of calling an interpreter, and the fitness of the person so called, are matters for the trial court. People v. Ramirez, 56 Cal. 535, 38 Am. Rep. 73. No abuse of discretion appears.

The objection to interrogating a witness as to the length of time she had known the defendant was not improper, even though it should appear that she was a prostitute. It was permissible to show her acquaintance and knowledge of the defendant in connection with her statement as to his identity and visit to her shortly after the robbery, when money of the kind and character taken from the prosecuting witness was shown her.

The district attorney was within the lines of legitimate argument when he made an assertion that defendant had added perjury to his other crimes, when such conclusion was a fair inference from the testimony properly before the court. There is a marked distinction between such statements made in argument, when discussing legitimate testimony, and in an attempt to prove another crime for the purpose of prejudicing the defendant before the jury.

The conduct of the district attorney in commenting during the argument upon the character and extent of punishment which, under the law, the court might inflict, is not to be commended. It would be doing violence to the intelligence of this jury to say that under the evidence in this case such statements had any weight in influencing their minds. The court, when its attention was called to it, advised the jury that with such punishment they had nothing to do, and that it was for the court alone to determine that question. This admonition of the court was in the nature of a correction of the abuse, and in line with the suggestion of the Supreme Court in People v. Kramer, 117 Cal. 647, 49 Pac. 842.

From the whole record presented in this case, it would be unfair to reverse a judgment so obviously correct upon so slight a pretext.

Judgment affirmed.

We concur: GRAY, P. J.; SMITH, J.

2 Cal. App. 540

HUMPHRY v. BUENA VISTA WATER CO. et al.

(Court of Appeal, Second District, California. Dec. 29, 1905.)

1. CORPORATIONS—ASSESSMENTS—LEVY—SALE OF STOCK—INJUNCTION—COMPLAINT.

Where, in a suit to restrain a sale of corporate stock for nonpayment of an assessment, the original complaint omitted to aver that defendant corporation was one organized for profit, and thereby prohibited by Civ. Code, § 290, subd. 5, to diminish the number of its board of directors except by an amendment of its articles, it was fatally defective; it not appearing what number of directors had been provided in the original articles, or that the number who undertook to levy the assessment did not constitute a quorum of the board.

2. INJUNCTION—PRELIMINARY INJUNCTION—AMENDMENT OF COMPLAINT.

Where, prior to the hearing of a motion to dissolve a preliminary injunction, plaintiff on leave amended her complaint after a demurrer had been sustained thereto, so as to cure a fatal defect therein, such amendment related back to the date on which the original complaint was filed; and hence the court had no power to dissolve the injunction because of the sustaining of the demurrer to the original complaint.

Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by Emily A. Humphry against the Buena Vista Water Company and others. From a judgment dissolving a temporary injunction, plaintiff appeals. Reversed.

Henley C. Booth, for appellant. George H. Gould, for respondents.

ALLEN, J. Appeal from an order dissolving a temporary injunction. The temporary injunction, restraining the sale of certain corporate stock delinquent on account of nonpayment of an assessment, granted "until the further order of the court," was so granted upon notice, and upon the hearing of which affidavits of defendants and a certain certificate in relation to the diminution of the number of directors, together with the complaint, were considered by the court. Thereafter, a general demurrer was sustained to the complaint and leave given plaintiff to amend. Thereafter a stipulation was entered into that, without the formality of notice, a motion should be made to dissolve the injunction, "upon the ground that the defendants' demurrer to the complaint on the ground that said complaint does not state facts sufficient to constitute a cause of action, has been sustained. Said motion will be made upon the pleadings and papers on file herein and on said order, subject to plaintiff's objection that a motion to dissolve cannot now be made." At the time agreed upon for the hearing of the motion, and within the time given plaintiff to amend her complaint, she presented and filed an amendment thereto, which cured the defects of the original complaint. The court, however, upon hearing the motion to dissolve, refused to consider such amendment, but heard the matter on the papers filed and used in said action, and thereupon made its order dissolving the injunction. The right of the court to make such order, pending the hearing of the cause on its merits, is challenged on this appeal.

The original complaint, through its omission to aver that the defendant corporation was one organized for profit and thereby restricted by subdivision 5, § 290, Civ. Code, in the manner of diminishing the number of its board of directors, otherwise than through an amendment of its articles of incorporation, was clearly defective; it not appearing therein what number of directors had been provided in its original articles, or that three thereof, who undertook to levy an assessment on August 13, 1904, did not constitute a quorum of such board. The amendment to the complaint supplied this defect, and by it the complaint, as amended, averred facts from which it appears that less than a quorum undertook to levy an assessment. This being true, the attempted levy of an assessment was void and of no effect. The amendment to the complaint was based upon the same cause of action. It related back to the date upon which the original complaint was filed. White v. Soto, 82 Cal. 658, 23 Pac. 210. The trial court had then before it on the motion to dissolve a sufficient complaint, and by relation of the amendment sufficient at the date of the issuance of the preliminary injunction. "We think that the whole theory of a preliminary injunction is that it is to preserve the rights of the party until the truth of the charges can be regularly investigated." Lambert v. Haskell, 80 Cal. 621, 22 Pac. 327. That it cannot be dissolved until after the trial of the cause upon its merits is determined in Natoma Co. v. Clarkin, 14 Cal. 544, cited in Curtiss v. Bachman, 110 Cal. 439, 42 Pac. 910, 52 Am. St. Rep. 111. The court, by the stipulation, was restricted upon the hearing of the motion to the one ground, namely, the effect of the order sustaining the demurrer to the original complaint. That order had lost all of its significance when by leave of court the complaint was amended, and afforded by itself no ground upon which the court could make an order dissolving the injunction. That the court considered no other ground is made to appear affirmatively in the record, wherein it says that only those papers on file were considered, not including the amendment to the complaint. Neither the certificate heretofore mentioned, nor the affidavit of defendants were on file, as appears from the record. In other words, the court, without reference to the sufficiency of the complaint, as amended, made its order solely on the ground that the original complaint before amendment was defective. This, we think, was error. Whatever effect may be given to the words, "until the further order of the court," they at least import an order that until such time, for good cause appearing, the same should be modified or dissolved, not an arbitrary right of dissolution at the court's discretion. The broadest powers given to courts in the control of their records and judgments do not comprehend arbitrary power of rescinding orders once entered, but do comprehend that such orders of modification or rescission should be based upon good reasons presented to the court. It is unnecessary here to determine the effect which should be given to the certificate when once considered by the court. This certificate was neither filed nor considered upon the motion to dissolve.

The order appealed from is reversed, and the cause remanded for further proceedings.

SMITH, J. (concurring). I concur in the judgment. The questions involved in the case are: Whether the court below had jurisdiction to dissolve the injunction; and whether, assuming it to have jurisdiction, there was error in dissolving it. On the first point the majority of the court are of the negative opinion, and this view is supported by some of the early cases. Natoma Co. v. Clarkin, 14 Cal. 544; Hicks v. Michael, 15 Cal. 117; Curtis v. Sutter, 15 Cal. 265; Natoma Co. v. Parker, 16 Cal. 83. But, unless it is to be supposed that the court was unaware of the force of its expressions, the later cases are, I think, to be understood as affirming the rule that in all cases "the dissolution or continuing in force of a preliminary injunction is a matter largely within the judicial discretion of the court below," and that "the settled rule in such cases is that the court will not interfere with the action of the lower court unless there has been an abuse of discretion." Parrott v. Floyd, 54 Cal. 535, citing De Godey v. Godey, 39 Cal. 166; McCreery v. Brown, 42 Cal. 457; Rogers v. Tennant, 45 Cal. 186. And see, also, Payne v. McKinley, 54 Cal. 533; County of Yuba v. Cloke, 79 Cal. 239, 21 Pac. 740. I have also no doubt, if it could be assumed that ordinarily the court has no jurisdiction to dissolve an injunction, it would still be in its power to limit the time of its continuance, as, for example, until the coming in of the answer, or until some definite time, or "until the further order of the court."

I dissent, also, from the opinion that the certificate of diminution of directors (made under section 290, Civ. Code) and the unfiled answer of the defendants used on the hearing of the motion granting the injunction, were not before the court on the hearing of the motion to dissolve, or that they cannot be considered by us. But it appears that the certificate was not filed in the office of the county clerk, or certified copy with the Secretary of State, or the certificate of the Secretary with the county clerk until August, and that the election of the five directors assuming to act in the assessment took place in May. The election, and consequently the assessment by the elected directors, was, therefore, I think, void; and on this ground I concur in the judgment.

GRAY, P. J. (concurring). I concur in the opinion of Mr. Justice ALLEN, and will add the following: The preliminary injunction was granted after notice. Section 532 of the Code of Civil Procedure provides that: "If an injunction be granted without notice, the defendant at any time before the trial, may apply, upon reasonable notice, to the judge who granted the injunction, or to the court in which the action is brought, to dissolve or modify the same." It seems to me that this language means that, if an injunction is granted after notice, it cannot be dissolved until after or upon the trial of the case upon its merits. This construction of the statute has been clearly recognized in the following decisions of the Supreme Court: Natoma Water & Mining Co. v. Clarkin, 14 Cal. 544; Curtis v. Sutter, 15 Cal. 260; Natoma Water & Mining Co. v. Parker, 16 Cal. 83. The last of these cases is referred to with approval in Curtiss v. Bachman, 110 Cal. 439, 42 Pac. 910, 52 Am. St. Rep. 111, wherein it is said: "As the preliminary injunction was granted upon notice to the defendant, and after hearing thereon, the proper course for the defendant to take was to appeal from the order, and the court in all probability denied the motion upon the ground that the defendant was not authorized to make it." I am aware of no case holding anything to the contrary of these as to the construction of this statute; and it would seem that its meaning in this regard ought to be treated as settled by these decisions. It is no answer to these cases to say that the preliminary injunction was here granted "until the further order of the court"; for it is of the very essence of a preliminary or temporary injunction that it be granted "until the further order of the court." If it were not so granted it would not be temporary, but permanent. It would not be in terms preliminary, but final. All that the expression, "until the further order of the court," implies is that the order or decree made at the final trial of the case will displace or supersede the preliminary order. Moreover, the court cannot alter the effect of the statute by placing any particular words in its order. The order must still be treated as a preliminary injunction granted upon notice, and upon the settled construction of the statute an injunction so granted cannot be interfered with, except on appeal, until the trial of the case on its merits. And this is a wise rule. Why should there be two or three preliminary hearings, when the matter can be brought to a final hearing upon the motion of either party at any time? The section quoted in no way interferes with the constitutional jurisdiction of the court in matters of equity. It merely regulates the method and time of its exercise. It still leaves the court to vacate its preliminary order on the final trial, if it be so advised.

For these reasons, I concur in the judgment.

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2 Cal. App. 546

BOCA & L. R. CO. v. SIERRA VALLEYS RY. CO. et al.

(Court of Appeal, Third District, California. Dec. 29, 1905.)

1. APPEAL — REVIEW — GROUNDS OF ORDER GRANTING NEW TRIAL.

An order granting a new trial, on the ground that it appeared to the court that error of law occurred at the trial, did not exclude the ground of insufficiency of evidence so as to prevent an examination of the evidence by the appellate court.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3477.]

2. EMINENT DOMAIN—EXERCISE OF POWER BY RAILROAD.

A railroad corporation has no power to condemn a crossing at a point 15 miles beyond the terminal of its road as designated in its articles of incorporation.

3. CORPORATIONS—AMENDMENT OF ARTICLES OF INCORPORATION—ACKNOWLEDGMENT.

Under Civ. Code, § 362, providing that any corporation may amend its articles of incorporation by a majority vote of its board of directors or trustees and by a vote or written assent of the stockholders representing two-thirds of the capital stock, it is not necessary that such amendments be acknowledged.

4. APPEAL — SCOPE OF REVIEW — ORIGINAL PLEADING NOT IN RECORD.

Where the original complaint is not in the record, the appellate court cannot determine whether the amended complaint states an entirely new and different cause of action, and the rights of the parties will be determined under the amended complaint.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2883.]

5. EMINENT DOMAIN—PROCEEDINGS TO CONDEMN CROSSING — SUFFICIENCY OF COMPLAINT.

Under Code Civ. Proc. § 1244, relating to eminent domain, and providing that the complaint must show the location, general route, and termini, and must be accompanied with a map thereof so far as the same is involved in the action or proceeding, a complaint describing the railroad crossing sought to be condemned as about three-fourths of a mile eastwardly from a certain town, and also showing the general route, termini, etc., of the lines of road as shown on the map made part of the complaint, was sufficient.

6. SAME—EXERCISE OF POWER BY RAILROAD CORPORATION—CONDEMNATION OF CROSSING —LOCATIONS DESIGNATED IN ARTICLES OF INCORPORATION.

Under Civ. Code, § 291, providing that the articles of incorporation of any railroad must state the place from and to which the road is intended to be run, and all the intermediate branches and the estimated length of the road, where amended articles provided for an extension of the corporation's main line "from a point in the town of Boca, * * * thence in a northerly direction * * * to the town of Beckwith, * * * and thence in a westerly direction * * * to the town of Quincy, * * * and also running in a northerly direction from the town of Beckwith a distance of about 35 miles," the railroad company was entitled to condemn a railroad crossing three-fourths of a mile east of the town of Beckwith.

7. CORPORATIONS — FILING AMENDED ARTICLES.

Where amended articles of incorporation of a railroad company have not been filed with the Secretary of State, the corporation can claim no rights thereunder as to the condemnation of a right of way.

8. Eminent Domain — Railroad Corporation—Description of Road in Articles.

Under Civ. Code, § 291, subd. 2, providing that articles of incorporation of any railroad must state the place from and to which its road is intended to be run, and all the intermediate branches, a railroad corporation cannot, by stating where one branch is to be run, exercise the right to condemn a crossing on a different branch from that described in the articles.

9. Same—Amended Articles.

Civ. Code, § 297, providing that "a copy of any articles of incorporation filed in pursuance of this chapter * * * must be received in all courts of this state * * * as prima facie evidence of the facts therein stated," gives a railroad corporation no right to begin an action to condemn a right of way along a particular route which it has not included in its articles of incorporation, and then support the complaint by amended articles subsequently filed.

10. Railroads—Powers Incidental to General Grant — Construction of Branch Railroad.

Where the enumerated powers of a railroad corporation included only the construction of the main line of road and an east branch, the corporation could not claim the right to construct a west branch on the ground that such branch was necessary to the expressed objects of the corporation.

11. Corporations — Exercise of De Facto Powers.

While there is such a thing as the exercise of power by a de facto corporation, there is no such thing in law as the exercise of a de facto power by a corporation which legally exists, and has prescribed powers.

12. Eminent Domain—Railroad Corporation—De Facto Corporation.

A railroad corporation legally incorporated cannot ignore its de jure or statutory entity and claim the right to condemn a right of way as a de facto corporation.

13. Constitutional Law — Self-Executing Provisions — Railroad Crossing Other Railroads.

Const. art. 12, § 17, providing that "every railroad company shall have the right with its road to intersect, connect with or cross any other railroad," is not self-executing, in the sense that a railroad company may cross the tracks of another company without regard to the power granted by its articles of incorporation.

14. Eminent Domain—Power of Railroad Corporation—Limitations of Charter.

Where the charter of a railroad corporation states its purpose to be to construct a railroad by a designated route, the purpose is limited to the route substantially as designated, and the limitations of the charter cannot be circumvented by the corporation's assuming to be a person seeking to acquire property for any of the uses mentioned in Code Civ. Proc. § 1238, reciting the uses in behalf of which the right of eminent domain might be exercised.

15. Same.

A branch line of road not authorized by the articles of incorporation was in no sense incident to the main line, nor was it an appendage or adjunct such as is referred to in Civ. Code, § 465, subd. 4, which provides that every railroad corporation has power to receive, hold, take, and convey such voluntary grants and donations of property which may be made to it to aid and encourage the construction, maintenance, and accommodation of such railroad, and therefore the corporation has no additional authority to condemn a crossing on such branch road.

16. Same—Particular Use—Right of Way over Track of Other Company.

Code Civ. Proc. § 1240, provides that the private property which may be taken includes "(5) all rights of way for any and all purposes mentioned in section 1238 * * * shall be subject to be connected with, crossed or intersected by any other right of way." *Held*, that to condemn a right of way by one railroad over the right of way of another railroad company is the taking of private property for public use, and it must be done, if at all, under the provisions of law regulating eminent domain.

Appeal from Superior Court, Plumas County; C. E. McLaughlin, Judge.

Action by the Boca & Loyalton Railroad Company against the Sierra Valleys Railway Company and others. From a judgment granting defendants' motion to set aside a judgment for plaintiff and for a new trial, plaintiff appeals. Affirmed in part and reversed in part.

George E. Bates and L. N. Peter, for appellant. Dodge & Parker and Goodwin & Moncur, for respondents.

CHIPMAN, P. J. Action to condemn two crossings of two branch roads of plaintiff's railroad over the track and roadbed and right of way of defendant railroad company's. Plaintiff had final judgment of condemnation. Defendants moved to set aside the judgment and for a new trial, which motion was granted and the appeal is from the order, on bill of exceptions.

The question presented is: Whether by the original and amended articles of incorporation, or either of them, plaintiff was authorized to maintain condemnation proceedings to condemn either one or both of the crossings involved. Plaintiff's original articles of incorporation were acknowledged on September 22, 1900, and were filed with the Secretary of State September 25, 1900, and provided for constructing a railroad from the town of Boca, Nevada county, "and thence in a northerly direction through the County of Nevada into the County of Sierra, in the State of California, to a station to be known as Roberts, to be built about two miles easterly of the present town of Loyalton, in said Sierra County." The principal place of business was named at the city and county of San Francisco. The articles were first amended by vote of the directors and written assent of all the stockholders on January 9, 1903, and were filed in the office of the county clerk of the city and county of San Francisco on January 12, 1903, and filed in the office of the Secretary of State on January 13, 1903, and provided for an extension of the main line of the road "from a point in the town of Boca, in Nevada County, thence in a northerly direction, through the County of Sierra, to the town of Beckwith, in Plumas County, in said State, and thence in a generally westerly direction along the Feather River, Spring Garden Creek, and Spanish Creek, to the town of Quincy, in Plumas County, in said State, a distance of about 80 miles; and also running in a northerly direction from the town of Beckwith a distance of about thirty-five miles." The second amended articles described the main line as in the first amended articles, and further provided: "Also an intermediate Branch Broad Gauge Railroad to leave the main track of the Boca and Loyalton Railroad at a point thereon about three-fourths of a mile easterly from the town of Beckwith, in Plumas County, California, and in Section twenty-five (25), Township twenty-three (23) North of Range Fourteen (14) East, M. D. M., and running thence across a portion of Sierra Valley and across the Sierra Valley Railway, and its right of way, in a general northerly direction through Red Clover Valley to Squaw Queen Valley; thence in a general northerly direction through Last Chance Valley to a point on the head of Indian Creek (describing it), its intended terminal; a total distance of about thirty-five miles, the entire length of said branch being in Plumas County, California. Also, an intermediate Branch Broad Gauge Railroad to leave the main line of said Boca and Loyalton Railroad track at a point thereon about two and one-half miles westerly from the town of Beckwith, Plumas County, California, in Section twenty-eight (28), Township twenty-three (23) North, Range fourteen (14) East, M. D. M., near Grizzly Creek; thence following up said Grizzly Creek in a general northwesterly direction through said Grizzly Valley to a point at the northwest end of said Grizzly Valley in Section fifteen * * * its intended terminal, making a total distance of about eighteen miles," said branch being entirely in Plumas county. It is further provided: "That the estimated length of said road is eighty (80) miles, and of said intermediate branches fifty-three (53) miles, making a total length of said road and branches of one hundred and thirty-three miles * * *." The articles were amended in a manner similar to the first amendment and were dated February 26, 1904; were filed in the clerk's office at the city and county of San Francisco on February 27, 1904, but have no evidence of filing with the Secretary of State. They were filed with the clerk in the action February 29, 1904, during the trial. The third amended articles were similarly made and on the same day as the second amended articles and describe the road and its branches the same as the second amended articles, and a copy thereof was filed with the Secretary of State February 29, 1904. They were admitted in evidence on the last day of the trial, over the objections of defendants, as were the other amended articles. The second and third amended articles increased the capital stock and increased the mileage of track to correspond with the length of the extensions.

The only objection to the first amended articles was that the only certificate of acknowledgment attached to the said amended articles was the one attached to the original articles. The second amended articles were objected to on several grounds: (1) Because not properly acknowledged; (2) because not filed in the counties of Nevada and Lassen, where the plaintiff's property is located; (3) because not properly certified by the Secretary of State; (4) because they show an increase of mileage and an increase of capital stock; (5) because the affidavit required by sections 293, 294, and 295 of the Civil Code has not been filed nor has the certificate of the Secretary of State been shown as required by section 296 of the same Code; (6) that said amended articles were attempted to be adopted February 27, 1904, while this suit was commenced on June 6, 1903, and that the certificate of acknowledgment was signed on September 22, 1900; (7) that the purported articles were not filed with the clerk of the city and county of San Francisco until February 27, 1904; said date being the date this cause was called for trial. The third amended articles were objected to upon all the foregoing grounds and particularly upon the ground that they appeared to have been filed with the Secretary of State on February 29, 1904, and are therefore "not evidence of the corporate power or right at the time this suit was commenced, to build the branch road east of Beckwith, as is claimed by the plaintiff in this suit." It does not appear when the original complaint was filed, except as stated by counsel for defendants in the above objections, but the amended complaint was filed August 24, 1903, which was some months prior to the date of the third amended articles. It was stated at the argument that the error of law on which the new trial was granted was that the third amended articles, having been made after the filing of the amended complaint, conferred no authority to condemn under that complaint, and were improperly admitted in evidence. The language of the order is: "* * * And it appearing to the court that error of law occurring at the trial and excepted to by defendant make it proper that a new trial be granted herein; it is, therefore, ordered," etc., setting aside the judgment and granting a new trial.

1. It is claimed by appellant that the limitation in the order of the ground upon which it was granted precludes any contention on appeal that the order may have been granted for insufficiency of evidence to support the findings. The general rule is that if there be any grounds upon which the order of the court can be upheld, the order will be sustained, irrespective of the particular ground given by the court, whether in an opinion or by a statement in the order itself. The exception to the rule is that if the trial court, in its order granting a new trial, excludes by direct language the ground of insufficiency of evidence, and the record shows that there was a conflict of evidence, the appellate court will accept the conclusion of the trial court, and not re-examine the evidence. We do not think the order in this case is brought within the exception. Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124; People v. Flood,

102 Cal. 330, 36 Pac. 663; Sherwood v. Kyle, 125 Cal. 655, 58 Pac. 270; Swett v. Gray, 141 Cal. 69, 74 Pac. 439.

2. Under the original articles of incorporation the northern terminal of plaintiff's road was at Roberts station, near Loyalton, some 15 miles southerly from Beckwith. No mention was made in the articles of any branch roads, nor does anything appear therein of an intention to build the road farther north. No right or power to condemn crossings of defendant's road at or near Beckwith could arise out of the original articles. Before either of the contemplated crossings could be made the main line would have to be extended all this distance beyond the original terminal, and far beyond where it was originally contemplated to build. Nor do we understand that plaintiff claims such right, unless it be implied from its view as to its rights and powers as a de facto corporation, which will be considered later.

3. The first amended articles provided for extending the road to Beckwith, thence westerly to Quincy, and also northerly from Beckwith. The only objection made by defendant to these articles was that the acknowledgment was the same as to the original articles. But the statute as to amendments does not require an acknowledgment. The statute requires the action of the board of directors with the written assent of two-thirds of the stockholders. Civ. Code, § 362. The amended articles show that "the stockholders representing and owning the entire capital stock * * * did in writing, by them signed, on the 31st day of December, 1902, consent," etc. The Code requires also that "notice of the intention to make the amendment shall first be advertised for thirty days," but this is required only where "the assent of two-thirds of the stockholders to such amendment has not been obtained." Civ. Code, § 362.

One of the branches crossed defendant railroad company's track at a point above three-fourths of a mile easterly from the town of Beckwith, as the main line approached the town from the east. There was evidence tending to show that it was impracticable to cross said track at the town of Beckwith or at a point nearer than that selected. The court found very fully as to the general objects and purposes of the plaintiff corporation as set forth in its amended articles; that the estimated length of its main line from Boca to Quincy was about 80 miles; that the length of its branch northerly from Beckwith was about 35 miles and the branch leaving the main line northwesterly from Beckwith was about 15 miles in length, and that "for the purpose of constructing, maintaining and operating the said two spur tracks or intermediate branches as aforesaid, into and through a large timber, grazing and otherwise productive area in said Plumas County, and in order that it may be entitled so to do, and to properly operate and maintain its said railroad, plaintiff of necessity needs and requires a right of way for the aforesaid uses and purposes over and across and upon the right of way of the said track of the said Sierra Valley Railroad and needs to cross, intersect and connect with the tracks and improvements on the right of way of said Sierra Valley Railway, both in section 25, T. 23 N., R. 14 M. D. M. [the point easterly of Beckwith], and in section 28, T. 23 N., R. 14 E. M. D. M [the point about two and one-half miles west of Beckwith]"; that the main line and its said branches are to be constructed and used and operated "for public transportation and for the carrying of freight and passengers thereon and thereover for hire; that the use to which said rights of way and said crossings and intersections and each of them are to be applied by plaintiff is a public use authorized by law; that plaintiff is in charge of said public use and that the taking of the same is necessary to the public." These first amended articles were filed in the office of the county clerk of the city and county of San Francisco, and in the office of the Secretary of State and in the office of the county clerk of the county of Plumas some months prior to the filing of the amended complaint describing the two crossings; a new summons was issued, but the record does not show that it was served; it is marked filed October 19, 1903. There was, however, a demurrer to the amended complaint, which was overruled on October 26, 1903, and defendants answered on November 28, 1903. As the original complaint is not in the record, it cannot be determined whether the amended complaint states an entirely new and different cause of action, and that question does not arise.

It is the only complaint before us, and, as it was filed and issues joined on it subsequent to the first amendment of the articles of incorporation, the rights of the parties may be determined under this complaint and these articles just as they may be under subsequent amendments of the articles when we come to consider them. Section 291 of the Civil Code provides as follows: "The articles of incorporation of any railroad * * * must also state: 1. The kind of road * * * intended to be constructed. 2. The place from and to which it is intended to be run, and all the intermediate branches. 3. The estimated length of the road. * * *" Here the first amended articles give the place from which (Boca), to which (Quincy, via Beckwith) the road is intended to run; they also state the intermediate branch in question. So far as we can see, the statement in the articles of an intention to run a branch line in a northerly direction from Beckwith a distance of 35 miles gave the plaintiff authority to condemn a crossing for the purpose of building this branch, provided the plaintiff complied substantially with the declared intention, and the only debatable question, in our opinion, as to the east crossing is whether the starting point should have been in the town of Beckwith and the crossing within the town limits. The evidence tends to show that the topography of the county immediately north of the town would not admit of going north directly; that to cross in the town would have required the track to interfere with defendant's depot ground and switching facilities, and would have required several crossings of parallel side tracks and switches and would have greatly interfered with the operation of both roads; that the nearest practicable crossing point was the one chosen. The amended complaint shows the location, general route, and termini of the main line as commencing for the main line at Boca and thence northerly to Beckwith and westerly to Quincy, and of the intermediate branch line now under consideration commencing at Boca and thence to a point about three-fourths of a mile easterly from Beckwith, thence by a route northerly definitely described to its intended terminal at the head of Indian creek in a certain described section, township, and range, as shown on the map part of the complaint. The route, location, and termini were sufficiently described to meet the requirements of section 1244, Code of Civil Procedure, and we think the articles as first amended were sufficient to authorize the plaintiff to condemn the crossings at the point now being considered. In fact, the road was completed to Beckwith and in operation when the amended complaint was filed, and was part of the road from Boca to Beckwith, with which the branch line was connected. For all practical purposes the branch line might be considered as part of the line from Beckwith as well as the line crossing from Boca.

4. The second amended articles were not filed with the Secretary of State. The third amended articles are the same as the second, but were so filed. Both amendments were made some months after the amended complaint was filed. The second amended articles may be left out of consideration, as they were not filed with the Secretary of State. Wall v. Mines, 130 Cal. 27, 62 Pac. 386; People v. Lodge, 128 Cal. 262, 60 Pac. 865. All mooted questions, however, arise under the third amended articles.

5. The ground chiefly urged in support of the order is that the third amended articles were not filed with the Secretary of State until long after the amended complaint was filed and hence the plaintiff had no right to condemn these crossings. We have seen that the right existed under the first amended articles to condemn the crossing east of Beckwith. It remains only to determine plaintiff's right as to the crossing west of Beckwith. This latter crossing is necessary for the construction of the branch road above described, and is about 2½ miles westerly from Beckwith. That branch road, however, runs in a northwesterly direction, and is entirely separate and distinct from the branch running northerly from Beckwith, as well as distinct from the main line, and was not contemplated, so far as the first amended articles show, when the latter were filed. We must treat this west branch as having been first definitely included in the project of the corporation upon filing its third amendments to its articles of incorporation. We cannot agree with plaintiff that in the first amended articles it had sufficiently complied with subdivision 2, § 291, Civ. Code, supra, to entitle it to construct as many branches in different directions from Beckwith as it found necessary, provided they started from the vicinity of Beckwith. We think the requirement of section 291, Civil Code, applies equally to branches and to main lines of railroads, and when it says "all the intermediate branches," it means what it says, and does not mean that by stating where one branch is to run that other and different branches are to be deemed included in such statement. Appellant contends that if it could not proceed under the first amended articles to condemn this west crossing, it had the right either, first to amend its articles at any time before trial and thus support its complaint, or, second, that it had the right to condemn as a de facto corporation.

(a) Upon the first proposition the answer is that at the time the amended complaint was filed plaintiff was not authorized by its then articles of incorporation to maintain this action as to the west crossing. Section 297 of the Civil Code provides that "a copy of any articles of incorporation filed in pursuance of this chapter, and certified by the Secretary of State, or by the county clerk of the county where the original articles shall have been filed must be received in all courts of this state, and other places as prima facie evidence of the facts therein stated." But when received they are but prima facie evidence. Plaintiff contends that "the articles could properly be amended, after suit brought, so as to more particularly state and designate the line of the spur tracks or branch lines. The only effect of the amendment," it is said, "was to particularize that which before had been general," and was "not the creation of a new cause of action." But none of the preceding articles—neither the original nor the first amended articles—made any mention of this particular branch, and the corporation was by them clothed with no power to condemn rights of way over this west branch route. The third amended articles were not, therefore, "in aid or explanation of a right already existing when the action was commenced." No such right then existed, and we do not think a corporation can begin an action to condemn a right of way along a particular route which it has not included in its articles of incorporation, and be permitted to support the complaint by subsequently amended articles which include this omitted route. Plaintiff's right to condemn is to be measured by the powers possessed by it at the time the action was commenced. The action was premature as to the west crossing. The corporation took its existence by virtue of its original articles; the amendments added nothing to its corporate entity except to enlarge its purposes, and these purposes went no further than to provide for the branches designated. There was no effort to further amend the complaint when the last amended articles were offered in evidence, if it be admitted that such amendment would have been allowable. Cases arising under section 299 of the Civil Code, such as California Sav. & L. Soc. v. Harris, 111 Cal. 133, 43 Pac. 525, and the recent case of Ward L. & S. Co. v. Mapes (Cal.) 82 Pac. 426, do not apply. The provisions of section 299 relate to the filing of the articles in counties where the corporation is doing business, and may be waived by failure to raise the objection by proper plea (Id.); but here the objection was timely, properly made and went to the existence of the power to do the thing in question. A corporation can exercise no other powers than such as are specifically granted, or such as are necessary for carrying into effect the powers granted. As to any given act, the inquiry is, first, whether it falls within the powers expressly enumerated in the certificate; or, second, whether it is necessary to the exercise of the enumerated powers. Vandall v. S. S. F. Dock Co., 40 Cal. 88. The claim that the west branch was necessary to the expressed objects of the corporation cannot be maintained, for the enumerated powers included only the construction of the main line of plaintiff's road and east branch. The third amended articles brought the west branch within the corporate scheme, but it came too late to avail plaintiff under its previously filed complaint.

(b) The claim that plaintiff was a de facto corporation, and as such could maintain the action, is equally untenable. Plaintiff confuses the question of corporate existence with corporate power. The corporate existence was alleged and admitted; no question of de facto corporation arises. The allegation of the complaint is "that plaintiff is a railroad corporation, duly incorporated, organized and existing under the laws of the state of California," and this averment is admitted. The question is one of power alone, and we know of no such thing in law as a de facto power. There is such a thing as the exercise of power by a de facto corporation. The corporation in condemnation proceedings acts as the agent of the state. The power to condemn may be delegated by the state, through legislative act, to any corporation or individual who shall comply with the terms upon which the right is given. Moran v. Ross, 79 Cal. 159, 21 Pac. 547. No one questions the right of a corporation duly organized under the laws of the state to condemn rights of way over lines of road stated in its articles as required by section 291, Civ. Code; but it cannot exercise this power as a duly organized corporation and at the same time exercise like power as a de facto corporation over branch or other lines of road not stated in its articles. Plaintiff cannot exist as a corporation and condemn the east crossing, as we have held it could, and in the same action ignore its de jure or statutory entity and claim the right to condemn the west crossing as a de facto corporation. Whatever its powers may be to condemn, they cannot exceed those given by its charter. It would be strange, indeed, if, as a corporation de jure, it could not condemn under its charter, and yet could do so as a de facto corporation. It has been held that a de facto corporation cannot exercise the right of eminent domain (10 Am. & Eng. Ency. of Law, p. 1058), a point upon which we express no opinion, for whether this be true or not, we do not think a corporation can act simultaneously in the dual capacity of corporation de jure and a corporation de facto. Throughout this entire proceeding plaintiff has admitted as much; for it has amended its complaint and its articles so as to show a statutory corporation, and has not, except for purposes of argument, claimed to be a de facto corporation. There is an obvious distinction between a challenge to the corporate existence and a challenge to the power which may be exercised by the corporation, whether it be a de facto or de jure corporation. In the former case the general rule is (with exceptions) that the corporate existence may not be attacked collaterally; but it has always been held that the ultra vires acts of the corporation may be thus challenged, often by the corporation itself. And this rule would apply as well to a de facto corporation as to one de jure.

6. It is contended by the plaintiff that by virtue of article 12, § 17, of the Constitution, section 1238, subd. 4, and section 1242, Code of Civil Procedure, and section 1001, Civil Code, every corporation and every individual owning and engaged in the construction of a steam railroad is in charge of a public use, and, seeking to acquire property for such use, immediately becomes an agent of the state, clothed with sovereign power. The argument is that the Constitution says that "every railroad company shall have the right with its road to intersect, connect with or cross any other railroad," and this does not mean "every railroad company incorporated for this or that purpose shall have the right," but that "every railroad company" without distinction may cross every other railroad; that the Code provides (section 1001, Civ. Code) that "any person seeking," etc., is "an agent of the state" or a "person in charge of such use," etc., and hence "we must look to the purposes for which the corporation is seeking to acquire the property, and not to the declarations in the articles of incorporation, for the test of the right to exercise the sovereign power of eminent domain." In the first place the section of the Constitution referred to is not self-executing in the sense plaintiff

would apply it. To condemn land a railroad company is to be governed by general law as in the exercise of other powers. It may be doubted whether the Constitution states a right, which, without it, the railroad company would not have under the statute. In any event the Constitution would not authorize the taking of land by a railroad corporation regardless of its charter powers and regardless of the statute providing for condemnation. In the next place we cannot agree with plaintiff that the purpose for which the corporation is seeking to acquire property is all-controlling, and that the declaration in the articles of incorporation furnishes no test of the right to condemn for any particular purpose. Suppose the charter was for a street railroad in a city, and the corporation conceived the purpose of extending its system into the country by a steam railroad. Would the fact that it was "seeking" to do this thing be sufficient to confer the right to condemn? Here and always, the charter measures the powers of the corporation which are such as the Legislature gives it and are not coextensive with the powers of the individuals who compose it; it can lawfully exercise such powers only as are expressly or impliedly conferred by its charter. If the charter states the purpose to be to construct a railroad by a designated route, the purpose is limited to that route substantially as designated. The limitations of the charter cannot be circumvented by the corporation's assuming to be a "person seeking to acquire property for any of the uses mentioned" in section 1238, Code of Civil Procedure; the charter ever remains the measure of power. Nor, as is claimed, can the power here sought to be exercised be sustained as incidental to the powers expressly given. The branch road now under consideration was in no sense incident to the main line, nor was it an appendage or adjunct such as is referred to in section 465, subd. 4, Civil Code. It was necessary for the purpose of opening contributory business and reaching new territory, but it was not necessary or incident to the operation of the main line.

Plaintiff cites In re Johnston, 137 Cal. 119, 69 Pac. 973, and People v. Stephens, 62 Cal. 209, in support of its contention that every railroad has the right to cross any other railroad (Const. art. 12, § 17); that this is not a right to condemn a right to cross; and that this right is absolute; the duty of the court being only to determine the amount of compensation and the point or manner of crossing. These were cases arising in cities in relation to the right to lay pipes in the streets for the supply of water or illuminating light, under section 19, art. 11 of the Constitution. It was held that the privilege of laying pipes for the purposes mentioned "is expressly granted by the section of the Constitution cited, subject to the direction of the superintendent of streets or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, and upon the condition that the municipal government shall have the right to regulate the charges thereof"; that the section is "a direct grant from the people to the persons therein designated of the right to lay pipes in the streets of a city for the purposes specified, without waiting for legislative authority." The distinction between the two provisions of the Constitution, however, is obvious. In granting the use of streets which are highways and subject to the control of the state there is no taking of private property for public use; it is but devoting the highway to a use additional to that to which it is usually put and consistent with that use. In the other case there is involved the taking of private property which, it must be presumed, is to be taken in consonance with that other provision of the Constitution, that "private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court, for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be made * * * which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law." Article 1, § 14. "Property appropriated to public use" is private property (Code Civ. Proc. § 1240), and to condemn a right of way by one railroad over the right of way of another railroad company is the taking of private property for public use (Memphis & Charleston R. R. Co. v. Birmingham, Sheffield & Tennessee R. R. Co., 96 Ala. 571, 11 South. 642, 18 L. R. A. 166); and must be done, if at all, under the provisions of law regulating eminent domain.

Some other grounds in support of the order are made in the record and in the briefs of respondents, but we do not deem it necessary to notice them.

Our conclusion is: That there was sufficient evidence to support the findings as to what we have designated as the east crossing, for which the damage was adjudged to be $100, and that the judgment as to that crossing should stand; that the court erred in admitting the second and third amended articles; and that its findings as to the right of plaintiff to condemn a right of way at the so-called west crossing of defendant's road are not sustained by the evidence, and the judgment relating thereto should be set aside and vacated. The order is affirmed in so far as it grants a new trial as to the crossing herein referred to as the west crossing; the new trial upon that issue to be had on the evidence heretofore submitted in the case, and such further evidence as either party may be advised to offer. The order is reversed in so far as it grants a new trial as to the crossing referred to herein as the east crossing, and the trial court is directed to proceed with the case in accordance with the views herein expressed; the costs of this appeal to be borne equally—one-half by plaintiff and one-half by defendants.

We concur: BUCKLES, J.; McLAUGHLIN, J.

2 Cal. App. 534

UNION CONTRACTING & PAVING CO. v. CAMPBELL et al.

(Court of Appeal, First District, California. Dec. 27, 1905.)

CONTRACTS—DELAY IN PERFORMANCE—OPERATION OF LAW.

Where a contract for street improvement provided that it should be finished in a certain time, that the contractor was enjoined from performing the contract in a suit by a third person was not an act of the law excusing performance, as provided by Civ. Code, § 1511; the contractor having taken no steps to procure an extension of time prior to the expiration of the time specified in the contract.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by the Union Contracting & Paving Company against H. C. Campbell and others. From a judgment for plaintiff, defendants appeal. Reversed.

James F. Tevlin, for appellants. D. H. Whittemore, for respondent.

HALL, J. This is an action to foreclose the lien of an assessment for curbing and paving a portion of Market street in San Francisco. Plaintiff had judgment, and certain of the defendants moved for a new trial, and upon the denial of their motion appealed from the order and judgment.

It appears from the complaint, findings, and evidence that the contract to do the work was let by the superintendent of streets, dated January 26, 1896, in which the time limited for the performance of the work was fixed at 120 days from the date of the contract. On March 4, 1896, the contractor was, at the suit of a third person—that is, a person not a party to this action, nor an officer of the municipality—enjoined by the superior court of the city and county of San Francisco from performing the work. This injuction remained in force until November 28, 1898, when the action was dismissed by the plaintiff therein; and on said day the board of supervisors and street superintendent granted an extension of the time for the performance of the contract, and the work was done during such extension and a second extension. On the record presented here the time for performing the contract had long since expired, and the contract lapsed before any extension was granted (Turney v. Dougherty, 53 Cal. 619; Beveridge v. Livingstone, 54 Cal. 54; Mappa v. Los Angeles, 61 Cal. 309; Palmer v. Burnham, 120 Cal. 364, 52 Pac. 664; Kelso v. Cole, 121 Cal. 121, 53 Pac. 353), unless the running of the time stipulated in the contract for the doing of the work was suspended by the injunction. And this presents the most important question for determination by this court upon this appeal.

There is no express provision, either in the street law or elsewhere, making the issuance of an injunction at the suit of a third party an excuse for delay in the performance of such a contract. Section 1511 of the Civil Code provides that "the want of performance of an obligation * * * or any delay therein, is excused by the following causes, to the extent to which they operate: (1) When such performance * * * is prevented or delayed by the act of the creditor, or by the operation of law." It is under the rule of this section that the delay in this case can be excused, if at all, and this depends upon whether or not the delay caused by the issuance of the injunction is a delay caused by operation of law. A similar question was presented in Klauber v. San Diego St. Car Co., 95 Cal. 353, 30 Pac. 555, where it was held that interference by a writ of injunction sued out by a third person will not excuse the performance of a contract, and that such an interference is not a prevention of performance by operation of law. It is there said: "No case has been cited in which it has been held that interference by a writ sued out by a private litigant will excuse performance of a contract, although it may deprive the contractor of the means of performance. It is not prevention by operation of law. It is an act of an individual and not of the government. * * * The obligor contracts that he can and will control the acts of third persons so far as necessary to enable him to perform his contract. People v. Bartlett, 3 Hill, 570. * * * It is not the law operating upon the facts which creates the difficulty, but the use of a judicial writ by a private litigant." The above case is cited with approval in Sample v. Fresno Flume, etc., Co., 129 Cal. 222, 61 Pac. 1085, where it was held that the issuance of an injunction at the suit of a third party was not a prevention by operation of law. In Rogers v. Druffel, 46 Cal. 654, it was held that an order enjoining a sale, issued at the suit of a third party, did not prevent the expiration of the two-year lien, nor extend the time within which a sale might be made.

In the case at bar it is not pretended that any of the defendants, or any officer of the city, took any part in the injunction suit or in any way instigated it. The contractor could have kept his contract alive by obtaining from the board of supervisors an extension of time. So far as the record in this case shows he took no steps to procure a dissolution of the injunction, but simply waited until the plaintiff in that action dismissed the proceeding. The cases of Hadley v.

Clarke, 8 Term Rep. 259 and Baylies v. Fettyplace, 7 Mass. 325, cited by respondent, are both cases of delay in the performance of contracts by reason of the operation of embargo acts, and are typical cases of prevention of performance by operation of law. Williams v. Pouns, 48 Tex. 141, and Little v. Price, 1 Md. Ch. 182, also cited by respondent, are cases where the bringing of the action was enjoined for a time at the suit of the opposite party to the litigation, and it was held that such injunction stayed the running of the statute of limitations, in favor of the party procuring the injunction, not because the bringing of the suits was prevented by operation of law, but by the act of the party defendant. On the other hand, in Wilkinson v. The First Nat. Fire Ins. Co., 72 N. Y. 499, 28 Am. Rep. 166, it was held that an injunction issued at the suit of a third person was not a prevention by act of law, and did not suspend the running of the time limited in the contract for the bringing of an action thereon. In Hadley v. Dague, 130 Cal. 207, 62 Pac. 500, the work was completed and accepted by the superintendent of streets within the time provided for in the contract, but upon appeal by property owners to the board of supervisors the acceptance of the work was vacated, and directions given for its completion in strict accordance with section 11 of the street improvement act (St. 1891, p. 196, c. 147), and the decision in that case is not in point.

For the reasons above set forth, we are of the opinion that the issuance of an injunction at the suit of a third party was not a prevention of performance by operation of law, and therefore the time for performing the contract had expired before the extensions thereof pleaded and found, and all subsequent proceedings thereunder were void. Kelso v. Cole, and other cases cited supra. In view of the conclusion we have reached on the main point involved in this case, it is unnecessary to discuss other points made by appellants.

The judgment and order are reversed.

We concur: HARRISON, P. J.; COOPER, J.

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2 Cal. App. 522

BRIGHAM v. SOUTHERN PAC. CO.

(Court of Appeal, Second District, California. Dec. 21, 1905. Rehearing Denied Feb. 19, 1906.)

1. CARRIERS — EJECTION OF PASSENGER — TICKETS—EVIDENCE.

Where a passenger purchased a ticket by which he agreed to identify himself as the original purchaser, when required by the carrier's conductors or agent, and that unless all the conditions of the ticket were fully complied with it should be void, the carrier having obtained information that the passenger had endeavored to sell the ticket to a broker, and proof of such fact having been admitted in an action for ejection while the passenger was attempting to ride on such ticket, because of his refusal to sufficiently identify himself as the purchaser, it was error for the court to exclude evidence that the train agent, who refused the ticket, had knowledge that an attempt had been made by the purchaser to sell the same.

2. SAME—IDENTIFICATION.

Where the purchaser of a railroad ticket agreed to identify himself as the original purchaser, when required by the carrier's conductors or agent, he was only required to produce such reasonable evidence of his identity within his reach as ought to satisfy a reasonable man, honestly seeking to do justice between the carrier and the passenger, and hence instructions that he was bound to identify himself "to the satisfaction of the train agent" where properly refused.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Perry Brigham against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Reversed.

J. W. McKinley, for appellant. Powers & Holland, for respondent.

GRAY, P. J. The plaintiff had a verdict for damages in the sum of $2,000 for having been wrongfully ejected from defendant's train. On defendant's motion for a new trial, the damages were reduced to $1,000, and on acceptance by plaintiff the new trial was denied. The appeal is by defendant from the order denying a new trial.

The plaintiff in his complaint says that for a long time prior to his injury he had been engaged in mining, mercantile, and brokerage business. From his testimony it appears that he was a "traveling man" by occupation, and had, a little less than three months previous to his alleged injury, purchased in New York a first-class round-trip ticket from that point to San Francisco and Los Angeles and return; that he had come out here on that ticket, and on his way had worked the towns from Salt Lake City to San Francisco and down to Los Angeles, "working up trade for a friend of his in iron beds, and establishing agencies for their manufacture on the Western coast." He had been in Los Angeles some six days, and during that time, according to his own testimony, he had appeared at one or two ticket broker agencies and inquired what unused tickets were selling at, with a view of possibly selling the ticket upon which he was riding at the time he was ejected from the train. Witnesses of the defendant testified that a man other than the plaintiff had brought the ticket in question to the ticket broker's office twice, once before it was validated and again after it was validated. One of these witnesses was the ticket broker himself, and his testimony was very positive to the point that it was the same ticket and that the man who offered it for sale each time was not the plaintiff. He did not sell the ticket, however, and on the 23d day of September, 1902, plaintiff boarded an overland train of defendant with said ticket in his possession, intending to go east thereon, as he says, to accept a position with a business concern in Boston, Mass., at $35 per week. At that time plaintiff was about 57 years of age, was recovering from a recent illness, and had been an invalid for 20 years immediately previous thereto. Soon after the train left Los Angeles the plaintiff encountered the train agent, named M. E. Clute, who demanded his ticket and received into his hands the ticket in question. The train agent, having as he says, "a bulletin of a ticket of Perry Brigham" (the plaintiff's name), at once set to work to ascertain whether the plaintiff was the original purchaser of the ticket. The plaintiff, in consideration of the reduced rate at which the ticket was sold, had signed an agreement indorsed upon the ticket, as follows: "The holder will identify himself or herself as the original purchaser of this ticket by writing his name or by other means if necessary, when required by conductors or agent." He had also agreed that, "unless all the conditions of this ticket are fully complied with, it shall be void." He also signed the following: "To prevent imposition, the holder must identify himself as the original purchaser of this ticket to the satisfaction of any conductor or agent, by signature and otherwise, whenever requested." Under this agreement the plaintiff was called upon by the agent to write his name upon a pad, with which request he seems to have complied cheerfully and so wrote his name twice. The agent seemed not satisfied with these signatures and proceeded to ask plaintiff if he knew any one on the train, to which a negative reply was given. Some other questions followed, which are not specifically stated in plaintiff's evidence, and then the agent asked the plaintiff whether he crossed the Missouri river at Omaha or St. Louis on his way out here. To this plaintiff replied that he did not know, as he was asleep at the time. The agent thereupon told the plaintiff that the ticket was not his and directed plaintiff to pay his fare or get off at the next station. Afterwards, on arrival at Burbank, some 11 miles out of Los Angeles, at 1 p. m., by the threats of the conductor to forcibly eject him, the plaintiff was induced to leave the train; the conductor carrying his baggage and placing it near the depot. The plaintiff then stated to the depot agent that he had been put off the train and asked about when he could get a train back to Los Angeles, and also where he could get something to eat. The agent advised him as to these matters, and he then went to a restaurant and procured and consumed some crackers and a bottle of beer. Some time after he alighted from the train—the evidence being conflicting as to the exact time, but between 30 minutes and 3 hours thereafter—the plaintiff was approached by the station agent with a statement that the latter had been in communication with the train agent who had taken up the ticket, and the train agent desired plaintiff to remain at Burbank until he should return there on his way to Los Angeles (the time of his return being between 7 and 8 o'clock that same afternoon), and that Clute, the said train agent, said he wanted to see the plaintiff very much, and it would cost plaintiff nothing to go with him back to Los Angeles, and if Mr. Clute had made a mistake he would like to talk with plaintiff about it; would like to interview him, see him personally, etc. The plaintiff in response to this said he was sick and did not want to talk with Mr. Clute because of the previous ill treatment received at his hands.

The train agent testifies concerning his attempt on the train to identify the plaintiff as follows: "When the ticket was presented to me for passage I asked the gentleman for his signature after looking at the ticket. He made the signature once and it—I didn't think it compared favorably with that on the ticket. Taking all precautions I asked him to make it again, which he did. I then asked him a few questions about the ticket, and then asked him if he could identify himself in any way; if he had anything with him to identify himself. And all the answer I could get from him, he says, 'That is my ticket.' He repeated it several times. But I says, 'Have you anything by which you can identify yourself?' 'Well,' he says, 'That is my ticket.' I then asked him if he was known in Los Angeles. He says, 'I am.' I said, 'Then you can identify yourself there.' He said, 'I could.' 'Well,' I says, 'the best way for you to do, if you don't care to go through, you can do two things: You can pay your fare, taking a receipt from the conductor, and afterwards, if you can satisfy the company that you are the original purchaser of this ticket, they will refund you your money. If not, get off at Burbank. I will return here on the Santa Barbara local, and I will take you into Los Angeles. It will cost you nothing. I will keep the ticket, and if you can satisfy me that you are the original purchaser I will return the ticket at Los Angeles, and you can get right out of there." To that he said nothing more than to make the remark again, 'That is my ticket.' I went on working through the train. Then I went back and notified Mr. Bodman." At about 7 o'clock in the afternoon plaintiff boarded one of defendant's passenger cars attached to a freight train and returned to Los Angeles, and a few days later commenced this suit.

Among other contentions of appellant it urges that the court erred to its prejudice in refusing to allow it to prove that Clute, the train agent, at the time he was investigating the question of plaintiff's identity, had knowledge of the fact that the ticket in question had been exhibited for sale at the office of a ticket scalper. For some reason, possibly because he thought it a matter of no importance, the respondent makes no direct reply to this contention. I think this matter deserves attention. The plaintiff had agreed to identify himself to the reasonable satisfaction of the train agent. He had also agreed that if he did not comply with this agreement his ticket should be void. His right to remain upon the train depended as much upon the performance of the contract as it did upon his having the necessary ticket. Plaintiff had, in a way, made the train agent the judge of the question of his identity; and if by his own negligence or willful and wrongful acts he had led the train agent to believe that he was not the original purchaser of the ticket, he could not be heard to complain. Of course, the train agent must proceed reasonably in the premises, and should not eject plaintiff from the train unless the facts before him were sufficient to satisfy a reasonable man, seeking to do justice between the railroad company and its patrons, that the plaintiff was not the original purchaser of the ticket. The burden is on the plaintiff to show that he complied with his contract. Central of Georgia Ry. Co. v. Cannon (Ga.) 32 S. E. 874. "The ticket holder must furnish such proof of his identity as would satisfy a reasonable man." Morse v. Southern Ry. Co. (Ga.) 29 S. E. 865. This being the rule, and it also being a question of fact for the jury to decide as to what was reasonable, we think the jury should have been put in possession of all the facts upon which the train agent acted in requiring plaintiff to further identify himself, pay fare, or leave the train. How were the jury to determine the reasonableness of the agent's conduct, unless they knew all the evidence which he had received, tending to show that the ticket was not in the hands of the original purchaser? The fact that the ticket had been offered for sale to a scalper would be some evidence to the mind of the agent that the original purchaser had no further use for it, and the fact that there were so many places in Los Angeles where these tickets are treated as articles of merchandise would naturally lead him to think that the effort to sell had probably met with success; and if the evidence had been admitted, showing that he knew that this ticket had been offered for sale, it is possible that the jury might, by adding this circumstance to the fact that plaintiff was riding in a day coach to New York, and that he could not or would not tell the agent whether he came out on the ticket by way of St. Louis or Omaha, and would give no satisfactory answer to that question, it is possible that they would have reached the conclusion that the conduct of the agent, as described in his own testimony, was justified on the ground that he had good reason to believe that plaintiff was not the original purchaser of the ticket. It seems to have been conceded at the trial by all parties that it was proper to show that the ticket had been offered for sale; but of what benefit to defendant's theory of the case was it? What defense did this tend to establish, unless it was also shown that this fact had been brought to the knowledge of the train agent? Defendant's defense rested largely upon the reasonableness of this agent's decision. How could it be argued that a fact about which the agent knew nothing could throw any light upon that question? It is difficult to understand how any man of reasonable intelligence can travel across the continent and not know whether he passed through St. Louis or Omaha. Of course, it was for the jury to determine what was a reasonable identification, as well as whether the agent acted reasonably under the circumstances, and we do not mean to here interfere with that important function; but no material fact bearing upon that question should have been excluded from the jury. We think that the agent's knowledge of the conceded fact that an effort had been made looking to the sale of this ticket should have been admitted in evidence.

There is another way in which this matter was pertinent to the case. It was an act of bad faith, as being in violation of contract, and a wrongful act toward defendant, to even try to sell this ticket. The plaintiff had agreed that it was not transferable. If, then, plaintiff's wrongful efforts in this behalf had any weight with the agent in determining that plaintiff was not the rightful holder of this ticket, to that extent at least the plaintiff was the victim of his own wrongful act, for which he could not be heard to complain. Unless it were shown that the agent had his knowledge, the jury could not consider the fact in this material connection. In other words, we think the excluded evidence should have been received in mitigaton of damages, or as bearing upon the question as to what amount of damages the plaintiff was entitled to recover in case it were determined by the jury that he was entitled to recover anything. The excessive verdict may be attributed to this erroneous ruling.

Complaint is made of the refusal of the court to give certain instructions offered to the effect that it was the duty of plaintiff to identify himself to the satisfaction of the train agent. We think these instructions were properly refused. To be sure, the plaintiff did agree to satisfy the agent as to his identity; but this must be taken to mean only that he would give such reasonable evidence of his identity within his reach as ought to satisfy a reasonable man, honestly seeking to do justice between the company and the passenger. This is what the cases seem to hold, and is as far as they go. An instruction following literally the language of the contract might be misunderstood by the jury. Central of Georgia Ry. Co. v. Cannon (Ga.) 32 S. E. 874. As the other points urged by appellant are not likely to arise upon a new trial of the case, we deem it unnecessary to further extend this opinion.

The order appealed from is reversed, and the case remanded for a new trial.

I concur: ALLEN, J.

I concur in the judgment, on the ground last stated in the opinion: SMITH, J.

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2 Cal. App. 506

LINCK et al. v. MEIKELJOHN et al.

(Court of Appeal, Second District, California. Dec. 20, 1905. Rehearing Denied Jan. 19, 1906.)

MECHANICS' LIENS—OWNERSHIP OF LAND.

Const. art. 20, § 15, and Code Civ. Proc. tit. 4, provide for a lien upon property for material furnished for its construction. Section 1185 of that title provides that the land on which any building is constructed is also subject to the lien if, at the time of furnishing the materials, it belonged to the person who caused the building to be constructed. *Held*, that a person who furnished materials for the construction of a building under contract with a person who falsely represented himself to be the owner of the land was entitled to a lien therefor on the building

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by F. X. Linck and others against M. C. Meikeljohn and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

D. H. Laubersheimer (Isidore B. Dockweiler and S. C. Pardee, of counsel), for appellants. Charles L. Batcheller, J. W. Ballard, and Charles D. Ballard, for respondents.

ALLEN, J. This action was brought by plaintiff to enforce a lien of materialmen who furnished the materials used in the construction of a house erected by a contractor, who constructed the same under a contract with one, not the owner, but who falsely represented himself as such. The trial court by its decree rendered judgment against the contractor and directed a sale of the building. From this decree and judgment, and an order denying a new trial, the owners of the real property appeal.

It is insisted by appellants upon this appeal that no lien can attach to a building permanently resting upon land, unless some interest in the real property is vested in the person who caused the superstructure to be erected; and that a decree directing the sale of the building in proceedings to foreclose a mechanic's lien is unauthorized. Section 15, art 20, of our state Constitution provides: "Mechanics, materialmen * * * shall have a lien upon the property upon which they have bestowed labor or furnished material for the value," etc. Title 4 of the Code of Civil Procedure, which comprises the necessary legislation to carry into effect this constitutional right, provides that the lien shall be upon the property upon which they have bestowed labor and furnished materials; and by section 1185 of such title it is provided that "the land upon which any building * * * is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof * * * is also subject to the lien, if at the commencement of the work, or the furnishing of the materials for the same, the land belonged to the person who caused said building to be constructed."

The Supreme Court of this state in Humboldt Lumber Co. v. Crisp, 81 Pac. 30, in construing these sections, says: "In these provisions we see an intention of the Legislature to make the lien on the building the principal thing, and the lien upon the land on which it is situated an incident of the completion of the building." It is only when the land belongs to the person who caused the building to be constructed, or who has an interest therein, that such land or interest may also be charged. The decree of sale in this case is then as to the primary thing upon which the lien existed. It is true that where a building is constructed in a permanent manner upon land it becomes a part thereof, but if it is constructed with a lien thereon it becomes a part of such land subject to such lien. It would be grossly inequitable to say that one who may elect to treat a structure as a trespass and remove it, may elect to retain it, with knowledge that it is burdened with a lien, and yet hold it free from such burden. If the landowner desires to avail himself of the incidental benefit of the construction made without his authority, he should be required in common honesty to pay liens thereon occasioned by its construction, created in good faith, without knowledge that the erection of the building was unauthorized.

It is unnecessary upon this appeal to notice the questions raised as to the validity of the deficiency judgment against the contractor. This judgment does not purport to be against appellants. The only decree affecting appellants is as against the building, and in the absence of any showing that its removal would in anywise injure the property of appellants, they will be taken as having suffered no injury by reason of the sale and removal. If, upon the other hand, they elect to pay the judgment and retain the building, to which up to the present time they have contributed nothing, such election would no doubt be based upon the equivalent they received for the outlay. In no event, however, does the amount of the judgment affect their present interests.

We see no prejudicial error in the record, and the judgment and order are affirmed.

We concur: GRAY, P. J.; SMITH, J.

2 Cal. App. 501

GILLESPIE v. SALMON.

(Court of Appeal, First District, California. Dec. 19, 1905.)

1. Bills and Notes—Consideration.

Plaintiff paid a firm note signed by himself and defendant as partners, and took an assignment thereof, and employed attorneys to collect the amount claimed to be due from defendant on the original note, who represented to defendant that they were employed by the original creditor, and defendant, believing the representations, executed a new note to him, which was left with plaintiff's attorneys and the original creditor indorsed it to plaintiff. *Held*, that the new note was without consideration.

2. Partnership—Payment of Firm Debts by Partner—Rights Against Copartners.

A partner who pays and takes up a note executed by the firm becomes a creditor of the firm, and he may maintain a suit for an accounting and settlement of the partnership affairs and the firm assets must be first applied to the payment of his claim, and in case of deficiency a personal judgment against his copartners may be rendered.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, §§ 318, 796.]

3. Witnesses—Cross-Examination.

Where plaintiff, who was the assignee of notes sued on, testified to an assignment of the notes to him, defendant was entitled to ask him on cross-examination when and where the notes were indorsed.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 933, 934.]

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by W. W. Gillespie against Rosalio Salmon. From a judgment for plaintiff, defendant appeals. Reversed.

J. J. Burt, for appellant. Campbell, Metson & Campbell, for respondent.

COOPER, J. This action was brought by plaintiff, as assignee of one Maggie Gillespie, to recover upon six promissory notes, amounting to $581.28, besides interest. The jury returned a verdict in favor of plaintiff, upon which judgment was accordingly entered. This appeal is from the judgment on the judgment roll and a bill of exceptions.

The defendant alleged in his answer, and contended at the trial, that the promissory notes were made under false and fraudulent representations, without consideration, and that they were never delivered to or owned by Maggie Gillespie, the alleged assignor. As the merits of the case depend upon the question as to whether or not the contentions of defendant are well founded, we will not discuss the questions raised as to the pleadings, and other rulings of the court on the admission or rejection of evidence during the trial. The evidence shows substantially the following facts: Maggie Gillespie, the alleged assignor, is a sister of the plaintiff, and a sister-in-law of the defendant, who married the sister of plaintiff and Maggie Gillespie. The plaintiff, defendant, and one MacCurdy, entered into a copartnership in January, 1893, for the purpose of editing and publishing a newspaper in San Jose, Cal., known as "The Daily Record," which partnership continued up to the early part of June, 1894, when it was dissolved. During the continuance of the partnership the enterprise did not pay expenses, but ran behind each and every month. In order to get money to pay the shortage the plaintiff, with the consent of his copartners, borrowed money for the use of the copartnership from time to time from Maggie Gillespie, the dates and amounts being as follows: June 3, 1893, $100; June 9, $200; July 22, $100; July 25, $200; October 17, $125; November 25, $50; April 16, 1894, $105, making in all $930. For the above amounts the partnership notes were given to Maggie Gillespie, signed by the partners, all bearing interest at the rate of 8 per cent. per annum. These notes were never paid by the copartnership, but were all taken up and paid by plaintiff prior to May 1, 1897, and upon payment were assigned by Maggie Gillespie to plaintiff. After May 1, 1897, there was no further indebtedness to Maggie Gillespie from the copartnership or from plaintiff, and plaintiff became the owner of the partnership notes so assigned to him. Plaintiff tried to get the defendant to pay his portion of the notes, but did not succeed in doing so. He then employed a firm of attorneys for the purpose of collecting from defendant the amount claimed by plaintiff to be due him from defendant. Maggie Gillespie did not employ or know anything about the employment of the attorneys, as she had no further interest in the matter. On June 1, 1897, the attorneys so employed by plaintiff wrote to defendant the following letter: "June 1st, 1897. R. Salmon, Esq., c/o California World, No. 623 Montgomery street, City—Dear Sir: Miss Maggie Gillespie has presented some notes to us long since over due, and one of which outlaws on the 3rd of June. The notes are signed by R. S. Salmon and W. W. Gillespie in part, and by R. Salmon, W. H. MacCurdy and W. W. Gillespie in part. The amounts are: $100; $200; $100; and $200; $125; $50, and $105. The amount due from you upon the whole up to the present time is $571.04. If you will give a new note for that amount we will extend the time. Mr. W. W. Gillespie proposes to do this with regard to his share, in order to avoid suit. By calling at our office tomorrow morning before 12 o'clock you will save yourself the trouble and expense of being sued."

Defendant was ignorant of the fact that plaintiff had paid Maggie Gillespie, and believed that the partnership notes were still held by her, and that she had employed the firm of attorneys to collect them, as stated in the letter. In compliance with the request contained in the letter, defendant went to the office of the attorneys, and was again told by them that Maggie Gillespie had employed them to collect the partnership notes, and that plaintiff had given a note for his portion, which note was shown to defendant. The statements so made to defendant were not true, but defendant, believing the statements, and believing that the partnership notes were still due to Maggie Gillespie, executed and signed the notes described in the complaint, which were left with plaintiff's attorneys, and were never delivered to Maggie Gillespie, although her name appears from the evidence to be written across the back of each of them. She testified that the indorsements were in her handwriting, but that she did not remember anything about them, either the notes or the indorsements; that she never placed, or authorized anyone else to place, any notes in the hands of any lawyer for collection against defendant. Plaintiff testified that the indorsement on the back of each note, "Maggie Gillespie," was in the handwriting of his sister, Maggie Gillespie. He was asked by defendant's attorneys in cross-examination as to when and where the indorsements were made upon the notes, but to each question so asked the plaintiff's attorneys objected, and the objections were sustained. Defendant was not allowed to show by cross-examination anything as to the indorsements, except what was stated by Maggie Gillespie. No denial was attempted to be made of the fact that plaintiff's attorneys represented to defendant that they were acting for Maggie Gillespie, whereas they were in fact acting for plaintiff. Plaintiff was asked the following question: "Q. At the time that Mr. Salmon was sent for * * * who owned those partnership notes? A. I presume they were mine."

Counsel for plaintiff stated to the court below during the trial of the case: "I might state during this pause that our position is that it is a matter of indifference whether those notes run payable to Gillespie or not. The law would require us to bring the suit in the name of the real party in interest. The only question here is, did Mr. Salmon get a consideration for the notes at the time he made them? We say the forbearance of this plaintiff, although he did not state that he owned the notes, to sue on those notes which he had acquired from his sister, was a sufficient consideration for the notes in suit. He may have, and we do not deny that he did, conceal the fact that he had become the real party in interest from Mr. Salmon. We will show why he did, if Mr. Salmon has not already shown it—that he would not have paid the notes had he known that they were in the name of W. W. Gillespie." We are of the opinion that upon the above facts the plaintiff was not entitled to recover. There was no consideration for the execution of the promissory notes. Defendant did not owe Maggie Gillespie anything, and she appears to have been wholly ignorant of the transaction. Plaintiff did not agree to forbear bringing suit upon the partnership notes, but, on the contrary, had told defendant that his sister owned them. It is evident that Maggie Gillespie, if plaintiff, could not maintain the action because she had already been paid, and there was nothing due her. plaintiff, by the assignment, took no greater rights or title, than his assignor had. She having nothing, he took nothing. Nor can the plaintiff be allowed to maintain the action upon the theory that the partnership still owes him. It is evident that when the plaintiff paid Maggie Gillespie and took up the copartnership notes he was a creditor of the partnership, but as such he could not sue his copartners in an action at law. His remedy was by an action for an accounting and settlement of the partnership affairs. The firm assets, if any, should first have been exhausted, and then, if the assets proved insufficient to pay plaintiff, he might have had a personal judgment against his copartners. The fact, if it be a fact, that defendant is still liable for his portion of the money paid by plaintiff to his sister, cannot relieve plaintiff in this case. If plaintiff could not have procured payment from defendant by a fair and square statement of the facts, he had his right to proceed according to law. He will not be allowed to deceive defendant, procure notes to a party to whom defendant was not indebted, and thus by such circuitous route accomplish indirectly what he could not have done directly.

The defendant asked the court to instruct the jury: "You are next to determine whether there was anything owing from the defendant to Maggie Gillespie at the time they [the notes] were taken. If there was nothing owing to her at the time on account of what had been loaned by her to the defendant and others at any time, because she had been fully paid, no matter whether she had been paid by the defendant or by someone else liable with him, then your verdict should also be for the defendant." The court refused the instruction, and for the reasons hereinbefore stated such refusal was error.

It was also error for the court to sustain the plaintiff's objections to questions asked of plaintiff in cross-examination as to when and where each of the notes was indorsed. For the purpose of showing the assignment to him, the plaintiff had testified to the handwriting of his sister on the back of the notes. His evidence was directed to proving an assignment of the notes to him. If the facts that he had testified to proved an assignment, defendant should have been allowed in cross-examination to show that there was no assignment. The question as to when the notes were assigned was material, for the reason that it might have appeared that they were assigned after the action was commenced. The questions as to where the assignments were made might have led to facts showing that they were never assigned, and that the notes were always in the possession of the plaintiff.

The judgment is reversed.

We concur: HARRISON, P. J.; HALL, J.

2 Cal. App. 496

NISHKIAN v. CHISHOLM et al.

(Court of Appeal, Third District, California. December 18, 1905. Rehearing Denied by Supreme Court Feb. 15, 1906.)

1. APPEAL—RESERVATION OF GROUNDS OF REVIEW—MOTION FOR NEW TRIAL—SPECIFICATIONS.

Under Code Civ. Proc. § 659, requiring a motion for a new trial to contain specifications stating wherein the evidence is alleged to be insufficient, an appellate court will confine its examination of the evidence to the points embraced within such specifications.

2. SAME—VERDICT.

Where there is some evidence tending to support the verdict, the judgment will not be reversed on appeal as against the weight of the evidence.

3. CONTRACTS—SUBSTANTIAL PERFORMANCE—EVIDENCE.

In an action on a contract for the cultivation and planting of certain land to vines, evidence *held* sufficient to show a substantial performance of the contract, entitling plaintiff to recover.

4. APPEAL—JUDGMENT—JOINT DEFENDANTS—SPECIFICATION OF ERROR.

Where there were no specifications in a motion for new trial pointing to the insufficiency of the evidence to support the verdict as against any particular defendant, an objection that the verdict was erroneous, because it was against all the defendants, could not be reviewed.

5. SAME—THEORY OF CASE.

Where a case was tried on the theory that all or none of the defendants were bound, defendants were not entitled to object on appeal to a joint judgment against all.

Appeal from Superior Court, Fresno County; H. J. Austin, Judge.

Action by H. M. Nishkian against William Chisholm and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

F. H. Short and James Gallagher, for appellants. L. L. Cory and M. B. Harris, for respondent.

McLAUGHLIN, J. This is an action to recover money due on contract. The cause was tried before a jury, and upon a general verdict for the plaintiff for $840 judgment for such sum was entered against the defendants. From such judgment and an order denying their motion for a new trial, defendants appeal.

It appears from the complaint that the plaintiff and defendant Chisholm entered into a contract by the terms of which plaintiff was to plow and harrow 40 acres of land in a manner particularly specified, and plant the same to "good, sound, healthy, rooted Zinfandel vines, in an efficient and workmanlike manner, and in rows eight feet apart, straight and parallel with each other in all directions; and the vines equi-distant eight feet." Under the terms of the original contract, the planting was to be commenced on March 1, 1902, and completed within five days. Plaintiff, however, alleges that the contract was subsequently modified by mutual consent so as to permit and authorize him to commence planting on March 18, 1902, or thereabouts. The contract price was $10 per thousand for vines planted, $8 per acre for plowing and harrowing, $150 as a general payment, and $16 for each additional time the tract was harrowed and cultivated. It also contained a provision for the payment of a balance of $125 for a surrender of a lease by plaintiff and his brother. It is alleged that the plaintiff plowed and harrowed the land and planted 24,500 vines thereon, completing the same on April 3, 1902, and that defendants Bronge, as assignees of Chisholm, assumed all rights, liabilities, and obligations arising under the contract. As a second cause of action plaintiff set up an account stated, showing a balance of $605 due on account of the transactions between plaintiff and Chisholm, and a third cause of action was based on performance of the contract, nonpayment of the contract price, and the expenditure of $40 at the special instance and request of Chisholm in carrying out the agreement between them. The prayer of the complaint was for the sum of $605, but by way of supplemental complaint plaintiff set up additional liabilities accruing under the contract after the complaint was filed, increasing the total demand to $880. In their answer to the original and supplemental complaints, defendants admit the execution of the contract, but deny that it was ever modified or performed. There is an express admission that defendant Catherine Bronge became the assignee of the contract and assumed all liabilities arising thereunder, and there is no denial as to defendant Albert Bronge in this regard. The parties to the action entered into a stipulation reciting that any and all injuries, claims, wrongs or matters accruing from or arising out of the agreement or contract in the complaint first mentioned might be litigated in this action; that the plaintiff and defendants were proper parties to such litigation, and that no objection would be made by reason of or upon the ground of a misjoinder of parties. The specifications of insufficiency of the evidence to support the verdict all relate to the performance of the contract, and the mistake in and modification of the same, and to the issue touching an account stated. There is also a specification that the evidence is insufficient to show that the sum of $125, or any sum, was due or owing from defendants to plaintiff.

It is a well settled rule that the appellate court will confine its examination of the evidence to the points embraced within the specifications. Code Civ. Proc. § 659; Citizens' Bank v. Jones, 121 Cal. 32, 53 Pac. 354; Spelling on New Trial, § 369. And if there was some evidence tending to support the conclusion reached by the jury, the verdict and judgment must be sustained. Spelling on New Trial, §§ 236–238; Kile v. Tubbs, 32 Cal. 339; Driscoll v. Market St. Ry. Co., 97 Cal. 562, 32 Pac. 591, 33 Am. St. Rep. 203; Raymond v. Glover, 144 Cal. 552, 78 Pac. 3; Astill v. S. Y. W. Co., 146 Cal. 57, 79 Pac. 594.

The contract contains an express promise to pay $125 on November 15, 1902, for the surrender of the lease; therefore it cannot be pretended that there is no evidence to show a liability for that amount. The item of $150, also included in the supplemental complaint, was made payable September 1, 1902; but, as this was a payment dependent on performance of the contract, this item is involved in the inquiry as to such performance. The circumstances and conditions, the correspondence and conduct of the parties being considered, it certainly cannot be said that the evidence fails to show a substantial compliance with the terms of the contract. Indeed, the evidence, without serious conflict, shows that defendant Chisholm was in a great measure responsible for the delay and its consequences, and that he consented to or at least waived deviations from the letter of the contract. His brother Colin Chisholm held his power of attorney and had full power to act for him, and this brother in turn had a representative named Eckelberg upon the ground. On March 4th Colin Chisholm wrote plaintiff, saying: "Mr. Eckelberg has written me that the leveling and plowing on the 40 acres had been completed, and about ready for planting." Nine days later he again wrote plaintiff that he had just received a letter from Eckelberg stating that there were squirrels on the land, and that they should be killed before planting, and suggested that plaintiff procure some carbon bisulphide with which to kill the squirrels, and advise with Eckelberg, who would assist him when he was ready to plant. In another letter to plaintiff dated March 19th, the same writer says: "I hope you will have favorable weather for planting, as it is about time it was completed, and if you need information or suggestions about the work, I wish you would call on Mr. Eckelberg." Other letters, including one acknowledging receipt of plaintiff's account for money due under the contract were written by Colin Chisholm to plaintiff, but in none of these was there the slightest hint that the plaintiff was not performing or had not performed the contract to his entire satisfaction. Then, too, there is evidence showing that, after defendant Chisholm had sold the land, Mr. Bronge expressed his satisfaction with plaintiff's work, and promised payment of the contract price. On the whole, it must be said that there was evidence enough to warrant the jury in finding that the plaintiff had earned the contract price by a substantial performance of the contract. It necessarily follows that the verdict for $840 is supported by the evidence, and hence it is unnecessary to consider the evidence bearing on an account stated. Even if there was no evidence on this point, the verdict would still be supported by proof of performance of the contract.

It is said that the verdict is erroneous because it is against all of the defendants. There are no specifications pointing to the insufficiency of the evidence to support the verdict as against any particular defendant, and, as our inquiry is limited by the specifications, this point must fail. An appellant must place his finger on the precise errors or defects upon which he will rely. "Unless the alleged errors are specifically pointed out, they are deemed waived." Bohnert v. Bohnert, 95 Cal. 445, 30 Pac. 590; Rauer v. Fay, 128 Cal. 525, 61 Pac. 90; Spelling on New Trial, §§ 433, 434. But, aside from this, the general conduct of the trial, the conjunctive form of denials in the answer, the form of offered instructions, and the very specifications themselves, all point to an interpretation of the stipulation made a preface to the trial, which must sustain the joint verdict and judgment. The case was clearly tried on the theory that all or none of the defendants should be bound.

We find no error in giving or refusing instructions.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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2 Cal. App. 491

LEVY v. WOLF.

(Court of Appeal, First District, California. Dec. 16, 1905.)

1. Brokers — Commissions — Sufficiency of Evidence.

In an action to recover commissions alleged to be due plaintiff on the sale of defendant's real estate, evidence examined, and *held* sufficient to support a judgment for plaintiff.

2. Same—Ratification of Broker's Acts.

The acceptance by the vendor of land of an offer actually made to a broker, and the consummated sale on such terms, is a ratification of the broker's act, and entitles him to his commission.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 41.]

3. Same—Completion of Negotiations.

Where a broker, within the time allowed by his contract for the sale of land, obtained an oral offer from a prospective purchaser which he communicated together with the name of the purchaser to his principal, who accepted the offer and within a few days thereafter sold the property on the terms offered such purchaser, plaintiff was entitled to his commission, though the sale was actually made through another broker.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 82.]

4. Appeal—Nonsuit—Harmless Error.

Where defendant's evidence supplies the requisite proof, a refusal to grant a nonsuit is harmless error.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4210.]

5. Appeal—Harmless Error—Admission of Evidence.

In an action by a broker to recover commissions on the sale of defendant's real estate, where it appeared that, subsequent to the communication by plaintiff to defendant and the acceptance by the latter of an offer, defendant sold the land to the party and at the price named, through another broker, the admission of evidence on plaintiff's part that such second broker divided his commissions with the purchaser, who had been a favorable witness for defendant, if error, was harmless.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by M. B. Levy against William Wolf. From a judgment for plaintiff, and from an order denying his motion for new trial, defendant appeals. Affirmed.

George D. Shadburne, for appellant. A. Ruef and W. M. Cannon, for respondent.

HALL, J. This is an action to recover commissions as a broker for a sale of real estate. Plaintiff recovered judgment. Defendant moved for a new trial, and, upon his motion being denied, appealed from the order and judgment.

The principal point discussed by appellant relates to the sufficiency of the evidence to sustain the findings. The complaint alleges that the defendant is indebted to the plaintiff in the sum of $700 for services rendered by plaintiff for defendant, and for which defendant promised and agreed to pay said sum to plaintiff, and that no part of said sum has been paid, and is unverified. Answer a general denial. The court found all the allegations of the complaint to be true, and rendered judgment for plaintiff for $700 accordingly. On the 6th day of August, 1900, defendant in writing gave to plaintiff the exclusive privilege to sell a certain piece of real estate for $36,000 cash. Five days were "allowed to find a purchaser," and it was stipulated that the commission should be 2 per cent. on the amount for which the property should be sold. Evidence was given which, if true, proved that plaintiff negotiated with one Goldaracena, and received from him various offers for the property, which he communicated to defendant. That on Saturday, August 11, 1900, being the fifth and last day allowed under his employment, plaintiff received an oral offer from Goldaracena for the property for $35,000, without the house. That he, on the same day, communicated this offer to defendant. On this latter point the record shows the plaintiff testified: "On Saturday I told him Goldaracena will take the property for $35,000, without the house. Mr. Wolf said nothing; that is all right." The plaintiff also testified that he disclosed the name of the prospective purchaser to defendant when he got his written contract on Monday, August 6th. Plaintiff did not obtain a written offer or agreement from Goldaracena, nor bring him to defendant, but in this regard plaintiff testified: "I told Mr. Wolf that I was willing to bring Mr. Goldaracena up there [Mr. Wolf was confined to his house by illness], but he said it wasn't necessary, he did not want to see him. This was after the contract. Mr. Wolf said he was sick and did not want to see him." Plaintiff further testified that he told Wolf that Goldaracena was going out of town, but would be back on the Monday or Tuesday following. On the Monday following defendant gave a written authorization to another broker, and on Tuesday sold the property to Goldaracena for $35,000, without the house, the precise terms offered through plaintiff on Saturday. Goldaracena also testified in the first part of his testimony that he made the offer to plaintiff on Saturday of $35,000, without the house, but subsequently, in the latter part of his testimony, after talking with the other broker, stated that perhaps he had been mistaken in that statement.

From the foregoing statement we think the evidence was sufficient to support the conclusion that plaintiff obtained an oral offer from Goldaracena of $35,000, without the house, for the property, which he reported to defendant on Saturday, together with the name of the purchaser, and that defendant then signified his acceptance of such offer. It is true that the statement of the plaintiff in his testimony where he says, "Mr. Wolf said nothing; that is all right," is not very clear or precise in its meaning. But it is made clear by other testimony, and in this connection plaintiff testified in effect that, while the price was fixed in his contract at $36,000, the real price was $35,000; the sum of $36,000 being placed in the contract because intending purchasers might want to see the contract. Indeed, defendant, while he denied that plaintiff had ever brought him such an offer from Goldaracena, testified that, if he had brought an offer of $35,000, "he would be the seller." In stating the evidence we have, of course, stated that most favorable to plaintiff, as the court found the facts in accord with the contention of plaintiff, though on most points there was sharp conflict in the evidence.

Under the foregoing statement of the evidence and the findings of the court, the real question to be determined is this: Has a broker earned his commissions for the sale of real estate, who, within the time allowed by his contract of employment, obtains an oral offer from a responsible purchaser, and informs the seller thereof and of the name of the purchaser, and the seller accepts the same (all within the time allowed), and subsequently sells to the purchaser on the terms procured by the broker? Appellant insists that plaintiff should not recover for the reason that the offer procured was not in accord with the terms of plaintiff's contract, being an offer of $35,000, without the house, instead of $36,000. But the acceptance by the seller of the offer actually made, and the consummated sale upon such terms, is a ratification of the act of the broker, and makes the seller liable to the broker for his commissions. In Gelatt v. Ridge, 117 Mo. 553, 23 S. W. 882, 38 Am. St. Rep. 683, this precise question was involved, and it was held that a departure by a real estate broker from the terms of his authority in effecting a sale becomes, on ratification by the principal, a part of the original contract, and the compensation fixed therein governs, and the broker is entitled to recover in accordance therewith. To the same effect, see Jones v. Adler, 34 Md. 440. In Phelps v. Prusch, 83 Cal. 626, 23 Pac. 1111, cited by appellant, no such point was involved. The broker did find a purchaser on the specified terms, but the sale failed because of defective title, and the rights of a broker who makes a sale on terms not at first authorized, but in fact accepted, was not involved.

It is also urged that plaintiff cannot recover because he neither procured a written agreement from the purchaser, nor introduced him to the seller; and in support of this contention cites Gunn v. Bank of Cal., 99 Cal. 349, 33 Pac. 1105, and Mattingly v. Pennie, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87. In neither of these cases was a written agreement obtained from the buyer, nor was he introduced to the seller by the broker, nor his name disclosed, nor any sale in fact finally effected. In the case at bar, assuming the testimony for plaintiff to be true, the name of the purchaser was given by the broker to the seller, and his offer accepted within the time allowed by the contract, and a sale consummated in accordance with the offer. In Tyler v. Parr, 52 Mo. 249, it is said: "Or if the agent introduces the purchaser, or discloses his name to the seller, and through such introduction or disclosure negotiations are begun, and the sale of the property is effected, the agent is entitled to his commissions, though the sale may be made by the owner." Also in Jones v. Adler, 34 Md. 440, it is said: "It is well settled, if the agent introduces or discloses the name of the purchaser, and such introduction or disclosure is the foundation on which negotiations are begun and the sale effected, he will be entitled to commissions, and this, too, although in point of fact the sale may be made by the owner. In other words, he cannot avail himself of the services, and, by making a sale through information derived from the agent, deprive the latter of his commissions." In Vanderveer v. Suydam (Sup.) 31 N. Y. Supp. 392, it was held that a real estate broker employed to sell land within a limited time, on certain terms, is entitled to his commissions, where he procures a purchaser within the time and informs the seller; and the seller, by deferring the meeting with the purchaser until after the time of the agent's employment has expired, cannot defeat his right. See, also, Duclos v. Cunningham, 102 N. Y. 678, 6 N. E. 790.

As we have seen, there was evidence in this case that tended to prove that plaintiff, within the time allowed by his contract, obtained an oral offer from Mr. Goldaracena, which he communicated to defendant, together with the name of the buyer, within said time, and that defendant accepted such offer, and within a few days sold the property on the terms offered to Goldaracena. On this state of facts the broker had earned his commissions. What we have said as to the evidence disposes of the point that error was committed in denying defendant's motion for a nonsuit, for, although some of the evidence referred to in this opinion was introduced by defendant after the motion had been denied, a refusal to grant a nonsuit is not harmful error where the defendant's evidence supplies the requisite proof. Russell v. Pacific Can Co., 116 Cal. 527, 48 Pac. 616.

It is also objected that the court permitted plaintiff, in his cross-examination of Weston, the second broker, to prove that Weston divided his commissions with Goldaracena, over the objection of defendant that such objection was incompetent, immaterial, and irrelevant. Goldaracena had been a witness for defendant, and in some things had been a favorable witness. The testimony objected to possibly may have been considered as tending to show a bias or interest in the controversy by Goldaracena or Weston. It is very doubtful if it were admissible for such purpose, but, if any error was committed in admitting it, the error is of too little consequence to justify a new trial.

For the foregoing reasons the judgment and order are affirmed.

We concur: HARRISON, P. J.; COOPER, J.

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2 Cal. App. 48

HOWELL v. BOYD.

(Court of Appeal, Third District, California Dec. 15, 1905. Rehearing Denied by Supreme Court Feb. 13, 1906.)

1. EXEMPTIONS — PROPERTY EXEMPT—USE IN FARMING.

The property declared to be exempt from execution by Code Civ. Proc. § 690, subd. 3, exempting from execution farming utensils and other enumerated property, not exceeding in value a specified sum, together with grain actually provided for sowing within the next six months not exceeding in value a specified sum, is exempt only to a debtor engaged in farming.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Exemptions, §§ 17, 25.]

2. SAME—DEBTOR NOT ENGAGED IN FARMING.

Evidence *held* not to show a debtor engaged in farming on a certain date, so as to be entitled to the exemptions prescribed by Code Civ. Proc. § 690, subd. 3, exempting from execution farming utensils, etc.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by G. W. Howell against J. W. Boyd. From a judgment for defendant, plaintiff appeals. Affirmed.

H. P. Andrews, for appellant. McCoy & Gans, for respondent.

BUCKLES, J. This was an action to recover certain personal property claimed by the plaintiff to be exempt from execution as farming property, under section 690, Code Civ. Proc. The plaintiff was in debt to the

Bank of Tehama County for over $5,000. The bank sued and attached this property, consisting of two horses, harness, spring wagon, grain wagon, four gang plows, three single plows, two harrows, a combined harvester, one hay rake, two hay racks, two mowers, two cultivators, one fanning mill, one Jackson derrick fork, two cows and their sucking calves, and four large pork hogs; all of said property being worth the sum of $1,000. Judgment was for the bank in that case, and defendant then brought this action against Boyd, the sheriff, holding the property. The judgment was for the defendant, and this appeal is from the judgment and order denying a motion for a new trial.

The lower court found that the plaintiff was the owner of the property, but was not in possession of it when attached, and was not entitled to the possession. That plaintiff was not a farmer on September 7, 1904, when the property was attached, and that it was not exempt from execution. The demand for the return of the property is admitted. That on September 7th the plaintiff had given up farming and left the state of California; that he left California August 23, 1904, and went to Washington, and there engaged in other business than that of farming; that he left said property in charge of his wife on the ranch, and that she wrote a letter to one Sydenstricker, who then had charge of the J. W. Howell Company ranch where the property was situated, stating that the ranch and the personal property was abandoned, and that he should take charge of the said personal property and look after it and water the stock; that the said wife at the same time posted a notice on the door of the house on said ranch where the personal property was situated, addressed to him, instructing him how he could get water for the stock; and that said Sydenstricker then took charge of said property, on or about August 26, 1904, and kept it until the levying of the attachment September 7th. The plaintiff's deposition was taken in Washington October 25, 1904. Up to that time plaintiff had not returned to California and had not engaged in farming after leaving California. He testified as follows: "I am a farmer and reside in Tehama county, Cal., and farming was my occupation on September 7, 1904. I was the owner and in possession of all the said personal property on September 7, 1904, and I claim the same as exempt from execution under the laws of California, and I never did, prior to September 7, 1904, give up the possession of said property to any one, nor abandon the same to creditors." He further testified that he had been engaged in farming all his life; that he left California about August 23, 1904, and went to Colfax, Wash., and went to work in a blacksmith shop, where he worked for two weeks, and then went to Pullman, where he worked in a livery stable from October 1st to October 25th. He says: "When I left Tehama county I left this personal property in charge of my wife and told her to get some one to take care of it, and some one to look after it. I did not send word or authorize word to be sent to my father to take charge of the property. I did not intend father should take the property I left and sell or otherwise dispose of it to pay my debts at the Bank of Tehama County. I expected him to take some of it for that purpose, but not what was exempt. When I left Tehama county I had not fully determined what I would do with this property. I left to see if I could find a better location, and did not know where I would go, and had not made up my mind to take up my residence outside of the state of California, nor have I yet done so, and I have not decided what I would do with this property. I could not conveniently dispose of it when I left, and had no occasion to claim it as exempt until it had been attached. I had not made up my mind what to do with my family, and have not yet." J. W. Howell, the father of the plaintiff, who testified for the defense, says that plaintiff farmed a section and one-half of land for him during the last year, but his lease did not extend beyond September 1, 1904, and that the plaintiff had no claim on the land on September 7th for any purpose. That he also farmed other land "last season." Plowed some summer-fallow in the spring, but had no control of it on September 7th. Had a contract for the purchase of 320 acres of land, but did not make the first payment, which was due; that plaintiff had no land in Tehama county and had none under lease there since before September 7th. When the witness returned from a trip East about September 1, 1904, his son Ralph and son-in-law Sydenstricker were in possession of this personal property and were taking care of it. For the last 13 years plaintiff had rented of witness, and farmed the Adobe ranch, but in August this ranch belonged to the J. W. Howell Company, a corporation; that plaintiff is now and was when he left, a member of said corporation, and a director therein; that the corporation had never given him any written notice that he was not to retain possession of the place after September 1st. Plaintiff had no seed grain on the ranch or anywhere else for sowing for another season. He had done no farming, put in no grain or made any pretense to since September 1, 1904. The witness Sydenstricker testified that he took charge of this property at the request of plaintiff's wife, that there was no way of the stock getting water except as it was pumped to them, that he found the windmill broken and fixed it, and thereafter cared for the stock and property. When he went to the ranch where the property was situated he found the place deserted, the household goods gone, no one at the place, and a notice posted on the door addressed to him suggesting to him how he should proceed to get water for the stock. O. W. Parsons testified that plaintiff had said to him the early part of August, that "he had got tired of hard work; crops were getting poor, wasn't making anything, and he had got disgusted with it and wasn't going to stick a plow in that ranch again. He said he was trying to sell the summer-fallow." Jeff Brunk testified he purchased a Graham seeder and the summer-fallow of plaintiff a few days before he left. During the season of 1903–04 plaintiff had used in his farming business thirty mules, ten head of horses, a combined harvester, two or three mowing machines, four gang plows, two or three single plows, two harrows, two cultivators, and two Graham seeders; one of these seeders belonged to his father and the other he sold to Jeff Brunk. This, then, is the testimony on which the court based its findings.

The question is: Was the plaintiff a farmer, in the sense of the section which exempts certain property of the farmer, on September 7, 1904? It is certain that on September 7, 1904, the plaintiff was not actually engaged in doing any act that would make him a farmer. This could be true, and yet he be a farmer, and the things which would tend to establish that fact would be found in the possession by him of farming land, either as owner or renter, seed grain reserved and on hand, food for two horses or stock with which to put in the grain, the owner of summer-fallow reserved for seeding, in possession of stock and tools sufficient for farming purposes, and any other preparations a farmer would naturally make for carrying on the business of farming for the next year. Not one of these things could appellant show to the court below because not possessing them. The provision of law under which plaintiff claims the exemption is subdivision 3 of section 690, Code Civ. Proc., and reads as follows: "The farming utensils or implements of husbandry of the judgment debtor, not exceeding in value the sum of one thousand dollars; also two oxen, or two horses, or two mules, and their harness, one cart or buggy and two wagons, and food for such oxen, horses or mules for one month; also seed grain or vegetables actually provided, reserved or on hand for the purpose of planting or sowing at any time within the ensuing six months, not exceeding in value two hundred dollars." In Robert v. Adams, 38 Cal. 383, 99 Am. Dec. 413, the court said of these exemptions: "The act (section 690) does not in express terms make this exemption applicable only to such judgment debtors as were engaged in the business of farming at the date of the levy; but it is obvious that such was the intention, and we so held in Brusie v. Griffith, 34 Cal. 305, 91 Am. Dec. 695. That this is the correct interpretation of the act we entertain no doubt whatever." Farming implements of the farmer, like the tools of the artisan and the library of the professional man, are made exempt from execution so that he may have the means of earning his living at the business in which the tools and the implements or books are necessary. None of these things are exempt merely because found in possession, but because they are a part of the business for which they are adapted and to be used in such business. If the plaintiff was not engaged in farming when the levy was made, then the instruments of husbandry would not furnish him with the means whereby he could earn his living. It is true the plaintiff testified he was engaged in farming on the 7th day of September, 1904, but the other facts in the case do not support this statement. Neither does he produce a single other fact that would in any way tend to show he was farming at that date. Indeed, every fact in the case tends directly to show that he had quit farming, that he had abandoned the stock and tools with which to carry on farming. This is not a case of a farmer going off his farm on a visit to another state for 15, 30, or 60 days, and having his exempt property attached during that time. Here is a case where a farmer had given up every vestige of farming, sold most of his farming implements, sold his summer-fallow, the seeder, given up all leases he had, declared that he was tired of hard work, that crops were getting poor, and there was nothing in it, abandoned his property, at least some of which he expected his father to take, sell and pay his debt in the bank, and according to his own statement did not know what he was going to do when he left California, and has not found out since. We think the testimony clearly shows that appellant had quit farming on August 23, 1904, when he left the state, that he had no intention of resuming that business, that he was not engaged in farming on September 7th, and that he had abandoned his farming implements and stock prior to said date.

The evidence warrants the findings of the lower court, and, in turn, the findings support the judgment.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

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2 Cal. App. 470

In re O'CONNOR'S ESTATE.

O'CONNOR v. O'CONNOR.

(Court of Appeal, First District, California. Dec. 14, 1905.)

1. TRUSTS — TESTAMENTARY TRUSTS—ALLOWANCES—JURISDICTION.

Testamentary trustees do not take the devise solely by virtue of the decree of distribution, but as devisees under the will, their relation to the trust dating from the death of testator; and hence where a testamentary trustee instituted proceedings to compel the executrix to account and distribute the estate, and resisted her claim that she was entitled as executrix to control the trust property until testator's youngest daughter became 30 years of age, the superior court had power, on settling the account of the trustee, to award such trustee a reasonable sum out of the estate for counsel fees in procuring distribution, notwithstanding

Code Civ. Proc. §§ 1699, 1700, providing that the superior court shall retain jurisdiction for the purpose of settling the accounts of trustees where the trust created by will continues after distribution, and that on all accountings by such trustee "the court shall allow the proper expenses and compensation for services" as the court may adjudge to be just and reasonable, etc.

2. SAME—ACCOUNTING BY TRUSTEES.

Where a testamentary trustee, in a preliminary accounting, claimed an allowance for counsel fees in procuring distribution, the court did not lose jurisdiction of such item by passing upon the other items of account and declining such item for an alleged lack of jurisdiction to grant such an allowance.

Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Judicial accounting by William M. O'Connor, as one of the trustees under the will of Cornelius O'Connor, deceased. From an order refusing to make an allowance to the accountant for attorney's fees expended in obtaining distribution of the estate by the executors, the accountant appeals. Reversed.

Harrison & Harrison, for appellant. Lloyd & Wood, for appellee.

CHIPMAN, J. The question involved in this appeal is whether the superior court has jurisdiction to make an allowance to a testamentary trustee for counsel fees in obtaining a distribution of the estate to the trustees. The deceased died possessed of an estate of very considerable value, consisting of real and personal property, which by his last will was devised in trust to appellant and respondent as trustees; the respondent being also named as executrix of the will. She duly qualified as such executrix and entered upon the discharge of her duties as such. It appears from the uncontradicted statement of Mr. Robert W. Harrison, which was received in evidence, as facts to which he would testify, that he "was consulted by Wm. M. O'Connor as to his rights as trustee under the will of Cornelius O'Connor, deceased," and on March 24, 1900, prepared and caused to be duly served upon the attorneys for respondent a paper asserting his rights as such trustee, and also a notice of his appearance as such trustee in the matter of said estate, and filed the said papers in the proceedings for the administration of said estate and also recorded a revocation of a power of attorney which appellant had previously given to respondent. The statement then shows that thenceforward appellant by his said attorney was more or less actively and continuously seeking to bring respondent to a final settlement of her accounts as executrix, with a view to final distribution of the estate to the trustees, during which time his efforts were met by opposition from the respondent and by the other beneficiaries, sisters of respondent; the former claiming that certain provisions of the trust were invalid, and that the property should be distributed directly to the ultimate beneficiaries, and the latter contending that by a proper construction of the will the property of the estate must remain in her hands as executrix until the youngest daughter of deceased should arrive at the age of 30 years. The statement further shows that as many as four different accounts were from time to time obtained through the insistence of appellant; but that respondent objected to their consideration as final accounts. The fourth account showed that the estate was in condition to permit of a partial distribution, and appellant in October, 1901, filed a petition for that purpose and caused citations to issue, and continued his efforts to obtain from respondent her final account as executrix, which resulted in her filing such account as executrix on March 5, 1902. Respondent, however, "failed and refused to file a petition for final distribution with her said final account as is customary, and the said final account having been settled on March 17, 1902, and the said executrix having thereafter again refused to file a petition for final distribution of the said estate," appellant on March 24, 1902, prepared and filed such petition, praying distribution to himself and his co-trustee in accordance with the terms of the said will. This resulted in a decree of distribution on October 24, 1902. At the close of the first year of their trusteeship the trustees filed their first annual account, respectively, and in appellant's account he asked the court to allow him a reasonable sum out of the funds of the trust estate for the compensation of the attorney employed by him in said matters above set forth, as appellant "was under the necessity of employing an attorney at law to aid him in enforcing the trust set forth in the will of said O'Connor, deceased, and to bring about a distribution of the property of said estate to said trustees in order that the said trust might be performed." In its decree settling the account of appellant the court found the substance of the facts briefly above set forth, but as to the right of appellant to be allowed a reasonable sum to reimburse him for expenses incurred therein the court found "that it has no jurisdiction or authority to make such allowance, and for that reason refuses to make any order with reference thereto." The appeal is from the order settling appellant's account, and particularly that part thereof refusing to make any order with reference to said allowance.

I have stated the facts in this case because they show the situation in which appellant found himself placed when he was called upon to act in his capacity as trustee. Other situations of a testamentary trustee which might arise before distribution will, I think, still further aid us in solving the question. Suppose the trustee is brought into court before distribution to defend the trust against an assault made upon it and successfully establishes the trust, or he has reason to believe that the executor is wasting the trust property or is grossly mismanaging it, or is prolonging distribution to the detriment of the estate and the beneficiaries, and in violation of the obvious purpose of the testator, or refuses to take steps to protect the estate against waste being committed upon it by another, or is guilty of a diversion of the trust funds; can it be said that in such instances there is no duty cast upon a trustee to take affirmative and effectual proceedings to protect and defend the trust property against spoliation, and must he be regarded as a mere volunteer, as claimed by respondent, and disentitled to any compensation whatever for necessary expenses, if he assumed to perform this duty in advance of distribution? Whether in the case now before us a necessity was shown for appellant's action is not necessarily, and perhaps not at all, the question. It is whether, when a testamentary trustee before distribution acts in the interest of the trust estate and for its protection and to carry out the wish of the testator, the superior court is powerless to make any allowance for his expenses, for counsel fees or otherwise. It seems to us that it would endanger the safety of trust property and lead to defeating the objects of the testator to thus tie the hands of the court. A responsible person would hesitate to assume a duty so important, in the discharge of which he must necessarily incur expenses and devote personal attention, if, under no circumstances, he could be compensated from the trust estate he has safeguarded. Before holding the court to be thus impotent to aid the trustee in the performance of so clear a duty, we should require some statutory restraint upon the court to be shown, or that the power has upon some well-recognized equitable or legal principle been denied it. The position taken by respondent is clearly and distinctly stated in the brief of counsel. It is that the power to settle the account of a trustee is conferred by the Legislature and the jurisdiction is limited by legislative enactment as found in sections 1699 and 1700 of the Code of Civil Procedure, and "that the court was limited to the consideration of matters properly involved in an account authorized by the Code, and when the account was settled, and allowance made for the expenses and compensation of the trustees, the powers of the court were exhausted, and it was wholly without jurisdiction to consider matters occurring before the trust estate existed, and which could not, in the nature of things, become part of an account which the trustees could ask to have settled in pursuance of the provisions of sections 1699 and 1700."

By section 1699 jurisdiction is retained by the superior court "for the purpose of the settlement of accounts under the trusts," where the trust created by will continues after distribution. "Pending the execution of his trust," or at its termination the trustee may "render and pray for the settlement of the account as such trustee before the superior court in which the will is probated." Full directions are given as to the hearing and settlement of the account. Section 1700 provides as follows: "On all such accountings the court shall allow the trustee or trustees the proper expenses and such compensation for services as the court may adjudge to be just and reasonable and shall apportion such compensation among the trustees according to the services rendered by them respectively, and may, in its discretion, fix a yearly compensation for the trustee or trustees to continue as long as the court may judge proper." It is altogether too narrow a view of the testamentary trustee's relation to the trust property to say that it begins at distribution, and not before, and that his expenses incurred in the discharge of a duty he owes to the trust are by these sections limited to such as arose after distribution, and under no circumstances to any expenses incurred prior to distribution. Certainly no such express limitation is found in the language used in the statute, and we do not think there is any such implied limitation. He does not become a trustee by virtue alone of the decree of distribution, although his fuller and more complete powers and duties are thus devolved upon him; but he takes as trustee under the will at the death of the testator. Civ. Code, § 1341; Williams v. Williams, 73 Cal. 99, 14 Pac. 394; Dunn v. Schell, 122 Cal. 626, 55 Pac. 595; Martinovich v. Marsicano, 137 Cal. 354, 70 Pac. 459. The testamentary trustee is a devisee under the will, and, though he may not deal with the property as fully as he may after distribution, we do not see why he may not exercise the rights and powers as may any other devisee under section 821 of the Civil Code, and sections 1452, 1663, 1664, and perhaps other sections of the Code of Civil Procedure, in a proper case and under justifiable circumstances. By section 1699, referred to by respondent, the probate court retains jurisdiction for the purpose of settling the trustee's accounts, and it was held in McAdoo v. Sayre, 145 Cal. 344, 78 Pac. 874, that the court upon final accounting has the power to dispose of the entire matter of the trust by determining who is entitled to the property, and directing the trustees to turn it over to the person entitled thereto. But the accounts thus settled are the accounts of the trustee acting in that capacity, and are separate and distinct from the accounts of the executor, which latter are settled before or at the time of final distribution.

That a duty respecting the trust property may devolve upon the trustee before distribution, and that a liability may attach to him for failure to discharge that duty, rest both upon reason and authority. Whatever may have been the object of the testator in creating a testamentary trust and appointing one of the trustees as executrix, certain it is that he would not have appointed trustees at all if he had intended to commit the management of the estate exclusively to the executrix, and that it should reach his heirs at law or the beneficiaries of the trust directly through distribution by the executrix and administration then to cease. Having devised the estate to trustees, it became their duty, having accepted the trust, to obtain control of the trust property. Pomeroy's Eq. Juris. § 1067. When the trustees should take the step, where the will names one of them as executrix, or under what circumstances it is not necessary to speculate, the court would be the ultimate judge upon the case presented. But clearly it is the duty of the trustees to take such action under all proper circumstances, and failure to do so would render them liable to the beneficiaries, if loss of the estate or damage thereto ensued. Sustaining this position are cited Speakman v. Tatem, 48 N. J. Eq. 136, 21 Atl. 466; McGachan v. Dew, 15 Beav. 84; Billing v. Brogden, 38 Ch. Div. 546. In the last of these cases the testator bequeathed a certain sum of money in trust for a daughter, to two of his sons and one Samuel Budgett; the sons and another son having been made executors of the will. Budgett made frequent but unavailing efforts to induce the executors to pay the legacy to himself and his co-trustees. The estate was largely composed of an interest in a partnership conducted by the testator's three sons, which failed, and thereupon the daughter sued her brothers and Budgett—the object being to reach Budgett's liability; the brothers being insolvent. It was held that Budgett had committed a breach of trust in not insisting upon the payments of the legacy by the executors to the trustees at a time while the estate was solvent, and he was adjudged to make good the loss with interest. In the Court of Appeal one of the judges, among other things, said: "A trustee undoubtedly has a discretion as to the mode and manner, and very often as to the time, in which and at which he shall carry his duty into effect. But his discretion is never an absolute one. It is always limited by the duty, the dominant duty, the guiding duty, of recovering, securing, and duly applying the trust fund. And no trustee can claim any right of discretion which does not agree with that paramount duty."

The relation of the testamentary trustee of the trust property is different from that of an executor (Goad v. Montgomery, 119 Cal. 552, 561, 51 Pac. 681, 63 Am. St. Rep. 145; Mackay v. San Francisco, 128 Cal. 678, 685, 61 Pac. 382), and the desire of the testator can be fully carried out only through the trustees and their appointment, as such implies a wish on the part of the testator that it should be so done. The policy of the probate law is to reach final settlement and distribution of the estate as soon as may be, whether the deceased dies testate or intestate, and this should be no less the policy where trustees are by the will made devisees in trust. The Legislature seems to have regarded the testamentary trustee as having some necessary relation to the estate before distribution. Section 1702, Code Civil Procedure, makes provision for the appointment by the court of a trustee if a vacancy occurs before distribution, and exacts from him, before acting, a bond such as is prescribed by section 1388. Such an appointment may be made upon the application of any person interested in the estate. It may be said that this provision is only intended to have some qualified trustee ready to take upon distribution. But the fact that such a substituted trustee might be called upon to protect the estate against the dangers already pointed out as liable to arise suggests a much broader reason for his appointment than merely to accept the trust at distribution. Appellant institutes an analogy between an executor and testamentary trustee, claiming that an executor, who in a contest for the probate of the will succeeds, is entitled to an allowance for attorney's fees. It is claimed upon the authority of cited cases arising in other jurisdictions and upon the decisions in Estate of Chinmark, My. Prob. 129, and Estate of Chittenden, 1 Coffey, Prob. Dec. 53, that the executor is so entitled. Respondent cites certain cases decided by our superior court which it is claimed hold otherwise, but appellant contends that they do not so decide. It is not necessary to the decision here that we should pass upon these respective contentions. We do not think the jurisdiction of the court to determine the question now before us is in any wise dependent upon the power of the court to allow an executor his expenses in securing probate of the will. Whether the action of the trustees in seeking distribution is seasonable or unseasonable, and whether justified by the circumstances under which they act, are matters for the court to determine. But when they have been compelled to act, and the necessity for action finds justification by their success there is neither justice nor reason in denying to the court the power to determine whether or not they should be paid their necessary expenses out of the trust fund. This would undoubtedly be true if the testamentary trustees' accounts are to be settled according to the principles adopted by the courts of equity. See Estate of Clos, 110 Cal. 494, 501, 42 Pac. 971; McAdoo v. Sayre, supra; Adams on Equity, pp. 61 and 391; Trustees v. Greenough, 105 U. S. 527–533, 26 L. Ed. 1157, and we fail to see in sections 1699 and 1700 of the Code of Civil Procedure any restrictions put upon the powers of the court to so settle such accounts. Between solicitor and client the general rule, as stated by Mr. Perry, is that the trustee will be allowed his costs whether plaintiff or defendant. Perry on Trusts, §§ 894–899. As confirming this view, see Harrison v. Perea, 168 U. S. 311, 325, 18 Sup. Ct. 129, 42 L. Ed. 478; Clark v. Anderson, 76 Ky. 111; Ingham v. Lindemann, 37 Ohio St. 218. In Perkins' Appeal, 108 Pa. 314, 56 Am. Rep. 208, a credit was allowed the trustee in his account for legal services in obtaining the trustees' appointment. See Adams on Equity, p. 61. In this state it has been held that one having a common interest with others in a trust fund who successfully maintains his suit to prevent diversion of the trust fund may be reimbursed his costs and expenses, including attorney's fees. Miller v. Kehoe, 107 Cal. 340, 343, 344, 40 Pac. 485; Fox v. Hale & Norcross S. M. Co., 108 Cal. 475, 41 Pac. 328.

Respondent claims that "when the account was settled and allowance made for the expenses and compensation of the trustees, the powers of the court were exhausted." But in appellant's account he claimed an item for counsel fees in procuring distribution, and it is from the order of the court refusing to consider the item for lack of jurisdiction that the appeal was taken. The claim was fairly before the court, and it did not lose jurisdiction by passing upon the other items of the account.

Our conclusion is that the court had jurisdiction to determine what, if any, allowance should be made out of the trust estate for the services of appellants' counsel in procuring distribution of the property to the trustees.

The order is reversed in so far as the court refused to allow the attorneys' fees, with directions to the court to proceed in accordance with the views herein expressed.

We concur: COOPER, J.; HALL, J.

2 Cal. App. 460

KELLY v. NING YUNG BENEV. ASS'N.

(Court of Appeal, First District, California. Dec. 14, 1905.)

1. ATTORNEY AND CLIENT — EMPLOYMENT — FINDINGS—EVIDENCE.

In an action for attorney's services, evidence *held* to sustain a finding that the attorney was employed by defendant, that his services were rendered at its instance and request with reference to an auxiliary corporation, and that defendant had received and enjoyed such services.

2. CORPORATIONS—EMPLOYMENT OF ATTORNEY —ESTOPPEL TO DENY POWER.

Where a corporation assumed to employ an attorney, received the benefit of his services, and the contract was fully executed on his part, the corporation could not, in a suit for fees, deny that it had power to make the contract of employment.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 1557-1559.]

3. PRINCIPAL AND AGENT—PROOF OF AGENCY —DECLARATIONS OF AGENT.

In a suit against a corporation for attorney's services, a statement of the secretary of the corporation by whom the attorney was employed that he was secretary of the corporation, while insufficient of itself to prove the fact, for the purpose of binding defendant by the secretary's acts and representations, was admissible to be considered in conection with other evidence of his authority.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent. §§ 40, 41.]

4. CORPORATIONS — CONTRACT OF EMPLOYMENT—PROOF.

In an action against a corporation for attorney's services, it was not necessary that plaintiff should show that the secretary by whom the attorney was employed was authorized by a by-law or a formal resolution of the corporation's board of directors to make such contract on behalf of the corporation.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 1602-1608.]

5. ATTORNEY AND CLIENT — EMPLOYMENT OF ATTORNEY—ESTOPPEL.

The employment of an attorney by a private corporation may be proved by conduct constituting an estoppel.

6. SAME—LIABILITY FOR VALUE OF SERVICES —DEFENSES.

Where defendant employed an attorney to perform certain services with reference to its business, the fact that such services were also of benefit to certain others and that they contributed a portion of the compensation was no defense against defendant's liability for the value of the services.

7. APPEAL—RECORD—INSTRUCTIONS—REVIEW.

Where error was assigned in a motion for a new trial that the court erred in refusing to give "the fourth instruction" requested by defendant, but the body of the statement contained no instruction thus numbered, the assignment could not be reviewed.

8. TRIAL—INSTRUCTIONS — APPLICABILITY TO EVIDENCE.

Where, in an action for attorney's services, there was no evidence that the services were rendered for a corporation other than defendant, it was not error for the court to refuse an instruction that, if the jury so found, defendant would not be liable to plaintiff.

9. EVIDENCE—ADMISSIONS—INTERPRETERS.

Where two persons conducted an interview through an interpreter, neither being able to speak the language of the other, the interpreter would be regarded as their joint agent for that purpose, and their statements so made were not objectionable as hearsay, but were competent as admissions.

10. DEPOSITIONS—NOTICE—EFFECT—WAIVER.

Where defendant's attorney was present at the taking of certain depositions and cross-examined the witnesses at length, an objection that the notice of taking the deposition was insufficient was waived.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Depositions, §§ 92, 93, 336.]

11. SAME—MOTION TO SUPPRESS.

Where defendant claimed to have been injured by reason of an insufficient notice on which depositions were taken, his remedy was by prompt motion to suppress.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Depositions, §§ 219, 223.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by George W. Kelly against the Ning Yung Benevolent Association. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Affirmed.

See 72 Pac. 148.

Campbell, Metson & Campbell, for appellant. C. G. Nagle and Nagle & Nagle, for respondent.

HARRISON, P. J. Action to recover from the defendant for certain legal services rendered it by Charles G. Nagle and assigned to the plaintiff. The cause was tried by a jury and a verdict rendered in favor of the plaintiff for $600. A motion for a new trial was denied, and the defendant has appealed. It is not controverted that Mr. Nagle rendered the services, nor does the appellant question their value, but contends that the evidence was insufficient to show that Mr. Nagle was employed by the defendant, and that the services which he did render were not rendered to the defendant, but to another corporation.

1. The defendant was organized as a benevolent corporation in 1892 for the purpose of aiding and assisting Chinese persons in California who may be indigent or needy through sickness or any other cause. As a part of these functions, it interested itself in the removal from California of the Chinese dead, for burial in China, and for that purpose had obtained from the supervisors of San Francisco the right to bury these dead Chinese in the city cemetery. In 1897 the discontinuance of burials in San Francisco was bruited, and the defendant became desirous of acquiring a burial place in San Mateo county. It was advised that under its charter it could not hold land for burial purposes, and that for that purpose it was requisite that a corporation be organized under the provisions of the Civil Code for cemetery corporations. Accordingly some of its members formed such a corporation under the name of Ning Yung Benevolent Association Cemetery, and a tract of land in San Mateo county was conveyed to this corporation for the purpose of a cemetery; and thereafter the burial of the dead by the defendant was had in this cemetery. The record does not show who were the officers of the cemetery corporation, or whether there were any other members thereof than members of the defendant, but it was shown that the cemetery corporation was incorporated at the instance of the defendant, and that the expenses attendant upon its incorporation and the cost of the land which was conveyed to it were paid by the defendant, and that the cemetery and the cemetery corporation were owned by the defendant. It was also shown that after its incorporation the defendant entered into a contract for the construction of a road leading to this cemetery and other work with one Whalen; that the secretary of the defendant went with Mr. Whalen to the office of Mr. Nagle for the purpose of having this contract prepared; that in that contract it was recited that Mr. Nagle was the attorney for the defendant, and that the work was to be done to his satisfaction; and it was also shown that the defendant paid Mr. Whalen $300 for the work done under this contract, and that an entry thereof was made in its books of record. Upon this evidence the jury was authorized to find that the cemetery corporation was merely an agency or instrumentality adopted by the defendant for carrying out the purposes of its incorporation, and that the defendant was liable for whatever services were rendered by Mr. Nagle at its instance or request in reference to or connected with said auxiliary corporation. See Chater v. S. F. Sugar Co., 19 Cal. 248; Shorb v. Beaudry, 56 Cal. 446; Cornell v. Corbin, 64 Cal. 197, 30 Pac. 629; Hunt v. Davis, 135 Cal. 31, 66 Pac. 957. It is not necessary to determine whether it was ultra vires for the defendant to make provision for the ultimate transfer to China for burial there of the remains of the Chinese under its care who might die in San Francisco, and as a means therefor acquire a cemetery for their temporary burial until such transfer could be made. The plaintiff is not seeking to enforce an executory contract against the plea of ultra vires, but to obtain from the defendant compensation for services rendered under a contract which has been fully executed and whose fruits it is now enjoying. Main v. Casserly, 67 Cal. 127, 7 Pac. 426. The defendant assumed such action to be within its corporate powers, and engaged and has received the services of Mr. Nagle for the purpose of carrying it into effect. Having received the benefit of his services, it is not now competent for it to claim that it had no power to employ him.

2. Mr. Nagle had acted as attorney and legal adviser of the defendant for about a year prior to the rendition of the services for which this action is brought, including the examination of the title to its real estate, preparation of books suitable for its business, and its records, effecting the incorporation of the auxiliary cemetery corporation above referred to, and the purchase of land for such cemetery, and in these matters his relations with the defendant were carried on chiefly through its secretary. He was paid for these services by the defendant, and was requested by its new president and secretary to continue to act as its attorney, and in pursuance thereof rendered the services for which this action is brought. During this period he had several conferences in reference thereto with its officers, including the president and secretary and some of its directors, at the headquarters or office of the defendant. After the larger portion of the services had been rendered he sent a letter in November, 1899, to the defendant, requesting some compensation, and in reference thereto the secretary came to his office with this letter, and stated to him that the defendant wished the Six Companies to contribute thereto, and asked him to write a letter for that purpose. Acting upon this request, he wrote such letter to the Six Companies, which he gave to the secretary, and in response thereto he received a request from the Six Companies to visit that body. Before doing so he went to the office of the defendant, and there again met the president and secretary and others, including one of its directors, and was told by the secretary in the presence of the others that the Six Companies had agreed to pay him $500, and that the defendant would pay him

the balance. The letter which he wrote to the Six Companies was in reference to services rendered towards removing the tax imposed for the disinterment and removal of the Chinese dead, and at the request of the defendant's secretary Mr. Nagle named therein the sum of $3,000 as his charge therefor. Mr. Nagle visited the Six Companies in company with the officers of the defendant, as requested by them, and thereafter received from them the sum of $500. Under this evidence the jury was authorized to find, not only that Mr. Nagle had been employed by the defendant, but also that the defendant had received and was in the enjoyment of the services rendered by him under such employment.

The objection to the testimony of Mr. Nagle that he was employed by the secretary of the defendant, upon the ground that it had not been shown that the person so employing him was such secretary, as well as the motion for a nonsuit on such ground, were properly overruled. Although the statement of the secretary that he held that office was insufficient of itself to prove that fact for the purpose of binding the defendant by his acts and representations, yet testimony that he made such statement was not incompetent, but could be considered in connection with other evidence of his authority. Moreover, whatever deficiency there may have been at first in establishing this fact was subsequently supplied, and it was shown by the testimony of witnesses introduced by the defendant that this person was its secretary. The fact that these witnesses contradicted the testimony of Mr. Nagle as to the terms or fact of his employment created only a conflict of evidence, and this was resolved by the verdict of the jury. It was not necessary for the purpose of making the defendant liable to Mr. Nagle for the services rendered under the employment of its secretary to show that there was a by-law of the defendant, or a formal resolution of its board of directors, giving its secretary such authority. The fact that he was the secretary could be shown by testimony other than the records of the defendant, and it had been testified by Mr. Nagle that this person was the secretary. It was not ultra vires for the defendant to procure legal services, or to employ an attorney for that purpose; and, after having received and enjoyed the benefit of such services it cannot repudiate its liability therefor on the ground that his employment is not set forth in its records. The employment of an attorney by a private corporation, as well as by an individual, may be shown by its conduct; and the rules under which it may be estopped from disputing its liability for his acts or by which its ratification of his acts may be established are the same. Pixley v. W. P. R. R. Co., 33 Cal. 183, 91 Am. Dec. 623; Main v. Casserly, 67 Cal. 129, 7 Pac. 426; Crowley v. Genesee M. Co., 55 Cal. 273; Gribble v. Columbus B. Co., 100 Cal. 71, 34 Pac. 527; Streeten v. Robinson, 102 Cal. 542, 36 Pac. 946. The defendant is not relieved of its obligation to compensate Mr. Nagle for the services which he rendered at its request, and for which it agreed to pay him, upon the ground that such services were also of benefit to the Six Companies, and that they contributed a portion of his compensation. The jury may be assumed, in determining the amount of their verdict, to have taken into consideration the amount which he had received from the Six Companies.

Other objections made by the defendant to the evidence offered on behalf of the plaintiff were either subsequently obviated or were not of such a nature that the rulings thereon, even if technically erroneous at the time they were made, would justify a reversal of the judgment.

3. In the statement on motion for a new trial the appellant has specified as an error of law that "the court erred in refusing to give the fourth instruction requested by the defendant." There is however, in the body of the statement no instruction thus numbered. The statement recites that at the close of the evidence the defendant requested the court to give certain instructions to the jury, and directly thereafter sets forth three instructions correspondingly numbered, and no others. The court did not give the third instruction thus requested, and in its brief herein the appellant has argued that in this refusal it erred. As it did not specify the refusal to give this instruction as error, it is not available to it for a reversal of the judgment. We have, however, examined the instruction, and are of the opinion that, even if it had been properly excepted to, there was no error in refusing to give it. By it the court was requested to submit to the jury to find that if it appeared from the evidence that the services of Mr. Nagle were rendered for the cemetery corporation the defendant would not be liable to the plaintiff. There was no evidence before the jury from which they could have found the existence of this condition, and the court was justified in refusing to submit the proposition to them. Not only was there no evidence that the services had been rendered for that corporation, but Mr. Nagle gave direct testimony to the contrary.

4. The president of the defendant did not understand the English language, and Mr. Nagle was unable to converse in the Chinese language, an in one of the interviews at the office of the defendant the secretary acted as an interpreter between them. When Mr. Nagle stated this fact while testifying at the trial, the attorney for the defendant objected to his stating what the president had said, upon the ground that it was hearsay. The court overruled the objection and admitted the testimony. There was no error in this ruling. An interpreter who is selected by two

persons speaking different languages as the medium of their communication with each other is regarded as their joint agent for that purpose, and the statements of what they say in the presence of each other are regarded as the statements of the persons themselves; and like any other admission may be shown by the testimony of any person who heard them without calling the interpreter as a witness. Greenl. on Ev. § 183; Commonwealth v. Vose, 157 Mass. 393, 32 N. E. 355, 17 L. R. A. 813.

5. An objection was made by the defendant to the introduction in evidence of a deposition taken on behalf of the plaintiff, on the ground that the notice of taking it was insufficient. It appeared from the deposition itself that the attorney for the defendant was present at the taking thereof and cross-examined the witness at length, and there was no claim that it had suffered any detriment by reason of want of notice. The objection was therefore properly overruled. If the defendant had sustained any injury by reason of insufficient notice, it should not have waited until the trial before making the objection, but should have promptly moved the court to suppress the deposition. The plaintiff would then have had an opportunity to obviate the objection.

The judgment and order are affirmed.

We concur: COOPER, J.; HALL, J.

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2 Cal. App. 393

COLPE v. JUBILEE MIN. CO.

(Court of Appeal, Third District, California. Dec. 9, 1905. Rehearing Denied by Supreme Court Feb. 7, 1906.)

1. CORPORATIONS—OFFICERS—APPOINTMENT.

Where the by-law of a corporation declares that its officers shall be a president, vice president, secretary, general manager, superintendent, and treasurer, "which officers shall be elected by the board of directors," the manager is without authority to appoint a superintendent, and the superintendent so appointed is chargeable with knowledge of the limitation of the power of the manager.

2. SAME — UNAUTHORIZED APPOINTMENT — RIGHT TO COMPENSATION.

A person appointed superintendent of a corporation by its manager, notwithstanding a by-law declaring that the superintendent must be elected by the board of directors, cannot recover on the contract without showing that the acts of the manager were ratified by the board.

3. SAME—RATIFICATION.

Civ. Code, § 1589, declares that a voluntary acceptance of the benefit of a transaction is equivalent to a ratification so far as the facts are known "or ought to be known to the person accepting." Section 2310 provides that a ratification can be made by accepting the benefits of the act with notice thereof. The directors of a corporation empowered by its by-laws to elect its superintendent knew that a third person was acting as superintendent, and that he had been appointed by the general manager, and acted on his reports as superintendent and treated him as such. The manager informed the board that the superintendent would draw the manager's salary, and the superintendent did not claim compensation until he quit. *Held*, that the board ratified the appointment and thereby made the corporation liable for some compensation, but not for that promised by the manager, knowledge of which never came to the board.

4. SAME.

The manager of a corporation appointed a superintendent, though a by-law declared that he should be elected by the board of directors. The board had knowledge of the appointment and treated the superintendent as such. The manager informed the board that he was going away and that the superintendent would draw his salary, and the board did not know that the manager had agreed that the superintendent was to be paid a monthly salary largely in excess of the salary of the manager. The superintendent from the time he went to the work until he quit did not claim any compensation from the corporation. *Held* that, though the board ratified the appointment, it did not ratify the contract as to the amount of the compensation; Civ. Code, § 2311, declaring that the ratification of part of an indivisible transaction is a ratification of the whole not being applicable.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by Charles H. Colpe against the Jubilee Mining Company. From a judgment for plaintiff, defendant appeals. Reversed.

Rehearing denied by Supreme Court February 7, 1906; Beatty, C. J., dissenting.

F. W. Street, for appellant. A. L. Levinsky and J. F. Rooney, for respondent.

BUCKLES, J. This is an action by the plaintiff to recover from the defendant, a mining corporation, the sum of $1,995.19 for services rendered as superintendent of defendant's mines in Tuolumne county, at the rate of $200 for salary and $50 expenses per month. Plaintiff recovered judgment for the amount, defendant moved for a new trial, which was denied, and the appeal is from the order denying the motion for a new trial and from the judgment.

The following is the by-law of defendant relating to officers and compensation: "The officers shall be a president, vice president, secretary, general manager, and superintendent and treasurer; which officers shall be elected by and hold office at the pleasure of the board of directors. The compensation and tenure of office of all the officers of the corporation (other than directors) shall be fixed and determined by the board of directors." L. B. Doe was a director and general manager of said corporation, and received a salary of $100 per month. The minutes of the board of directors show his election and that his salary was fixed at $100 a month. The minutes of August 12, 1901, show that James B. Hamilton was elected superintendent, and his salary fixed at $125 a month. Hamilton resigned February 26, 1902, and the minutes show no further appointment of superintendent, and no further fixing of superintendent's salary. The actual employment of plaintiff was made by the general manager, Doe, February 1, 1902. He testified that all the compensation he promised plaintiff was that he would turn over to him the $100 a month salary he was receiving, and that plaintiff was to take Doe's place in looking after the mine of the company and be his substitute during the time he (Doe) should be absent, and that no other or different compensation was ever mentioned between them until plaintiff had quit the mines in October, 1902, and was demanding the payment of his salary of $250 a month from the company, when Doe thinks he may have asked plaintiff to put in his bill for the amount to the company, $250 a month. Plaintiff testified that Doe promised him when he employed him that his salary should be $200 a month and $50 a month for his expenses. And, were the action against Doe to recover the amount of $250 a month, we think the plaintiff sufficiently corroborated to entitle him to recover from Doe. The plaintiff did act as the superintendent at the mines after Hamilton resigned, directed the mining work at the mines, employed men, kept their accounts for labor, and drew checks for their payment, signing his name as superintendent, which checks were paid, and made weekly and monthly reports to the board of directors, signing the reports for February, "L. B. Doe, by Chas. H. Colpe, Superintendent," and after that signing all reports as superintendent, omitting the name Doe "because I asked Doe, when employed, if he had a meeting of the board of directors to appoint me as superintendent, and he said, 'No'; and I said: 'If you will appoint me, will it be sufficient?' He said, 'Yes,' and that I had better sign reports in my name, 'L. B. Doe, per C. H. Colpe, Superintendent,' till I get directors together. After these reports went in so signed I called Doe up on telephone and asked him if everything had been attended to, and that Doe answered that everything had been arranged satisfactorily, as they understood I was superintendent and to go ahead." Thereafter these reports were signed, "Chas. H. Colpe, Superintendent," and were sent to Mr. Benton, the secretary of the corporation, were received, and acted upon by the board of directors. None of these weekly or monthly reports made any mention of the plaintiff's salary, and plaintiff testified that he never mentioned his salary to any of the directors but Mr. Doe until after he quit the mines in October, though he met other members of the board at different times during the time he was employed. President Tatum visited the mines and remained with him a week at one time, and the plaintiff visited the defendant's office in San Francisco several times and conversed with Mr. Benton, the secretary, concerning the business and work at the mines, and corresponded with the president and secretary, but the subject of his salary was never mentioned. The members of the board knew plaintiff was working for the company as its superintendent, but claim they understood he was merely substituting for Mr. Doe and that his compensation was what Mr. Doe was to receive, to wit: $100 a month. Plaintiff tendered his resignation on August 20, 1902, as superintendent, which was not accepted at that time, and plaintiff remained at the mines in the capacity of superintendent until the month of October.

It is claimed that plaintiff became a stockholder in the corporation, but this does not clearly appear. The questions to be determined, are: Did Doe have power to employ a superintendent and to fix his compensation? If not, then were the services rendered by the plaintiff, and the information the board was furnished and had, sufficient to amount to a ratification so as to bind the defendant? The plaintiff sues for compensation as superintendent, and if he was superintendent then he was one of the officers provided for by the by-laws, and as has been seen by a reference to said by-law there is but one way of selecting a superintendent and fixing his compensation, and this must be done by the board of directors. Mr. Doe, being the general manager, had power, as the title of his office indicates, to hire laborers and fix their compensation, and do all things incident to the carrying on of the work at the mines and the corporation would be bound thereby. Crowley v. Genesse M. Co., 55 Cal. 273, and cases there cited. But no power was vested in Doe as general manager to appoint a superintendent or fix his compensation. It is a well-settled rule that with regard to the appointment of agents and the making of contracts private corporations are upon exactly the same footing as natural persons, unless such corporation is limited by its charter or by-laws to some particular method to be pursued. Carey v. P. & C. Petroleum Co., 33 Cal. 694. And, if there is a provision of charter or a by-law requiring the powers of a board to be exercised in some particular way, then the thing must be done in that way, and all persons dealing with such corporation must know what the limitation of power is. "But when the charter of a corporation provides that certain officers may be elected and their salaries fixed by a board of directors, and a president is thus elected, but without salary being named, the law raises an assumpsit on the part of the corporation to pay a reasonable compensation for his services rendered after election." 1 Beach on Private Corporations, 209. But here there was no election of plaintiff by the board, and he does not sue in assumpsit, but on a contract. If the plaintiff had the right to recover in the action, he must have such right under the idea that the acts of Doe in appointing him superintendent and fixing his salary at $250 a month has been ratified by the board, for it is evident he did not receive his appointment by the board, nor was his salary fixed by the board. The rule laid down in Gribble v. Columbus Brewing Company, 100 Cal. 71, 34 Pac. 529, is "that which a principal may authorize an agent to perform he may ratify when performed by the latter without authority, and the same rule applies to a corporation, where, with full knowledge of all the facts involved, a principal reaps the fruits of an unauthorized contract of his agent, and for some time yields acquiescence to its provision, he will be deemed to have ratified it, and will be estopped, as against one who has fully performed the contract, from repudiating it to the injury of the latter. And this doctrine applies to corporations equally with individuals." The Civil Code provides:

"Sec. 1589. A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

"Sec. 2310. A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof."

There can be no doubt but the board had full knowledge and all the knowledge upon the subject that plaintiff was acting as superintendent of the mines and that he had been appointed by Doe, and with this knowledge they acted upon the reports and treated him as the superintendent, and thereby ratified his appointment, and would, of course, be liable to him for some compensation. It could not be for the compensation promised by Doe, because such knowledge never came to the board. Doe informed the board that he was going away, and that he had put plaintiff in his place and would draw his (Doe's) salary, and to this Doe says the board agreed, and upon this the board seems to have acted all the way through, and therefore never spoke to plaintiff about his compensation; it being a matter about which the corporation would not be concerned, as he was to have the $100 a month the board had fixed as Doe's salary. The board was not in possession of all the facts as to plaintiff's salary; that body having been informed plaintiff was to have Doe's $100 a month. That Doe had gone to New York and to Mexico, plaintiff was in charge of the work at the mines, making weekly and monthly reports, and never including in any of such reports any claim for or mention of compensation from the corporation, would be sufficient to confirm what Doe had told them. It cannot be said, therefore, that there was any kind of ratification by the board or any of its members of the contract for $250 a month salary. It is true the board might have gained the knowledge that plaintiff was claiming compensation at the rate of $250 a month, had they inquired of the plaintiff; but under the circumstances detailed, that Doe informed the board that plaintiff was to take his salary as his compensation, and that at no time, from the time plaintiff went to the mines in January until he quit in October, did he lay any claim to compensation from the defendant, would excuse the board from making such inquiry. Had plaintiff sued for the reasonable value of his services, he might have been entitled to recover, probably the amount the board had fixed as superintendent's salary, to wit, $125 per month. But the defendant has never fixed the superintendent's salary at $250 a month, and has done no act whatever to ratify the action of the general manager in fixing the salary.

It is claimed by respondent that the provisions of section 2311, Civ. Code, must prevail here, and that if the defendant ratified the contract of employment as superintendent then it also ratified the contract as to amount of compensation. Section 2311: "Ratification of part of an indivisible transaction is a ratification of the whole." Under the peculiar facts shown in this case we do not think this rule can apply here. There is, therefore, no evidence to support that part of finding 2, which finds that the defendant employed plaintiff at the agreed compensation of $250 a month, and there is no evidence to support the part of finding No. 9, which finds that defendant is indebted to plaintiff in the sum of $1,995.19 for salary as superintendent.

Judgment reversed, and cause remanded for a new trial.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

On Rehearing.

BUCKLES, J. This is a petition for rehearing, and petitioner cites Kelly v. Ning Yung Ben. Ass'n, 84 Pac. 321. Upon carefully considering the petition and the points referred to in said case, we find the case cited not applicable. The rehearing is denied.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

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2 Cal. App. 479

HEINRICH v. HEINRICH.

(Court of Appeal, Third District, California. Dec. 14, 1905. Rehearing Denied by Supreme Court Feb. 12, 1906.)

1. TRIAL—FINDINGS—SUFFICIENCY.

A finding that all of the allegations in a particular paragraph or pleading are true or untrue is sufficient.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 929.]

2. TRUSTS—FRAUD.

Under Civ. Code, § 2224, providing that one who gains a thing by fraud, undue influence, or other wrongful act is, unless he has a better right thereto, a trustee of the thing gained, a husband who obtained his wife's money by fraud and with it purchased land was her trustee.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 145.]

3. SAME—PAYMENT OF CONSIDERATION.

Under Civ. Code, § 853, declaring a trust in favor of a person paying the consideration for a conveyance to another, a husband procuring land with his wife's money is a trustee for her benefit.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 116.]

4. SAME—CONFIDENTIAL RELATIONS—HUSBAND AND WIFE.

Under Civ. Code, § 158, providing that transactions between husband and wife are subject to the rules relating to persons occupying confidential relations, and section 2219, providing that a person in a relation of personal confidence is a trustee as to any person over whose affairs, by reason of such confidence, he obtains any control, a husband is his wife's trustee as to property obtained by him by reason of the relation.

5. SAME — ESTABLISHMENT — RESTORATION OF MONEY RECEIVED BY BENEFICIARY.

Where, on a compromise between a husband and wife, procured by the efforts of him and his attorney, he paid her a certain sum, she need not tender a return of such sum as a condition precedent to maintaining an action to enforce a trust as to property and money still held by him, which belongs to her, as well as the amount previously paid.

6. COMPROMISE AND SETTLEMENT—FRAUD.

A wife, induced, by the false representations of her husband and the advice of his attorney, to accept a certain sum in settlement, is not barred thereby from enforcing a trust as to the property still retained by him.

7. WITNESSES—EXAMINATION—LEADING QUESTION.

A leading question is properly excluded.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 837-851.]

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by Lucinda Heinrich against Carl A. Heinrich. James Astil, executor, substituted as plaintiff. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Harding & Sargent, for appellant. John M. Fulweiler, for respondent.

McLAUGHLIN, J. This is an action to enforce a trust. The pleadings and findings are so voluminous that it is impossible to insert more than a brief statement of the vital facts in this opinion. The parties to the action were married in Iowa, November 28, 1902. The defendant represented that he owned a farm in California worth $21,000, and through such representations and expressions of affection for plaintiff he induced her to marry him and come to California to live on his farm. They reached Santa Rosa early in December, 1902. Shortly after their arrival she discovered that his father owned the land, which is the principal bone of contention here. He, however, told her that his parents would sell it to him for $15,000 if $300 was paid upon the purchase price. She gave him a draft for $650 with which to make his payment; he agreeing to return the balance to her. On December 12, 1902, his parents conveyed the land to him for a stated consideration of $15,000. This recital was false, and was inserted in the deed to enable him to cheat and defraud his wife. At the time the deed was executed he paid $300 on the purchase price, gave his father a mortgage for $3,200, and assumed a mortgage for $1,000, held by Mrs. Somers. The sum total of $4,500 thus represented was the real consideration for the deed. Instead of returning the balance of the money to his wife, he abused her for asking for it, and shortly thereafter indulged in such brutal and abusive conduct toward her that she was compelled to leave him and return to Iowa. In a short time he followed her and by fair promises and false representations induced her to sell her Iowa property for $7,000 and return with him to California. They arrived in Sacramento June 1, 1903, and within one month thereafter, by falsehood, protestations of affection, and fraudulent representations, he had succeeded in obtaining all of her money, amounting to $6,985, under a promise that he would pay off the mortgages on the land, make her a deed conveying one-half thereof, and return the balance of the money to her. He at all times assured her that the land was worth $15,000 and that this sum was the actual purchase price paid. He paid the sum of $4,200 to the mortgagees above mentioned, but met her request for a deed and the return of the money with defiance and abuse. The balance of the money amounting to $2,785 was deposited in a bank in his name. He used a portion of this balance to pay for certain personal property, and was careful to see that she did not visit neighbors nor acquire personal knowledge of the character or value of the land. After procuring her money and refusing to fulfill his promises, he treated her so shamefully that she was compelled to leave him on August 4, 1903. Two days later she went to him and requested that he execute and deliver to her a deed conveying one-half of the land, which had been prepared by her attorney, but he refused to do so, and immediately sent for his attorney. By reason of suffering and mental anguish, resulting from the cruel treatment above mentioned, the plaintiff was distracted and in a nervous mental condition, entirely unfitting her to form any judgment as to the statements and representations of the defendant and his attorney, and that evening, through false and fraudulent representations, and the advice of his attorney, she was prevailed upon to accept $500 and a deed conveying a segregated one-half of the land in full settlement of all transactions between herself and husband. She was also induced to sign an agreement of separation, waiving alimony. The land thus deeded was worth $1,500, and from this it will be seen that under the so-called settlement she was to receive about $2,000 in money and property in return for $7,635 which her husband had fraudulently obtained from her during eight months of married life. At the settlement mentioned she was not represented or advised by her attorney, and her husband's conduct clearly shows that he did not intend that she should have independent advice or aid. It further appears that other money belonging to her was used to defray household expenses and the cost of the honeymoon trip. On November 28, 1902, the unfortunate plaintiff had $1,000 in an Iowa bank and owned property worth $7,000. Eight months later, after receiving many brutal beatings from the husband, who had stripped her of her property, she was again compelled to leave him. He never allowed her to go to the land but once, and then she was permitted to remain there but a few hours. The facts above recited were gleaned from the findings, which disclose, in detail, a perfidious and unconscionable fraud perpetrated by a designing and unscrupulous man, who used the most sacred of human relations as a means to the end he had in view. The court below rendered judgment decreeing that plaintiff was the owner of the real and personal property purchased with her money, and directing that the defendant, or in case of his refusal, the clerk of the court for him, execute and deliver a deed and bill of sale to plaintiff. It was also decreed that the instruments executed by plaintiff at the above-mentioned settlement were fraudulent and void. From this judgment plaintiff appeals. An appeal was also taken from the order denying defendant's motion for a new trial, but such appeal is not supported by the necessary bond, and hence it must be dismissed.

The first contention of appellant is that the court failed to find on all of the issues of fact. In this connection it is said that a finding that all of the allegations in a particular paragraph or pleading are true or untrue is insufficient. A long line of authorities sustain the opposite view, and we have neither the inclination nor the right to disturb a rule so firmly established. Gale v. Bradbury, 116 Cal. 40, 47 Pac. 778; Williams v. Hall, 79 Cal. 606, 21 Pac. 965. The findings cover all the material issues, and hence this contention cannot be sustained.

It is next contended that the findings do not support the judgment. The argument on this point is based on the theory that the facts found do not establish the existence of a resulting or constructive trust, and that in any event plaintiff should have restored or offered to restore the deed and money received by her before this action was commenced. We do not think this theory can find support in law or logic. "One who gains a thing by fraud, accident, mistake, or undue influence, the violation of a trust or other wrongful act is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." Civ Code, § 2224; Pomeroy, Eq. Jur. §§ 1053, 1055, 1056; Crosby v. Clark, 132 Cal. 5, 63 Pac. 1022. When the defendant fraudulently obtained his wife's money and applied it to the purchase of the property in dispute, a trust resulted in her favor. She at once became the equitable owner of the property, and he held the legal title as an involuntary trustee for her benefit. As he obtained an unconscionable advantage, the law creates a presumption of undue influence, and this, in conjunction with his fraudulent and wrongful acts, brings this case squarely within the wholesome rule of equity embodied in the above-cited section of the Civil Code. Farmers', etc., Bank v. De Shorb, 137 Cal. 693, 70 Pac. 771; White v. Warren, 120 Cal. 323, 49 Pac. 129, 52 Pac. 723; Brison v. Brison, 90 Cal. 336, 27 Pac. 186; Pomeroy, Eq. Jur. §§ 1052, 1053, 1040; Civ. Code, § 158. There is another rule which constitutes the defendant a trustee holding title to the real property for the benefit of his wife. "When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made." Riley v. Martinelli, 97 Cal. 575, 32 Pac. 579, 21 L. R. A. 33, 33 Am. St. Rep. 209; White v. Costigan, 138 Cal. 569, 72 Pac. 178; Civ. Code, § 853; Pomeroy, Eq. Jur. §§ 1031, 1037, 1040, 1043, 1044, 1058.

Aside from any question of fraud, there is still another rule which operates to hold the defendant a trustee. Whenever a husband purchases property with money belonging to the separate estate of his wife, equity regards such purchase as made in trust for the wife. The defendant stood in a fiduciary relation toward his wife, and the law will not permit him to take advantage of such relation for his own benefit and to her detriment. Civ. Code, §§ 2219, 158; Pomeroy, Eq. Jur. §§ 1049, 370; Brison v. Brison, 90 Cal. 336, 27 Pac. 186; Dolliver v. Dolliver, 94 Cal. 648, 30 Pac. 4; Odell v. Moss, 130 Cal. 357, 62 Pac. 555. It is said that she was his senior and should have known better than to trust him after her confidence had once been abused. But, if she was too credulous, that fact cannot weigh against her under the circumstances shown here. Dow v. Swain, 125 Cal. 683, 58 Pac. 271. If the wisdom of the rules which make him a trustee needs vindication, such vindication is supplied in full measure by the record before us. That record bristles with evidence showing how much a good woman will suffer at the hands of a man who has won her affection and hand. It demonstrates how affection and fear combine to make her subservient to her husband's will. He had blackened her eyes, pulled out her hair, slapped her face, and kicked her time after time. He had lied to and deceived her from the beginning. His promises were made only to be broken, and his general conduct was unmanly and contemptible. Yet when she stood before him, after he had robbed her of her property and happiness, and immediately after he had refused the poor return he had promised, he was able to persuade her to wait on him until 6 in the evening, and made use of the time to get his lawyer on the scene. Even then, distracted though she was through his cruelty, she believed his statements and acted as he desired. The record in its every line shows how she trusted him, and, no matter what her age or his, the law will hold him to the trust, and courts of equity will rigidly enforce the rule which prevents persons standing in a fiduciary relation from retaining property purchased with funds of the cestui que trust.

We cannot understand the theory upon which appellant bases his contention that restoration or an offer to restore the deed and money received at their last meeting was indispensible to her right to the relief here sought. All of the land was purchased with her money and he had in his hands at least $1,700 which also belonged to her. He could not fulfill his trust, nor satisfy the demands of equity by giving her a part when she was entitled to all. The land deeded was hers as a matter of right, and the record abundantly shows that the money he paid her was likewise hers. Viewing this as an action for cancellation or rescission, she was not compelled to restore or offer to restore that which in equity and good conscience belonged to her, and to which the defendant had no right. "One who rescinds a transaction on the ground of fraud is not required to restore that which in any event he would be entitled to retain." Richards v. Fraser, 122 Cal. 461, 55 Pac. 246. All she ever received from him in return for her confidence and money was billingsgate and blows, and she certainly was not compelled to restore a portion of her property to his possession before she could bring suit for the recovery of the rest of it. But "rescission is only one of the remedies in cases of fraud, and in cases where real or personal property is thus obtained the most common and familiar relief granted by a court of equity is to convert the party guilty of the fraud into a trustee." More v. More, 133 Cal. 493, 65 Pac. 1044; Pomeroy, Eq. Jur. §§ 369, 375, 1058, 1080. And the relief granted by the court, namely, a reconveyance of the property, was appropriate to the case and was justified by the facts found. More v. More, supra. The facts found show his influence over her, and this finding of undue influence is emphasized by the confidential relation existing between them. He was in law a trustee for her benefit, and the transaction termed a "settlement" amounted to nothing under the circumstances. "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into without sufficient consideration and under undue influence." Civ. Code, § 2235. This presumption accords with the facts found, which show conclusively that the outraged wife received no consideration whatever for the surrender of her legal right to all of the property. His condescension in the premises was on a par with the effrontery manifested by him from the time he met her until they parted forever. Nor is she barred from the relief here sought by any act of hers at that last meeting. She was not given full information touching the facts, and did not act with full knowledge of her legal rights. Instead of stating the facts, he continued to misstate them. In lieu of information as to her legal rights, she was told that she would not fare as well if she sought relief in the courts. Under these circumstances the alleged settlement did not amount to acquiescence or a waiver of her rights. Pomeroy, Eq. Jur. § 1083.

Waiving respondent's objection to the consideration of the statement on motion for a new trial, the evidence is ample to sustain the findings. There was no error in sustaining the objection to the question asked the witness Trippett. The question was clearly leading, and the objection was as clearly based on that ground. We find no error in the record.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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2 Cal. App. 445

PEOPLE'S HOME SAVINGS BANK v. RAUER.

(Court of Appeal, First District, California. Dec. 13, 1905. On Rehearing, Jan. 10, 1906. Rehearing Denied by Supreme Court Feb. 8, 1906.)

1. CORPORATIONS—UNPAID STOCK—LIABILITY OF TRANSFEREE.

A suit by a corporation to recover under a call the unpaid portion of the subscription price of its stock may be maintained against either the original shareholder or his transferee, who has the same placed in his name as owner on the corporation books, though he holds the same as collateral for money loaned to the original owner, notwithstanding Civ. Code, § 322, providing that stock held as collateral does not make the holder a stockholder within the meaning of the section which relates to the liability of stockholders; such section dealing only with the statutory liability of stockholders for their proportion of the corporate debts.

2. BANKS — STOCKHOLDERS—ACTION FOR UNPAID STOCK—VALIDITY.

The directors of an insolvent bank may, as against the objections of the stockholders, issue a call for the unpaid portion of the capital stock, though the bank commissioners created by St. 1895, p. 175, c. 167, had directed the levy of an assessment by the directors under Civ. Code, § 332, authorizing assessments by directors of a corporation for paying debts, etc., the statute of 1895 merely giving the bank commissioners the power to direct a speedy settlement of the affairs of the bank, but not interfering with the right of the directors to convert the assets of the bank into cash; and hence, if the bank commissioners acquiesce in the method adopted, no one can complain.

3. CORPORATIONS—CALL FOR UNPAID STOCK—NOTICE—SERVICE.

A notice for a call for the unpaid portion of the capital stock of a corporation was mailed to the stockholders on the day on which, as provided by the resolution of the directors, proceedings might be brought to enforce payment. The notice was duly published, and was served by mail long before any action against a delinquent stockholder was brought. *Held*, that the service of the notice was sufficient; the resolution not providing when notice should be served by mail.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 376.]

4. ATTORNEY AND CLIENT—AUTHORITY OF ATTORNEY—PRESUMPTIONS.

The directors of a bank adopted a resolution for a call for the unpaid portion of its capital stock, which provided that on default in payment the attorney for the bank might take such action to enforce the collection as he might deem necessary. A suit for collection was brought by a licensed attorney. *Held*, that the court, in the absence of a showing to the contrary, would presume that the attorney was authorized to bring the suit, rendering the question of the validity of the resolution authorizing the attorney to enforce collection immaterial.

On Rehearing.

5. APPEAL—APPEAL FROM ORDER DENYING NEW TRIAL—QUESTIONS REVIEWABLE.

On an appeal from an order denying a motion for a new trial, the point that the findings do not support the judgment cannot be considered; that question being reviewable only on an appeal from the judgment.

Appeal of Superior Court, City and County of San Francisco; George H. Bahrs, Judge.

Action by the People's Home Savings Bank against J. J. Rauer. From a judgment for plaintiff, defendant appeals. Affirmed.

Fisher Ames, for appellant. Stratton & Kaufman, for respondent.

HALL, J. This is an action to recover the unpaid portion of the subscription price of stock in the plaintiff corporation. Plaintiff recovered judgment in the trial court, and this appeal is from the order denying defendant's motion for a new trial, and comes here upon a statement of the case and the judgment roll.

It appears by the statement that plaintiff was a savings and loan corporation from the year 1888 to the 20th day of January, 1895, when it went into liquidation, in accordance with the provisions of the act entitled: "An Act creating a Board of Bank Commissioners, and prescribing their duties and powers." St. 1895, p. 172, c. 167. On the 3d day of January, 1895, two certificates aggregating 24 shares of the capital stock of the corporation were surrendered, and 24 shares were issued to defendant in his name and receipted for by him, and his name was entered in the stock transfer book, stock journal, and stock ledger. The receipt signed by Rauer was on the stub from which the certificate was detached, which showed that the stock was one-third paid up, and the receipt recited that the certificate was received subject to the articles of incorporation and by-laws of the company. As a matter of fact, however, Rauer took the stock as collateral security for money loaned to one of the former owners thereof, but this does not in any way appear upon the books of the corporation. The plaintiff was insolvent, and the entire amount of the unpaid portion of the subscription price of its stock was not sufficient to pay its liabilities. On August 28, 1895, the bank commissioners, by resolution, ordered the board of directors to levy an assessment for the full amount of the unpaid capital stock, but, instead of levying such assessment, the board of directors issued a call for the unpaid portion of capital stock. This call was duly published, and notice given by mail to each stockholder.

Appellant discusses the case in his brief as though it were an action to enforce a stockholder's statutory liability under section 322 of the Civil Code, which it is not, and the cases cited under this head have no application to the case at bar. This is a suit by the corporation to recover, under a call, the unpaid portion of the subscription price of its stock. Such a suit may be maintained by the corporation against either the original shareholder or his transferee. People's Home Savings Bank v. Sadler (Cal. App.) 81 Pac. 1029. It is urged, however, that this suit will not lie because defendant in fact held the stock as collateral security only, and again, defendant relies on section 322, Civ. Code, quoting that portion of the section which says: "Stock held as collateral security or by a trustee, or in any other representative capacity, does not make the holder thereof a stockholder," but omitting the words which immediately follow in the same sentence, to wit, "within the meaning of this section." An examination of this section discloses that it deals entirely with the statutory liability of stockholders for their proportion of the corporate debts, and has nothing to do with their liability for the unpaid portion of the capital stock. The true rule as to the liability of stockholders for the unpaid portion of its capital stock is laid down in Baines v. Babcock, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158, where it is said: "It seems to be well settled that one to whom stock is issued by the corporation, and who has the same placed in his name on the corporation books as the owner, is liable to the creditors of the corporation as though he were the absolute owner, and this whether he was in fact a pledgee, agent, or trustee for the real owner." To the same effect see Bank v. Case, 99 U. S. 631, 25 L. Ed. 448; Cook on Stockholders, §§ 247–253; Thompson on Stockholders, § 223; Thompson v. Bank, 19 Nev. 103, 7 Pac. 68, and note to same case in 3 Am. St. Rep. 865; Herrick v. Wardwell (Ohio) 50 N. E. 903; Cutting v. Damerel, 23 Hun, 339; and Pauly v. State Loan & Trust Co., 165 U. S. 606, 17 Sup. Ct. 465, 41 L. Ed. 844, although in this latter case it was held that, where the certificate on its face showed that the holder was a pledgee, he could not be held under a provision of the United States revised statutes in relation to national banks. This last case, however, completely sustains the rule that one who appears on the books to be the owner of the stock is liable, though he may in fact be a pledgee or trustee only as between himself and the real owner.

It is also insisted that the action of the board of directors in issuing a "call" for the unpaid portion of the capital stock was void, because the bank commissioners directed an "assessment" to be levied by them under section 332, Civ. Code. It seems to be the theory of appellant that the board of directors, acting as trustees in liquidation, under the provisions of the "Act creating a Board of Bank Commissioners, etc." could only do such acts as they are expressly directed to do by the bank commissioners. We do not so read the law. Under the provisions of the act referred to (St. Cal. 1895, p. 175, c. 167), upon a bank being ordered into involuntary liquidation the board of directors become trustees for the creditors and all persons in interest. Argues v. Union Savings Bank of San Jose, 133 Cal. 139, 65 Pac. 307; Bank of National City v. Johnston, 133 Cal. 185, 65 Pac. 383. As such their most important duty is to promptly take steps to collect the debts due the bank, and to realize upon its assets, to the end that the creditors shall be paid and the affairs of the insolvent concern wound up without unnecessary delay. The unpaid portion of the capital stock of a corporation constitutes an important part of its assets, and is a fund to which creditors may look for the payment of their claims. While the act creating the board of bank commissioners gives such board a general power of direction and visitation over the board of directors acting as trustees in liquidation, the board of directors is the body that in fact must collect the assets and pay the debts of the bank. Thus the act, after providing for the removal and election of directors in certain cases, provides that: "Subject to this right of removal and appointment the directors or trustees of all banking corporations in liquidation shall be permitted to continue the management of the affairs of such corporation during the process of liquidation, under the direction of the bank commissioners, as hereinafter provided." The subsequent provisions of the act clearly indicate that the trustees may proceed with the liquidation, doing all acts necessary of their own motion, but subject to control by the board of bank commissioners; the power given to the bank commissioners evidently being to insure a speedy and economical settlement of the affairs of the bank. The directors as trustees surely may convert the assets of the bank into cash without waiting for a specific direction as to each asset. No different rule applies to the unpaid portion of the capital stock. Under this view of the powers of the trustees, there was no necessity for any direct authorization from the bank commissioners to enable the trustees to proceed to collect the unpaid portion of the capital stock. The pleader in this case might have omitted any allegation as to the order by the bank commissioners to levy an assessment. The validity of the call does not rest upon the order for the assessment. The purpose of the order by the bank commissioners was to cause the collection of the unpaid portion of the capital stock. If they chose to acquiesce in the method adopted by the trustees, no one else can complain.

It is also objected that the notice mailed to the stockholders was not mailed until the day upon which it was provided by the resolution of the trustees that proceedings might be brought to enforce payment. The notice was, however, duly published, and was served by mail long before any action was brought. The resolution did not provide when notice should be served by mail. And in this respect, the notice, being given long before suit was brought, was sufficient. 2 Beach on Corp. § 57.

It is also urged that the board of directors exceeded their powers, in this, that in the resolution for the "call" it was provided that on default in payment the attorney for the bank was authorized to take such action as may be by him deemed necessary to enforce the collection of the amount due from each stockholder. It is sufficient answer to this to say that this suit was brought by duly licensed attorneys. We must presume, in the absence of a showing to the contrary, that they were duly authorized to bring this suit. If, as contended for, the authorization in the resolution was void as being a delegation of power by the trustees, the board may have subsequently directed this particular suit to be brought by these particular attorneys.

It is also urged that the transfer of stock to defendant is void, and therefore he is not a stockholder, for the reason that the transfer was made while the bank was in liquidation. Upon this point there seems to be some confusion in the record, but the settled statement on the motion for new trial shows that the bank went into liquidation January 20, 1895, while the stock was transferred to defendant January 3, 1895. Taking the statement as correct—and we are bound by it, we think, in considering an appeal from an order denying a motion for a new trial—the question presented by apppellant does not arise on the record.

The order is affirmed.

We concur: HARRISON, P. J.; COOPER, J.

On Rehearing.

HALL, J. Appellant, in his petition for a rehearing, asks us to determine a point not passed on in the opinion heretofore filed in this case, viz., as to the validity of a transfer of stock made after the banking corporation went into insolvency. The findings of the court show that the corporation went into insolvency May 1, 1894, and that the transfer of stock took place January 3, 1895. Appellant contends that under these facts the transfer of stock was void. If he be correct in this latter contention, defendant did not in any sense become a stockholder of the corporation plaintiff, and the result is that the findings in this case do not support the judgment. Indeed, in appellant's petition for a rehearing he so contends. We quote his language: "He [appellant] in effect contends that the judgment is not sustained by the findings. Surely a statement on motion for a new trial cannot be made to take the place of the court's findings for the purpose of sustaining the judgment that is otherwise unsupported by the findings." In thus stating his contention counsel has overlooked the rule that on an appeal from an order denying a motion for a new trial the point that the findings do not support the judgment cannot be considered. Such a point must be presented by an appeal from the judgment. This is the rule laid down in Thompson v. Los Angeles Co., 125 Cal. 270, 57 Pac. 1015, cited by appellant, and in Re Westerfield, 96 Cal. 113, 30 Pac. 1104; Wheeler v. Bolton, 92 Cal. 159, 28 Pac. 558; Brison v. Brison, 90 Cal. 323, 27 Pac. 186, and other cases. The appeal in this case is from an order denying the motion for a new trial, and is not an appeal from the judgment.

Petition for rehearing is denied.

We concur: HARRISON, P. J.; COOPER, J.

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2 Cal. App. 421

DANIELS v. DEAN et al.

(Court of Appeal, First District, California. Dec. 12, 1905.)

1. Limitation of Actions—Recovery of Real Property.

Where plaintiff, acting under erroneous legal advice, and believing that she was not entitled to hold certain real estate belonging to her deceased husband, as her homestead, relinquished all homestead rights therein on October 15, 1885, in consideration of a sum of money paid to her by the executors of her husband's estate, a subsequent suit brought by her in February, 1902, nearly 19 years after the death of her husband, to set aside such surrender of her homestead and certain subsequent deeds to the property, and have her homestead rights therein declared, was an action to recover real property, and was barred by Code Civ. Proc. § 318, providing that such an action cannot be maintained, unless plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property within five years prior to the commencement of the action.

2. Homestead—Contract Waiving Right—Cancellation—Mistake of Law.

Where complainant, believing that she was not entitled to a homestead in certain property of her deceased husband, and acting under the advice of her attorneys, executed a written abandonment of all claim to the property in question, in consideration of a payment of money by her husband's executors, when, in fact, on her husband's death, but for such instrument, she would have acquired title to the property in fee, her mistake was one of law which she was not entitled to urge for the purpose of canceling such instrument and recovering the property.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Suit by Mary E. Daniels against Walter E. Dean and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Alfred Fuhrman and John Heenan, for appellant. Page, McCutchen, Harding & Knight, W. J. Gleason, and Carl W. Mueller, for respondents.

COOPER, J. The court sustained a demurrer to the complaint, and judgment was entered for defendants. This appeal is from the judgment for the purpose of reviewing the ruling on the demurrer.

The complaint states in substance as follows: That plaintiff and John Lowth intermarried in February, 1871, and were husband and wife until July, 1883, when John Lowth died. That at the time of the said marriage John Lowth was the owner of the premises described in the complaint, and in April, 1880, while the plaintiff and said John Lowth resided upon the said premises, the said John Lowth made and acknowledged a declaration of homestead thereon, which contained the statement that: "I, John Lowth, * * * do hereby certify and declare that I am married, and that I do now at the time of making this declaration reside with my family on the lot of land and premises" (describing the same). The declaration of homestead was acknowledged and recorded. The plaintiff and said John Lowth continued to reside upon said premises up to the time of his death, and no declaration of abandonment of said homestead was ever made or recorded. John Lowth left a will, which was duly admitted to probate, and executors thereof appointed and qualified. In October, 1885, the said executors, having power under the will to sell real estate, were negotiating with one Costa for the sale to him of certain real estate belonging to the estate of said John Lowth, deceased, which included the premises described in said declaration of homestead. Plaintiff was consulted in regard to said contemplated sale, was represented by McAllister & Bergin, her attorneys, and was by them advised in good faith, and upon such advice she believed, that the real estate described herein was the property of the estate of said John Lowth, deceased. Plaintiff was further advised by her said attorneys, and believed, that she had a right to have a homestead set apart to her out of the estate of said deceased, and accordingly filed her application therefor in September, 1885. In ignorance of her rights, and in ignorance of the fact that the said homestead premises vested in her absolutely upon the death of said John Lowth, and in consideration of the sum of $7,500, she entered into the following stipulation, to wit:

"In the Matter of the Estate of John Lowth, Deceased.

"It is hereby stipulated by the undersigned as follows: That the family allowance payable to Mary E. Lowth, surviving wife of said deceased, under order of said court, be discontinued, and that said Mary E. Lowth relinquish all claim to any further allowance. That from the proceeds of the sale of real estate, or with funds that may come into the hands of the executors of the will of said deceased, the executors pay to said Mary E. Lowth the sum of five thousand dollars in lieu of homestead. That on payment of said sum of $5,000.00 said Mary E. Lowth, ipso facto, relinquishes absolutely and forever, all right to homestead in said estate, whether under alleged declaration of homestead filed for record by said John Lowth in his lifetime and recorded in the county recorder's office of said city and county, and affecting part of property of said estate, situated on the northeast corner of Tyler and Jones street, in said city and county of San Francisco, or under the provisions of the Code of Civil Procedure of the state of California applicable to cases where no homestead has been selected, designated and recorded prior to death. That the petition of said Mary E. Lowth for order setting apart homestead filed herein on the 21st day of September, 1885, be dismissed. That in addition to said sum of $5,000.00 said executors pay to said Mary E. Lowth from the proceeds of the sale of real estate of said estate the further sum of $2,500.00 in full satisfaction and payment of family allowance, due and unpaid under orders of court heretofore made herein. That upon payment of the aggregate sum of $7,500.00 said Mary E. Lowth relinquish all right, title, claim and demand in, to or against said estate or to the income therefrom, and release and discharge the executors of the will of said deceased from all liability to her under said will. That said $7,500.00 to be accepted by her in full discharge of said homestead claim, family allowance, bequests and all other claims and demands in her favor under said will. * * * Dated October 15, 1885.

"This agreement is executed subject to the condition that all parties in interest consent to this agreement and also consent that the $7,500.00 mentioned herein shall be a preferred claim against said estate, and shall be preferred to all other claims. October 15, 1885. Witness: That is all other claims except the mortgages. Mary E. Lowth. Hall McAllister. Bidelia Kennedy. Timothy S. Brew, Executor and Creditor. Thos. Breen, Executor and Creditor. William Wynne, Assignee of William Halpin, Legatee under the Will of John Lowth, Deceased. Charles Castle, Creditor. Halpin Bros., Creditor. Catherine Roche, by her Attorney in Fact, A. H. Loughborough. Teresa McGee, by her Attorney in Fact, A. H. Loughborough. James Croke. M. C. Hassett, Attorney for Absent Heirs."

Plaintiff, in pursuance of the said stipulation, duly made out and acknowledged an abandonment of said homestead, and of her right to have a homestead set apart to her by the probate court, which abandonment was duly recorded. That but for her ignorance, misapprehension, and the advice of her said attorneys she would not have made said agreement, entered into said stipulation, and abandoned the said homestead. That thereafter the said homestead was appraised as part of the estate of said John Lowth, deceased, and was sold with other property by the executor to said Costa in January, 1886, and a deed was duly made and delivered to said Costa and recorded. That in January, 1886, the said Costa executed a deed of conveyance to one Masten, who, in January, 1886, conveyed to one Hopkins, who afterwards, in April, 1889, conveyed through her attorneys in fact to defendant Dean. Each of said conveyances was duly acknowledged and recorded. That in October, 1888, plaintiff intermarried with one William T. Daniels, who died in December, 1897. That in February, 1902, the plaintiff first discovered that said homestead was her property and vested in her absolutely by the death of her husband. The prayer of the complaint is that the stipulation, the order dismissing the plaintiff's petition for a homestead, the abandonment of the homestead, and each deed in the chain of title up to and including the deed to defendant Dean be canceled, annulled, and declared void ab initio, "that it be decreed that plaintiff is the owner of the said land, premises, and homestead, and that defendants and all persons claiming or to claim under them be forever enjoined from asserting or claiming any right, title, interest or estate in, to, or of said land, premises, and homestead of plaintiff, or any part thereof," that an accounting may be had of the rents, issues, and profits, and that plaintiff may have judgment therefor, and for such other relief as may be proper in the premises. The complaint was filed in February, 1902, nearly 19 years after the death of John Lowth, and more than 16 years after plaintiff had signed the stipulation and abandoned her claim to the homestead in consideration of $5,000. No offer is made in the complaint to restore the $5,000 which was paid to plaintiff.

We are of the opinion that the court properly sustained the demurrer to the complaint. One of the grounds of demurrer is that it appears upon the face of the complaint that it is barred by the provisions of section 318 of the Code of Civil Procedure, which provides that no action for the recovery of real property, or for the recovery of the possession thereof, can be maintained unless it appear that plaintiff, his ancestor, predecessor, or grantor was seised or possessed of the property within five years before the commencement of the action. We think the action is one in effect to recover real property. It is a part of the prayer of the complaint that plaintiff be adjudged to be the owner of the homestead, that all deeds and papers tending to show title in others be set aside and declared void, and that plaintiff's title be quieted against all persons. In Goodnow v. Parker, 112 Cal. 437, 44 Pac. 738, it was sought by the action to compel a conveyance and to quiet title. The action was held to be in effect an action to recover real property. The court said: "If the plaintiff had had the legal title to the disputed portion, having been ousted from its possession, he could have recovered the possession in ejectment; but without the legal title his only remedy was in equity, not only to obtain possession, but to recover the property, and these were the objects and purposes of the suit, and that section of the Code which relates to actions for these purposes is the one to which we must look." The question is fully discussed in Murphy v. Crowley, 140 Cal. 145, 73 Pac. 821, where it is said: "Under our system of pleading there is no distinction in the forms of civil action, but it has been held that the distinction between the causes of action still remains for some purposes. Legal and equitable remedies may be sought in the same case where they relate to the same subject-matter. The nature of a cause of action is to be determined more from the object and purposes of the suit than from the character of the evidence which is necessary to maintain it. * * * If the plaintiff alleges facts which show, as matter of law, that he is entitled to possession of the property, and a part of the relief asked is that he be let into possession, or that his title to the land be quieted, the action is in reality for the recovery of real property, and is not barred except by the five-year limitation contained in section 318." The above case was followed and approved in South Tule, etc., Co. v. King, 144 Cal. 450, 77 Pac. 1032. If this action had been in ejectment, there is no question but that it would be barred by the statute. If the court should find for plaintiff that she is the owner of the land, and that all the defendants be forever barred from claiming or asserting any title to it, she could then bring an action in ejectment, and defendant would have no defense. She would thus be allowed to recover through the machinery of two actions that which she could not have been allowed to recover if she had sought all the relief in the one action. Surely the law does not contemplate such result. This action is in effect to settle and determine the question as to whether or not the plaintiff is the owner of the homestead, and is thus for the recovery of real estate, and barred by the statute.

We are further of the opinion that the complaint asks relief for a mere mistake of law without showing any facts which will take it out of the general rule that courts will not grant relief on the simple ground of mistake of law. The plaintiff had not been advised of her right to a probate homestead. She had able attorneys. She knew of the "alleged declaration of homestead filed for record by John Lowth in his lifetime." She does not allege nor show that $5,000 was not the full value of the alleged homestead. There is not an element of fraud, concealment, misrepresentation, undue influence, violation of confidence reposed, or other inequitable conduct alleged in the complaint. The gist of the whole case is that she did not know the law, that the homestead vested in her by the death of her husband. It is one of the fundamental maxims of the common law that ignorance of the law excuses no one. If ignorance of the law could in all cases be the foundation of a suit in equity for relief, there would be no end of litigation, and the administration of justice would become in effect impracticable. There would be but few cases in which one party or the other would not allege it as a ground for exemption from legal liability, and the extent of the legal knowledge of each individual suitor would be the material fact on which judgment would be founded. Instead of trying the facts of the case and applying the law to such facts, the time of the court would be occupied in determining whether or not the parties knew the law at the time the contract was made or the transaction entered into. The administration of justice in the courts is a practical system for the regulation of the transactions of life in the business world. It assumes, and must assume, that all persons of sound and mature mind know the law, otherwise there would be no security in legal rights and no certainty in judicial investigations.

One of the most instructive cases on the question is Stewart v. Stewart et al., 6 Clark & Finnelly, 911, where the opinion was delivered by Lord Chancellor Cottenham, and the English cases fully reviewed. It was held that a widow, who had entered into a compromise agreement by the advice of her law agent, and received her share of the estate under the agreement, could not be relieved of the agreement upon the ground that she was ignorant of her legal rights. It is there said: "The question is whether a compromise and arrangement fairly and honestly entered into, in which the party now complaining acted under the advice of a professional man, who called to his assistance two of the most distinguished counsel of the Scotch bar, is to be set aside because a point was overlooked in that party's case which, if thought of at the time, might have prevented her from agreeing to the terms proposed, as it might have made a very material difference in the relative situation of the parties. * * * All the facts raising the point of law were fully known to all the parties, and the point of law mistaken, or not attended to, was that the pursuer was entitled to repudiate the provisions made for her by her deceased husband, and to claim the jus relictæ; whereas the negotiation of the compromise proceeded upon the supposition that, if the law of Scotland was to prevail, she could only claim the benefit of those provisions." In Gwynn and Wife v. Hamilton's Adm'r, 29 Ala. 233, where the husband, under the erroneous supposition that his marital rights had not attached to certain slaves belonging to his wife, delivered them to the distributees of her estate, the court held that it was a mistake of law, and that equity would grant no relief. In Weed et al. v. Weed, 94 N. Y. 243, it was held that, where a person, with full knowledge of all the facts, but through a mistaken belief that his interest in real estate was not subject to sale on execution, has lost his title through a regular sale on judgment and execution, and a conveyance by the sheriff to the purchaser pursuant to the sale after the time for redemption had expired, the court had no power to permit a redemption, as it was a mere mistake as to legal rights. In Williams v. Thwing Electric Co., 160 Ill. 526, 43 N. E. 595, it was held that a subscription to the capital stock of a corporation cannot be canceled, because the subscriber, through ignorance of law, acted under the mistaken idea that she was purchasing stock of a corporation already organized, instead of participating in the organization of a new corporation. In Meckley's Estate, 20 Pa. 478, it was held that parol evidence was not admissible to show that the parties interested did not understand the will to mean what it had been construed to mean, but that its meaning was that dower was to constitute a part of the purchase money of the farm and not an addition to it, as the matter in dispute was not a matter of fact, but a question of law. The question was considered at an early day by the Supreme Court of the United States in Hunt v. Rousmaniere's Administrators, 1 Pet. 15, 7 L. Ed. 27, and it was there said: "We hold the general rule to be that a mistake of this character [ignorance of law] is not ground for reforming a deed founded on such mistake; and, whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their characters." In Cooley v. County of Calaveras, 121 Cal. 486, 53 Pac. 1077, it is said: "The understanding of the law prevailing at the time of the settlement of a contract, although erroneous, will govern, and the subsequent settlement of a question of law by judicial decision does not create such a mistake of law as courts will rectify."

It may be that the attorneys for plaintiff fully advised her in regard to an alleged defect in the homestead declaration made by John Lowth, and that it was with this in mind that the stipulation was made. The declaration is referred to in the stipulation as an "alleged declaration of homestead." It is seriously urged by respondent that the declaration of homestead is void, because it does not show that John Lowth was the head of a family; and, unless we were to take judicial notice that John is and was the name of the husband, there would seem to be much force in this contention (Reid v. Englehart Davidson Co., 126 Cal. 527, 58 Pac. 1063, 77 Am. St. Rep. 206); and it would seem that we cannot determine the sex from the name alone (People v. Carroll, 81 Pac. 680). However, we do not deem it necessary to decide the question as to the validity of the homestead declaration, and what we have said is only for the purpose of showing that it is probable that plaintiff secured a good compromise of her homestead claim.

The judgment is affirmed.

We concur: HARRISON, P. J.; HALL, J.

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2 Cal. App. 383

In re MYRTLE.

(Court of Appeal, Third District, California. Dec. 9, 1905.)

1. Habeas Corpus—Judgment—Review.

Under Pen. Code, § 1484, providing that the party brought before the court or judge on the return of a writ of habeas corpus may deny or controvert any of the material facts set forth in the return, or except to the sufficiency thereof, or allege any fact to show either that his imprisonment is unlawful, or that he is entitled to his discharge, the writ cannot be invoked to review a judgment, and, while, where a void complaint or information is alleged as the basis of a commitment which of itself seems insufficient, such complaint or information and all the record proceedings on which the commitment depends will be examined for the purpose of determining whether there is any legal ground for holding petitioner, nothing which is a defense can be reviewed.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, § 19½.]

2. Information—Waiver of Objections.

Where an information substantially charged the crime of robbery in the language of the Code defining it, and no objection was made either by demurrer or motion in arrest of judgment, defendant could not, after a plea of guilty and sentence, be heard to say on a writ of habeas corpus that no offense was charged.

3. Robbery—Information—Sufficiency.

Pen. Code, § 211, declares that robbery is the felonious taking of personal property in the possession of another from his person or immediate presence and against his will, accomplished by means of force or fear. Section 959 provides that the information is sufficient, if the offense is clearly and distinctly set forth in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended. Section 960 provides that no indictment is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form, which does not tend to the prejudice of a substantial right of the defendant upon its merits. *Held*, that an information charging that defendant did willfully, unlawfully, and feloniously take, steal, and carry away from the person and immediate presence of one E. certain personal property (describing it), all of which said property was then and there of the aggregate value, etc., and in the possession of E., and was then and there so taken, stolen, and carried away, as aforesaid, from the person and immediate presence of said E. and against the will of said E., was sufficient to establish, when taken with defendant's plea of guilty, a case of robbery as completely as if using the words "then and there the property of said E."

Application by Charles Myrtle for a writ of habeas corpus. Writ denied, and petitioner remanded.

F. N. Thomson, for petitioner. J. D. Fredericks, Dist. Atty., C. C. McComas, Asst. Dist. Atty., and P. J. McCormick, Deputy Dist. Atty., for respondent.

BUCKLES, J. The defendant was arrested upon a warrant charging him with the crime of robbery committed January 18, 1902, upon a complaint, the charging part of which is in the following language: "Did willfully, unlawfully and feloniously take, steal and carry away from the person and immediate presence of one E. F. C. Klokke one twenty-dollar gold coin of the United States, certain silver coins lawful and current money of the United States, of the value of two dollars, one hunting case stem winding gold watch and one gold and platinum link chain with gold locket attached, all of which said property was then and thereof the aggregate value of seventy-five dollars gold coin of the United States and in the possession of E. F. C. Klokke and was then and there so taken, stolen and carried away as aforesaid from the person and immediate presence of said E. F. C. Klokke against the will of said E. F. C. Klokke and which said taking was then and there so accomplished as aforesaid by means of force and fear used upon and against the person of the said E. F. C. Klokke by said Charles Myrtle." The defendant was duly held to answer upon said charge, and thereafter an information was duly filed against him, the charging part of which was exactly the same as that of the complaint before the committing magistrate above set forth. Upon this information the defendant was duly arraigned and pleaded guilty to the charge. He was thereafter, on February 7, 1902, brought before the court and by the court duly and fully informed of the nature of the information against him for the crime of robbery committed January 18, 1902, of his arraignment on said information, and of his plea of guilty, as charged in the information. He was then asked by the court if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none, and, none appearing, the court sentenced him to the state prison at Folsom for life. He now brings this writ, asking this court to discharge him for the following reasons: (1) That the complaint and information are invalid, illegal, null, and void and of no effect for the reason that they do not charge a public offense, or any offense known to the law; (2) that the judgment is void because the court had no jurisdiction over the person, place, and subject-matter; (3) that he was deprived of his liberty without due process of law; (4) that the punishment he is undergoing is cruel and unusual.

When arraigned upon the said information, no demurrer or objection of any kind was interposed to said information, and at no time was there a motion in arrest of judgment, no motion for a new trial and no appeal of any kind taken. The defendant, of course knew, when he pleaded guilty, whether he had "Willfully, unlawfully and feloniously" taken, stolen and carried away from the person and immediate presence of Klokke the goods mentioned in the information, and whether, if he did so take and steal them, the taking was accomplished by means of force and fear, and were we called upon to form any conclusion as to this, which we are not, we have the fact that the defendant suffered a deprivation of liberty for three years before making any move to be released from the state prison, and this contains the significant fact that it required just three years' time for the running of the statute of limitations so that if discharged on the writ he could not be again prosecuted for that robbery. The return to the writ sets forth that the prisoner is detained by the warden of the prison under a commitment of a competent court having power to imprison upon a conviction of a felony, and robbery is a felony. The return also sets forth the complaint on which the committing magistrate acted in causing the defendant's arrest in the first instance, being the foundation also of the commitment held to answer, and this complaint "constitutes the ground work of the whole superstructure thereafter to be built thereon, and draws the lines which circumscribe the limits the prosecution can take." People v. Howard, 111 Cal. 660, 44 Pac. 342. The return also contains a copy of the information on which the petitioner was arraigned and pleaded guilty. As has been seen, the latter charges the same crime and in the same terms as the complaint, and therefore reference need be hereafter made to the information only. If the information does not charge the crime of robbery sufficient under a plea of guilty, neither does the complaint, and then the petitioner would not have been legally held to answer, and could not be legally proceeded against by information. People v. Howard, supra.

Petitioner claims the information fails to allege that the $20, the $2, and the gold watch and chain, or any of them were the property of any one, and therefore, so far as appears from the information, this property may have been the property of petitioner. But I think, under the circumstances in this case, enumerated above, there could hardly arise a suspicion, much less a presumption, that any of such property belonged to petitioner. Section 211 of the Penal Code defines robbery as follows: "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence and against his will, accomplished by means of force or fear." Section 959, Pen. Code, provides that the information is sufficient if the offense is clearly and distinctly set forth in ordinary and concise language and in such a manner as to enable a person of common understanding to know what is intended. The petitioner is presumed to be of sound mind, and therefore of common understanding, and his plea of guilty shows that he did understand that he was charged with the crime of robbery, and, had he looked at section 211, Pen. Code, he would have received no further information. The offense was described in the language of the Code, with the addition of charging that he did, willfully, unlawfully, and feloniously, steal and carry away the property described. It is safe to say that petitioner raised no objection to the information, because he did know and understood that he was charged with committing an offense of which his plea of guilty shows he knew he was guilty. Section 960, Pen. Code, is as follows: "No indictment is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits." It is true that, if an information for robbery must in all cases allege ownership of the property in some one by saying in so many words "the property of ———," then such allegation is matter of substance rather than of form. But it is certain the writ of habeas corpus cannot be invoked to review a judgment. Ex parte Cottrell, 59 Cal. 422. It is true that, where a void complaint or information is alleged as the basis of a commitment which of itself seems insufficient, such complaint or information and all the record proceedings upon which the commitment depends will be examined into for the purpose of determining whether there is any legal ground for holding the petitioner, but that anything which is a defense cannot be reviewed on habeas corpus. Ex parte Bird, 19 Cal. 130; Pen. Code, § 1484. As said in Ex parte McCullough, 35 Cal. 100: "Establish the doctrine that the judgments and orders of courts may be reviewed on habeas corpus, upon the ground of error, and appeals for the correction of errors may be dispensed with in all cases in which the arrest or imprisonment of persons is allowed. Every criminal action, every civil action in which an arrest is given, and every proceeding for a contempt, could be brought to the Supreme Court (or the appellate courts) by writs of habeas corpus. Not only that, but, as already suggested, inferior tribunals would be called upon to review the judgments of superior tribunals, and tribunals of equal grade to interfere and review each other's proceedings. It is well settled that habeas corpus can be put to no such use, and that its functions, where the party who has appealed to its aid is in custody under process, do not extend beyond an inquiry into the jurisdiction of the court by which it was issued, and the validity of the process upon its face." See cases cited. The commitment on its face being free from objection, and no objection being made thereto, the serious questions to be determined is: Did the superior court of Los Angeles county have jurisdiction to make such order of commitment?

In the case of Ex parte Williams, 121 Cal. 328, 53 Pac. 706, the petitioner was charged that "by false and fraudulent promises and representations, did willfully, unlawfully, and fraudulently obtain credit for food and lodging at the boarding house of Peter Gordon in said town, county, and state, to the extent of $48 in value; the said Dr. B. Williams did then and there willfully and unlawfully defraud said Peter Gordon out of such board and lodging to said value of $48." The petitioner was tried and convicted and sentenced, and in his petition for writ alleges that the complaint charges no offense known to the law. The section of the Penal Code (section 537), under which the proceeding was had, reads as follows: "Any person who obtains any food or accommodations at an hotel, inn, restaurant, boarding-house without paying therefor, with intent to defraud the proprietor or manager thereof, or who obtains credit at an hotel, inn, restaurant, boarding-house, or lodging-house by the use of any false pretense, or who, after obtaining credit or accommodation at an hotel, inn, restaurant, boarding-house, or lodging-house absconds or surreptitiously removes his baggage therefrom without paying for his food or accommodations is guilty of a misdemeanor." Petitioner claimed that the complaint was an effort to state an offense solely for the obtaining of credit by the use of false pretenses, and that the allegations were wholly insufficient for that purpose because of the failure to allege what the false pretenses were. In its rulings, the court said: "While the inquiry on habeas corpus may extend to the question whether the complaint or information charges an offense known to the law, since this objection goes to the question of jurisdiction, the proceeding may not be made to subserve the office of a demurrer, and, if the facts alleged squint at a substantive statement of the offense, no matter how defectively or inartificially they may be stated, or however confused and beclouded they may be rendered through intermingling them with immaterial or unnecessary averments, the writ will not lie"—citing cases. And the court further holds that it appears from the complaint, "to a common certainty, that petitioner obtained food and lodging at the boarding house of Peter Gordon, without paying for it and with the intent to defraud Gordon thereof. * * * Because a demurrer might have lain for duplicity, or uncertainty, or some other special ground, will not, as we have seen, avail the petitioner in this proceeding." It will be observed that the court did in that case look into the information and determined that without demurrer it was good. It is doubtless true that a complete description of the crime of robbery includes an allegation of ownership of the property taken, or words which will at once indicate that such property is not the property of the robber, but in our opinion, in a case where the complaint and information charge that the defendant "did willfully, unlawfully and feloniously, steal, take and carry away, from the person and immediate presence of the person robbed certain personal property, describing it, and in the possession of (the person robbed) and was then and there stolen, taken and carried away as aforesaid from the person and immediate presence * * * against the will of the said * * * and which taking was then and there so accomplished as aforesaid by means of force and fear used upon and against the person of said, * * *" substantially describes the crime of robbery in the language of the Code defining it, and, no objection being made by either demurrer or motion in arrest of judgment, the defendant cannot, after sentence, and on a writ of habeas corpus, be heard to say that no offense is charged. Of course it would be otherwise if no attempt had been made to state any of the acts and facts constituting robbery. We are firmly convinced the authorities support this view.

The following cases were cited by petitioner as holding that an information which does not allege ownership fails to state the crime of robbery: People v. Vice, 21 Cal. 345. In that case the indictment charged, "did violently and feloniously, take money (describing it) from the person of another, to wit, from the person of J. A. B. by force, threats, and intimidations and against the will of the said J. A. B." There was no demurrer, but, when the defendant was convicted, he moved in arrest of judgment upon the ground that the indictment did not charge that the property taken was not the property of the defendant, or was the property of any person other than the defendant. The motion was overruled, the defendant sentenced, and appealed. The court held that a failure to state ownership was a fatal defect, and says further: "It is not necessary that the property should belong to the party from whose possession it was forcibly taken. It is requisite, however, that it should belong to some other person than the defendant." It will be borne in mind that the indictment did not allege the stealing, but merely the taking, and that there was an objection to the sufficiency of the indictment. In People v. Webber, 138 Cal. 149, 70 Pac. 1089, the court said: "The Penal Code does not relieve the prosecuting attorney from the necessity of informing the defendant with reasonable certainty of the nature and particulars of the crime charged against him, that he may prepare his defense, and, upon acquittal or conviction, plead his former jeopardy against further prosecution." The defendant was charged with burglarizing a railroad car and train of the S. P. Company as the same was then prosecuting its trip through Solano county, and did not designate the particular car in which the burglary was committed. The defendant had demurred to the information on this ground. The demurrer was overruled, the defendant convicted, and appealed. The court held that it was necessary to give the number of the car, so that defendant might be able to defend against the charge of burglarizing a particular car. People v. Lee, 107 Cal. 477, 40 Pac. 745, was an appeal by the people from an order sustaining defendant's demurrer to the information charging a violation of the election laws. The court says: "Criminal proceedings, it is true, have been much simplified by the Codes, and many offenses may now be charged in the strict language of the statute. Nevertheless, there are certain fundamental principles which have neither been abrogated nor modified. A defendant is still entitled to be apprised with reasonable certainty of the nature and particulars of the crime charged against him, that he may prepare his defense, and, upon acquittal or conviction, plead his jeopardy against further prosecution." People v. Ward, 110 Cal. 369, 42 Pac. 894, is a similar case. But in these cases the court held the demurrer was not well taken, and reversed the judgment of the lower court. In the case at bar the petitioner was informed he had stolen, taken, and carried away from the possession and immediate presence of one Klokke certain gold and silver money, a watch and chain, and that such theft was against the will of Klokke and accomplished through force and fear, and from this the petitioner knew full well, and understood perfectly that he had stolen said property from Klokke in a way that made it robbery, all of which is evidenced by his plea of guilty. Under the circumstances, he could have successfully maintained a plea of once in jeopardy should another prosecution be attempted for the same thing.

Petitioner relies upon the case of People v. Ammerman, 118 Cal. 23, 50 Pac. 15; the opinion having been written by Commissioner Chipman, now a member of this court. The information in that case was as follows: "Did willfully, unlawfully and feloniously take personal property [describing it] from the person and possession of one Richard Johnson, said taking by said Ammerman as aforesaid, being there and then accomplished by means of force." The defendant had pleaded "not guilty," and no demurrer had been interposed. A jury was called and duly impaneled, and duly sworn to try the case, the clerk had read the information and stated the defendant's plea to the jury, when the judge called the district attorney to him and, after a few moments' conference, a recess for a half hour was taken, and when the court again assembled the jury was present, the defendant and his counsel were in court, the statement was then made (presumably by the district attorney): "that the information was wholly defective in that it did not allege the ownership of the property stolen," and the court being satisfied ordered the information dismissed. The district attorney at once commenced a new proceeding, filed a complaint in the justice's court charging defendant with the same taking and alleged therein that the property taken was the property of Richard Johnson, and when the defendant was examined and held to answer thereon the district attorney filed a new information charging the crime of robbery and alleging the ownership of the property as in the complaint. On arraignment the defendant pleaded not guilty and once in jeopardy, a trial was had, he was convicted, and appealed on numerous grounds, among which was his plea of having once been in jeopardy for the same offense. The court says: "Jeopardy attaches where a party is once placed upon trial before a competent court and jury, upon a valid indictment, to which he cannot be again subjected. * * * The information here was not a valid information, and there was no jeopardy." Upon the suggestion being made to the commissioner who wrote the opinion in that case, "That an indictment is sufficient if it describes the offense charged in the language of the statute," he replied: "I do not understand that our court intends to hold that, where a fact must be stated in an information in order to charge an offense, it may be omitted from the information where the statute is silent as to the fact. The ownership of the property in some person other than the accused is deemed to be as essential in making out the crime of robbery as any other element of the offense expressed in the statute, and must be regarded as within the legislative intent in denouncing the crime, and therefore it cannot be said that the information here falls within the rule above stated." The doctrine as thus announced and as applied to that case is correct, for there the information did not charge stealing, but merely alleged "did willfully, unlawfully and feloniously take" the property described. As I understand it, robbery is where a person, either with violence or with threats of injury, and putting the person robbed in fear, takes and carries away a thing which is on the body, or in the immediate presence of the person from whom it is taken, under such circumstances that, in the absence of violence or threats, the act committed would be a theft. In the Ammerman Case the taking of the property might have been for some other purpose, for the language of the information does not intimate that the object was to steal it any more than the mere naming the crime "robbery" might tend to indicate a theft, and there being no allegation of ownership and no words used by which any inference could be drawn of ownership in one other than the defendant, except the mere possession Richard Johnson had of the money taken by Ammerman at the time. We think the decision in that case was correct.

But in the case at bar a very different state of facts exists. The information here charges petitioner with "did steal, take and carry away" and he comes into court and by his plea of guilty says, "Yes, I did steal, take and carry away the coin and watch mentioned in the information, and I did it by force and fear." His declaring he stole this property is, for the purpose of enabling the court to sentence him, equivalent to saying it was not the property of the accused. The ownership of Klokke was not disputed but virtually admitted by the plea of guilty. Repeating, petitioner certainly admits thereby that he is not the owner of the property he took from Klokke, and that is as far as he is interested in the ownership. The information has all the elements of robbery alleged in direct and positive terms, with the one exception of direct ownership, and that petitioner supplied in a negative way; that is, that he was not the owner, by his plea of guilty. In the case of People v. Cleary (Cal. App.) 81 Pac. 753, the information was as follows: "Did willfully, unlawfully, and feloniously take from the person and possession of Peter Cadloni seventy dollars in gold and silver, * * * which said taking as aforesaid * * * was then and there without the consent and will, and was then and there against the will of said Peter Cadloni, and was then and there accomplished by means of force. * * *" The defendant pleaded not guilty, was tried, and convicted, and when brought before the court for sentence moved in arrest of judgment on the ground that the information did not charge that the property taken was not the property of the defendant. The motion was granted, and the people appealed, and the judgment of the lower court was affirmed because there was absolutely nothing to show the $70 taken was not the property of the defendant. We reiterate all that was said in this opinion of People v. Cleary as applied to the facts in that case and in all cases of like character, where there is a plea of not guilty and a motion in arrest of judgment, and we still maintain that in all cases of robbery it must appear either from the language of the information or the plea of the defendant that the property taken is not the property of the defendant. And we repeat the information which states that petitioner "did willfully, unlawfully and feloniously steal, take and carry away," with the other allegations there found, and petitioner's plea of guilty establishes a case of robbery as completely as if the information had used these words, "then and there the property of the said E. F. C. Klokke."

Writ denied, and prisoner remanded.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

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2 Cal. App. 371

SHEEHAN v. HAMMOND.

(Court of Appeal, First District, California. Dec. 9, 1905. Rehearing Denied by Supreme Court Feb. 7, 1906.)

1. New Trial—Grounds—Newspaper Publications.
Where a newspaper article denouncing defendant as a felon, and guilty of subornation of perjury, published during the trial, was not shown to have been read by any of the jurors, and was not called to the court's attention until the termination of the trial, it did not entitle defendant to a new trial.

2. Same—Commitment of Defendant.
Where, after the jury had retired, the court entered an order that the evidence given by a witness was false, that he had been suborned by the defendant, and committed defendant on a charge of subornation of perjury, but neither such commitment nor order was made in the presence or hearing of the jury, and it did not appear that they had knowledge thereof until after the verdict was rendered, and they had been discharged, such order did not entitle defendant to a new trial.

3. Master and Servant—Injuries to Servant—Minor Employés—Defective Appliances—Question for Jury.
Where, in an action for injuries to a minor employé, there was evidence that the polishing wheel at which he was employed, and by which he was injured, was improperly adjusted, and there was evidence that he was not warned of the danger in operating the wheel, the question of defendant's negligence was for the jury.

4. Same—Persons Liable.
Where, in an action for injuries to a servant, it was not denied that defendant was operating a factory in which plaintiff was employed, and that he employed and discharged the servants and operators therein, and he did not attempt to show that he was not one of the owners, or that he was operating the factory for others, he could not escape liability on the ground that he was operating the factory as the executor of the will of a deceased person.

5. Same—Evidence—Previous Similar Occurrences.
In an action for injuries to a servant while operating a polishing wheel, evidence that defendant had never had any trouble of the kind before, and that no one had been previously injured on the wheel, was irrelevant.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Daniel Sheehan against Manton E. Hammond. From a judgment in favor of plaintiff and from an order denying defendant's motion for a new trial, he appeals. Affirmed.

Van Ness & Redman, for appellant. Sullivan & Sullivan, for respondent.

COOPER, J. This action was brought by plaintiff, a minor, aged 13 years, through his guardian ad litem, to recover damages for personal injuries claimed to have resulted from the negligence of defendant in furnishing plaintiff insecure and unsafe appliances with which to perform the work to which he was assigned, and in requiring him to do certain dangerous and hazardous work concerning which he had had no experience or knowledge, without instructing him as to the dangers incident to the work and the dangerous character of the machinery and appliances. The case was tried before a jury, and a verdict rendered for plaintiff in the sum of $1,000. Defendant made a motion for a new trial, which was denied, and this appeal is from the order denying the motion, and from the judgment.

Defendant claims that the judge before whom the trial was proceeding publicly denounced him through certain articles in three leading newspapers of San Francisco, and thus injured him and his defense in the eyes of the jury. The facts that led up to the publication of the articles in the papers may be briefly stated as follows: The plaintiff was employed by defendant to polish telephone boxes by holding them against a rapidly revolving wheel covered with sandpaper. The wheel revolved close to a table, which came up to about the center of the wheel and which was about a quarter to half an inch from the revolving wheel. Plaintiff claimed that he was injured while engaged in his ordinary business of polishing a telephone box. Defendant claimed that as a matter of fact at the time of the injury the plaintiff was not engaged in polishing a telephone box, but was, of his own volition, engaged in sharpening a stick on the wheel, which was dangerous, and that the injury was caused by plaintiff's fingers catching in between the stick and the wheel and being pulled in between the table and the revolving wheel. Defendant introduced evidence tending to show that plaintiff was so engaged in sharpening a stick on the wheel. One witness testified that a few moments before the accident he saw plaintiff holding a stick against the wheel. Two or three other witnesses testified to seeing the stick under the table partly sharpened, and one witness testified to seeing blood upon the stick. Defendant called Walter Fahey, a boy 16 years of age, a companion of plaintiff, who was working for defendant at another table about five feet away from plaintiff, at the time the plaintiff was injured. Fahey testified that plaintiff was attempting to sharpen a stick against the wheel, and that the wheel drew the end of the stick down between it and the table, thereby throwing the other end up against the wheel, and thus catching the plaintiff's hand between the stick and the wheel, causing the injuries to plaintiff. Upon his cross-examination Fahey testified that the evidence given by him in the direct examination was false, and had been given at the solicitation of and under the direction of defendant, that plaintiff did not have a stick in his hand, and was not engaged in sharpening a stick at the time of the injury, but that plaintiff was engaged in his ordinary work polishing a telephone box. This statement of Fahey made in cross-examination was made in the afternoon of February 2d, and seems to have caused some excitement in the courtroom. The next morning, February 3d, before the trial was completed, the San Francisco Call, the Chronicle, and the Examiner each had glaring headlines in regard to the matter, followed by a statement of the reporters' views upon it. These articles were headed: "Perjures Word to Hold Place. Boy Witness Makes a Startling Disclosure on the Stand. Says Capitalist Hammond Suborned Him under Promise of a Position." And: "Manton E. Hammond Wanted Boy Witness to Swear Falsely. Gave Him Employment for Untruthful Story. Cross-Examination Brings out the Truth in a Damage suit. Judge Graham may Ask the Grand Jury to Investigate the Serious Charge Made." And: "Promised Position for Testifying Falsely. Reason Given by Walter Fey for the Sudden and Complete Change in His Evidence in a Suit for Damages. Declares That Manton E. Hammond Offered Him a Good Job if He would Become a Witness for the Defense." The article in the Call was probably most severe on the defendant. It closed by saying that upon being seen at his house last night Judge Graham said: "That was about as rank a piece of subornation as has ever come before the bar in this city. Hammond has not a peg to stand on. When the case is completed, I will certainly hale him and his boy witness before the grand jury." The next morning, upon being again called to the stand in redirect examination, Fahey testified that his cross-examination was false, and that he had stated the truth in direct examination. He further said that Mrs. Sheehan, the mother of plaintiff, had promised him one-fourth of all she recovered in consideration of his testimony. Both the mother and the grandmother of the boy Fahey testified that after plaintiff was injured, when the boy came home, he told them that plaintiff was injured while attempting to sharpen a stick upon the wheel.

It is thus seen that the public journals referred to denounced defendant as a felon upon the uncorroborated statement of a boy who admitted afterwards that his whole statement in cross-examination was untrue, and whose first statement, whether true or not, was strongly corroborated. But no matter what may have been the motives of the said public journals in publishing the articles, we do not think under the circumstances of this case they constitute in law a sufficient ground for reversing the order denying a new trial. It is not made to appear, except as stated in the articles, that the judge ever made any remarks about the case or about the defendant. We cannot presume that a judge would so far forget the duties of his high position as to make such remarks. It is not made to appear that any of the jurors read the articles or any of them. Not only this, but the next morning after the publication of the articles the defendant and his counsel, instead of calling the court's attention to them then and there, proceeded with the trial of the case without objection. They do not appear to have made any objection at all until after the trial was over and the verdict pronounced against the defendant. The defendant cannot be allowed to remain quiet and take the chances upon a favorable verdict, and then raise a point that he knew of, and could have raised, during the progress of the trial. Monaghan v. Rolling Mill Co., 81 Cal. 194, 22 Pac. 590; 1 Hayne on New Trial, § 27, and cases cited; Cons. Ice Machine Co. v. Trenton Ice Co. (C. C.) 57 Fed. 898. We do not think it would be a safe rule to grant a new trial on account of statements in public journals during the trial, which statements do not appear to have been read by the jurors, and to which the court's attention was not called until the termination of the trial. We must presume that the jury did its duty and acted conscientiously.

After the case was finally submitted to the jury and it had retired, the court made an order in which it recited that the "evidence given by Walter Fahey was a tissue of falsehoods so plain and palpable as to be indisputable. The record also discloses that he has been suborned to testify as he did by the defendant in this case Manton E. Hammond," and further committed the defendant to the custody of the sheriff on the charge of subornation of perjury, and fixed his bail at $2,000. It is needless to say that the above order of the court was indiscreet, and was evidently made without that mature and careful deliberation that should characterize all judicial action. To find a citizen guilty of a felony by an ex parte order while he has a case on trial before the court, and this upon the testimony of one whose testimony is found to be a "tissue of falsehoods," might, if known to the jury, have seriously injured defendant. The boy had testified for plaintiff in his cross-examination, and had said that plaintiff's mother had promised him one-fourth of the judgment recovered. If this was true, the plaintiff's mother was guilty of subornation of perjury. But the order of the court, under the circumstances disclosed by the record, is not ground for granting a new trial. It was not made in the presence or hearing of the jury. The bailiff who had charge of the jury swears that the jury after they retired were not permitted to speak to anyone, or to see any newspaper, and that they had no knowledge of the order of the court until after the verdict has been rendered and they were discharged. We must again presume that the jury did its duty. We cannot set aside its verdict because the court, after the jury retired, made an order of which the jury was ignorant. The affidavit of the bailiff shows that the jury were not influenced by or informed of the order. Estate of McKenna, 143 Cal. 580, 77 Pac. 461. The evidence is sufficient to sustain the verdict. There was evidence tending to show that the wheel was too far from the board on top of the table, and thus left space sufficient for the plaintiff's fingers to be drawn into the opening, and that the revolving wheel was not true, but would "wobble." There was also evidence tending to show that plaintiff was not warned of the danger in operating the wheel. Of course, these matters were for the jury.

It is urged that as the defendant was the executor of the will of John Hammond, deceased, he could not be held for damages, but that, if there is any liability, such liability is upon the owners of the property. The complaint alleges that at the time of the injury the defendant was operating the factory and the wheel therein. It is not denied that the defendant was operating the factory, but defendant alleges affirmatively that he was operating it for the owners. He testified to facts which show that he was operating the factory, and that he employed and discharged the servants and operators. He does not attempt to show that he was not one of the owners, nor that he was operating the factory for some other party or parties. In such case the defendant cannot escape responsibility. He was operating the factory, employed the men and discharged them, and, if he desired to escape liability by claiming that he was operating the factory for other parties, it was incumbent upon him to make such proof.

It is claimed that the court erred in certain rulings on the admissibility or rejection of evidence during the trial. The first of such alleged errors was in regard to the evidence of Hasty, the defendant's foreman carpenter. He testified to hearing the plaintiff scream, and to assisting in throwing off the belt and stopping the wheel. He also described the wheel, it uses, and the table used in operating it. He testified to showing the plaintiff how to operate the wheel and as to warning him of its danger. He was then asked by defendant: "Q. Did you ever have any trouble of any kind, or was anybody ever injured on that wheel before that time?" The plaintiff objected to the question on the ground that it was incompetent, irrelevant, and immaterial. The court sustained the objection. Defendant claims the evidence was admissible for the purpose of showing how the accident occurred. We do not think it tended to prove how the accident occurred; and certainly the fact that the defendant had never injured anyone before by the wheel would not excuse the injury on this occasion, if caused by his negligence. If a piece of machinery is operated negligently for years, and finally some one is injured by such negligent operation, the owner cannot by way of excuse show that no prior injury had occurred. Silveria v. Iversen, 128 Cal. 192, 60 Pac. 687. The reason given for the exclusion of this class of evidence is given in Temperance Hall Association of Trenton v. Giles, 33 N. J. Law, 265, as follows: "That it would lead to the trial of a multitude of distinct issues, involving a profitless waste of time of the court, and tending to distract the attention of the jury from the real point in issue, without possessing the slightest force as proof of the matters involved." See 1 Greenl. on Ev. § 52; Bauer v. City of Indianapolis, 99 Ind. 56; Burgess v. Davis Sulphur Ore Co., 165 Mass. 75, 42 N. E. 501.

It is not necessary to notice in detail the other of such alleged errors. It is sufficient to say that we have examined them, and find no error sufficient to justify a reversal of the order.

The judgment and order are affirmed.

We concur: HARRISON, P. J.; HALL, J.

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2 Cal. App. 404

COZZENS et al. v. NORTH FORK DITCH CO.

(Court of Appeal, Third District, California. Dec. 9, 1905. Rehearing Denied by Supreme Court Feb. 7, 1906.)

1. Mandamus — Irrigation Corporations — Duty to Furnish Water—Enforcement.

Under Const. art. 14, § 1, providing that the right of all water now appropriated, or which may be hereafter appropriated for sale, rental, or distribution, is declared to be a public trust, and Civ. Code, § 552, declaring that whenever any person who is cultivating land on the line and within the flow of any ditch owned by an irrigation corporation has been furnished water by it to irrigate his land, such person shall be entitled to the continued use of said water on the same terms as those who had purchased their land of the corporation, such a corporation owes a duty to the public to furnish water irrespective of contract, which may be enforced by mandamus.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, § 268.]

2. Same—Contract—Petition.

Defendant water company assumed a contract between its predecessor and plaintiff's grantor to furnish water, not exceeding a certain amount per acre, which contract also provided that defendant was entitled to sell and deliver water to lands either on or off a certain grant, provided each sale or diversion should not reduce the volume of water in its main canal below the requirements of irrigation, etc., on such granted lands, and that if, at any time, the quantity of water should be reduced from any cause other than selling water for other purposes than those mentioned, then each water right should be scaled so that each person entitled to water from the main ditch should only receive his proportionate share of water in the ditch. *Held*, that a petition for mandamus to compel defendant to furnish the contract quantity of water, which failed to allege that defendant had water in sufficient quantity not only to supply plaintiff, but to supply all of the water takers, in compliance with the legal duty imposed on it, was demurrable.

Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Action by F. B. Cozzens and another against the North Fork Ditch Company. From a judgment in favor of defendant, denying a writ of mandamus, plaintiffs appeal. Affirmed.

L. T. Hatfield, for appellants. A. L. Shinn and W. F. George, for respondent.

BUCKLES, J. This was an application to the superior court of Sacramento county for a writ of mandate to compel the defendant to furnish plaintiffs 66,000 gallons of water per day for irrigating fruit trees and for domestic uses. A demurrer was interposed to the petition; the main objections being that the petition does not state facts sufficient to authorize the issuance of a writ of mandate, because the demand was based upon a certain water right and contract which provided for furnishing other lands along said ditch with certain quantities of water, and the petition fails to state whether the defendant has sufficient water to furnish for irrigating said other lands and to give the plaintiffs the water demanded. There were many other objections to the petition raised by said demurrer, but it seems to have been sustained upon the ground above stated. The plaintiffs decline to amend, and judgment was rendered denying the writ; hence this appeal.

The defendant is the owner of a water system established for the purpose of furnishing water for irrigating a large tract of land in the San Juan grant, Sacramento county, and for domestic use. The owners of said land to be irrigated from said system caused the same to be subdivided into lots, and sold the same to different purchasers. The plaintiffs became the purchasers and owners of three of said lots, to wit, lot 1 in block 11, and lots 5 and 7 in block 12, containing 30 acres in all, and became the owners of a water right from defendants.

The said water right is as follows, to wit:

"Water Right.

"This agreement (subject to the terms and conditions of a certain contract made and entered into on the 14th day of April, 1896, and April 14, 1899, between first parties hereto and the Howard & Wilson Publishing Company), made and entered into this 18th day of April, 1900, by and between C. W. Clarke, H. G. Smith and A. N. Buchanan, all of the city of Sacramento, hereinafter designated parties of the first part, and J. F. Thompson, hereinafter designated party of the second part, as follows: Whereas, on the 18th day of March, 1895, the Howard & Wilson Publishing Company, a corporation, organized under the laws of the state of Illinois, entered into a contract in writing, wherein it agreed to buy from C. W. Clarke and Frederick Cox certain land in the county of Sacramento, and state of California, consisting of about 7,500 acres and being part of the San Juan Grant, upon certain conditions in the said contract stated, one of said conditions being that the said Clarke and Cox should make arrangements satisfactory to the said publishing company for water to irrigate said lands; and whereas, the land agreed by said publishing company to be purchased by it, as just stated, has been by it surveyed and platted in tracts or subdivisions, and the intended location of the laterals hereinafter mentioned, marked on said plat in red ink, which plat, with the lateral so marked thereon, was filed in the office of the county recorder of the said county of Sacramento, on the ——— day of ———, and the same is hereby referred to and made part hereof; and whereas, the parties of the first part are the owners of water and water rights, and are now prepared to supply water to the main pipe line constructed by the Howard & Wilson Publishing Company for the purpose of irrigating the same, and the party of the second part has purchased, or agreed to purchase, from the said publishing company the tract or subdivision of land marked on said plat and hereinafter particularly described.

"Now this agreement witnesseth:

"First—That in consideration of the sum of one dollar, in gold coin of the United States, the receipt of which is hereby acknowledged, and the observance by the party of the second part of the covenants and agreements in this contract contained, the parties of the first part hereby agrees to furnish to the party of the second part from main canal, main pipe line or laterals, at the point most convenient to the party of the second part on said main canal as aforesaid, at the rate and subject to the conditions and restrictions hereinafter stated, all the water necessary to irrigate the following described tract or subdivision of said land platted on said plat, and particularly described as lots 5 and 7, block 12, and lot 1, block 11, Fair Oaks addition, and all water required for domestic uses from the 1st day of April, 1900, to the first day of June, 1946; provided, that the parties of the first part shall not, at any time during said period be required to furnish water for the purpose which has been done by second party of irrigating said tract of land just described on a basis exceeding twenty-four hundred (2,400) gallons per acre for every twenty-four hours for oranges, and a corresponding amount for other trees and products as per schedule hereinafter set forth.

"Second—It is understood and agreed by and between the parties hereto, that the obligation of the parties of the first part to furnish water with which to irrigate said tract of land above particularly described, as is hereinbefore provided, is only to furnish such water from the main canal or main pipe line or laterals at a point on said canal, pipe line or laterals most convenient for such purpose, and the willingness of the parties of the first part to furnish said water at said point shall be a compliance with the requirements of this contract on their part to furnish water to irrigate said land, and they shall not be re quired to otherwise conduct water to said tract of land above particularly described, except as hereinafter provided, and all water supplied by virtue hereof shall be measured, and the quantity thereof used by the party of the second part ascertained at the point of the diversion from said main canal or main pipe line or laterals; provided, that if the said party of the second part shall desire water to be conducted from said main canal or main pipe line to the said tract of land above particularly described, he shall first construct or cause to be constructed, at his own cost and expense, service pipes or conduits, with their connections with the main pipe line or laterals necessary and sufficient for such purpose. Upon completion of the service pipes or conduits necessary to conduct water to the tract of land above particularly described and the making of said connections as above provided it shall then be incumbent upon the parties of the first part to supply water with which to irrigate said tract of land and for domestic uses, for the period and subject to the limitations mentioned in the first subdivision hereof, and at and for the same rates hereinafter mentioned. After the main pipe lines and laterals have been built and such connections made, the same shall be under the exclusive care of the parties of the first part, and shall be by them kept in good order and repair, and the expense of such care and cost of such repairs shall, as to each of such laterals and main pipes, be paid by all owners of tracts or subdivisions of land marked on said plat, touched by or to which water is or may be conducted by such lateral or main pipes, such payments to be severally made by the owners of said tracts or subdivisions in the proportion that the number of acres in each of said tracts bears to the whole number of acres in all the tracts touched by such lateral or to which water is or may be conducted by it; and the party of the second part hereby imposes upon said tract of land above particularly described a burden and charge in the nature of a continuing lien for the payment of said tract's share of said cost and expenses as just provided, which burden and charge shall be perpetually appurtenant to and shall run with and bind said tract of land.

"Third—That the party of the second part shall not use or permit the water furnished under this agreement to be used on any land except the land above particularly described, nor permit such water to run on contiguous land or spread out on low places, or in any way to run to waste.

"Fourth—That the parties of the first part, for the purpose of enlarging their ditch or pipe line, or for the purpose of general or special repairs of their reservoirs, ditches, pipe lines, laterals, gates, connections, or for any other necessary purpose, may shut off the water for such length of time as may be absolutely necessary.

"Fifth—That the parties of the first part shall not be responsible for a deficiency of water caused by drought, insufficiency of water in the river from natural causes only, interference, obstruction, hostile diversion, floods or accidents; provided, that the parties of the first part use due diligence in maintaining the full supply of water and in protecting and repairing said ditches and pipe lines.

"Sixth—That the parties of the first part may, at their option, sell, rent and distribute water from time to time for any purpose whatever, to the full capacity of the main ditch or canal or pipes on any point on said ditch or canal or pipes, either on or off of said land so platted on said plat, as aforesaid, not exceeding the quantity of water now, or hereafter owned, appropriated or acquired by them; provided, that such sale or diversion of water shall not reduce the volume of water in said main canal or pipes or laterals below the requirements of irrigation, domestic and public uses on lands referred to in this contract, and if at any time the quantity of water in said main ditch or canal shall fall below the capacity of said main ditch or canal or pipes, other than for the reasons above specified, then each water right or privilege so rented or otherwise granted by the parties of the first part, including the right of the party of the second part by virtue hereof, shall be scaled down so that each person entitled to water from said main ditch or canal or pipes or from said laterals, instead of receiving the quantity he would receive if said main canal or ditch or pipes were full, shall only receive his proportionate share of the water in said ditch or canal or pipes, and the quantity so received shall satisfy the covenants in this contract contained.

"Seventh—That the right of water acquired by the party of the second part under this agreement shall be appurtenant to said land, and shall run with said land and be transferred only by transfer of the same; and all covenants herein contained to be performed by the party of the second part shall run with and bind said land.

"Eighth—That the party of the second part, his heirs, personal representatives and successors in interest, hereby grants to the parties of the first part, and their heirs and assigns, the right of way and rights of way through, upon and over the said land above particularly described, with the right to enter upon the same for the purpose of constructing and using thereon canals, ditches, pipes and laterals, and therein conveying and flowing water to, on or through and across said land so platted on said plat, as aforesaid; and also for the purpose of making all necessary connections with said canals, ditches, pipes and laterals, and for maintaining, caring for and repairing the same at any and all times during the continuance of this contract.

"Ninth—That the party of the second part, and his successors in interest in said land above particularly described, hereby promises and agrees and covenants to pay, and shall and will annually pay to the party of the first part, their heirs or assigns, at Sacramento City, in gold coin of the United States, on the 1st day of November for the year Apr. 1, 1900, and until June 1st, 1946, the following prices and rates for said water for irrigating purposes, to wit: (a) For all water used for irrigating citrus fruits, the sum of $4 per acre per year; (b) for all water used to irrigate deciduous trees and vines, including olive trees three years old and over, alfalfa, garden truck or berries, $3 per acre per year; (c) for deciduous trees and vines, less than three years old, $2 per acre per year; (d) for grain, $1 per acre per year; (e) for domestic uses, including water for household purposes, lawn and garden, not exceeding 2,000 square feet, $1 per month. The maximum quantity of water allowed for any of said purposes being on the basis of 600 gallons in twenty-four hours for each $1 per year charged for its use. All sums which shall become due under this contract, if not paid at maturity, shall bear interest at the rate of 10 per cent. per annum until paid, and if suit is brought for the collection of the same, the party of the second part agrees to pay all costs and attorney's fees incurred in the collection thereof, and all such sums and such cost and attorney's fees shall be a lien upon the land above particularly described.

"Tenth—That any violation of this agreement by the party of the second part, his successors or assigns, shall, at the option of the parties of the first part, their heirs and assigns, render this agreement, except subdivisions seventh and eighth, null and void.

"Eleventh—That the parties of the first part may, at all times during the continuation of this contract, have the supervision of the use and distribution of said water, and may adopt and enforce any and all reasonable regulations subject to the provisions of this contract for the use and distribution thereof, and all such regulations, when adopted by them, and notice duly given to the party of the second part, shall be binding upon the party of the second part and said land above particularly described; and on and before the first day of April of each year the party of the second part shall designate in writing to the parties of the first part the quantity of water he requires for all or any of the purposes mentioned in the ninth subdivision hereof, and unless such notice is given, the quantity of water that the party of the second part shall receive that year for all or any such purposes shall be optional to the parties of the first part, subject to the conditions set forth in article six (6) of this contract, and the reasonable requirements for water of the party of the second part.

"Twelfth—That the right to use water for irrigating said land above particularly described, as hereinbefore provided, is optional with the party of the second part from year to year, subject to the covenants and agreements hereinbefore contained, and to the regulations adopted by the parties of the first part for such use; provided, that at the time of signing this contract party of the second part may bind himself to use continuously a definite quantity of water each year this contract continues in force with which to irrigate said land above particularly described. The quantity to be so used to be agreed upon and expressed in this contract at the time of the signing thereof, subject to such modification or change from time to time as the nature and need of the land and the products may demand, and if so agreed upon and expressed, the party of the second part shall pay for the same the prices and rates specified in subdivision ninth (9) hereof, less a discount of twenty-five (25) per cent., and thereafter each year during the time this contract continues in force he shall be entitled to the quantity so fixed, subject to the limitations, restrictions and conditions hereinbefore contained. Second party desiring under this clause to provide for 5 acres of lemons and 10 acres of oranges, other trees desired to be irrigated to be optional with second party from year to year:

"J. F. Thompson,
Party of the Second Part. [Seal.]
"C. W. Clarke. [Seal.]
"H. G. Smith. [Seal.]
"A. N. Buchanan. [Seal.]

"The within and foregoing contract between the parties herein named is hereby, in pursuance of a resolution duly adopted, recognized and adopted as the contract of the North Fork Ditch Company, the successor in interest of C. W. Clarke, H. G. Smith, and A. N. Buchanan, and to the extent and effect that they are affected, this company shall be affected.

"In witness whereof, the North Fork Ditch Company has hereunto subscribed its name and affixed its seal this ——— day of July, 1900.

"[Seal.] C. W. Clarke, Pres.
"A. N. Buchanan, Sec'y."

The plaintiffs were grantees of J. F. Thompson, both as to the lots mentioned and the water right set out. The petition alleges that the said land of plaintiffs was and is contiguous to and within the flow of the main pipe line of defendant for the carrying of water, and is under cultivation. The petition sets forth: That the water rates are due and payable on the 1st of November of each year, and the irrigating season is from April 1st to November 10th. Plaintiffs notified defendant, before the irrigating season of 1904 commenced, of the amount of water they would need. That defendant is furnishing plaintiffs with water for irrigating, but in quantities less than 26,400 gallons of water per day during the irrigating season, and that this is delivered at irregular intervals, and defendant states that it will not, at any time, furnish any greater quantity of water. That any less quantity than the maximum, as specfied in the water right, is wholly inadequate and insufficient. That said Thompson would not have purchased said lots if it had not been for the terms and conditions of the water right, nor would he have planted said lots to trees, and, but for the said water right, the plaintiffs would not have purchased said lots from said Thompson. Without the maximum quantity of water the trees will be permanently injured. That defendant has at all times been, and is, the owner of a sufficient quantity of water to supply plaintiffs with all the water necessary for their use.

Under these conditions, facts, and circumstances, and the limitations found in the water right above set out in full, can the writ of mandate be invoked to compel the defendant to do what the plaintiffs claim it should do? The water appropriated by defendant for its system is taken from the North Fork of the American River, and is appropriated for the purpose of selling, renting, and furnishing for irrigation and other useful purposes, and it is therefore in the exercise of a public trust, and, of course, owes a public duty which the law will require it to perform irrespective of any contract. The Constitution of California provides (section 1, art. 14) that "the right of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public trust." Section 552, Civ. Code, also provides: "Whenever any person who is cultivating land on the line and within the flow of any ditch owned by such corporation, has been furnished water by it, with which to irrigate his land, such person shall be entitled to the continued use of said water, upon the same terms as those who have purchased their land of the corporation." Not only is the land of plaintiffs being cultivated and within the flow of the ditch and water system of defendant, but it is a part of the tract for which the water was appropriated by defendant to irrigate, and there is therefore a duty, under the law, resting upon the defendant to furnish this tract of land with water; and, had the defendant failed to furnish such water, it could be compelled by a writ of mandate to furnish it in the quantity needed, if it (the defendant) has a sufficient supply for all the lands within the flow requiring water.

As we understand the duties imposed on corporations which have appropriated water for sale and for irrigating purposes, before they can be compelled to perform that duty, there must exist the following conditions; the same appearing in the complaint or petition for a writ: (1) The land for which water is sought to irrigate must lie within the flow of said water ditch; (2) a showing that such corporation has the water in quantity required to supply the one demanding and all the others equally entitled (see Price v. Riverside L. & I. Co., 56 Cal. 439); (3) that notice be given the irrigating company of the amount of water required (Price v. Riverside L. &. I. Co., supra); and (4) payment of the rates or tender thereof when due, and an allegation of willingness to pay when due (Price v. Riverside L. & I. Co., supra). All of the prerequisites are admitted to be necessary by the appellants, except the second, for they set them out in the complaint, and, as to the second, plaintiffs allege that defendant "is the owner of a sufficient quantity of water to supply plaintiffs with all the water necessary for their use," and do not allege, as we think they must, that the quantity is sufficient to supply plaintiffs, and all others entitled to water, the quantity required. Each water taker in a municipality, by paying the rates fixed, has a right to use a reasonable quantity of the water appropriated for public use, to be used in a reasonable manner (McCrary v. Beaudry, 67 Cal. 120, 7 Pac. 264), and this evidently depends upon the supply of water; but the right of one member is no greater than that of each of the others. To illustrate, if the supply should run so low during any season that there remained only enough to supply domestic uses alone, the water company could not supply to any one individual water for irrigating a lawn or garden, and refuse to supply water to others for the same purpose. While there are doubtless many differences between the rules governing the water question, when being supplied to the inhabitants of a municipality, and when being supplied alone to agricultural lands for irrigation, yet we think the same rule applies to both, so far as supply is concerned, except that in the case of one within the municipality would not be required to allege the supply was sufficient to furnish all the inhabitants alike.

In Price v. Riverside L. & I. Co., supra, which was a mandamus case, defendant being a corporation formed to appropriate and furnish water to irrigate certain lands of a colony, plaintiff's lands were a part of the colony to be irrigated. The court held the defendant was "bound to furnish plaintiff with water to irrigate his lands on payment of the rates fixed in the manner prescribed by law; it having the water to furnish. The case shows that defendant has an ample supply of water to furnish the quantity demanded by those entitled to receive, including the quantity alleged on agreement to be needed by plaintiff." It was also held in that case that the rates which the defendant may charge had never been fixed in the manner required by law, but that defendant had fixed the rates and could not be permitted to refuse water to one, otherwise entitled to receive it, who should offer to pay their rates. And that is the case here. In that case there was not sufficient demand, presumably made, nor offer to pay the rates, and this was taken advantage of by special demurrer. Merrill v. South Side Irrigation Company, 112 Cal. 426, 44 Pac. 720, which was cited by plaintiffs in support of their contention that a writ must issue to compel defendants to furnish the amount of water asked. In that case the mandate did issue and was upheld on the ground that the defendant, in running its main pipe line, passed over the lands of plaintiff, said plaintiff having conveyed a right of way to defendant for that purpose, the consideration being an understanding that plaintiff could have water from defendant's said pipe to irrigate his land, "the west half of the southeast quarter of section 21, etc., to the extent of one-half the flow of a twenty-two inch round pipe, twice per month, for 36 hours each time, once on or about the first day of each month, and once on or about the 15th day of each month," upon tender of payment of reasonable and customary charges; and after defendant had supplied this water for use on plaintiff's land for a considerable time it extended its pipe line beyond and below the land of the plaintiff, and began supplying water for lands along the extension of its pipe line, and then took from plaintiff, and sold to others, the water it had been accustomed to furnish her. The defendant was in the exercise of a public use, and had the water to supply her as demanded, and the writ issued. In that case it would seem the contract the defendant made with plaintiff was made prior to the extension of defendant's main line, and certainly not with a view by either party thereto to furnishing other land below plaintiff's with water for irrigating same, while in the case at bar the contract of water right was entered into with the express view of supplying all others in the San Juan grant with water in the same quantity according to trees planted, and so forth, as to the plaintiff.

The water right contained this clause: "Water will be delivered [at any point on the main line] to the grantees * * * who are the owners of water rights under the before mentioned contract, at the following rates per acre per year, such rates to be enforced with each after the first year; for oranges and nurseries $4.00; for deciduous trees and vines over three years old, for alfalfa, garden truck and berries, $3.00; for trees and vines less than three years old $2.00; for grain $1.00. Water for domestic purposes shall be charged for, for each household of six persons or less at the rate of $1.00 per month and a proportionate rate for a number in excess of six persons." The defendant, under the water right contract, had the right to sell and deliver water to lands either on or off the lands in the said San Juan grant, providing that each sale or diversion of water should not reduce the volume of water in its main canal or pipes below the requirements of irrigation, domestic and public uses on the San Juan grant lands, and if, at any time, the quantity of water should be reduced from any cause other than selling water for other purposes than those mentioned, "then each water right or privilege so rented or otherwise granted by the parties of the first part, including the right of the parties of the second part by virtue thereof, shall be scaled down so that each person entitled to water from said main ditch, or canal or pipes, or from said laterals, instead of receiving the quantity he would receive if said main canal or ditch or pipes were full, shall only receive his proportionate share of the water in said ditch or canal or pipes, and the quantity so received shall satisfy the covenants in this contract contained." It will thus be seen that, when the water right was conveyed to the grantors of plaintiffs, all persons purchasing and owning lands in the part of the San Juan grant subdivided and brought under cultivation would own a similar water right contract, and would be just as much entitled as plaintiff to water to irrigate his trees, vines, grain, and so forth, and to give to plaintiffs the quantity of water demanded might deprive many others of the water they might be entitled to; and, as said by the learned judge of the trial court, "in the absence of a pleading that there are no others who are entitled to the common benefit of the various contracts attached to plaintiffs' complaint, or of a statement of their number, the court might render a judgment in favor of plaintiffs, giving them such an amount of available water as would render the court powerless, in a subsequent suit by another party, based upon the identical instruments here relied upon, and equally entitled with these plaintiffs, to render a similar judgment in the latter case."

In our opinion the petition must state that the defendant has water in sufficient quantity, not only to supply plaintiffs, but to supply all water takers in compliance with the legal duty imposed upon the defendant. As the complaint fails in this respect, it fails to state facts sufficient to entitle plaintiffs to the writ of mandate prayed for.

The judgment is affirmed.

I concur: CHIPMAN, P. J.

McLAUGHLIN, J. I concur in the order affirming the judgment. But I do not desire to be understood as concurring in the view that rights purely contractual, even though they relate to the sale, rental, or distribution of water, can be enforced through the medium of the writ of mandate. Mandate will issue only to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. Water appropriated for sale, rental, or distribution is a public use, and subject to the regulation and control of the state. Const. art. 14, § 1. Hence, every person, company, or corporation engaged in the sale, rental, or distribution of water may be compelled to furnish water to all who require it, to the full extent of the supply of water under the control of such person, company, or corporation. This is a duty specially enjoined by law, and mandate will lie to enforce it. But the legal duty of the respondent in the case at bar is measured and limited by the quantity of water which it has the ability to supply. When the supply is exhausted by the requirements of those having a legal right to its use, the legal duty as to all others ceases. Therefore it was incumbent upon petitioners to show in their petition, not only that respondent had sufficient water to supply their demand, but that it had such quantity over and above the amount of water actually being supplied to those entitled to demand and receive water. The contractual duties of respondent extend to the full amount of water which it agreed to furnish, but its legal duty, enforceable by mandate, extends only to the surplus water which remains subject to petitioner's use and demand after the needs of others actually receiving water, and entitled thereto by reason of prior demand and use, have been satisfied. In my opinion, therefore, the right asserted under the contract is a false quantity in determining petitioners' right to the particular remedy and relief here sought. The petition is framed on the theory that, because respondent contracted to furnish a certain definite quantity of water, mandate will lie to compel it to do so. This being the case, the majority opinion might be construed as holding that this would follow if the omitted statement of fact had been inserted. Waiving consideration of all other rights arising under this or similar contracts, I am of the opinion that it is only rights to water arising under the Constitution and statutes which can be enforced by mandate, and, hence deem it proper, if not necessary, that the ground of my concurrence should be separately stated.

2 Cal. App. 377

SMITH v. FARMERS' & MERCHANTS' BANK.

(Court of Appeal, Third District, California. Dec. 9, 1905.)

1. MONEY RECEIVED—OBLIGATION.

Where one has money which he knows belongs to another, and knows that it is his duty to pay it over, he may be sued for money had and received.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Money Received, § 1.]

2. SAME—RECEIPT FROM THIRD PERSON.

Where an agent, having money due the principal, pays it to a third person, who knows how the agent held the money, he takes it for the use and benefit of the principal, who may maintain an action for it against him.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Money Received, § 31.]

3. SAME—COMPLAINT—SUFFICIENCY.

A complaint, in an action against a bank, alleged that K. sold certain butter as plaintiff's agent and deposited a specified amount of the proceeds of sale in defendant bank, which knew that the money was held by K. solely as agent for plaintiff, but retained the sum in question and refused to pay it to plaintiff. *Held*, that the complaint was not demurrable; there having been no necessity for joining K. as a defendant, it not being necessary to show that defendant was a party to the contract between plaintiff and K., and it appearing that K. had himself set apart the specified sum as plaintiff's money, so that there was no necessity for an accounting.

Appeal from Superior Court, Yolo County; H. M. Alberry, Judge.

Action by J. H. Smith against the Farmers' & Merchants' Bank. From a judgment dismissing the action, and from an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Clark & Clark, for appellant. A. C. Huston, for respondent.

BUCKLES, J. This is an appeal from the judgment dismissing the action and the order sustaining the demurrer. The complaint alleges: That between January 14, 1904, and March 3, 1904, the plaintiff and 44 others delivered to one A. G. McKerlie certain milk and cream, the property of plaintiff and the other 44 persons, upon an agreement that said McKerlie would make the same into butter for said persons and as their agent market the butter for them, receive the proceeds thereof, retain two cents on every pound of such butter, and pay over to such persons "to each person that portion of the whole proceeds of sales which the quantity of butter made from the milk or cream delivered by such person bear to the quantity made from that delivered by all such persons." That said McKerlie received the milk and cream delivered to him and made the same into butter except about 20 per cent. thereof and sold the butter for said persons, and also the 20 per cent. of cream and milk. The complaint then proceeds: "That, between said two dates, defendant herein, well knowing that said A. G. McKerlie held said proceeds of sales mentioned in paragraph 3 hereof solely for and as agent of said persons hereinafter mentioned and solely for the purpose of returning the same to said persons, and well knowing the said proceeds of sales were property of the said persons, and well knowing all the facts and matters alleged and set forth in paragraph 2 and 3 hereof, received from said A. G. McKerlie, agent as aforesaid, after said A. G. McKerlie had fully taken out and appropriated his said agreed two cents for each pound of butter made, and fully taken out therefrom all expenses of receiving and marketing all cream sold, a portion of said proceeds, amounting, as the plaintiff is informed and believes and upon such information and belief alleges, to the sum of sixteen hundred and fifty dollars ($1,650). That since receiving the same said defendant has retained, held, and kept said sum and, though requested so to do by said persons and by plaintiff, has refused and still refuses to pay the same or any part thereof to said persons or to plaintiff. Said sum so received by defendant was had and received by defendant for the use and benefit of the persons hereinafter named." Alleges nonpayment by McKerlie to plaintiff or the other said persons, and that he never returned to plaintiff and such persons, or any of them, any part of the proceeds of said butter, and that the same is due. Alleges assignment to plaintiff of the claims of the other persons whose names, with the amount of cream and milk furnished by each, and the amount of money due to each from the butter and cream sold by McKerlie. Alleges that defendant received "about $^{165}/_{190}$ of the amount ($1,908.26) and portion of said proceeds of sales belonging to and agreed to be returned to each of said persons by said A. G. McKerlie, agent, as aforesaid."

The demurrer is general and special: (1) That the complaint does not state facts sufficient to constitute a cause for action; (2) that it appears that no contract was ever made between plaintiff and defendant or between McKerlie and defendant for the benefit of plaintiff; (3) the complaint shows no obligation in either law or equity in favor of plaintiff against the defendant; (4) that no contract was ever made between plaintiff and defendant and that defendant was never, and is not now, a party to any contract respecting the matters alleged in the complaint in favor of plaintiff or to any contract creating any obligation in favor of plaintiff and against the defendant; (5) that it appeared that defendant never had any knowledge of the matters and transactions alleged as occurring between plaintiff, his assignors, and A. G. McKerlie; (6) that it appears the milk and cream were delivered to McKerlie with full authority on his part to dispose of the same and it does not appear that defendant received any moneys from McKerlie in any manner other than in the ordinary course of business, in good faith and for value; (7) that it is not alleged that defendant has not repaid to McKerlie the money sued for, and it is not alleged that McKerlie has not now the said money; (8) that plaintiff and his assignors are now estopped from claiming anything from defendant because the complaint shows they delivered their property to McKerlie and vested him with apparent ownership and knowingly permitted him to deal with it as his property. There are other objections alleged by this demurrer, among which are: (14) That there is a defect of parties, in that the said A. G. McKerlie is a necessary and proper party to the determination of said answer; (15) that the complaint is uncertain in not alleging the facts constituting the pretended agency between McKerlie and plaintiff; (16) that it appears from the complaint that McKerlie did not have any specific funds in his hands to pay to plaintiff, and that it appears that the moneys paid defendant were not paid from the specific fund derived from the sale of said butter and cream; and that it does not appear that when McKerlie paid said moneys to defendant that he did not have the funds in his hands with which to pay plaintiff. It does not appear upon which of the grounds the demurrer was sustained or whether upon all. The plaintiff declined to amend, and judgment was given in favor of the defendant and against the plaintiff, and the action was dismissed, the defendant to recover its costs.

The agreement between McKerlie and plaintiff and his assignors was a simple one, requiring no extraordinary amount of intelligence to understand just what it meant. McKerlie was to receive the milk and cream they should bring him. He was to take the butter therefrom, sell it for the best price obtainable, retain two cents a pound for his compensation, and pay the balance of the proceeds of such sales to the persons named in proportion to the milk and cream furnished by each; and in the absence of any other contract, agreement, or understanding between McKerlie, the defendant, and the persons who had furnished the cream and milk, it would seem certain he is a proper party and that he should be made a party defendant to the action. But where one has money in his hands which he knows to belong to another, and it is his duty to pay it over, he may be sued for money had and received. Chung Kee v. Davidson, 102 Cal. 188, 36 Pac. 519. The complaint here alleges that the defendant, the bank, knew that McKerlie held the money which he had received from the sale of butter for plaintiff and his assignors, and when he turned it over to the defendant it was the property of plaintiff and his assignors, and that he received said money for the use and benefit of the persons named. If the defendant knew this $1,650 belonged to the people named in the complaint, and knew it received it as "money had and received" for the use and benefit of such persons, to be paid over to such persons, then the law raises a promise on the part of the defendant to do so. Quimby v. Lyon, 63 Cal. 394, and cases cited; also County of Colusa v. County of Glenn, 124 Cal. 503, 57 Pac. 477. We think the complaint shows the defendant had such knowledge, and therefore the suit is against the right defendant, and joining A. G. McKerlie as defendant was unnecessary. This, then, disposes of objections 2, 3, 4, 5, and 14 in favor of plaintiff.

It is not material that the complaint fails to show that the defendant was a party to the contract between McKerlie and plaintiff, so long as it alleges knowledge independent that McKerlie held the $1,650 solely for the use and benefit of plaintiff and his assignors and that it came to its hands for the same; neither is it material to allege as to whether said money was received by McKerlie as an agent of plaintiff or came to him in the capacity of the seller of property belonging to him, so long as the bank is alleged to have known he held the proceeds of the sale of butter for the use and benefit of the plaintiff and these other people. The agreement of McKerlie was that he would take the cream and milk of these people, make the butter therefrom, sell the same, take two cents for every pound of said butter, and return the balance to said persons. The bank may not have had the knowledge the complaint alleges it had when it took the money, and may have received it in the ordinary course as a deposit of money belonging to McKerlie, or may have received it on a debt due it from McKerlie, or in any other way; but that is not the question here. We are dealing with the sufficiency of the complaint and nothing more, and are not concerned as to what the facts may be, as will be developed by the proof when the case comes to trial. In his brief, respondent argues that as the plaintiff could not have sued McKerlie for the specific moneys received as the proceeds of the butter, as a specific fund, but could only sue as a debtor after an accounting, he is therefore estopped from suing the bank to recover the same. But the allegations of the complaint show that McKerlie himself set this money ($1,650) aside as the money belonging to these people, and placed it in the bank for their use and benefit, and that the bank knew this. The authorities cited by respondent doubtless announce the truth as to sales, the rights of vendee and vendor, and agents and bailments; but under the view we take of this complaint and demurrer, it would be of no assistance to quote them here. In addition to what is said above it will be noted that the complaint alleges that A. G. McKerlie was the agent of plaintiff and the other persons named, and that the sale of the butter was as agent, and the holding of the proceeds was as agent, and that defendant knew all these facts. If money is paid over to a third person by the agent, and the third person knew the agency and all matters connected with the same, how the agent acquired and held the money, then such third person takes such money for the use and benefit of the principal and becomes liable to the principal, and such principal may sue such third person to collect the money. We do not think the complaint subject to the charge of uncertainty in any matter material; neither is it ambiguous or unintelligible. We have examined critically every objection raised by the demurrer, and conclude the same should have been overruled.

The judgment is reversed, and the court below directed to overrule the demurrer.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

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2 Cal. App. 400

McMAHON et al. v. HETCH-HETCHY & YOSEMITE VALLEYS RY. CO. OF CALIFORNIA et al.

(Court of Appeal, Third District, California, Dec. 9, 1905.)

1. TRIAL—VERDICT.

A verdict, "We * * * find a verdict in favor of plaintiff," is against both defendants.

2. JUDGMENT—CONFORMITY TO VERDICT.

The clerk may not enter a judgment against one only of the defendants on a verdict against both of them, though there is evidence to support the verdict as against such defendant only.

3. NEW TRIAL—INSUFFICIENT VERDICT.

There is a mistrial, requiring a new trial, where there is a verdict for plaintiff against one defendant only, and no verdict for or against the other defendant.

4. RAILROADS—FIRES—EVIDENCE.

In an action against a railroad company for a fire alleged to have been set by sparks from an engine, evidence of emission of sparks by engines about the time of or a little before the time of the fire is admissible.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1722.]

5. SAME—NEGLIGENCE.

Where a railroad company negligently allows combustible material to accumulate on its right of way and a spark from its engine sets it on fire, the use of the best of appliances to prevent the escape of sparks will not excuse the company's negligence in other particulars.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1676.]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by James A. McMahon and others against the Hetch-Hetchy & Yosemite Valleys Railway Company of California and another. Judgment for plaintiffs. Defendants appeal. Reversed.

F. P. Otis, for appellants. E. W. Holland, for respondents.

McLAUGHLIN, J. This is an action to recover damages resulting from a fire started by sparks from a locomotive. The complaint alleges that the defendants negligently permitted dry grass, leaves, and other combustible material to remain on the track and right of way of a railroad owned and operated by them, and that by reason of the negligent and careless manner in which the defendants and their servants and employés ran and managed the locomotives and cars on said railroad sparks of fire escaped from a locomotive and ignited and set fire to such combustible material, which fire spread to adjoining lands, where the property of plaintiffs was situated, and burned and destroyed said property to their damage in the sum of $809. The defendant West Side Lumber Company denied that it at any time owned or had an interest in such railroad, or was engaged in operating the same. Both defendants united in denying the other allegations of the complaint. The cause was tried before a jury, and the verdict rendered reads as follows: "We, the jury in the above-entitled action, find a verdict in favor of the plaintiffs in the sum of $300.00 damages." The judgment entered by the clerk, after the usual preliminary recitals, contains a copy of the verdict, and concludes by adjudging and decreeing that the plaintiffs do have and recover of and from the Hetch-Hetchy & Yosemite Valleys Railway Company of California, one of the defendants in said action, the sum of $300, with costs. The defendants appeal from the judgment and from the order denying their motion for a new trial.

The verdict is strictly within the issues made by the pleadings; and, this being the case, the clerk had no authority to enter a judgment at variance with the verdict as recorded. Code Civ. Proc. § 664; Ency. Pl. & Pr. vol. 11, pp. 904, 905; Id., vol. 18, pp. 429 et seq., 448, 451; Watson v. S. F. R. R. Co., 50 Cal. 524; Patochi v. C. P. R. R., 52 Cal. 90. In entering a judgment on a verdict or findings, the clerk performs a ministerial duty, and he can neither enlarge nor abridge the scope of the judgment. Crim v. Kessing, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491; County of Sacramento v. C. P. R. R. Co., 61 Cal. 255; Ency. Pl. & Pr. vol. 18, p. 448. It is said that the verdict does not support the view that the jury found against both of the defendants, but unanswerable rules of logic make it clear that it is against both or neither of them. It must be construed as a verdict against both, upon which a judgment against both jointly should have been entered. Enc. Pl. & Pr. vol. 11, pp. 856, 857; McLaughlin v. Kelly, 22 Cal. 222; Winans v. Christy, 4 Cal. 76, 60 Am. Dec. 597. The cause was at issue as to both of the defendants, and the jury was called upon to determine the issues of fact presented by the pleadings. Schultz v. McLean, 76 Cal. 609, 18 Pac. 775; Enc. Pl. & Pr. vol. 11, pp. 865, 866. This duty they performed, and their verdict when recorded was conclusive evidence as to the facts in issue. The clerk could not change or disregard the verdict, however erroneous the conclusion of the jury may have seemed. He could not pass upon the weight or sufficiency of the evidence, and enter judgment according to his idea of what the verdict should have been.

Respondents argue that there was no evidence to establish the liability of the West Side Lumber Company, and hence that the judgment was properly entered against the other defendant. Waiving the rule as to the limited authority of the clerk in the premises, we cannot imagine how the fact that there is no evidence to support the verdict can aid the judgment. The verdict was against both defendants as joint tort-feasors, and the judgment singles out one only as liable. This the law will not tolerate. If the finding or verdict be against all defendants, and the judgment runs against one only, the latter is clearly prejudiced. A judgment must be supported by the verdict, and manifestly this judgment is not so supported. True the verdict as to the West Side Lumber Company is unsupported by the evidence, but this fact simply destroys the verdict. The jury having found by their verdict that both defendants were jointly liable, we cannot remodel that verdict or make a new one, fixing a several liability for the whole sum on one of them. When a verdict is not supported by the evidence, the law provides several modes of correcting the error. Code Civ. Proc. §§ 647, 650, 652 (6), 662, 956. In such a case appellate courts will not make verdicts or findings contrary to the conclusion of jury or court (Blood v. La Serena L. & W. Co., 113 Cal. 230, 41 Pac. 1017, 45 Pac. 252), but will remand the cause for a new trial. Maine Boys, etc., Co. v. Boston T. Co., 37 Cal. 40. Although we can see no escape from the conclusion that the verdict is joint, reversal must follow, even if respondent's interpretation of its terms be accepted as correct. If that construction be adopted, then the jury failed to find on the issues raised by the pleadings. The West Side Lumber Company, in common with its codefendant, was entitled to a verdict or judgment one way or the other, and, if the jury failed to find on issues presented by that corporation, there was a mistrial. Schultz v. McLean, 76 Cal. 609, 18 Pac. 775; Rankin v. C. P. R. R. Co., 73 Cal. 94, 15 Pac. 57. And it is now too late to correct the error in any other mode than by a retrial. The court or jury may find against one or more of several defendants. Code Civ. Proc. § 579. But there must be a finding or verdict for or against each defendant.

The evidence as to the emission of sparks by engines about the time of the fire or a little before was admissible. Liverpool Ins. Co. v. S. P. Co., 125 Cal. 441, 58 Pac. 55. Many other alleged errors in the admission of evidence will not be noticed for reasons stated in People v. Woon Tuck Wo, 120 Cal. 297, 52 Pac. 833, and Humphrey v. Pope (Cal. App.) 82 Pac. 223. Instruction No. 1, requested by plaintiff, read as a whole, contains a correct statement of the law. If the defendants negligently allowed combustible material to accumulate upon their track and right of way, and a spark from one of their locomotives set it on fire, the use of the best of appliances to prevent the escape of sparks would not excuse its negligence in other particulars. It was error to refuse to give defendants' instruction No. 1. The plaintiffs were bound to prove the cause of action stated in their complaint, and this instruction simply told the jury that they must prove their case. We do not deem it necessary to discuss other assignments of error in giving or refusing instructions. Suffice it to say that instructions numbered 14, 15, and 18, requested by defendants, entirely ignore the rule that a railroad company must use reasonable diligence and care in preventing a fire occasioned by sparks from spreading from their right of way to adjoining lands.

The judgment and order are reversed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

2 Cal. App. 364

In re GALLEHER.

(Court of Appeal, First District, California. Dec. 8, 1905.)

1. GUARDIAN AND WARD—RIGHTS OF PARENT.

Under the express provisions of Code Civ. Proc. § 1751, the father of a child under 14 years of age, if a fit, proper, and competent person, is absolutely entitled to the guardianship of such child.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Guardian and Ward, §§ 4, 25.]

2. SAME—PROCEEDINGS FOR APPOINTMENT—EVIDENCE.

Evidence that at the time an infant child was placed in the care of its maternal aunt she was obliged to buy it a pair of shoes and a bonnet because it did not possess such articles was insufficient to warrant a finding that at that time when the child was six months of age the father had failed and refused to properly care for it.

3. PARENT AND CHILD—CONTRACT FOR CUSTODY—TERMINATION.

An oral agreement, by which a father gave his child, when six months of age, to the child's maternal aunt to raise, was revocable at the father's election.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parent and Child, § 8.]

4. GUARDIAN AND WARD—RIGHTS OF FATHER—COMPETENCY—EVIDENCE—FINDINGS.

In a proceeding for the appointment of a guardian for a child under 14 years of age, evidence *held* insufficient to warrant a finding that the child's father, who applied for the child's custody, had either deserted or abandoned the child, or that he was profligate, indolent, intemperate, and an improper person to be awarded such custody.

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Application by Mary Marshall to be appointed guardian of the person of Lizzie Galleher, a minor. From an order granting such petition and refusing to appoint Fred W. Galleher, the child's father, he appeals. Reversed.

R. B. Tappan, for appellant. J. P. Sex, for respondent.

HALL, J. This is an appeal from an order appointing Mary Marshall guardian of the person of Lizzie Galleher, a child aged about three years at the time of the filing of the petition. The appellant, Fred W. Galleher, is the father of the child, and the respondent, Mary Marshall, is its maternal aunt. The mother of the child died when the child was but a few days old, and the father subsequently, under circumstances hereinafter detailed, placed the infant with Mrs. Mary Marshall, where it remained until these proceedings were begun by the filing of a petition in the superior court by Mrs. Marshall for her appointment as guardian of the child. It is alleged in the petition of respondent that the child has been abandoned by her father for more than two years last past, and that the father is not a fit, or proper, or competent person to have the care, custody, or control of said minor, in this: that he is shiftless, improvident, and lacks industry, is addicted to drink, and is financially unable to provide for the wants of the said minor, and that he has no reasonable place for the maintenance of said child, and has and will neglect her, and is of bad repute for industry and sobriety. The father of the child filed an answer, wherein he took issue with the above statements of the petitioner, and asked that, if the court found it necessary to appoint a guardian for the child, he be appointed such guardian. The court found that appellant, over three years ago, and when the minor child was of the age of six months, deserted and abandoned the said minor child, and ever since said time has so continued to desert and abandon the said minor child; that he is not a fit, or proper, or competent person to have the care, custody, or control of said minor child; that he is a shiftless and improvident person, without industry, and lacking in integrity and honesty, and having no reasonable place for the maintenance of the said minor child, or a home or a place of abode for said minor child; that from the death of the mother of the child up to the time of the abandonment of the child, when it was six months of age, appellant failed and refused to properly care for said child. The court made other findings along the same lines, tending to sustain the allegation that appellant is not a fit, or proper, or competent person to have the care of his own child. These findings are challenged by appellant as not being supported by the evidence.

It is well settled in this state that a parent is entitled to the guardianship of his child under the age of 14 years, if he is a fit, proper, and competent person, in perference to any other person. Code Civ. Proc. § 1751; Guardianship of Salter, a Minor, 142 Cal. 412, 76 Pac. 51; In re Campbell, a Minor, 130 Cal. 380, 62 Pac. 613. In the Campbell Case, after discussing the provisions of section 1751, Code of Civil Procedure, it is said: "The fact of the competency or incompetency of the father was therefore the controlling question in the case; and, as there is no finding on the point, the findings must be regarded as insufficient to support the order appealed from." In the Salter Case the court again lays down the rule that the competency or incompetency of the father, where the contest is between the father and a person other than the mother, is the controlling question, and then says: "Nor is the right of the father, he being competent, to have the custody and control of his child at all affected by the finding of the court relative to the health of the child, and the better opportunity he would have for fresh air and exercise at the home of his grandmother than at the residence of his father." The necessity for an affirmative showing as to the incompetency of the father is recognized by respondent, and accordingly, as we have seen, such an allegation is contained in her petition and a corresponding finding made. And the only question presented is as to the sufficiency of the evidence to sustain the findings on that question.

Before taking up a discussion of the evidence upon this point, it may be conceded that the evidence abundantly shows that Mrs. Marshall is in every way a proper person to have the care of the child, and is well able and willing to give her good care, and is evidently much attached to the child. The evidence shows, without contradiction, that about a month after the death of the mother of the child the father removed from San Jose to Alameda, and took the babe with him. On the train he fed her warm milk, and on arriving at Alameda took her to a Mrs. Rafferty, who kept the child for several months, and was paid for so doing by the father. He next put it in charge of a Mrs. Schultz, who kept house for him and cared for the baby. The child became ill and was next placed in the care of a Mrs. Jamison, where it remained until placed in charge of Mrs. Marshall, which was done when the child was six months old, and upon her request and solicitation, three times made, through her brother to Mr. Galleher, the father of the child. There is not one word of evidence that these women who cared for the child in Alameda did not give it good care, or were not good and competent women. One of them, Mrs. Jamison, complains that she was paid but $8 for her services; but she does not suggest that the child was neglected. There is no contradiction of the testimony that the father paid the other women for their care of the child. It was further shown that, when the child was sick in Alameda, it was attended by a physician, for which Mr. Galleher still owes. The only evidence in the record that the child was in need of anything when in Alameda is that, when Mrs. Marshall took her to remove her to San Jose, she had to buy her a pair of shoes and a bonnet, as the child did not have any. We do not think this is sufficient evidence to warrant the finding that from the death of the mother up to the time of the abandonment of the child, when it was six months of age, appellant failed and refused to properly care for said child. It is true that the child was ill, but no evidence was offered tending to show that it was neglected during this time. On the contrary, it would appear that, considering the circumstances and condition of life of appellant, he provided reasonably good care for the child.

We now come to a consideration of the finding as to abandonment of the child. As we shall see when we examine the evidence on this point, this finding is based upon the fact that appellant, at the solicitation of Mrs. Marshall, gave the child to her to raise, and made no provision for the child's support by himself, Mrs. Marshall having assumed that charge. An agreement, especially if oral, whereby a parent gives his child to another to raise, is generally held to be revocable at any time. Weir v. Marley (Mo.) 12 S. W. 798, 6 L. R. A. 672; State v. Baldwin, 5 N. J. Eq. 454, 45 Am. Dec. 397; Child v. Dood, 51 Ind. 484; Drumb v. Keen, 47 Iowa, 435; Cook v. Bybee, 24 Tex. 278; Foulke v. People (Colo. App.) 36 Pac. 640; Brooke v. Logan (Ind.) 13 N. E. 669, 2 Am. St. Rep. 177; In re Scarritt, 76 Mo. 565, 43 Am. Rep. 768. Thus in Foulke v. People, supra, it was held that a father's agreement to leave his minor child with its aunt has no mutuality, and is revocable by the father at any time. In this case the aunt had had the child for about two years, and had spent considerable sums of money for her support. In State v. Baldwin, 5 N. J. Eq. 454, 45 Am. Dec. 397, it is said: "A verbal agreement by the father committing the child to the care and custody of another until it should attain its majority is void, and such child will be restored to its father upon a writ of habeas corpus. That the parents are the natural guardians and prima facie are entitled to the custody of their minor children."

The findings in this case on this point are so drawn as to give the impression that appellant abandoned a sick and helpless child to its fate, and that Mrs. Marshall thereupon took the child to her heart and home and cared for it. Thus finding 19 is in these words: "That the said child when so abandoned and deserted by the said Fred W. Galleher was dangerously ill and momentarily expected to die. That in such condition the said child was deserted and abandoned by the said Fred W. Galleher, and was so dangerously ill and its life despaired of when the said Mary Marshall took the said child and nursed and cared for and attended to it, and ministered to its wants and necessities." Any person reading this finding, and several like it in the record, would suppose that the father had deserted and abandoned a sick and helpless infant to its fate, and that after being abandoned it was rescued by Mrs. Marshall. Yet the evidence shows beyond question that the child was given by the father into the custody of its maternal aunt, Mrs. Marshall, at her repeated solicitation, to be by her raised as the child of Mr. Galleher. In this regard the evidence is that Mr. Hogan, a brother of Mrs. Marshall, frequently called on Galleher and the baby while it was in Alameda, and, at the request of Mrs. Marshall, on three different occasions requested Mr. Galleher to let Mrs. Marshall have the child. At this time the child was ill, and, though cared for by women against whom no word is spoken, it was not in the care of any woman related to it by the ties of blood. Mrs. Marshall, its aunt, herself the mother of a little girl and able to give the child good care, offered to take it, and, upon the father consenting, came to Alameda and took the child to her home in San Jose. Mrs. Marshall in her testimony makes it perfectly clear that she expected no compensation for her work of love, but expected to herself provide for the child, and, in fact, she did do so. It is also in evidence without contradiction that it was understood that Mr. Galleher should be kept informed of the condition of the child by its aunt or its uncle Hogan; and it is in evidence without contradiction that Galleher's brother, at his request, frequently visited the child and kept the father advised as to the condition of the child. It is true that the evidence shows that during the three years the child was in the care of Mrs. Marshall the father did not himself visit it more than three or four times, and did not contribute to its support save to send it trifling gifts at Christmas and birthdays. We do not think this evidence is sufficient to justify a finding that the father deserted and abandoned his child in the sense in which those words are used in the findings. On the contrary, such evidence rather shows that the father was making what at the time was a prudent provision for the care and nurture of his infant.

The evidence also shows without contradiction that ever since Mr. Galleher came to Alameda he has worked as a motorman for the Oakland Transit Company, being a period of three years and three months, earning in such employment $19 per week, that he has worked almost daily during that time, and that he is now married to a woman who testified to her willingness and wish to take the child into her home. It was shown without contradiction that Galleher and his present wife reside in Alameda in a rented five-room cottage, furnished with carpets and beds, and, though not as well off financially as the Marshalls, they are able to support the child. Depositions were read wherein nine residents of Alameda testify that Galleher's reputation in that community for truth, veracity, sobriety, and morality is good. Two of these witnesses are officials of the company for which he works. As against this, one witness testified that during a period of three months, while Galleher rented a portion of her house, she saw him under the influence of liquor: "Once he was a good deal under the influence of it. He plainly showed the signs of liquor." That they (he and his wife) borrowed household necessaries and money. The money was repaid, but the household things were not returned. What they were is not shown. It was also shown that he still owed bills that accrued while he lived at San Jose, consisting of a meat and a grocery bill, as well as for medical attendance and the burial of his deceased wife. This evidence does not justify a finding that Galleher is without industry, or that he has no reasonable place for the maintenance or the abode of his child. His neglect to pay his bills under the circumstances may to some extent indicate that he is lacking in integrity, yet we do not think it is sufficient to justify the taking from a father his natural right to the custody of his child.

The general finding that Galleher is not a fit, or proper, or competent person to have the care, custody, or control of his own child is not sustained by the evidence as we have detailed it, and which we think is a fair statement of the evidence. After the death of the mother of the babe at its birth he seems to have made a brave struggle to care for the babe where he could have it with him daily, but after a trial of about six months, when the babe was ill, and upon the solicitation and offer of the aunt of the child, he allowed her to take it. He is now again married, and able to discharge that duty toward his child which the law of God and nature, as well as the law of man, impose on him. Unless he has been shown to be incompetent to discharge that duty, he should be allowed the right to do so. We do not think he has been shown unfit or incompetent to have the custody of his own child. In examining the evidence in this case we have not overlooked the rule where there is a conflict in the evidence, or where different conclusions may be fairly drawn from the evidence, the appellate court will not interfere with the action of the trial court. But we have considered it in the light of the rule that a father is prima facie presumed to be competent to have the care and custody of his child, and can only be deprived of his right by an affirmative showing that he is incompetent. He is not shown to be incompetent by proof that he has some faults, or that he has not been or is not an ideal parent. There must be such a showing as to make it appear that he will probably fail in a substantial degree to discharge his duty toward his child.

For the reasons above set forth the order appealed from is reversed.

We concur: HARRISON, P. J.; COOPER, J.

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2 Cal. App. 360

In re POHLMANN'S ESTATE.

(Court of Appeal, First District, California. Dec. 7, 1905.)

1. Homestead—Rights of Surviving Minor Children—Selection of Homestead—Authority of Court.

Code Civ. Proc. § 1465, authorizing the court, if a homestead was not selected in the lifetime of the decedent, to select one for the use of the surviving husband or wife and the minor children, or, "if there be no surviving husband or wife, then for the use of the minor children," gives the court power to set apart a homestead for minor children having no living parent.

2. Same—Property Subject to Selection.

Under Code Civ. Proc. § 1465, authorizing the court to set aside a homestead for the minor children of a decedent out of any property suitable for a homestead, the court may set apart as a homestead, real estate on which decedent never resided, and which, therefore, he could not have declared as his homestead.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, § 288.]

3. Appeal—Review—Objections Not Raised at Hearing.

Where, in proceedings to set apart a homestead for the use of the minor children of a decedent, the objection that the setting apart of a homestead would deprive the executor of the power of paying the expenses of administration, etc., was not made at the hearing, the objection was not available on appeal.

4. HOMESTEAD — PETITION TO SET APART HOMESTEAD—PARTIES.

Since the court has authority to set apart a homestead for minor children of a decedent on the petition of any friend of the minors or on its own motion, the objection that the guardian of minors has no authority to petition therefor is without merit.

5. SAME — RIGHTS OF MINOR CHILDREN TO HOMESTEAD — TEMPORARY ABSENCE FROM STATE—EFFECT.

That minor children of a decedent were temporarily absent from the state at the hearing of a petition to set apart a homestead for them did not deprive them of the right to have a homestead set apart or take from the court the power to make the order.

Appeal from Superior Court, Santa Clara County; H. D. Tuttle, Judge.

Application by the guardian of the infant heirs of H. H. Pohlmann, deceased, for the setting apart certain real estate to the heirs as their homestead. From an order granting the application, the executor of the deceased appeals. Affirmed.

Wm. A. Bowden and W. H. Johnson for appellant. J. B. Kerwin, for respondent.

HARRISON, P. J. Appeal from an order in probate setting apart a homestead to the minor children of the deceased. The above-named H. H. Pohlmann was a resident of the county of Santa Clara, and died in that county November 20, 1903, leaving two minor children, to whom by his last will and testament he gave all of his estate. His wife had previously died, and the respondent, Conrad Weller, was appointed guardian of the persons and estates of the minor children. After the will had been admitted to probate the executor returned an inventory of the estate, consisting of both real and personal property, the personal property being valued at about $900, and the real estate consisting of a tract of land of about 14 acres in the county of San Joaquin, with a dwelling house thereon, appraised at the sum of $1,350. The decedent had not selected or recorded any homestead in his lifetime, and in September, 1904, the guardian of the minor children presented a petition to the superior court to set apart the above-named real estate to the minor children as a homestead. The executor of the will, and certain others claiming to be creditors of the estate, filed opposition thereto, and at the hearing of the petition the court overruled the objections of the contestants and made an order setting apart the real estate to the said minors for a homestead. From this order the executor has appealed. No appeal has been taken by either of the other contestants, and the court does not find, nor is there any evidence set forth in the record, that either of them was a creditor of the estate, or that the deceased left any creditors at his death.

1. The contention of the appellant that a court is not authorized to set apart a homestead for minor children who have no living parent is contrary to the language of the statute and to previous decisions of the Supreme Court. Section 1465, Civ. Code Proc., authorizes the superior court, in case a homestead was not selected and recorded in the lifetime of the decedent, to select, designate, and set apart, and cause to be recorded, a homestead for the use of the surviving husband or wife and the minor children, or, "if there be no surviving husband or wife, then for the use of the minor children." In Estate of Davis, 69 Cal. 458, 10 Pac. 671, the deceased died testate, leaving two minor children, but no husband. She also left a lot with a dwelling-house thereon which, in her will, she directed to be sold, and that a portion of the proceeds should be given to her brother. The superior court set apart this real estate as a homestead for the minor children, against the objection of the brother, and the order was affirmed by the Supreme Court. In Estate of Still, 117 Cal. 509, 49 Pac. 463, it was held that the right to have a homestead set apart for the use of the minor children is paramount to the right to a family allowance. In that case a family allowance had been made, but the widow suffered it to remain unpaid until its accumulation was greater than the value of the property sought to be set apart, and then lost her right to a homestead by again marrying. An order setting apart the property as a homestead for her minor child, discharged of any claim for the unpaid family allowance, was sustained.

2. The appellant further contends that a court is not authorized to set apart as a homestead any property which could not have been dedicated as such immediately preceding the death of the deceased (citing in support of this proposition Estate of Ackerman, 80 Cal. 208, 22 Pac. 141, 13 Am. St. Rep., and Estate of Carriger, 107 Cal. 618, 40 Pac. 1032), and that, inasmuch as the deceased never resided upon the property in San Joaquin county, he could not have filed a declaration of homestead thereon. The Code does not make it requisite that the deceased should have resided on the property at the time of his death in order that the court may set apart a homestead for the use of the family, but authorizes the court to set apart any portion of the estate which is suitable for a homestead. It was shown at the hearing that the property in San Joaquin county was a suitable place for a family to live in, and in Estate of Levy, 141 Cal. 646, 75 Pac. 301, 99 Am. St. Rep. 92, the court said: "Admittedly the court, in probate proceedings, has the power to set apart premises as a homestead, if they be suitable and proper for residence purposes, and could have been legally selected as a homestead during the continuance of the marriage if the parties then actually resided thereon." In Estate of Ackerman a homestead had been selected in the lifetime of the decedent, which, upon her death, vested in the surviving husband with all its previous attri-

butes of a homestead, and it was held that he was not entitled to have another homestead set apart to him out of the separate estate of his wife. In Estate of Carriger the property sought to be set apart was not susceptible of being declared a homestead for the reason that it was held by the deceased in his lifetime as a tenant in common with others.

3. The appellant further urges that the effect of setting the property apart will be to deprive him of the power of paying the expenses of administration, funeral expenses, and taxes chargeable against the estate. It is a sufficient answer to this that no objection of this character was made at the hearing, and it does not appear from the record that there are any items of this nature which remain unpaid. It does, however, appear that the executor has in his possession upwards of $900 of personal property belonging to the estate, which the court must have deemed to be sufficient for all such payments.

The objection that the guardian of the minors had no authority to present the petition, is without merit. The court was authorized to set the homestead apart on its own motion or upon the petition of any friend of the minors. Neither did the fact that the minors were temporarily absent from the state at the time the petition was heard, deprive them of the right to have a homestead set apart, or take from the court the power to make the order.

The order is affirmed.

We concur: COOPER, J.; HALL, J.

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2 Cal. App. 312

WILLSON v. GREGORY.

(Court of Appeal, Second District, California. Dec. 1, 1905.)

1. Sales—Breach of Contract—Findings—Evidence.

In an action for breach of contract to purchase certain oranges, evidence *held* insufficient to sustain a finding that the price which plaintiff obtained for the fruit after defendant's refusal to accept the same, was the best price plaintiff could have obtained in the market nearest the place at which it should have been accepted by defendant, and at such time after the refusal by defendant to perform such contract, as would have sufficed with reasonable diligence for plaintiff to have effected a resale.

2. Same—Damages.

In an action for breach of a contract to purchase fruit, the value of the property in estimating plaintiff's damages is to be deemed the price which he could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer, and at such time after the breach of the contract as would have sufficed with reasonable diligence, for the seller to effect a resale as provided in Civ. Code, § 3353.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1098–1102.]

3. Same.

In an action for breach of a contract to purchase fruit, plaintiff's measure of damages in case the property had not been resold in the manner prescribed by Civ. Code, § 3049, was the excess, if any, of the amount due from the buyer under the contract over the value, to the seller, together with the excess, if any, of the expense properly incurred in carrying the property to market over those which would have been incurred for the carriage thereof if the buyer had accepted it.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1098–1102.]

4. Compromise and Settlement—Operation—Bar of Action.

Where, in a suit for breach of a contract to purchase certain fruit, the court found that plaintiff offered to deliver the balance of the fruit on December 4, 1900, such date must be taken as the date of the breach of the contract sued on, and as the date of the origin of plaintiff's cause of action, which was not therefore barred by the settlement of a former suit brought by plaintiff against defendant on November 28, 1900, to recover the purchase money due on fruit delivered under the same contract.

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by James Willson against A. Gregory. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Frank C. Prescott and Prescott & Morris, for appellant. Henry M. Willis, for respondent.

SMITH, J. Appeal from a judgment for the plaintiff, with bill of exceptions bringing up the evidence. The suit was brought for damages for breach of a contract; by the terms of which plaintiff agreed to sell to defendant, to be delivered at defendant's packing house at Portersville, a certain crop of navel and seedling oranges for the price of $1 per packed box for the latter, and for the former, for oranges delivered up to and including November 10, 1900, $1.75 per packed box, and for oranges thereafter delivered, $1.50. The defendant received and paid for a portion of the crop, but refused to receive the balance.

The allegations of the complaint as to damages are in effect that by reason of the breach of said agreement by defendant plaintiff was compelled to sell the remainder of his crop in the open market, exercising therein due and reasonable diligence and obtaining therefor as much as he could under the market prices and prevailing conditions; that the amount received therefor was $648.81; and that the difference between the agreed price and the amount received by plaintiff was the sum of $740.19, etc. The finding of the court upon the same point is in effect that upon the refusal by the defendant to accept the remainder of the crop the plaintiff made efforts to sell the same in Portersville, but was unable to do so; that thereupon the plaintiff delivered the remainder of the crop to the Fay Fruit Company of that place to be sold on commission; that plaintiff was unable to sell or otherwise to dispose of the crop; that the fruit delivered was sold by plaintiff, through the Fay Fruit Company on commission, with reasonable diligence; and that the sum received, "after deducting all the expenses incurred by plaintiff in effecting the resale," was as alleged by the plaintiff, $648.81. It is further found that this "was the best price which plaintiff could have obtained therefor in the market nearest to the place at which it should have been accepted by the defendant, and at such time after the refusal of the defendant to perform said contract as would have sufficed with reasonable diligence for the plaintiff to effect a resale." But from the evidence it appears, without substantial contradiction, that the market price of oranges at Portersville during the periods referred to was much higher, and there was no evidence as to the value of the fruit in any other market; nor was there any evidence or finding as to the market nearest to Portersville, or as to where or when the oranges were sold. It is clear, therefore, that this portion of the finding is not sustained by the evidence, and that it must be disregarded.

Upon the remaining facts found it is also clear that the findings fail to show that the plaintiff was entitled to the damages found and adjudged to him. The rule of damages in such cases as the present is as prescribed in section 3311, subd. 2, and section 3353, of the Civil Code. It appears, however, from the evidence, that on the 28th day of November, 1900, a suit was brought by the plaintiff against the defendant for the sum of $299—the balance of the purchase money due on the oranges delivered. This suit was settled for the sum of $263.10; and it is claimed that this is a bar to the present suit, which is on the same contract; and that the amount paid then was in full of all claims under the contract. But the latter point is disposed of by the finding of the court to the contrary; and with reference to the former, it is found by the court that the offer of the plaintiff to deliver the balance of the crop was of date December 4, 1900, which must be taken as the date of the breach sued on, and as the date of the origin of plaintiff's cause of action. Both these findings seem to be supported by the evidence, and it is, therefore, clear that neither of the points urged by the respondent is tenable.

The judgment is reversed, and the cause remanded, with directions to allow the plaintiff to amend his complaint, if he be so advised.

We concur: GRAY, P. J.; ALLEN, J.

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2 Cal. App. 316

MARSTON v. KUHLAND.

(Court of Appeal, Third District, California. Dec. 1, 1905.)

COURTS—APPELLATE COURTS—JURISDICTION—TRANSFER OF CAUSE.

Under Const. art. 6, § 4, providing that appellate jurisdiction on appeal from the superior courts in all cases in equity except such as arise in justices' courts, is given to the Supreme Court, a District Court of Appeal has no jurisdiction of a direct appeal taken in an action for the enforcement of a trust and for an accounting, and an appeal so taken will be transferred to the Supreme Court, as required by such section.

Appeal from Superior Court, Solano County.

Action by Mary A. Marston against Louis Kuhland. From a judgment in favor of defendant, plaintiff appeals. Transferred to Supreme Court.

Chas. J. Hasman and Alexander Church for appellant. Frank R. Derlin, for respondent.

CHIPMAN, P. J. This is an action for the enforcement of a trust and for an accounting. The appeal is taken directly to this court. By section 4, art. 6, of the Constitution of the state, "appellate jurisdiction on appeal from the superior courts in all cases in equity, except such as arise in justice's courts," is given to the Supreme Court. By the same section and article of the Constitution it is provided that "no appeal taken to the Supreme or to a District Court of Appeal shall be dismissed for the reason only that the same was not taken to the proper court, but the cause shall be transferred to the proper court upon such terms as to costs or otherwise as may be just, and shall be proceeded with therein as if regularly appealed to." In perfecting the appeal, these provisions of the Constitution were doubtless overlooked by appellant. When the cause was argued and submitted here it was assumed by the court that it was here by order of reference of the Supreme Court, the notice of appeal not having been called to our attention. The case is clearly one "in equity" and is appealable only to the Supreme Court, which alone has jurisdiction in the first instance.

The order of submission heretofore given and made is vacated and the cause transferred to the Supreme Court; the costs to attend its final determination.

We concur: McLAUGHLIN, J.; BUCKLES, J.

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2 Cal. App. 317

RENFRO v. FRESNO CITY RY. CO.

(Court of Appeal, Third District, California. Dec. 1, 1905. On Rehearing, Dec. 29, 1905; Rehearing Denied by Supreme Court Jan. 29, 1906.)

1. CARRIERS—ACTION FOR INJURY OF PASSENGER ON STREET CAR—EVIDENCE OF NEGLIGENCE.

While the injury of a passenger while on a street car is not of itself sufficient to raise a presumption of negligence in the operation of the car, evidence that when a passenger was about to step off a car, which had almost come to a stop, and while he was standing with one foot on the step and holding to a stanchion with one hand, the car suddenly jerked ahead with such violence as to break his hold and throw him to the ground with his head toward the rear of the car, is sufficient prima facie to charge the company with negligence, and the passenger is not required to show the cause of the sudden movement of the car.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1159, 1286.]

2. Appeal — Review of Instructions — Harmless Error.

Where there was no evidence of a want of proper and skillful surgical attention to a personal injury for which plaintiff sued, an instruction that his right to recover, or the measure of his damages, would not be affected by want of such care and attention if he was financially unable to procure the same, even if erroneous, was harmless error.

Appeal from Superior Court, Fresno County.

Action by E. Renfro against the Fresno City Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

F. H. Short and F. E. Cook, for appellant. Harris & Perkins, for respondent.

CHIPMAN, C. J. It is alleged in plaintiff's complaint that while he was a passenger on a certain car operated by defendant corporation at the terminus of the railroad "where said car usually stopped for passengers to alight therefrom, and while said car had slowed up for the purpose of permitting passengers to get off from said car, the employés of said defendant who were then and there running said car and had the same under their charge and control, negligently and carelessly caused said car to be suddenly and violently jerked and started and put in rapid motion without allowing plaintiff sufficient time to alight therefrom; and in consequence of said negligent and careless action of said defendant's employés, and without any fault or negligence on the part of plaintiff, and as a further consequence of the negligence and carelessness of defendant's said employés in running and conducting said car, plaintiff was violently thrown from said car to the ground and thereby sustained great injury, to wit," etc.

The attending surgeon testified that the injury was "to the right hip joint, the right thigh or femur, the bone near the hip joint * * * a fracture just inside of the capsule of the joint, what we call an intra-capsular fracture." The injury occurred on February 4, 1904, and on January 12, 1905, when the trial closed, plaintiff was on crutches and the surgeon testified that he "did not think his patient would ever be able to get around and pursue his usual vocation in an active way," that of a bricklayer and plasterer. Plaintiff testified: "I was a passenger on an electric car. As I got out near the end of the line the car began to slow down, and it was along between 12 and 1, and I was in a hurry to get home for dinner, and I got ready to get off when it stopped. It slowed down, and was pretty near a stop, and I went to get off, and it gave a sudden jerk as I left go with my hand of the rail, the bar where I was holding on, and I had my weight on one foot and it threw me back on my side. I had my seat on the outside in the rear end of the car on the right hand side, that would be the easterly side as I went out. I was standing on the lower step when I was thrown. I had hold of the bar—the iron. There is an iron post goes up outside of the other, the iron on the upright post. I was standing this way [showing] say we were going this way [the evidence is that the car was going north] and I had this hand [the left hand] a hold of the post and this foot [the right foot] was off the step, and this [the left foot] was on the step and just as I let go it jerked and threw me on this hip [the right hip]. My head fell to the south." He testified that the bottom step was about 15 inches from the ground; that he was then about 15 or 20 feet from the end of the track, and that the car went "but a little ways because I had to come down a little to get around it." He testified that he had frequently ridden on the car, and noticed that it stopped "anywhere along there clear from the end clear back as far as 50, 30 or 20 feet, anywhere along there from the end." He was sitting about the middle of the rear seat on the east side. He testified: "I was holding on with my left hand, and put my right foot off first. My right foot was off the step, but was not on the ground when I was jolted loose." The motorman testified that there was nothing in the nature of a jolt or jar that attracted his attention in making the stop; that he threw the power off about 94 paces back and the car was running from that time on its momentum, and he "stopped in the same way as always with the brake, which is customary." There was evidence that the effect of taking off the brake, if done too suddenly, will sometimes "give the car a jerk forward" if the car was going fast, and if going slowly "it would go ahead a little." The conductor testified that the car did not move more than 3 or 4 feet after plaintiff fell off; "it was practically stopped at that time." He "was standing on the rear end of the car, but did not notice plaintiff trying to get off." It does not appear that there were any other passengers on the car at the time.

Defendant contends that "the plaintiff shows no such facts as justify the presumption or conclusion of negligence on the part of defendant, or a verdict in favor of plaintiff, and this point presents the controlling considerations to be presented and considered on this appeal." Again attention is called, in italics, to the fact "*that the evidence is entirely void of any statement covering the cause or giving any reason for the sudden jerk mentioned by plaintiff.*" It will be observed, however, that plaintiff did testify that the sudden jerking of the car, under the circumstances narrated, threw him off and was the cause of the injury. Defendant's position is that plaintiff should have gone further and shown what caused the sudden jerking of the car before a presumption of negligence would arise. The mere happening of injury to a passenger while riding on defendant's cars, unaccompanied by any other fact, would not, we think, be sufficient to raise a presumption that the injury was attributable to defendant's negligence. The injury should, in some way, be connected with the operation of the cars by defendant. A passenger might suddenly be overtaken by vertigo while walking through the car, and, in falling, meet with injury, or, as suggested by defendant's counsel, the passenger might commit suicide. Nothing appearing in any way to connect the railroad company with the injury, no presumption of its negligence would arise. Here, however, it did appear that the injury resulted under circumstances giving rise to an inference that but for the sudden and unexpected jerking of the car the accident would not have happened. The evidence was that the car was near the end of the road, and was slowing down, and had nearly stopped, when plaintiff started to get off. He still had hold of the stanchion, and if the car had not suddenly moved forward at accelerated speed he would not have fallen. It is a physical fact, of which the court will take judicial cognizance, and is also within the common experience of patrons of street cars, that when a passenger, facing the front of the car, steps off while the car is moving forward he would fall forward, if at all, and not backward. The momentum acquired, while riding, would naturally carry him forward when he steps off from a moving car with his face to the front.

The evidence showed that the sudden jerking of the car was so violent as to compel plaintiff to release his hold of the stanchion and to throw him down with his head to the rear of the car, and with sufficient force to seriously injure him. These facts are to be considered in connection with the other facts testified to in determining whether a presumption of negligence arose. Ordinarily, a passenger injured while riding on a car is not in position to know more than that by some unusual movement of, or happening to, the car he has received injury. What caused the movement or happening he cannot be expected to know, and it is for this reason and for the further reason that the persons operating the car should know the cause and be able to explain it, that the presumption of negligence arises, and that the burden is cast upon the railroad company to explain the cause. The present case fairly illustrates the wisdom and justice of the rule. The proximate cause of plaintiff's injury was the sudden jerking of the car forward when he had reason to believe that it was about to stop. Beyond this he was in no position to know the cause. If such sudden movements of street cars, under like circumstances, are necessary or unavoidable, in their operation, we think the rule would cast the burden upon the company operating the cars to show this fact as part of its defense. In the present case the motorman testified that he had thrown off the current and was slowing down by the brakes. He may have released the car entirely from the brakes and thus caused it to suddenly move forward with a violent jerk, he may have unconsciously applied the current; but whatever he did the plaintiff could not know nor anticipate. He had a right to assume that the car was about to stop, and instead of increasing its speed suddenly, would diminish it and come to a stop. He showed enough to raise a presumption of negligence on the part of the defendant, and it was for the defendant to rebut this presumption to the satisfaction of the jury. Just what amount of evidence disclosing the circumstances attending an injury may be required to justify the presumption of negligence on the part of the carrier it is impossible to definitely point out. No two cases arising at different times are ever likely to be similar in all respects, and no hard and fast rule, applicable alike to all cases can be laid down. Respondent accepts the rule stated in Shearman & Redfield on Negligence, page 561, as follows: "One reason for this rule is said to be that when an event takes place which, according to the ordinary course of things, would not happen if proper care was exercised, it is presumed that such care was not exercised."

It is claimed that "in the case at bar there was nothing which occurred which ordinarily does not happen if those who have the management use proper care. In other words, everything that did happen in this case in the matter of the operation and movement of the car is such as usually does happen and is and must be ordinarily anticipated, and therefore is not negligence." Appellant's claim requires us to hold as matter of law that the thing which happened was nothing more than an ordinary occurrence such as every passenger is presumed to anticipate and guard against. It seems to us that the "event which took place" would not have happened "according to the ordinary course of things. * * * if proper care" had been exercised by the servants of the railroad company. When a car has reached its terminus, is slowing down and nearly at a stop, as here, it cannot be said as matter of law that "according to the ordinary course of things," the car is likely to suddenly and without warning accelerate its speed to such extent as to throw a passenger violently to the ground who was holding to a stanchion preparing to alight. Whatever may be the rule elsewhere, we think it firmly settled by the decisions of our Supreme Court in harmony with the views we have expressed. In Treadwell v. Whittier, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175, an instruction was under review which was drawn on the theory now urged by appellant. It was: "Plaintiff, in order to recover in this action, must prove to your satisfaction that defendants have been guilty of some fault or negligence, and must also prove what that fault or negligence was." The court said: "The law does not put on the plaintiff the burden of proving, not only fault or negligence on the part of the defendants, but also what that fault or negligence was. The law requires proof that plaintiff has sustained an injury by the breaking of the machinery by which he is carried or transported, and that such machinery was under the control and management of the defendant. [The injuries complained of were caused by the falling of an hydraulic elevator operated by defendants in their store, on which he (plaintiff) was riding at the time.] When plaintiff has made such proof, he has made out a case which entitled him, if not rebutted or disproved, to recover of defendant. The plaintiff by such proof has made a case showing negligence on the part of defendant. The burden is then thrown on defendant to show that he was not guilty of negligence for which he could be charged. This he can do by going into proof of the manner in which the hurt occurred, and showing that it was caused by an inevitable casualty, for which the law imposed on him no responsibility, or by establishing any fact which relieved him of responsibility."

The rule was stated in McCurrie v. Southern Pacific Company, 122 Cal. 558, 55 Pac. 324. In that case defendant's car had come to a stop at a street crossing; the front door of the car had been fastened open and plaintiff had gone to the front platform. The car "gave a violent jerk backward," and to save him from falling plaintiff caught hold of the door casing and "just then the door swung to and caught" his hand. The trial court granted defendant's motion for nonsuit. The Supreme Court said: "The evidence on behalf of the plaintiff showed that the relation of passenger and carrier existed between him and defendant at the time he received the injury; and there was also evidence tending to show that the injury was caused by the act of the defendant in the management and conduct of the train in which it had undertaken to carry him as a passenger. A prima facie case is established when the plaintiff shows that he was injured while being carried as a passenger by the defendant, and that the injury was caused by the manner in which the defendant used or directed some agency or instrumentality under its control. The carrier of passengers is required to exercise the highest degree of care in their transportation, and is responsible for injuries received by them while in the course of transportation which might have been avoided by the exercise of such care. Hence, when it is shown that the injury to the passenger was caused by the act of the carrier in operating the instrumentalities employed in his business, there is a presumption of negligence which throws upon the carrier the burden of showing that the injury was sustained without any negligence on his part. The case then falls within the rule given by Shearman and Redfield on Negligence," hereinbefore quoted. This has been the rule in this state ever since Boyce v. Cal. Stage Company, 25 Cal. 460. See, also, Samuels v. Cal. St. Ry. Co., 124 Cal. 294, 56 Pac. 1115; Bosqui v. Sutro R. R. Co., 131 Cal. 390, 63 Pac. 682; Osgood v. Los Angeles, etc., Co., 137 Cal. 280, 70 Pac. 169, 92 Am. St. Rep. 171. See, also, cases collected in Philadelphia, Wilmington & Baltimore R. R. Co. v. Anderson, 72 Md. 519, 20 Atl. 2, 8 L. R. A. 673, 20 Am. St. Rep. and notes 490.

The presumed negligence of the defendant in the McCurrie Case, supra, differed in degree only from defendant's presumed negligence in the present case; in each case it is obvious that the injury resulted from the management of the instrumentality operated by defendant; in neither cases does the rule of law put upon plaintiff the burden of showing the cause of such management, but does put it upon defendant. Defendant offered no evidence to explain the cause of the sudden start forward which caused the injury. The evidence in defense was a denial that any sudden jerk of the car occurred or that anything unusual happened, and merely produced a conflict in the evidence. It is not necessary to consider the rule as to contributory negligence on the part of plaintiff, as defendant makes no point upon that feature of the case. Nor do we think it necessary to consider the cases cited by appellant from other jurisdictions, some of which seem to sustain its contention. The rule established by our Supreme Court must be our guide.

Several instructions given by the court, and others requested by defendant and refused were noted in the assignments of error. With one exception the questions involved are, as we understand counsel, dependent upon the view taken by appellant upon the rule already fully discussed. As we hold against defendant upon these questions the instructions referred to need not be examined. The exception is the instruction numbered 10, by which the jury was told that "it was the duty of plaintiff to use such reasonable efforts as were in his power to mitigate the consequences of the injury; * * * and in this connection, you will consider the financial ability of plaintiff to employ physicians and all the circumstances connected with their employment and with the compliance with the treatment prescribed by them; and if you find that he used such reasonable efforts as were within his power to employ a physician or physicians of good reputation and standing for the purpose of treating his injuries, and that he complied with and took the treatment prescribed by such physician or physicians, then you are instructed that he is not responsible for any unskillful treatment of him on the part of said physicians; and the fact that a more skillful treatment might have been prescribed by the same or other physicians, or the fact that he did not employ the best medical and surgical skill to be had, can in no way affect his right to recover herein, nor the amount of damages which he is entitled to recover." The only testimony as to the character of the injury and the treatment prescribed and used came from the attending physician and surgeon whose qualifications were shown and are not disputed to have been equal in all respects to meet the exigencies of the case—both as to diagnosis and treatment of the injury. The criticism of the instruction is directed to that part in which the financial ability of plaintiff to employ physicians is mentioned. If the fact had been that because of poverty or through motives of economy plaintiff had employed a wholly unskillful person to treat him, and his injury had thus resulted in being greater than it would have been with skillful treatment, the question might have arisen as to the correctness of the instruction. But the evidence was that the attending physician was of unquestioned skill, and while he at first prescribed a treatment to which plaintiff would not submit, his testimony was, that under all the circumstances the treatment prescribed and followed was equally effective, and probably the better course. There was no evidence that the damage was increased by want of proper surgical attention. Conceding error, it was without prejudice to defendant. The judgment and order are affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

Petition for Rehearing.

CHIPMAN, P. J. We endeavored in the opinion to make our position free from ambiguity and uncertainty. Defendant urges that we carried the rule of presumptive negligence farther than is warranted by any of the decisions of the Supreme Court of this state, and that our position is opposed to the rule laid down in well-considered cases in other states. That the point in controversy may clearly appear we quote from the petition: "If the facts testified to up to the point of injury are such only as would not, if the injury did not happen, themselves show any negligence or unusual operation, then the happening of the injury does not raise the presumption of such negligence." Quoting certain passages from the opinion, the petition further states: "The point we make and which we have sufficiently stated is that the other facts must show negligence, but even if the contrary view were correct, the evidence of the nature of plaintiff's fall would be quite insufficient to raise such presumption." Again: "It will be observed again, that the evidence of the fall of the plaintiff is by the court made the controlling consideration in determining negligence." Still further: "In other words the passenger cannot by falling down or falling off or sustaining an injury, assist in creating the presumption of negligence, and unless something exceptional or unusual appears independent of what happens to the passenger, the presumption of negligence is not raised." With this statement there need be no further doubt as to plaintiff's point, and we shall meet it as frankly and squarely. Happily, if we are wrong, defendant is not without the means of correcting the error.

Suppose a railroad train is slowing down at a station for the purpose of allowing passengers to alight and has nearly stopped. Suddenly the train jerks forward, and with such force as to throw the passengers, who are moving towards the doors, preparatory to alighting, with violence to the floor of the cars, breaking limbs, dislocating joints, fracturing skulls, and otherwise maiming and injuring them. Our position is that the nature and extent of the injury may be taken into consideration in determining the question of negligence of the carrier in operating the train, and whether the jerking was unusual. If in the operation of railway trains or street cars their sudden jerking or jolting, when slowing down to stop, has been of such notorious character as to admonish passengers of the danger and would, as matter of common prudence, require them to keep their seats until the cars have come to a stop, we can see how the rule contended for might have some application. But no such thing is true. Passengers from street cars are urged to alight quickly, and are encouraged to make preparations to do so by approaching exits before the car stops. This is common knowledge. If the rule was that street car passengers should hold their seats until the car stops, it would take many more cars to perform the service, and such a rule would call for some sort of notice to passengers. But why should not the jury consider the circumstance of the injury itself, its nature and extent? Why is it not a legitimate fact tending to show whether the jolt or jerk of the car, causing the injury, was unusual or not? Unless it can be maintained (which it cannot), that street cars, when about to stop, usually, and so generally as to be within the several knowledge of passengers, are so liable to jerk or jolt as to throw occupants to the ground if they prepare to alight, we do not think the rule we have laid down is unreasonable or unjust. In the case of Samuels v. California Street, etc., Ry. Co., 124 Cal. 294, 56 Pac. 1115, the court took into consideration, on the question of negligence, the fact that two passengers, besides the plaintiff, were thrown from the car. Suppose in the present case there had been several passengers and all of them moving towards, or were on the dummy, with the view of alighting, and all of them had been thrown violently to the floor of the car, or had been pitched headlong from the platforms. Would these facts not have been admissible, and if admissible, for what purpose except to throw light upon the question of negligence? How else can the question of the carrier's negligence be within the means of the passenger to show presumptively or at all, in ordinary cases, except he be allowed for that purpose to show, not only that something happened to the car through the carrier's agency, but that he was injured thereby through no fault of his own? We are still of the opinion that it was competent, in the present case, to show the circumstances and nature of the injury as tending to assist the presumption of negligence on the part of the defendant which arose from evidence showing the sudden and unusual jolt.

Petitioner is not warranted in the statement that "the fall of the plaintiff is by the court made the controlling consideration in determining negligence." It was clearly shown in the opinion that "the mere happening of the injury to a passenger while riding on defendant's cars unaccompanied by any other fact would not, we think, be sufficient to raise a presumption that the injury was attributable to defendant's negligence. The injury should in some way be connected with the operation of the cars by defendant." It is beyond dispute that the jerking of the car in the present case was the cause of the injury. That much shown, the character of the injury might well tend to show that but for defendant's negligence it would not have happened.

Rehearing denied.

We concur: McLAUGHLIN, J.; BUCKLES, J.

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2 Cal. App. 618

BROWN v. LOS ANGELES RY. CO.

(Court of Appeal, Second District, California. Nov. 24, 1905.)

1. Appeal—Verdict—Conclusiveness.

A verdict or finding of negligence cannot be disturbed on appeal, unless the lack of negligence on the part of the defendant, or the existence of contributory negligence on the part of the plaintiff, follows necessarily as a conclusion of law from the undisputed facts.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 405.]

2. Street Railways — Collision — Negligence—Evidence.

In an action for injuries sustained in a collision between plaintiff's vehicle and a street car, evidence *held* to warrant a finding of negligence.

Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by William R. Brown against the Los Angeles Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Bicknell, Gibson, Trask, Dunn & Crutcher (Norman S. Sterry, of counsel), for appellant. Waters & Wylie, for respondent.

SMITH, J. The suit was brought to recover damages for the alleged negligence of the defendant in the operation of its cars. Plaintiff was driving a one-horse buggy, to which was attached a hack, to which in turn was attached a vehicle called a "runabout"; and the alleged injury was caused by the collision of one of defendant's cars with the hack, at the intersection of Flower and Twelfth streets in the city of Los Angeles. The former street runs north and south, and the plaintiff had approached defendant's track while traveling eastward on Twelfth street. The court found that the injury was caused by the negligence of the defendant, and gave judgment for the sum of $500 damages, from which, and from an order denying defendant's motion for a new trial, defendant appeals.

The only question involved is as to the sufficiency of the evidence to justify the finding. According to plaintiff's testimony, as he approached Flower street he was going in a walk, and when he had approached within 15 feet of the track he stopped and took a look both ways, and, seeing no car, proceeded to cross, when the accident occurred. But in the opinion of the court, which is inserted in the statement on motion for a new trial, it appears that the court disregarded the testimony of the plaintiff and based its conclusion upon that of the motorman, which, in the opinion of the court, was corroborated by the testimony of the other passengers on the car. According to the motorman's testimony, when he first saw the vehicles of the plaintiff, the car was about 100 or 125 feet from the point of the accident, and he thereupon "threw off the current and applied the air and rang the bell"; but then the plaintiff "pulled up on his lines and almost stopped"; and, he says, "I then released the air I had on and let my car roll." The plaintiff then "started to drive on"; and, at that time, he says, the car was "about in the neighborhood of 40 or 50 feet, and I put the air on full force then, rang the bell, and put on the reverse lever." When the witness first saw the plaintiff's train of vehicles, the car was running somewhere in the neighborhood of 9 or 10 miles an hour, and at this time the plaintiff's horse was somewhere in the neighborhood of 15 feet from the track; but, while the plaintiff was slacking his speed, the car approached to within about 40 or 50 feet of the point of the accident, at which time the horse's head was about 6 or 8 feet from the track. This testimony is corroborated generally by the passengers on the car, except that, according to their testimony, the car was about 20 feet from the point of the accident when the plaintiff started up his horse and the brake was put on the second time; while, according to the conductor, it was somewhere between 30 and 40 feet. The estimates of the witnesses as to the distances are, of course, more or less inaccurate; but the view of the case taken by the court was, in effect, that the plaintiff, observing that the car was slowing up, supposed that he could cross the track in safety, and that he would have done so but for "the act of the motorman in releasing the air brake and accelerating his speed after he had slowed up before ascertaining whether the plaintiff had stopped"; and the court was further of the opinion that "the plaintiff had a right to assume that defendant would not increase the speed of the car approaching the crossing until plaintiff had crossed the track." It is added: "Defendant's counsel have pertinently asked: 'How could plaintiff be deceived with regard to the speed of the car, when he did not see it?' But the defendant has proven that he did see it, and the plaintiff's cause is changed by this evidence from injury by reckless speed of defendant's car to negligence of the motorman in increasing his speed as he was approaching the crossing, when he was charged with knowledge that the plaintiff was about to cross in front of his car."

The case is undoubtedly a close one, but we cannot say that the views of the court below were not justified by the facts shown (Clark v. Bennett, 123 Cal. 278, 55 Pac. 908), and there are some other features in the case that tend to justify this conclusion: We know nothing of the rate of speed to which the car was reduced at the time it reached the point of 40 or 50 feet from the place of the accident; but it appears that at that time the horse's head was 6 or 8 feet from the track, and, as the car struck the hack, the horse must have traveled some 30 feet before the collision took place, and from this a high rate of speed may be inferred. The question of negligence is, in general, a question of fact, and not of law, and the verdict of the jury, or finding of the lower court, cannot be disturbed, unless the lack of negligence on the part of the defendant, or the existence of contributory negligence on the part of the plaintiff, follows necessarily as a conclusion of law from the undisputed facts. Schneider v. Market St. Ry. Co., 134 Cal. 488, 66 Pac. 734. Upon the evidence, we do not think we would be justified in disturbing the findings of the court below.

The judgment and order appealed from are affirmed.

I concur: ALLEN, J.

GRAY, P. J. I concur in the principal opinion and in the reasoning thereof; and, in addition, I think a reasonable conclusion from all the evidence is that, while the plaintiff may have been negligent, yet the motorman had actual notice of the dangerous position in which plaintiff had placed himself, and a clear opportunity to have avoided the collision by the exercise of reasonable diligence to do so after he saw the dangerous position in which plaintiff was placing himself. A street car running in to the third in a series of a horse and three vehicles, coupled together and passing before it, is pretty good evidence of gross negligence on the part of the motorman.

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2 Cal. App. 237

ABRAMS v. BRENNAN.

(Court of Appeal, First District, California. Nov. 23, 1905.)

ARBITRATION AND AWARD—AWARD—FILING—TIME.

Where the parties to an arbitration agreed that the award should be made in writing, signed by the arbitrators or a majority of them, and filed within 30 days after the agreement was filed with the superior court clerk, an award filed after such 30 days was void, though it was not essential to the validity of the arbitration agreement that it should limit the time for the filing of the award, as provided by Code Civ. Proc. § 1283.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Arbitration and Award, § 252.]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Arbitration between D. Abrams and P. J. Brennan. From an order denying the former's motion to set aside and modify the award, he appeals. Reversed.

L. L. Solomons and Philip I. Manson, for appellant. E. C. Chapman, for respondent.

COOPER, J. This is an appeal from an order denying the motion of appellant to set aside and modify the award of certain arbitrators in certain matters of dispute submitted to them. In this case objection was made that the award was void, and that the court had no jurisdiction because it was not made and filed in time.

It is clear that arbitration, being a creature of the statute, by which jurisdiction is taken from the courts of the matters to be arbitrated, and vested in designated persons regardless of their calling or learning in the law, must find support in and be governed by the limitations and restrictions named in the statute. The statute gives the parties to certain disputes and controversies the right to submit them to a tribunal of their own selection, and, by agreement, to vest such tribunal with many powers that, when properly exercised, become final. It may be stipulated in the submission that it be entered as an order of the superior court, and in such case it must be filed therein. The clerk of the court must thereupon enter certain enumerated matters in his register of actions, among which are "the date of the submission, when filed, and the time limited by the submission, if any, within which the award must be made." Code Civ. Proc. § 1283.

The agreement to submit in this case contained the provision: "And the parties hereto further agree that the award, decision and judgment must be made in writing, signed by the arbitrators or a majority of them, and filed with the clerk of the said superior court within thirty days from and after the day when this agreement is filed with said clerk." The agreement was filed with the clerk November 20, 1902, and the award filed December 22, 1902, more than 30 days after the making and filing of the agreement. It does not appear when the award was made, as it is not dated; but we must presume it was made when filed. We must therefore hold that, after the expiration of the 30 days, the arbitrators lost jurisdiction and the award was void. There is an attempt made by respondent to show that the delay in filing the award was caused by appellant, but the affidavits filed by appellant are in conflict with those of respondent on this point, and we must hold the parties to their contract. No doubt but that they could have extended the time by a written contract, but this they did not do.

The practice act contained provisions practically the same as those now in the Code as to arbitration, and the limitation of the time within which the award must be filed. In Ryan v. Dougherty, 30 Cal. 219, the agreement provided that the parties would faithfully abide by the award "which the arbitrators should make in writing on or before the 6th day of July, 1864." The award was not made and filed within the time named in the agreement. The court said: "The parties covenanted and agreed to and with each other that they would in all things faithfully observe, keep, and abide by the decision and award which the arbitrator should make in writing on or before the 6th day of July, 1864. This was evidently intended as a limitation of the time within which the arbitrator was to make his award. If it were conceded that the stipulation entered into between Ryan and James Mee, as attorney for Dougherty, extended the time for the hearing and determination of the matters submitted to arbitration for 60 days from the 2d day of September, 1864, the position of the respondent Ryan is in no sense improved, for the reason that the arbitrator did not make his award until the 19th day of April, 1865. Long before that date the powers conferred on the arbitrator by the parties had ceased, and this court had lost jurisdiction of the case (if it ever acquired jurisdiction in the premises) by the very terms and conditions of the submission." The above case is quoted with approval in an opinion by Mr. Justice Temple, in Fairchild v. Doten, 42 Cal. 125, where it is said: "The proceeding is a special one, and the statutory provisions must be substantially complied with or the judgment will not be valid." The same rule is followed in Massachusetts. Bent v. Erie Telegraph & Telephone Co., 144 Mass. 165, 10 N. E. 778. There the court said: "Section 9 [Pub. St. 1882, c. 188] provides that 'the award may be returned at any term or session of the court held within the time limited in the submission.' Under these provisions the agreement of submission must fix the time within which the award must be returned into court, and the court has jurisdiction only of an award returned to it within that time." See, further, James v. Southern Lumber Co., 153 Mass. 361, 26 N. E. 995; De Long v. Stahl, 13 Kan. 558; Brown v. Copp, 5 N. H. 223; Morse on Arbitration & Award, p. 261. The latter author says: "If a time be named within which an award is to be made, it is invalid if it be not made until after that time has elapsed."

Respondent contends that time is not material, because the Code provides that the arbitrators may be compelled by the court to make an award. Code Civ. Proc. § 1283. The same provision was in section 382 of the practice act (St. 1851, p. 112, c. 5) when Ryan v. Dougherty was decided. The submission need not limit the time within which an award must be made, and in such case the court may compel an award in case of unreasonable delay; but, where the time is limited by the contract of the parties, the court would have no jurisdiction to extend or add to the original agreement. It could not compel the arbitrators to act after their authority to act had expired.

The judgment is reversed, and the lower court directed to set aside the award.

We concur: HARRISON, P. J.; HALL, J.

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2 Cal. App. 197

PEOPLE v. BUNKERS.

(Court of Appeal, Third District, California. Nov. 16, 1905.)

1. Criminal Law—Accomplices—Who are—Question for Jury.

The question whether a witness is an accomplice is for the jury.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1720.]

2. Same—Principals—Who are.

All persons concerned in the commission of a crime, whether directly committing the act constituting the offense or aiding or abetting in its commission, are principals.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 71-74.]

3. Same—Accomplices—Corroboration.

Before a conviction for crime can be set aside for want of evidence corroborating the testimony of an accomplice, as required by Pen. Code, § 1111, providing that a conviction cannot be had on the testimony of an accomplice unless corroborated by other evidence, it must appear, without substantial conflict in the evidence, that the witnesses who gave corroborative evidence were also accomplices, and, where there is a conflict on that question, it will be presumed in aid of the verdict that the jury found that such witnesses were not accomplices.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1137.]

4. Same—Accomplices within Rules of Evidence.

Witnesses on a trial for bribery, in violation of Pen. Code, § 86, punishing the asking for or receiving bribes by members of the Legislature, who did not advise or encourage the accused to receive a bribe, but who assisted in procuring the money which was given to an accomplice, who gave the same to the accused, were not accomplices, for if they were guilty of any crime, it was the crime of giving a bribe in violation of section 85, of which crime they were principals under the express provisions of section 31, and not accessories to or principals in the crime punished by section 86.

5. SAME.

Witnesses on the trial for bribery, in violation of Pen. Code, § 86, punishing the asking for or receiving a bribe by members of the Legislature, who did not advise or encourage the accused to receive the bribe, but who merely assisted in procuring the money which should be paid to him with a view of exposing him, and who voluntarily exposed the transaction, were not accomplices as a matter of law, for the conduct of the witnesses did not conclusively establish a criminal intent essential to constitute a crime under the express provisions of Pen. Code, § 20.

6. SAME—CORROBORATION—SUFFICIENCY.

The evidence essential to corroborate the testimony of an accomplice must create more than a mere suspicion, but need not be absolutely convincing, nor need it extend to every fact covered by the statements of the accomplice, and is sufficient if, standing alone, it tends to connect defendant with the crime charged.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1128, 1129.]

7. SAME.

On a trial for bribery, evidence examined, and *held* to sufficiently corroborate the testimony of an accomplice so as to warrant a conviction.

8. BRIBERY—ELEMENTS OF OFFENSE.

Pen. Code, § 86, provides that a member of the Legislature who asks for or receives any bribe on any understanding that his official action shall be influenced thereby shall be punished, etc. A state senator was the chairman of a legislative committee which had commenced an investigation of building associations. He received money from the officers of two associations on the understanding that such associations should not be investigated. At the time the money was received the investigation of the two associations was not pending. *Held* that, as the investigations of the two associations was a matter on which the senator might be required to act, the offense of bribery was shown.

9. CRIMINAL LAW—EVIDENCE—DECLARATIONS OF CONSPIRATORS—PROOF OF CONSPIRACY—ORDER OF PROOF.

It was not error to admit evidence of conversations between a witness and accused on the theory that they were conspirators before proof showing the conspiracy was offered, where evidence independent of the testimony of the witness showing the conspiracy was subsequently introduced.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1012, 1013.]

10. SAME—DECLARATIONS OF THIRD PERSONS.

Where, on a trial for bribery, the evidence showed that accused and a witness entered into a conspiracy to procure money from third persons for accused, evidence of conversations between the third persons was competent for the purpose of showing the source of the money and tracing it to accused, and for the purpose of showing that the third persons were not accomplices.

11. BRIBERY—DEFENSES—INTENT OF BRIBE GIVER.

The guilt of a state senator receiving a bribe on the understanding that his official conduct should be influenced thereby is not affected by the absence of intent to bribe on the part of the persons furnishing the money which was paid to him.

12. CRIMINAL LAW—EVIDENCE—COMPETENCY.

On a trial of a state senator for receiving a bribe, in violation of Pen. Code, § 86, the testimony of witnesses plotting to entrap accused is not inadmissible as contrary to public policy.

13. SAME.

Since a public officer became guilty of a crime when he asked for or offered to receive a bribe, and his subsequent acceptance of it neither added to his guilt nor the penalty entailed, a plan to entrap him by delivering to him the bribe merely amounted to procuring corroborative evidence essential to conviction, and the evidence thereof was admissible under the rule which justifies dissemblance in order to procure necessary evidence of guilt.

14. INDICTMENT—JOINDER OF COUNTS—STATUTORY OFFENSES.

Where a statute enumerates a series of acts either of which separately or all together may constitute the offense, all the acts may be charged in a single count, for, though each act may constitute the offense, all of them together constitute but one offense.

15. CRIMINAL LAW—APPEAL—HARMLESS ERROR.

Where accused, charged with asking for and receiving a bribe, was found guilty as charged, an instruction that asking for or receiving a bribe justified a conviction was not prejudicial.

Appeal from Superior Court, Sacramento County; E. C. Hart, Judge.

Harry Bunkers was convicted of bribery, and he appeals. Affirmed.

Rehearing in Supreme Court denied. See 84 Pac. 370.

H. V. Morehouse, J. E. Alexander, J. S. Partridge, and F. C. Jacobs, for appellant. U. S. Webb, Atty. Gen., and A. M. Seymour, Dist. Atty., for the People.

McLAUGHLIN, J. The defendant was convicted of a felony, to wit, asking and receiving a bribe while a member of the Senate of the state of California, contrary to the provisions of section 86 of the Penal Code. From the judgment against him and from an order denying his motion for a new trial, he prosecutes this appeal.

It is unnecessary to insert a copy of the indictment, or to consider its sufficiency in this opinion, for such sufficiency was carefully considered in another proceeding, and a copy of the indictment is contained in the decision therein filed. Ex parte Bunkers (Cal. App.) 81 Pac. 748.

It is contended that the evidence is insufficient to support the verdict and judgment. This contention does not rest on any claim that there is no evidence tending to prove guilt, but is based on the proposition that the only testimony in that behalf was given by accomplices of the accused, and that such evidence lacks the corroboration essential to sustain the verdict rendered. The evidence is voluminous, and it would serve no useful purpose to embody more than an epitomized rehearsal of that portion thereof pertinent to the proper consideration and elucidation of this and other important points presented. It appears: That appellant was chairman of a committee of the Senate known as the "Committee on Commissions and Retrenchment," and as such chairman had power to issue subpœnas for witnesses to appear before said committee. That this committee had commenced an investigation of the affairs of the Continental Building & Loan Association and other corporations and associations engaged in a business of like character. It is shown by the testimony of one Joseph S. Jordan, the principal witness for the prosecution, that he met appellant on the ferryboat going to San Francisco on Friday, January 20, 1905. That, in reply to inquiries, appellant said that the Continental was not the only building and loan association under investigation, that all of them, including the Phœnix, would be investigated before the committee got through with them, and subpœnas would issue for Clarence Grange, secretary and manager of the Phœnix, and other persons connected with said association. Jordan thereupon expressed an interest in Grange and the association of which he was manager, and after some parley it was agreed that subpœnas for Grange and his associates would be withheld until Jordan could see Grange, and that they would meet again the next evening. Jordan then went to see Grange and told him of conditions in Sacramento, and what had been said by appellant. At the evening meeting Jordan informed appellant that he had seen Grange and that he (Jordan) thought "those people would pay for being let alone, if there were no subpœnas isued or at the worst a favorable report on the Phœnix and one or two others." Appellant suggested another meeting the next day at noon, and at this meeting Jordan mentioned a sum as the proper price to be paid for immunity for the Phœnix, Renters', and Pacific States Associations, but appellant said he would have to see Senator French, who was then in San Francisco, and that he expected to see him at 3 o'clock, at which time it was agreed that appellant and Jordan would meet again. When they met in the afternoon, appellant stated that he had seen French and that it had been agreed that if $500 each was paid to Senators Emmons, French, Wright, and Bunkers, who constituted a majority of the committee, that the associations last named would be protected, no subpœnas would issue, and no investigation would be had as to them. Appellant also said that it would take at least $10,000 to stifle investigation touching the affairs of the Continental. The proposition made by appellant was placed before Grange, who said the arrangement was all right, that he would see the various managers that night and meet Jordan in Sacramento under the name of Bill Newell, and bring the money with him. The next day Grange telephoned to Jordan from San Francisco, saying that the Pacific States had fallen down, and hence only $350 would be paid each senator, and that he could not come to Sacramento, but that another man under the same name would come up with the money and meet Jordan at the latter's room. This Newell, who proved to be a detective named Tichenor, met Jordan at the place appointed, made himself known, stated that he had the money, but would insist on paying each senator personally. There was some disagreement as to this and the sum to be paid Jordan for his labors in the premises, but the detective finally agreed to procure $100 additional for Jordan, and the latter departed for the purpose of informing appellant as to the changes and conditions. They met in the corridor of the Senate, and appellant for himself and associates flatly refused to accept payment from Tichenor. Jordan then sought Tichenor, and it was finally agreed that Jordan should pay each senator $350, and that Tichenor should witness such payment. They then repaired to Jordan's room, where the money was taken from five envelopes, four of which contained $350 each, and the fifth $150, all in $50 bills. Jordan was given the smaller sum, and the remainder was made into four packages of $350 each, and Jordan placed such packages in his pockets and went in search of the senators; Tichenor agreeing to keep him in sight. Jordan met appellant near the opera house on K street, made known his mission, and the pair walked up K street and turned the corner into Eighth, where Jordan, at appellant's request, dropped one of the packages of currency into appellant's pocket. This package contained seven $50 bills, appellant's pro rata of the money sent up by Grange to insure the Phœnix and Renters' Associations immunity and protection from investigation and subpœnas, in pursuance of the agreement made between Jordan and appellant. The testimony of Grange corroborated the testimony of Jordan, and it appears from the testimony of this witness, and the witnesses McNab, Heins, Russell, Older, Hartling, and Tichenor, that Grange consulted McNab on Sunday after Jordan had made known his mission. That thereupon a plan to entrap and procure evidence against the venal senators was arranged, and the two detectives, Tichenor and Hartling, were employed and instructed as to the plan and their part in carrying it into execution. That Grange procured part of the money from the manager of the Renters', furnished the balance himself, and placed it in five envelopes containing currency of the denomination and in the sums above mentioned. That, pursuant to a prearranged plan, he took these envelopes to the Mills Building and handed them to Heins, who was indicated by a nod from McNab. That Heins took the envelopes to Older, who counted the money and returned five envelopes containing the identical sums to Heins, who handed them to Tichenor pursuant to the prearranged plan. That later Grange took another envelope containing $100 to Heins at the same place, and Heins took it to Older, who substituted a hundred-dollar bill for the coin and currency first contained in the envelope, and returned it to Heins, who delivered it to one Russell, and he brought it to Sacramento and gave it to Tichenor. That Tichenor and Hartling came to Sacramento, the former for the express purpose of paying the money to the senators, and the latter to witness such payment. The two last-named witnesses witnessed the payment by Jordan to appellant, and Tichenor corroborated Jordan as to conversations, movements, etc. Hartling witnessed the conversation between Jordan and appellant in the corridor of the Senate, saw Jordan and Tichenor meet the first time, and corroborated both of the witnesses last named in other particulars. Older took the numbers of the bills and marked the same on the envelopes, which were also marked "A," "B," "C," "D," "F." Tichenor retained the envelopes at the time the money was given to Jordan, and they were introduced in evidence. The reporter employed by the committee, who was present at the meetings thereof, gathered from what was said that the committee was going to investigate building and loan associations, and "get-rich-quick" concerns. There was further testimony to the effect that the Continental and Pacific Associations, and some syndicates, were investigated by the committee, and that subpœnas for numerous witnesses had been issued and served. The evidence clearly shows that neither the Phœnix nor the Renters' Associations were investigated, and that no subpœnas were issued for officers of said associations. Appellant did not deny meeting Jordan at times and places mentioned by the latter, but according to his version their conversations related to commonplace matters and were entirely innocent. Appellant had no conversations with any of the witnesses named save Jordan, and the latter knew nothing whatever about the plan to entrap and expose the senators until the matter was made public. In acting as a messenger between appellant and Grange and Tichenor, he acted seriously, and supposed the money was obtained and paid for the purpose of purchasing immunity for the two associations contributing. The evidence also shows that Senator French was in San Francisco at the time appellant sought and had a meeting with him. It is clear from the foregoing skeleton rehearsal of the evidence that, if all participants in the transaction described were accomplices of the accused, then the corroboration required by section 1111 of the Penal Code is lacking, and the verdict must fall. Whether or not they, or either of them, were such accomplices, was a question of fact for the jury to determine. People v. Creegan, 121 Cal. 557, 53 Pac. 1082; People v. Compton, 123 Cal. 407, 56 Pac. 44; People v. Bolanger, 71 Cal. 17, 11 Pac. 799; People v. Curlee, 53 Cal. 607.

It is admitted that the witness Jordan was an accomplice, and the jury was instructed accordingly. As this admission by the prosecution is distinctly favorable to the appellant, further inquiry may be confined to the question whether or not there was evidence before the jury to warrant the conclusion that other participants named were not particeps criminas. An accomplice is "an associate in the commission of a crime; a participator in an offense, whether as principal or accessory." Under the law of this state all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid, or abet, or have advised or encouraged its commission, are principals. Therefore, before we can conclude that the verdict in this case must fall, for the reason now under consideration, we must be convinced that the evidence would warrant a jury in finding that the corroborative evidence was given by witnesses who were principals in the commission of the offense, under the rule just stated. More than this, it must appear that the evidence is without substantial conflict on this point. For, if there is a conflict, it must be assumed in aid of the verdict that the jury found to the contrary, and therefore had a right to view this evidence as corroborative of the testimony of Jordan. Keeping this before us, we will examine the evidence for light on the problem to be solved. The very nature of the crime here charged is such that there can be no hesitancy in saying that none of these witnesses could or did directly commit the acts constituting it. As neither of them ever conversed with appellant, they could not, and did not, directly, advise or encourage him to ask for or receive a bribe.

There is no evidence tending to show that any of them suggested to Jordan, or any one else, that appellant be advised or encouraged to commit this offense. The only possible theory upon which it could be said that any of them aided or abetted, or encouraged its commission, is that they, or some of them, assisted in procuring the money and in giving it to Jordan. Certain it is that, if any offense was committed by reason of such acts, it was the offense of offering to give and giving a bribe under section 85 of the Penal Code. If, then, these witnesses were guilty under that section, and they certainly were, if an offense was committed by them, to hold that they were also accomplices guilty as principals under the succeeding section would be to lay down the rule that each of them, and the appellant as well, could be active offenders in the commission of one crime, and be accomplices in the commission of another, at the same tme and through the same overt acts. We do not think such a construction of these sections is allowable. Const. art. 1, § 13; French v. Teschemaker, 24 Cal. 518; People v. Curry 130 Cal. 94, 62 Pac. 516; People v. DeFoor, 100 Cal. 156, 34 Pac. 642; People v. Ny Sam Chung, 94 Cal. 307, 29 Pac. 642, 28 Am. St. Rep. 129. "It is a fundamental rule of law that out of the same facts a series of charges shall not be preferred." People v. Stephens, 79 Cal. 430, 21 Pac. 856, 4 L. R. A. 845; People v. McDaniels, 137 Cal. 194, 69 Pac. 1006, 59 L. R. A. 578, 92 Am. St. Rep. 81; People v. Williard, 92 Cal. 488, 28 Pac. 585. It is very evident from an examination of the two sections mentioned that it was the intent and purpose of the Legislature to make offering to give, or giving a bribe, an offense, whether the legislator asked for and received it or not. And it seems quite as evident that it was never intended that persons concerned would be interchangeably guilty as accomplices, when the offer was accepted and the bribe received. In such event the giving would be the crime committed by one party, and the taking the crime of the other. As the only acts of these witnesses which could by possibility render them liable as principals under section 31 of the Penal Code constitute a separate and distinct offense under section 85, cardinal rules of construction forbid an interpretation which would also make them accessories before the fact, or principals, in the commission of the other offense defined in section 86 of the same Code. But there is another and much broader reason why the jury might reasonably find that neither Grange, McNab, Heins, Older, Russell, Tichenor, or Hartling were accomplices. "In every crime or public offense there must exist a union or joint operation of act and intent." Pen. Code, § 20; People v. Hoagland, 138 Cal. 341, 71 Pac. 359; People v. Welch, 63 Cal. 168. And it cannot be said that the conduct of said witnesses, or any one of them, conclusively establishes a criminal intent. The avowed purpose, the employment of detectives, the general course pursued, and the voluntary exposure of the whole affair, combine to indicate the contrary.

It is next contended that the testimony of these witnesses falls far short of that degree of corroboration required by law. While corroborating evidence must create more than a mere suspicion, it is not required that it be absolutely convincing. Nor need it extend to every fact and detail covered by the statements of the accomplices. It is sufficient if, standing alone, it tends to connect the defendant with the crime. People v. Barker, 114 Cal. 620, 46 Pac. 601; People v. Sternberg, 111 Cal. 6, 43 Pac. 198; People v. McLean, 84 Cal. 482, 24 Pac. 32. Here we find many facts and circumstances tending directly to connect the defendant with the crime. The meeting in the corridor of the Senate was witnessed by Hartling. Both Hartling and Tichenor corroborated the testimony of Jordan, not only as to the meeting near the Clunie Opera House, and the payment to appellant, but as to happenings, circumstances, and conditions preceding and accompanying such meeting and payment. Appellant, when testifying, admitted that he met Jordan at the Senate Chamber and near the Opera House, and that he walked with the latter to the corner of Eighth and K streets. His recollection was that the former meeting took place in the morning and the latter in the evening on Monday, while Jordan said they occurred in the afternoon and evening on Tuesday. He also admitted that he met Jordan the exact number of times, and approximately at the same times and places, Jordan said he did, during that fateful visit to San Francisco, and that French paid him a visit about the time the final meeting was had between Jordan and appellant before returning to Sacramento. He admitted, too, that Jordan mentioned building and loan associations, and expressed his interest in the investigation of such associations. In short, he admitted everything which was done openly, and only denied that which he might well think had not been seen or heard by others than Jordan. He might reasonably anticipate contradiction as to that which was done openly and publicly, and nurse the hope that only one witness could contradict him as to that which was deemed privately and secretly accomplished. In any event, he could not admit the incriminating conversations and acceptance of the currency without danger of conviction, and these were in substance the only things he denied. When thus analyzed, in the light of a probable desire to screen himself from danger of contradiction as well as conviction, his own testimony lends strong support to that of Jordan. The foregoing review of the evidence discloses ample corroboration. People v. Bently, 75 Cal. 409, 17 Pac. 436; People v. Cleveland, 49 Cal. 577; People v. Eldridge (Cal. Sup.) 82 Pac. 442; cases cited, supra. But uncontradicted evidence discloses facts full of significance in their tendency to prove what the corrupt agreement or consideration for the bribe actually was. It will be remembered that Jordan's testimony shows that appellant thought it would take "big money" to procure favor for the Continental Association, and that the declination of the Pacific led to a reduction of the amount originally agreed upon. Under these circumstances it probably seemed clear to the jury why these two associations were subjected to investigation, while the Phœnix and Renters' enjoyed the protection which Jordan says the money was paid to secure.

Appellant, however, contends that these facts, instead of lending aid to the case of the people, absolutely destroy such case, because it was necessary for the prosecution to show that the investigation of the Phœnix and Renters' Associations was actually pending before this committee. We cannot concur in this view. It is clear from the evidence that the committee was engaged in a general investigation of similar institutions, and equally clear that the investigation of these two associations was a matter upon which appellant might be required to act in his official capacity. This was sufficient. Pen. Code, § 86; Ex parte Bunkers, supra. It would, indeed, be singular if the very nonaction which the bribe was intended to secure could be held to constitute an impregnable barrier to the conviction of the briber and bribed

The next claim is that it was error to admit the testimony of Jordan touching conversations between him and the appellant. Ordinarily this contention could be answered by citing a section of the Code. Code Civ. Proc. § 1870, subd. 2. But it is said that Jordan and appellant were co-conspirators, and therefore proof of the conspiracy should have preceded such testimony. We do not understand that the rule invoked excludes acts and declarations of the accused, merely because the witness happens to be a co-conspirator. But, even if this proposition be conceded, the order of proof was discretionary, not mandatory, and as there is evidence in the record aside from Jordan's to show the relations between him and appellant we cannot say that the court erred in the course pursued. People v. Donnolly, 143 Cal. 398, 77 Pac. 177; People v. Rodley, 131 Cal. 253, 63 Pac. 351; People v. Compton, 123 Cal. 408, 56 Pac. 44; People v. Eldridge, supra.

It is said that the court erred in admitting evidence touching conversations between Jordan and Grange and Jordan and Tichenor. Considering the relations between appellant and Jordan, and the latter's connection with the bribery of the senators, we think such testimony was competent and pertinent. People v. Rodley, supra; People v. Gregory, 120 Cal. 19, 52 Pac. 41. People v. Lovern, 119 Cal. 91, 51 Pac. 22, 638; People v. Brown, 59 Cal. 352; People v. Geiger, 49 Cal. 650; People v. Cotta, 49 Cal. 170. Besides, this evidence and the evidence of the other witnesses examined in this connection was admissible to trace the money from its source to its destination, and to show that the witnesses were not accomplices. People v. Bolanger, 71 Cal. 19, 11 Pac. 799; People v. Creegan, supra; People v. Compton, supra; People v. Curlee, supra; People v. Northey, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129; People v. Squires, 99 Cal. 330, 33 Pac. 1092.

The appellant insists that, if there was an absence of intent to bribe on the part of Grange and those acting in concert with him, there could be no bribery as to this defendant. Waiving the fact that the appellant was charged with asking for as well as receiving the bribe, we cannot see how the culpability of Grange et al. or the lack of it can minimize the guilt of defendant. People v. Greening, 102 Cal. 387, 36 Pac. 665.

The final assault made upon the evidence is based on the ground that the plot to entrap these senators was reprehensible, if not criminal, and therefore the testimony of those implicated in it should have been rejected. We cannot be expected to lay down a code of ethics governing such transactions, and our inquiry will, therefore, be confined to the question whether the admission of such testimony is forbidden by express law or by rules of public policy.

The defendant stands convicted of one of the most dangerous crimes catalogued in the Penal Code. The murderer deprives an individual of life. The thief despoils a single citizen of property. The judge who forgets the sacred responsibility resting upon him can injure comparatively few by bartering his honor and violating his oath. But the venal legislator is a menace to the impartiality and probity of that system of law, which is the palladium of all rights pertaining to citizenship, and the foundation stone of public safety and security. This crime is secret in its nature, and as baleful as it is insidious in its effects. The social fabric could not long survive if its frequent commission was tolerated, and hence the preservation of our institutions, and the integrity of our system of government, demand that any tendency in that direction be sternly and effectually checked. The offer to receive a bribe, if satisfied, must lead to consequences as serious as they are evident, while a rebuff to the bribe seeker, gives rise to dangers, born of resentment, which are scarcely capable of estimation. It is, therefore, highly important that a crime fraught with so much danger to the state, as well as to individuals, should be detected and punished. Recognizing the secrecy which usually attends its commission, the age and probable intelligence of those in a position to commit it, and the consequent difficulty of obtaining proof to bring the perpetrator to just punishment, it seems clear to us that a wise public policy must lend sanction to evidence obtained in the mannner here assailed. No danger to the honest or innocent lurks in a rule upholding its competency under the circumstances here described. Honest lawgivers do not wait for or seek temptation, nor do they withhold proper official action until interested parties can be seen. True, neither the gravity of the crime nor considerations of public policy will warrant a departure from well-settled rules of evidence, but in this, as in most cases, public policy is seconded and sustained by law, for we believe this testimony was admissible under a rule of evidence long sanctioned by our highest court. The appellant was guilty of a crime when he asked for or offered to receive the bribe, and his acceptance of it neither added to his guilt nor to the penalty already entailed. Hence the plan to "entrap" him amounted to nothing more than procuring corroborative evidence essential to conviction. Such methods, under these circumstances, are not within the rule against encouraging crime, merely to procure its commission, to the end that those willing to become offenders may be punished. They fall within that other rule which justifies dissemblance in order to procure additional and necessary evidence of guilt. People v. Squires, 99 Cal. 330, 33 Pac. 1092; People v. Northey, 77 Cal. 632, 19 Pac. 865, 20 Pac. 129; People v. Bolanger, 71 Cal. 20, 11 Pac. 799; People v. Farrell, 30 Cal. 317; People v. Greening, supra.

Other assignments of error have been examined, but we are satisfied that no prejudicial error was committed in ruling on the admissibility of evidence. As most of the criticisms aimed at instructions excepted to are fully covered by the foregoing discussion touching evidence to which such instructions relate, it could serve no useful purpose to do more than review objections to instructions not included in this category.

The instructions as to "feigned accomplices" were not erroneous, for reasons stated in the cases last cited. The instructions relating to proof of acts which would warrant a verdict against the defendant were not erroneous. People v. Hall, 94 Cal. 598, 30 Pac. 7; People v. Thompson, 111 Cal. 250, 43 Pac. 748; People v. O'Brien, 130 Cal. 3, 62 Pac. 297. "It is a well-settled rule that where a statute enumerates a series of acts either of which separately, or all together, may constitute the offense, all of such acts may be charged in a single count, for the reason that, notwithstanding each act may by itself constitute the offense, all of them together do no more, and likewise constitute one and the same offense." People v. Gusti, 113 Cal. 178, 45 Pac. 263; People v. Ellenwood, 119 Cal. 166, 51 Pac. 553; People v. Eagan, 116 Cal. 287, 48 Pac. 120. Besides, an instruction that asking or receiving would justify a verdict of guilty could not have harmed appellant, for he was charged in the conjunctive, and the jury found him guilty as charged in the indictment. The instructions requested by the defendant and refused by the court were either erroneous or inapplicable or were fully covered by other instructions. The charge, read as a whole, was full, fair, and comprehensive, and the appellant certainly has no cause to complain that the law was not fully and clearly stated to the jury.

We do not deem it necessary to notice other errors assigned. Suffice it to say that we find no prejudicial error in the record.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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2 Cal. App. 197

PEOPLE v. BUNKERS. (Cr. 1,320.)

(Supreme Court of California. Jan. 15, 1906.)

On application for rehearing. Denied. For opinion in Court of Appeal, see 84 Pac. 364.

PER CURIAM. The application for a rehearing in this court, after decision in the District Court of Appeal for the Third District, is denied. In denying such application, it is proper to say that the determination of the question as to whether one who gives a bribe can be an accomplice of the one who accepts the bribe is not essential to the decision in this case, and we are not to be understood as approving that portion of the opinion of the District Court of Appeal which deals with that question.

JOHNSON v. GUNN.*

(Court of Appeal, Third District, California. July 25, 1905.)

COUNTY GOVERNMENT ACT—SPECIAL LEGISLATION—METHOD OF ASCERTAINING POPULATION—COMPENSATION OF JUSTICES.

County Government Act, § 184, subd. 13, as amended by St. 1901, p. 750, c. 234, in providing that for the purpose of regulating the compensation of justices of the peace townships in the twenty-seventh class of counties are classified according to their population "as shown by the federal census of 1900," whereas the methods provided for ascertaining the population of townships in counties of other classes is different, and in fixing the compensation of justices of the peace in townships having a certain population in counties of the twenty-seventh class at a certain amount, while the compensation is different in townships of the same population in counties of different classes, contravenes Const. art. 4, § 25, prohibiting "local or special laws * * * (9) regulating county and township business; * * * (29) affecting the fees or salary of any officer; * * * (33) where a general law can be made applicable."

Appeal from Superior Court, Napa County; H. C. Gesford, Judge.

Application by William D. Johnson for writ of mandate to H. L. Gunn. Writ denied, and petitioner appeals. Affirmed.

Bell, York & Bell, for appellant. R. Benjamin, for respondent.

McLAUGHLIN, J. This is an application for a writ of mandate compelling the respondent, as auditor of the county of Napa, to draw his warrant in appellant's favor for the sum of $55, claimed by appellant to be his salary as justice of the peace of Yount township for the month of January, 1903. In his petition, which contains other apt and usual averments, it is alleged that "according to the federal census of 1900 the population of said Yount township is given and stated to be 2,982 inhabitants, but that in truth and fact said township then had, and ever since and now has, a population of over

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*For opinion in Supreme Court, see 84 Pac. 665.

3,000 inhabitants." The respondent demurred to the petition, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and petitioner prosecutes this appeal from the judgment thereupon entered against him.

In subdivision 13 of section 184 of the county government act, as amended in 1901 (St. 1901, p. 750, c. 234), it is provided that for the purpose of regulating the compensation of justices of the peace townships in the twenty-seventh class of counties, are "classified according to their population *as shown by the federal census of 1900.*" In the same subdivision, the salaries of justices of the peace in townships having a population of 3,000 and less than 5,000 is fixed at $55 per month. Appellant contends that the portion of the subdivision above italicized, relative to the mode of ascertaining the population of townships, is unconstitutional, and hence that he was entitled to show what the actual population was, in order to establish that he is entitled to the salary claimed. It is argued that the portion of the subdivision objected to is special legislation, in that it applies only to counties of a certain class, when there is no substantial, intrinsic, constitutional reason why a general law could not be made applicable to all classes of counties. Two sections of the Constitution of this state, germane to the question thus raised, read as follows:

Section 5, art. 11: "The Legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of boards of supervisors, sheriffs, county clerks, district attorneys, and such other county, township and municipal officers as public convenience may require and shall prescribe their duties and fix their terms of office. It shall regulate the compensation of all such officers in proportion to duties, and for this purpose may classify the counties by population."

Section 25, art. 4: "The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * Ninth. Regulating county and township business. * * * Twenty-ninth. Affecting the fees or salary of any officer. * * * Thirty-third. In all other cases where a general law can be made applicable."

An examination of the county government act, as amended in 1901 (St. 1901, p. 685, c. 234 et seq.), shows that the methods prescribed for ascertaining the population of townships vary according to the classification of counties, and are widely different. In some instances the federal census is the standard; in others the board of supervisors must annually ascertain and declare the population in any way deemed by them advisable. In some counties the board must ascertain the number of inhabitants biennially, and in others no method whatever is provided. It is apparent from the foregoing that this legislation is special and local. It is an attempt to regulate county and township business in a manner forbidden by the Constitution. But, aside from this, taking the very broadest ground, and granting that the Legislature had discretion in the premises under the thirty-third subdivision above quoted, unless there is some legal reason why classification is necessary, and why a general law cannot be made applicable, it must fall before that higher law which forbids such legislation. Hale v. McGettigan, 114 Cal. 112, 45 Pac. 1049; Tucker v. Barnum, 144 Cal. 269, 77 Pac. 919; Dwyer v. Parker, 115 Cal. 549, 47 Pac. 372; Miller v. Kister, 68 Cal. 145, 8 Pac. 813; Dougherty v. Austin, 94 Cal. 622, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161; Lougher v. Soto, 129 Cal. 612, 62 Pac. 184; Rauer v. Williams, 118 Cal. 407. 50 Pac. 691. The rule that a statute shall not be declared unconstitutional unless the conflict is plain, substantial, and incapable of reconciliation has prompted a careful study of the provision assailed in the light of constitutional limitations. After such study, we are convinced that there can be no natural, intrinsic, or constitutional distinction upon which to base a special provision for determining the population of each class of counties in the state. We can conceive no reason why the population of all townships in all counties of the state should not be measured by the same standard and ascertained in the same way. Nor can we think of a reason which is even plausible why different yardsticks should be adopted in different classes of counties, when used for the same identical purpose. By consulting sections 10 and 157 of the act (St. 1897, pp. 453, 492, c. 277), we know that Napa is the only county in the twenty-seventh class, and, as there can be no natural, intrinsic, or even fanciful reason why a special rule for ascertaining population should be applied to such county, it follows that the provision is local and special, that it lacks uniformity of application, that it is an attempt to regulate county and township business by local and special laws, and is therefore unconstitutional and void.

It is urged that the remainder of the subdivision is valid, and that appellant would, on proper proof as to the population of Yount township, be entitled to the salary here claimed. Examining the subdivision for the purpose of determining the soundness of this contention, we find that it is here necessary to pass upon the validity of the provision relating to salaries. We are aware of the rule that we should avoid passing upon the constitutionality of legislation whenever such avoidance is possible. But as it has been held that the population of a township may be shown by competent evidence, and as appellant is here seeking to compel the payment of the salary therein fixed, the question of the validity of this provision is squarely presented, and must be passed upon. (Cothran v. Cook, 80 Pac. 699.) We are reluctantly forced to the conclusion that this provision must also fall before that same higher law which nullified the provision last under consideration. There can be no doubt that the Legislature may classify townships according to population, for the purpose of regulating the compensation of township officers. If it be said that there is no express or implied command to this effect in our organic law, it must certainly be admitted that no provision of the Constitution forbids the exercise of such power. Tucker v. Barnum, 144 Cal. 269, 77 Pac. 919.

That the power exists, therefore, is unquestionable. But it is equally certain that such power must be exercised within constitutional limitations, and in conformity with the rule that the compensation of township as well as county officers must be regulated "in proportion to duties." Tucker v. Barnum, supra. To say that there can be a classification of townships for the purpose of regulating the compensation of township officers, however, is far from conceding that there can be an arbitrary classification within the classification of counties, the palpable and inevitable effect of which is to inaugurate a system of territorial discrimination, in flagrant violation of wholesome provisions of the Constitution. If such classification is allowable, and we have seen that it is, it is allowable for such purpose only when the distinction between the classes is based on something more substantial than mere caprice, or the fact that the townships are situated in different counties. If population is the proper criterion for admeasuring the duties of officers, it follows as a logical sequence that, whenever this method or standard is used, officers performing like duties would be entitled to equal compensation when the population was the same. In other words, if the method which the Constitution commands shall be used in measuring the duties and fixing proportionate compensation for county officers is adopted by the Legislature as the proper method for measuring the duties and fixing proportionate compensation for township officers, it must certainly follow that, when population, and hence duties, are equal, the compensation must be the same, or the constitutional requirements will not be satisfied. Tucker v. Barnum, 144 Cal. 270, 77 Pac. 919; Welsh v. Bramlet, 98 Cal. 219, 33 Pac. 66; Rauer v. Williams, 118 Cal. 407, 50 Pac. 691; Knight v. Martin, 128 Cal. 247, 60 Pac. 849; Dwyer v. Parker, 115 Cal. 544, 47 Pac. 372; San Francisco v. Broderick, 125 Cal. 188, 57 Pac. 887; Longan v. Solano Co., 65 Cal. 122, 3 Pac. 463; Bloss v. Lewis, 109 Cal. 493, 41 Pac. 1081.

Turning to the provision here under consideration, we find that it applies only to one class composed of one county. Contrasting the salaries there fixed with salaries in other townships in other counties, we find that in no two instances of like population is the salary the same. As above said, it must certainly be that, under the constitutional provision requiring that compensation be proportioned to duties, the salary should be the same where like population gauges like duties. But the salaries fixed in this act cannot be reconciled to this or any other theory of proportion. To illustrate the viciousness of such legislation and the reason of rules which forbid it, we will assume that in each of the counties hereinafter mentioned, there is a township containing any number of inhabitants between 3,000 and 5,000. So assuming, we find that, in addition to fees, the following monthly salaries are fixed for justices in such townships in different counties: Los Angeles, $83.33; Alameda, $75; Santa Clara, $40; San Bernardino, $65; Monterey, $35; Tulare, $85; Contra Costa, $100; San Joaquin, $40 or $35; Riverside, $20 or $15; Shasta, $85; Kern, $100; Napa, $55; Ventura, $70 or $60; Yolo, $65; San Mateo, $75 or $70; Stanislaus, $70; Merced, $100 or $75; Colusa, $75; Glenn, $75. In Riverside county a justice in a township having 900 population would receive $5, and in some other counties $75, while in Alameda a justice in a township having 15,000 inhabitants could only receive the last-named sum. We might go on and show nearly as many discriminations as there are classes of counties, but it could serve no useful purpose to do so. Suffice it to say that it would be difficult to devise a scheme or system of compensation more obnoxious to the spirit and letter of the Constitution than this.

Had such county been specified by name, instead of class, in fixing the salaries of township officers, even the sophist would have been barren of argument in support of its validity. It would at once be admitted that the legislation was special, because its operation was confined to a county; and resort to this subterfuge of specification by class instead of name does not mend matters, for it creates a distinction without a difference. In either event, we would have one law for townships of a given population in one county, and a different law for townships of the same size in every other county. The Constitution absolutely forbids local or special legislation in all cases "affecting the fees or salary of any officer," or "regulating county or township business." That this provision affects the salary of an officer is amply demonstrated in this proceeding, and that it is local and special does not admit of question. Moreover, we can think of no reason why all townships in the state, regardless of county boundaries, may not be classified by a general law, providing for the payment of uniform salaries to officers of townships having the same number of inhabitants. Nor can our imagination or reason furnish a distinction or difference, which could make the services of a justice of the peace in one county more or less valuable than the services of a brother justice in a township of the same population elsewhere. It was said in argument that the classification of townships within a particular class of counties makes such legislation general, because it is uniform in its application to all townships within that particular class. But the obvious answer to this is that it is this very proposition which brings it under the ban of the Constitution. Hale v. McGettigan, 114 Cal. 118, 45 Pac. 1049; Miller v. Kister, supra. Its very nature is such that it can never apply to more than the twenty-seventh class of counties, and general laws must have a uniform operation throughout the state wherever like conditions prevail. The fact that counties in this class "have been classified for a purpose which the Constitution recognizes as a proper and necessary one does not relieve a law relating to other and distinct matters from the objection that it is local and special, if by its terms it is limited in its application or operation to one or more counties less than the whole." Pratt v. Browne, 135 Cal. 651, 67 Pac. 1082; Darcy v. Mayor, 104 Cal. 647, 648, 38 Pac. 500; Dougherty v. Austin, 94 Cal. 621, 635, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161; Turner v. Siskiyou, 109 Cal. 332, 42 Pac. 434; San Luis Obispo v. Graves, 84 Cal. 71, 23 Pac. 1032; Conlin v. Board of Supervisors, 114 Cal. 410, 46 Pac. 239, 33 L. R. A. 752; Marsh v. Supervisors, 111 Cal. 370, 43 Pac. 975.

It must ever be borne in mind that the Legislature has no discretion in the premises, for the Constitution prohibits local or special legislation "affecting the salary of any officer," or "regulating county and township business," under any and all circumstances. In Tulare County v. May, 118 Cal. 303, 50 Pac. 427, and kindred cases, the legislation was upheld "upon the theory that, so far as the power to appoint deputies is concerned, the rule is general and uniform throughout the state," and that it was competent to provide either of two modes of payment of deputies appointed under general laws. There the legislation applied to every county in the state which might, perchance, come within the class. Here the provision before us can never so apply; for we have seen that its very terms confine its operation to a particular class of counties, and that other counties have a separate schedule of salaries for justices in townships of exactly the same population. We have judicial knowledge of the fact, born of the very act in which this legislation is found, that by no process of reasoning, however subtle, can this provision ever apply to other portions of the state. The Constitution permits the classification of counties according to population for the single purpose of regulating the compensation of officers; but it does not permit such classification for the purpose of forming a basis upon which to rest special legislation applicable only to a particular portion of the territory and population of the state. It certainly does not permit such classification for the purpose of segregating counties, to the end that the townships of each county, or class of counties, may in turn be classified for the purpose of fixing the compensation of township officers therein, without regard to compensation fixed for the same class of officers in townships having the same population, but situated in other counties. It is true that townships are subdivisions of a county, but this fact does not render them any the less subdivisions of the state, nor alter their relation to the exercise of legislative powers, which in all cases, whether applied to counties or subdivisions of counties, is subject to constitutional limitations and restrictions. The mere fact that a township is part of a county of a certain class cannot justify legislation which practically sets it apart for the purpose of subjecting it to the operation of laws which cannot by any possibility be applicable, at any time or under any circumstances, to any other portion of the state. The rule permitting the classification of counties for a special purpose was designed to prevent special legislation, not to promote it. Rauer v. Williams, 118 Cal. 403, 405, 50 Pac. 691; People v. Henshaw, 76 Cal. 436, 18 Pac. 413; Cody v. Murphey, 89 Cal. 525, 26 Pac. 1081; In re Mitchell, 120 Cal. 394, 52 Pac. 799. It was certainly not intended to nullify and render farcical other provisions of the Constitution, forbidding local and special legislation and requiring that all laws of a general nature shall have a uniform operation, and thus render possible discrimination between localities and officers based on no higher considerations than mere geographical location. Therefore, viewed in any conceivable light, this provision falls within the category of forbidden legislation. That it is an attempt to fix township salaries by local and special laws, lacking every element of uniformity, is as clear to my mind as any proposition dependent upon fallible human reason can be. Such things, directly forbidden, cannot be accomplished by indirection; for there is no way to evade a plain law, honestly interpreted and administered. If the Legislature should attempt to classify counties, and fix compensation of county officers according to the same plan, few would contend that such a palpable evasion of the fundamental law could be upheld. The Legislature can no more indulge in special and discriminating legislation touching townships than it can indulge in similar legislation touching counties. If the Legislature can provide that in two different townships having the same population different salaries can be paid, simply because such townships happen to be in different counties, then, by parity of reasoning, we must conclude that two counties having exactly the same population can be put into different classes, merely for the purpose of fixing a different compensation, when such compensation must be proportioned to duties and such duties must be gauged by population. This would result in rendering the constitutional provision relating to compensation not only abortive, but absurd as well.

Counsel for appellant seem to present the case of Tucker v. Barnum, 144 Cal. 267, 77 Pac. 919, as sustaining the proposition that such legislation is valid. Waiving the proposition that the precise question here considered has never been presented to or considered by our Supreme Court, we think the decision and reasoning of the court in the case cited directly sustains the reasoning and conclusion here. The legislation there considered was held void, because it discriminated between justices of different townships in the same county, in that it did not fix their compensation in proportion to duties. If such discrimination and the neglect to proportion compensation to duties nullified the provision passed upon in that case, we know of no rule of law or logic which could make noncompliance with the same constitutional requirements less fatal here. Where the reason is the same, the rule must be the same, and we are certain that our highest court has neither suggested nor declared a rule which denounces discrimination between justices of the peace within the same county, and sanctions or justifies similar discrimination between the same class of officers in different counties, all of whom are protected from special and discriminating laws by the same Constitution. These provisions of the Constitution were designed to prevent legislation promotive of the selfish private or local interests of any class or locality, to prevent all discrimination and favoritism, and to make the public interest and welfare the pole star for legislative guidance. The far-reaching effect of this decision has weighed upon us throughout the consideration of the question here involved, but questions squarely presented must be squarely met and decided, for confidence in courts could not long survive, if possible or probable effects were permitted to outweigh higher considerations commanding the unbiased and fearless performance of public duties. The provision awarding the salary claimed by appellant being unconstitutional and void, it results that the demurrer was properly sustained, inasmuch as in no event could he be entitled to the amount claimed.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

CHINN v. GUNN*

(Court of Appeal, Third District, California. July 25, 1905.)

COUNTY GOVERNMENT ACT—COMPENSATION OF JUSTICES—POPULATION OF TOWNSHIPS.

The method provided by County Government Act, § 184, subd. 13, as amended by St. 1901, p. 750, c. 234, for ascertaining the population of townships of counties of the twenty-seventh class for purposes of fixing the compensation of justices of the peace, being unconstitutional, the population could be ascertained as provided by County Government Act 1897 (St. 1897, p. 460, c. 277) § 25, subd. 12½.

Appeal from Superior Court, Napa County; H. C. Gesford, Judge.

Application by H. J. Chinn for writ of mandate to H. L. Gunn. Writ denied, and petitioner appeals. Affirmed.

Bell, York & Bell, for appellant. R. Benjamin, for respondent.

McLAUGHLIN, J. The facts in this case are nearly identical with the facts in the case of Johnson v. Gunn (this day decided) 84 Pac. 370. The only difference between the two cases is that in the case we are now considering St. Helena township was carved out of Hot Springs township after the federal census of 1900 was taken, and hence it would be impossible to ascertain from such census just what the population of the new township was at the time such census was taken. This could make no difference, however, as far as the decision is concerned. As the mode prescribed in subdivision 13 of section 184 (St. 1901, p. 750, c. 234), for ascertaining the population of townships in Napa county is unconstitutional, there can be no doubt that such population could be ascertained as provided in subdivision 12½, § 25, of the county government act of 1897 (St. 1897, p. 460, c. 277). The lower court could not assume in passing on the demurrer that competent evidence could not or would not be offered to sustain the allegations of the complaint. As it has been held that such competent evidence would be admissible to establish what the population was (Cothran v. Cook, 80 Pac. 699), it results that the complaint would be good as against the demurrer interposed, were it not for the fact that the provision as to salaries is likewise unconstitutional. This being the case, however, the ruling on the demurrer was cured, because in no event could appellant be entitled to the salary claimed.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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*For opinion in Supreme Court, see 84 Pac. 669.

149 Cal. 24

AUSTIN v. WILCOXSON. (Sac. 1,272.)

(Supreme Court of California. March 20, 1906.
Rehearing Denied April 19, 1906.)

1. PLEADING—NATURE OF ACTION—CONSTRUCTION.

Where a complaint alleged that a certain person delivered to a decedent a sum of money, to be held in trust for plaintiff and to be paid plaintiff at the death of decedent, and that defendant, who was the executor, had taken possession of such sum of money and withheld it, and judgment was prayed that defendant deliver the money, the action could not be considered one in equity to declare and enforce a trust.

2. TRUSTS—ENFORCEMENT—PERSONS LIABLE.

Equity will enforce a trust against the executor of a deceased trustee.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 513.]

3. SAME.

Under the express provisions of Civ. Code, § 2222, a voluntary trust may be created as to the trustee by any words or acts of his indicating with reasonable certainty his acceptance of the trust or his acknowledgment of its existence, and the subject, purpose, and beneficiary.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 34–38.]

4. SAME—PAROL EVIDENCE—SUFFICIENCY.

Parol evidence to prove a trust in personal property must be clear and unequivocal.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 68.]

5. SAME.

On an issue as to whether a decedent had held a sum of money as trustee for plaintiff, evidence considered, and *held* insufficient to show such to have been the case.

Department 2. Appeal from Superior Court, Sacramento County; G. M. Nichol, Judge.

Action by Amanda P. Austin against George H. Wilcoxson. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

John M. Fulweiler and Grove L. Johnson, for appellant. Clinton L. White and Arthur M. Seymour, for respondent.

HENSHAW, J. Plaintiff's complaint alleged that Jackson Wilcoxson and Jefferson Wilcoxson were her granduncles; that on or about the 10th day of March, 1885, Jackson Wilcoxson delivered to Jefferson Wilcoxson the sum of $75,000 to be held in trust for, and to be paid to, plaintiff at the time of the death of Jefferson Wilcoxson; that Jefferson Wilcoxson accepted the trust and took possession of the $75,000; that Jefferson Wilcoxson died in the city and county of Sacramento on the 8th day of April, 1898; that he did not deliver to plaintiff in his lifetime, nor at his death, the sum of $75,000; that immediately after his death the defendant George H. Wilcoxson "took possession of said sum of $75,000 held in trust for plaintiff as aforesaid, and ever since has withheld and now withholds the sum from the plaintiff"; that after demand defendant has refused and still refuses to deliver the money to plaintiff. Plaintiff prayed judgment that defendant deliver to her the sum of $75,000, and that in the meantime he be restrained from disposing of any part of it. Defendant answered first by denial. For a second defense he alleged that Jefferson Wilcoxson died leaving a last will and testament by which he bequeathed all of his estate; that defendant was named executor therein and thereunder, and was appointed, qualified, and acted as executor; that as executor he proceeded to take possession of all the property, real and personal, belonging to the estate, and that he took possession of these properties in no other way than as executor. The moneys which plaintiff seeks to recover defendant personally makes no claim to and has not converted to his own use, but has taken and held the same only in his capacity as executor as money belonging to the estate of Jefferson Wilcoxson, deceased; that he did not know and had no means of knowing that plaintiff laid claim to the sum of $75,000, or any other sum, as having been held in trust by his testator for her benefit until the 18th day of January, 1900, when for the first time plaintiff notified defendant of her claim, and demanded of him the payment of the said sum of $75,000. Upon this defendant then proceeds to set forth matters from which he contends that plaintiff is estopped by her conduct from asserting a claim to this money, matters which need not here be set forth with any particularity. Upon the issues thus joined trial was had before the court, which found against the allegations of plaintiff's complaint and affirmatively in favor of defendant's plea in estoppel, and rendered its judgment accordingly. Plaintiff appeals, and upon her appeal urges that the complaint is "purely a bill in equity to have declared and enforced a trust," and that it was the duty of the court therefore to have found on all of the issues by special findings, whereas the findings in fact made were that "the allegations of the second, third and sixth subdivisions of the amended complaint are not, nor are any of them, true, and the allegations of the second subdivision of the answer of the defendant are true." We think, however, that plaintiff misconceives the legal effect of her complaint. It is not an action to declare and enforce a trust. She sues at law to recover moneys which she alleges have come into the hands of the defendant and which upon her demand he has refused to turn over to her. Her action may indifferently be called one in trover, in assumpsit, or for money had and received. It is true that to make out her title to the money she alleges that it was given by one of her granduncles to another granduncle in trust for her, but the allegation as to this defendant's connection with the fund is simply that he "took possession of it" and refuses after demand to pay it over. The same allegation would be good against a thief who had actually stolen the money, and assuredly it cannot be said that a demand made upon one whom it is alleged has wrongfully taken and wrongfully holds money constitutes an equitable action to enforce an express trust. The enforcement of a trust in equity has in contemplation the terms, conduct, and management of the trust, the settlement of the trustee's accounts, compensation to the trustee, the order of payment over and his discharge from his trusteeship. None of these matters are here in contemplation. It is not even charged that the defendant obtained and holds the money as executor of the estate of his deceased uncle. Nor is its recovery in any way to be had out of the funds of the estate. The demand is for a personal judgment against the defendant in his individual capacity. Equity will, of course, enforce a trust against the executor of the deceased trustee (Walkerly v. Bacon's Executors, 85 Cal. 137, 24 Pac. 638; McGrath v. Carroll, Executor, 110 Cal. 79, 42 Pac. 466; Byrne v. Byrne, Adm'r, 113 Cal. 294, 45 Pac. 536), but such is not the action here brought. The findings which the court made are supported by the decisions of this court from the cases of McEwen v. Johnson, 7 Cal. 258, uniformly down to the case of McLennan, v. Wilcox, 126 Cal. 51, 58 Pac. 305.

The principal point presented in argument upon this appeal, however, is that the evidence is insufficient to sustain the findings of the court to the effect that Jackson Wilcoxson did not deliver to Jefferson Wilcoxson the sum of $75,000 to be held in trust and to be paid to plaintiff at the time of the death of Jefferson Wilcoxson, and that Jefferson Wilcoxson did not accept in trust, and did not take and hold in possession, the sum of $75,000, or any other sum in trust for the plaintiff. A consideration of this proposition necessitates the following statement of facts: The deceased Jefferson Wilcoxson was a very wealthy bachelor. Upon his death he left an estate of a value exceeding $1,000,000. Over $200,000 of this was personal property, the principal part of which was money. In his safe at the time of his death were found moneys to the amount of sixty odd thousand dollars, partly in paper money, partly in coin, the packages wrapped and labeled with the amount of moneys which they contained and the deceased's name all in his own handwriting. In another part of the safe was an envelope on the outside of which in the handwriting of Jefferson Wilcoxson was written "1,000 shares Amanda P. Austin." Inside of the envelope was found a certificate for a thousand shares of stock in a mining company issued to Jefferson Wilcoxson, and indorsed by him to Amanda P. Austin. There were certificates of deposit also found in the safe. These certificates of deposit bore no indicia of a trust, but were one and all in favor of Jefferson Wilcoxson. The plaintiff, as has been said, was the grandniece of Jefferson Wilcoxson and lived with him much as though she were his own daughter. It is contended that in so living with him and devoting herself to him the plaintiff made large personal sacrifices, forebore entering into the marriage state and in all ways effaced herself to the comfort and happiness of her uncle. From witnesses testifying to the declarations which Jefferson Wilcoxson made to them in his lifetime the record abounds with expressions of his affection for the plaintiff; that she was a noble woman; that she was kinder to him than a daughter would have been, with assurances that he proposed to provide bountifully for her in his will; that he would leave her a rich woman, and much more to this effect. It appears further that upon Wilcoxson's death, provision to the satisfaction of this niece not having been made, she presented a claim against his estate for the value of her services rendered to him, and upon this claim prosecuted a suit in the superior court to judgment in the sum of $20,000, and this judgment with interest and costs was paid to her in full by the estate. Thus whatever may have been her claim against the estate of Jefferson Wilcoxson for her devotion, her self-denial, and her sacrifices, it has received a money value at the instance of her own litigation and the amount has been paid to her. In the present litigation, therefore, the evidence of promises and assurances of the deceased as to what he would do for her out of his own estate are of no importance, weight, or value. This action is strictly brought and a recovery strictly sought upon the allegation that Jackson Wilcoxson delivered to Jefferson Wilcoxson, and Jefferson Wilcoxson received in trust for plaintiff, $75,000, which $75,000 Jefferson Wilcoxson has never paid over to plaintiff and which $75,000 this defendant took possession of and now retains. While plaintiff presented her claim against the estate of Jefferson Wilcoxson for the value of her services, and while she testifies that during his lifetime Jefferson Wilcoxson repeatedly told her that her uncle Jackson had left a large sum of money with him in trust for her and that the money was in his safe, she never presented any claim against the estate for this money. In avoidance of the principle declared in Lathrop v. Bampton, 31 Cal. 17, 89 Am. Dec. 141, and the numerous cases which have followed and upheld it, plaintiff endeavors to earmark the trust fund, and to this end the testimony is directed to show that the $75,000 alleged to have been left in trust by Jackson Wilcoxson was the money actually found in Jefferson's safe at the time of his death.

With this statement of the surrounding facts and circumstances, we are brought to a consideration of the testimony by which it is sought to establish the trust. As to this testimony, it may be said in general that it consists wholly of evidence given by witnesses of the declarations made by Jefferson Wilcoxson during his lifetime. There is no other evidence of it whatsoever. There is no writing of Jefferson Wilcoxson, no memorandum, no acts of his in support of the trust, other than these oral declarations testified to by the witnesses. The trust sought to be established being one in personalty, of course, the oral declarations of Jefferson Wilcoxson are permissible in evidence for this purpose. Civ. Code, § 2222. Trusts in personalty may be created, declared, or admitted verbally, and may be proved by parol evidence, although, as the authorities uniformly unite in declaring, such evidence must be clear and unequivocal. Silvey v. Hodgdon, 52 Cal. 363; Sheehan v. Sullivan, 126 Cal. 189, 58 Pac. 543; Barker v. Hurley, 132 Cal. 21, 63 Pac. 1071; 3 Pom. Eq. § 1008; 1 Perry on Trusts, § 77. In considering what evidence may be regarded as clear and convincing in the establishment of such a trust it must be borne in mind that the Code enjoins caution in the reception of evidence of the oral admissions of a person (Code Civ. Proc. § 2061), even when that person is living. When he is dead and when, from the very nature of the evidence offered, it is impossible generally to contradict the witnesses who testify, reason suggests even a greater degree of caution, and it is not stating it too strongly to say that evidence so given under such circumstances must appear to any court to be in its nature the weakest and most unsatisfactory. Mattingly v. Pennie, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87; Davis v. Davis, 26 Cal. 23, 85 Am. Dec. 157; Byrne v. Byrne, 113 Cal. 295, 45 Pac. 536.

It would be unprofitable to review at length the testimony of plaintiff's witnesses offered to establish this trust by the parol admissions of the deceased, but in general it may be said that the testimony of some was inherently improbable, the testimony of others conflicted either with proved or admitted facts, or with the evidence of other witnesses testifying upon the same matter. The testimony of one of the witnesses fixes the date of the gift by Jackson as years before his death. The testimony of another witness fixes it as a gift by check a short time before his death. The testimony of still another witness would fix it as money in the safe of Jackson Wilcoxson at the time of his death, which money Jefferson Wilcoxson took from the safe, which also contained a letter to plaintiff from Jackson Wilcoxson declaring the gift made to her. The character and personnel of some of the witnesses offering this testimony, who are shown to have been comparative strangers to the deceased, might likewise of itself have caused doubt in the mind of the trial judge. From the nature of this evidence it was impossible, as has been said, to contradict all the alleged admissions, but, wherever a matter was testified to as a fact, and the defense experienced little difficulty in showing the nonexistence of the fact. For example, as to the alleged declaration that the $75,000 was in the safe of Jackson Wilcoxson at the time of his death, and was upon his deathbed given over to his brother Jefferson with the letter to the plaintiff, it is shown, by disinterested and indisputable testimony, that there was no money and no letter in the safe when it was opened. So as to the check it was shown by the banks with which Jackson Wilcoxson did business and by his own books of account that no such check had ever been given. And so generally the defense undertook and successfully carried the burden of showing by the banks and by the books of Jackson Wilcoxson, which seemed to have been carefully kept in his own handwriting, not only that he did not ever give such a sum to his brother, but that the largest sum of money he ever had at any one time in the bank was $15,000; that he frequently overdrew his bank account, and that during the last year of his life at the time when by the concensus of the testimony of plaintiff's witnesses the money was paid to Jefferson Wilcoxson, his account was overdrawn and at the time of his death he owed a balance of $1,185. Herein it is insisted by plaintiff that the court erred in admitting in evidence the cashbook and the two ledgers kept by Jackson Wilcoxson, but it was shown that the books were kept in the regular course of business by one who had personal knowledge of the subject-matter entered in the books, occupying a position such as to exclude all presumption of his having any interest to misrepresent or falsify them. The entries were contemporaneous with the facts which they represented; proof was made that they were in the handwriting of Jackson Wilcoxson, and it was an admitted fact, of course, that Jackson Wilcoxson was dead at the time of the trial. It may not be doubted that the books were admissible in evidence. Sill v. Reese, 47 Cal. 294; Banning v. Marleau, 121 Cal. 240, 53 Pac. 692. It thus appears that the court's findings to the effect that the $75,000 was never paid by Jackson Wilcoxson to Jefferson Wilcoxson in trust, nor received by the latter in trust, is supported by the evidence. Plaintiff's contention that even if this be so, Jefferson Wilcoxson's declarations and conduct are sufficient to raise an estoppel against him in favor of this plaintiff rests upon no meritorious ground. In the first place, plaintiff has failed to plead this estoppel, which relied upon, should be pleaded if possible, and it was certainly possible here to do so. In the second place, bearing in mind that she had recovered in full for all her services to her uncle in the suit which she had instituted against his estate for that purpose, it is not made to appear that she was in any way prejudiced by such statements as her uncle may have made. Those statements neither increased nor decreased the amount of her recovery, nor in any way impaired her rights in the commencement and prosecution of the present litigation. In no way does it appear that she was prompted to act or to refrain from acting to her own detriment.

What has been said renders unnecessary a consideration of the court's finding upon the plea of estoppel raised by defendant against plaintiff. The rulings of the court in permitting certain questions to be asked of plaintiff on cross-examination are objected to. Plaintiff was not only the party in interest, but, as a witness in her own behalf, offered testimony as to the oral admissions of her uncle in her favor. A wide latitude of cross-examination was permissible under these circumstances and a proper latitude was not exceeded. In striking out the testimony of the witness Kate Stevens as to the friendly relations existing between Harrison Wilcoxson's daughters and Jefferson Wilcoxson, the ruling, if error, was on an absolutely immaterial matter. The same may be said of the court's order in admitting in evidence an entry made by Jefferson Wilcoxson in his diary.

For the foregoing reasons, judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

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149 Cal. 18

BENNICHSEN v. MARKET ST. RY. CO.
(S. F. 3,488.)

(Supreme Court of California. March 19, 1906. Rehearing Denied April 18, 1906.)

STREET RAILROADS—INJURY TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

In an action for injuries from being struck by a street car, it was error to authorize a recovery by the plaintiff, notwithstanding contributory negligence, where the evidence showed conclusively that the motorman did not see the person injured until after the accident.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 219.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by Ruberta Bennichsen, by her guardian ad litem, against the Market Street Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

C. W. Cross, for appellant. Emil C. Peters and Bert Schlesinger, for respondent.

McFARLAND, J. This is an action to recover damages on behalf of the infant plaintiff for personal injuries alleged to have been caused by being struck by a moving car of defendant. The verdict and judgment were for plaintiff, and defendant appeals from an order denying its motion for a new trial.

The important features of the case are these: At the time of the alleged injuries defendant was operating a double-track electric street railroad on Sansome street in San Francisco, the street running north and south. Defendant also was operating a similar street railroad on Broadway street, which runs east and west, crossing Sansome street. Plaintiff lived with her parents in a house on the southeast corner of Sansome and Broadway, where the two railroads cross each other. She had been going to school for about four years before the accident by which she was injured, and in going to and from school, doing errands, etc., she had been in the habit almost daily of crossing said railroads. She was at the time of the accident almost nine years old—eight years, eight months, and some days. Her mother had frequently cautioned her to be careful in crossing the railroads. The plaintiff herself testified that before the accident when crossing the railroads she would look to see if there was any car coming so that she would not get hurt, and that if she saw a car coming she would wait on the sidewalk until it had passed. On the day of the accident she undertook to cross Sansome street between Broadway and Pacific street, which is the next street south of, and parallel with, Broadway, when the car was close at hand going north toward Broadway, and was struck by it, and injured. She did not look to see if the car was coming. The evidence of defendant was to the point that she ran against the side of the car, and was thrown under it, although the jury may have been justified in finding that she was struck by the front end of the car. Witnesses for plaintiff testified that when they saw her just before the accident she was from 8 to 10 feet from the car. But under any view of the evidence on this point it is clear beyond doubt that if she had been a person of mature age she would have been guilty of contributory negligence, negligence which contributed proximately and directly to her injuries. And we need not inquire whether the jury would have been justified, under all the evidence on the point, in finding that on account of her age, no negligence could be attributed to her, because the case was tried on the theory, and the jury were instructed, that even though she, or her parents, were guilty of contributory negligence, still she was entitled to recover if "by reason of negligence on his part the motorman failed to avoid the accident," and "if the defendant's employés could have avoided the injury by the exercise of ordinary care."

The case, therefore, was tried upon the theory that there was evidence to bring it within the cases which hold that although the person injured put himself by his own negligence in a place of danger, if the employés in charge of the train discovered his danger in time to prevent injury by the exercise of ordinary care and did not do so, then, notwithstanding the contributory negligence of the injured person, he may recover. But there was no such evidence in the case at bar. There is no pretense that the motorman saw the plaintiff at all at the time of the accident until after it had occurred; on the other hand, it is shown clearly that he did not. The motorman testified that he did not see her, and his testimony is not only uncontradicted, but is confirmed by testimony of the plaintiff. He said that he was looking ahead on Sansome street, although somewhat to the left or west in order to watch for a car that might be coming down Broadway, but that he had Sansome street in full view, and did not see plaintiff until she had run into the side of the car. And to confirm the fact that he did not see her, one of plaintiff's main witnesses testified that at the time of the accident the motorman "was looking behind" and that "his face was back he was looking back he was not looking ahead." And, indeed, plaintiff's whole case is argued upon the theory that the negligence of the motorman consisted in his not looking ahead, and that this is the negligence which entitles plaintiff to recover, even though she was guilty of contributory negligence. But no case has gone that far; and to go that far would be to practically destroy the whole doctrine of contributory negligence. There was in this case, therefore, no evidence to justify the jury in finding that there was such negligence on the part of defendant's employés as entitled plaintiff to recover notwithstanding her contributory negligence. Of course, contributory negligence implies some negligence on the part of the defendant; and the general rule is that a plaintiff complaining of personal injuries caused by a train or car, who was himself guilty of negligence, which contributed proximately and directly to the injuries, cannot recover, although the defendant was also guilty of negligence. There are exceptions to the rule, however, but they embrace only those cases where a person is by his own negligence in a dangerous situation and is discovered in that position by those in the management of the approaching train in time to prevent injury by the exercise of ordinary care. In the earlier cases the conduct of those in charge of a train who, seeing one in a dangerous position, made no effort to avoid injuring him when it could have been easily avoided, is characterized as "willful and wanton." The cases, however, all hold that the discovery of such a person in a dangerous position in time to prevent injury by the exercise of ordinary care is necessary to constitute an exception to the rule that one guilty of contributory negligence cannot recover. It is not necessary to review the authorities cited by respondent other than the case of Lee v. Market Street Railway Co., 135 Cal. 293, 67 Pac. 765, for that is the case most favorable to respondent's contention. But in the Lee Case this court, after referring to certain evidence, said (italics ours): "Here, then, was enough to warrant the submission to the jury of the question whether or not the defendant exercise ordinary care *after discovery of plaintiff's situation of peril.* If it did not, then, notwithstanding the negligence of plaintiff, it was liable. The verdict of the jury is a finding to the effect that they did not believe that defendant's employés exercised proper care *after discovery of plaintiff's situation.*" And so that case was decided upon the theory that defendant failed to exercise ordinary care to prevent the accident after discovery of plaintiff's perilous situation. It has been expressly held that a case like the one at bar can be taken out of the doctrine of contributory negligence only where the defendant had actual knowledge of plaintiff's perilous situation. In Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85, this court, speaking through Angellotti, J., after quoting from Beach on Contributory Negligence, said: "It is, of course, true, as urged by defendant, that it is essential to such liability that the defendant did actually know of the danger, and that there is no such liability where he does not know of the peril of the injured party, but would have discovered the same but for remissness on his part." In Herbert v. Southern Pacific Co., 121 Cal. 232, 53 Pac. 652, Temple, J., speaking for the court, said: "The case is not within the rule laid down in Esrey v. Southern Pacific Co., 103 Cal. 541, 37 Pac. 500. Doubtless, notwithstanding the negligence of a plaintiff has put him in peril, yet if his danger is perceived by the defendant in time, so that by the exercise of ordinary diligence on his part injury can be avoided, the defendant will be held for the injury. But that is based upon the fact that a defendant did actually know of the danger—not upon the proposition that he would have discovered the peril of the plaintiff but for remissness on his part. Under this rule, a defendant is not liable because he ought to have known."

It is not necessary to discuss with much detail the exceptions taken by appellant to rulings of the court in the matter of instructing the jury. The gravest objection to instructions given at request of plaintiff is that whether or not they are on their face as abstract propositions of law erroneous, they were not applicable to the evidence and undisputed facts in the case, and therefore misleading to the jury. They gave the jury to understand that although plaintiff was guilty of contributory negligence, still they might find for plaintiff if they believed that defendant was guilty of any of the kinds of negligence to which the evidence in any way pointed. But the only negligence of defendant to which the evidence in any way pointed was the failure of the motorman to ring a bell or give other notice (if, indeed, he was required to ring a bell at that point), and that, as testified to by one of plaintiff's witnesses, he was looking back and not in front of him at the moment when the accident occurred. Assuming that these two things constituted negligence, they were not, under the authorities above quoted, the kinds of negligence which took the case out of the rule that one guilty of contributory negligence cannot recover. For instance, in instruction No. 2, given at the request of plaintiff, the jury were told that "a party having an opportunity by the exercise of proper care to avoid injuring another, must do so notwithstanding that the latter has placed himself in the situation of danger by his own negligence or wrong, and although you should find that the parents of the plaintiff or either of them were careless in permitting the child to go upon the street unattended, or that the child herself was negligent, nevertheless, if the defendant's employés could have avoided the injury by the exercise of ordinary care, then you should find for the plaintiff." Now, in the case at bar, there was no evidence that the motorman "had an opportunity" to avoid injuring plaintiff, or that he discovered her in a perilous situation, but on the contrary it was proven and is admitted that he did not see her at all before the accident; and, therefore, the above instruction could apply to the case only upon the proposition that defendant was liable on account of the asserted negligence of the motorman in not looking ahead at the moment immediately preceding the accident—which is not the law. The same may be said of the court's amendment to instruction No. 13 asked by defendant. We do not deem it necessary to further refer to the instructions given, refused, and modified.

The order appealed from is reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SHAW, J.; HENSHAW, J.; SLOSS, J.

3 Cal. App. 136

HAYDEN v. CONSOLIDATED MINING & DREDGING CO.

(Court of Appeal, Third District, California. Feb. 21, 1906. On Rehearing, March 27, 1906. Rehearing Denied by Supreme Court April 21, 1906.)

1. TRIAL—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

Instructions given must be read together, and are sufficient if, when so read, they appear to cover the whole case and state correctly the law applicable thereto.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 703–717.]

2. SAME—CONTRADICTORY INSTRUCTIONS.

Where two instructions are contradictory in essential parts, the judgment must be reversed.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 564, 565.]

3. SAME.

In an action by the owner of an irrigation ditch in possession of a tenant, who had covenanted to repair, for injuries thereto, the court in two instructions charged that the damages awarded to plaintiff must be confined to the "permanent" injury; "that is, to injury inflicted upon her [plaintiff's] inheritance or reversionary interest therein." An instruction was then given that plaintiff could not recover for any injury to the tenant's possession or enjoyment of the property; that it was the duty of the lessee to replace and repair any portion of the ditch injured or destroyed, and that he could recover the necessary expenses incurred in doing so from defendant; and that if the ditch was permanently injured and destroyed so that it could not be rebuilt or replaced in the maner in which it originally existed, the lessee would not be bound under his covenant to repair such permanent injuries, and that plaintiff could recover for such damages. *Held*, that such instructions were not contradictory.

On Rehearing.

4. LANDLORD AND TENANT — INJURY TO LEASED PROPERTY — RECOVERY BY LANDLORD—RIGHTS OF LESSEE.

That a lessee in possession of property injured by the negligence of a third person had an option to purchase the same was no ground for denying the landlord the right to recover for permanent injury to the property, because, in the event of the tenant's exercising his option, he might also be entitled to recover for such injuries.

Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by Mary A. Hayden against the Consolidated Mining & Dredging Company. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Affirmed.

Gillis & Tapscott, for appellant. Coburn & Collier, for respondent.

McLAUGHLIN, J. Respondent was the owner of a tract of farming land in Siskiyou county, appurtenant to which was a ditch known as the "Alger Ditch," used for conveying water from Scott river to and upon said land for purposes of irrigation. The defendant constructed a dam in the channel of the river near the head of this ditch, thereby causing the waters of the stream to flow against one of its banks and into the head of the ditch. As a result, about one half-mile of the ditch was washed away, necessitating the construction of a flume for this entire distance. This action was brought to recover $5,000 damages, thereby sustained. The jury found for plaintiff, and assessed the damages at the sum of $550. Judgment was entered accordingly, and the defendant appeals from the judgment and from an order denying his motion for a new trial.

At the time the ditch was washed away, one Oltman was in possession of the land and ditch, under a lease which included an option to purchase the property. This lease contained a covenant binding the lessee to keep the ditch open and in repair at his sole expense and without charge to respondent. The court, after repeatedly instructing the jury that the plaintiff was only entitled to recover damages for permanent injury to "her inheritance" or "reversionary interest in the property," and that the lessee would be entitled "to recover against the defendant in respect to the value of his possessory interest and unexpired term in the premises," continuing said: "But if you further find from the evidence that the lease to Charles Oltman contains a covenant to repair the Alger ditch, then such covenant requires that the lessee, Charles Oltman, shall keep the ditch in as good repair as when he received it under his lease; and if destroyed by the defendant, he, the said Charles Oltman, would be required to replace and rebuild the portion or portions of said ditch so destroyed. And he, the said Charles Oltman, would be entitled to recover from the defendant the cost of rebuilding and replacing the portion or portions of said ditch, if any, so destroyed by defendant." In the same connection and immediately following said instruction, which was numbered 9, the court further instructed the jury as follows: "If you find from the evidence in this case that the damages alleged in the complaint, were in fact inflicted by the defendant, and that any portion of the said ditch was so permanently injured and destroyed as that it could not be rebuilt or replaced in the manner in which it originally existed, then the lessee would not be bound, under his covenant, to repair such permanent injuries, and the plaintiff may recover herein for such damages." The appellant does not assail the correctness of the whole or any portion of the charge of the court, but relies solely on the point that the jury must have ignored or refused to follow instruction No. 9 above quoted. It is argued that, as the lease contains a covenant requiring the lessee to keep the ditch in repair, this instruction absolutely precluded a recovery by plaintiff, for or on account of any injury to such ditch occurring during the continuance of the lease. Respondent answers this argument by saying that the instructions on this branch of the case must be read and construed together, and that if this course is pursued, the verdict cannot be held violative of the charge of the court, or of the instruction in question. Appellant replies by reiterating the argument first advanced, and adding that there is such an irreconcilable conflict between the two instructions above quoted that one cannot be followed without ignoring the other. It is well settled that instructions given by the court must be read together as a whole, and are sufficient if, when so read, they appear to cover the whole case, and state correctly the law applicable thereto. Nichol v. Laumeister, 102 Cal. 661, 36 Pac. 925; Ellis v. Tone, 58 Cal. 297; People v. Kennedy, 55 Cal. 202; Feliz v. Feliz, 105 Cal. 6, 38 Pac. 521; Monaghan v. Rolling Mill Co., 81 Cal. 193, 194, 22 Pac. 590.

There can, however, be no question that, where two instructions are contradictory in essential particulars, the judgment must be reversed. Brown v. McAllister, 39 Cal. 573; Chidester v. Con. P. Ditch Co., 53 Cal. 56; Haight v. Vallet, 89 Cal. 249, 26 Pac. 897, 23 Am. St. Rep. 465; Sappenfield v. Main St. R. R. Co., 91 Cal. 48, 27 Pac. 590. In applying the rule last stated it must be borne in mind that, although some of the instructions may in slight respects be repugnant to each other, if it appear that the jury could not have been misled thereby, a new trial will not be granted. Carrington v. P. M. S. S. Co., 1 Cal. 476; People v. Salorse, 62 Cal. 144; People v. Turcott, 65 Cal. 128, 3 Pac. 461; People v. Chun Heong, 86 Cal. 334, 335, 24 Pac. 1021; Edwards v. Wagner, 121 Cal. 378, 53 Pac. 821; People v. Cleveland, 49 Cal. 580. And it must further be remembered that "the meaning of the court below cannot be fairly arrived at by a partial view of what the jury was told was the law by which they should be governed. All that was said to them in relation to the matter should be considered." People v. Kennedy, supra; Ellis v. Tone, supra; Monaghan Rolling Mill Co., supra; Feliz v. Feliz, supra. In construing the charge of the court, it must be viewed in the light of common understanding, and the practical administration of justice should not be defeated by a too rigid adherence to close and technical analysis of the whole or any part thereof. People v. Alsemi, 85 Cal. 435, 24 Pac. 810; People v. Bruggy, 93 Cal. 476, 29 Pac. 26 Hanson v. Stinehoff, 139 Cal. 173, 72 Pac. 913; Thomas v. Gates, 126 Cal. 8, 58 Pac. 315; Stephenson v. S. P. R. R. Co., 102 Cal 150, 34 Pac. 618, 36 Pac. 407; People v. Gibson, 106 Cal. 474, 39 Pac. 864. "Jurors may be assumed to have ordinary intelligence and good sense." Ballou v. Andrews Banking Co., 128 Cal. 567, 61 Pac. 102. This being true, it follows that the crucial test to be applied in solving the problem before us must be whether a man of ordinary intelligence reading the charge intended for his guidance would be unable to ascertain its meaning as a whole, by reason of inherent contradictions creating confusion and doubt in his mind touching his duty as a juror. Taking the charge of the court in the case at bar by its four corners, and placing a reasonable unstrained construction upon each of its several parts, as viewed in the light of the general context and the relation of each part to the other, we feel certain that such a man could ascertain the meaning of the court, and could not have been misled as to his duty as a juror.

If instruction No. 9 stood alone, the conclusion contended for by appellant might be inevitable, but it is qualified by what precedes and follows it. If the first word of instruction No. 10 had been preceded by the word "but," or followed by the word "however," there could be no doubt as to the intention and meaning of the court. And we think the charge as it stands is fairly and reasonably susceptible of the interpretation that must have been placed upon it, had either or both of such words been so inserted. Instructions numbered 7 and 8 contain repeated admonitions to the effect that the damages awarded to the plaintiff must be confined to the permanent injury and damage to the property; that is, to injury inflicted upon "her inheritance" or "reversionary interest" therein. The jurors were then informed that she could not recover for any injury to Oltman's possession or enjoyment of the property. Instruction No. 9 informed the jury that it was the duty of the lessee to replace and repair any portion of the ditch injured or destroyed, and that he could recover the necessary expenses incurred in doing so from the defendant. In the next instruction, almost in the same breath, and as a continuation of the subject-matter embraced in the three preceding instructions, they were given to understand that if the ditch was "so permanently injured and destroyed that it could not be rebuilt or replaced in the manner in which it originally existed," the lessee would not be "bound under his covenant to repair such permanent injuries, and the plaintiff may recover herein for such damages." Surely the jury could not fail to understand from this that the lessee was only bound to do and could only recover for doing that which it was in his power to do. Surely they must have gathered from this charge that, if the injuries were permanent and irreparable, he was released from performing impossibilities by the law, which was part and parcel of his covenant. Civ. Code, § 3531. Viewing the whole charge through nonpartisan eyes, they certainly must have been able to comprehend from its context that the plaintiff could only recover for injuries to the property so permanent and irreparable in their nature that the lessee could not repair or replace the ditch in such manner as to avoid continuing and lasting injury to the property, and consequent damage to its owner. "To tell the jury that if they believe from the evidence that certain facts exist, they should find a certain way, is not a positive instruction to find a certain way." Eades v. Trowbridge, 143 Cal. 29, 76 Pac. 714. And as every presumption and intendment must be indulged in favor of the verdict and judgment, we are bound to assume that there was evidence to justify the jury in finding, and that they did in fact find, that the injury was of such a permanent and irreparable character that the plaintiff was damaged to the extent indicated by the verdict.

A well-deserved compliment to the attorneys for the appellant is involved in the statement that our labors have been minimized and brightened by the direct, straightforward, and lawyer-like way in which the point relied upon for reversal was segregated and presented.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

On Petition for Rehearing.

McLAUGHLIN, J. In the petiton for a rehearing it is earnestly contended that the judgment which was here affirmed must result in grave injustice to appellant, in the event that the lessee Oltman should voluntarily purchase the property under the option contained in the lease. It is said that in such event the purchaser could also recover for any permanent injury to the property caused by the negligence of which plaintiff complains, thus subjecting appellant to a double liability on account of the same omission or act. While the rights of the lessee cannot be determined in an action to which he is not a party, we cannot see how the fact that he might become a purchaser at some future date could affect the right of the owner of the property when the permanent injury was inflicted, to recover for any lasting injury to her property while it remained such. The option to purchase left Oltman free to act according to his will, and the mere fact that he might own the property at some subsequent time cannot prejudice the right of the present owner to recover for a tort resulting in lasting injury to realty which she now holds and he may never acquire.

Rehearing denied.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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3 Cal. App. 124

GAFFEY v. MANN.

(Court of Appeal, First District, California. Feb. 17, 1906. Rehearing Denied by Supreme Court April 10, 1906.)

1. APPEAL—JURISDICTIONAL AMOUNT.

The amount claimed in the complaint, and not the amount of costs claimed, governs the question of jurisdiction on appeal from an order taxing costs.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 202–225.]

2. COSTS—DISMISSAL OF LIBEL SUIT—ATTORNEY'S FEE.

Under Libel and Slander Act (St. 1871–72, p. 533, c. 377) § 6, providing that if plaintiff's bond for costs be not filed in five days after the order therefor the action shall be dismissed, and section 7 (page 534) providing that if the action is dismissed defendant shall be allowed $100 to cover counsel fees, in addition to other costs, the right to counsel fees obtains, not only in case of a dismissal for failure to file a bond for costs, but where dismissal is had under Code Civ. Proc. § 581, for failure to issue the summons within a year from the filing of the complaint.

3. SAME—TAXATION—PROOF.

The affidavit of counsel for defendant in a slander suit to the cost bill, supported by evidence that he had served on plaintiff's attorney, the day before plaintiff dismissed the action, a notice of motion to dismiss, in the absence of evidence to the contrary, proves the incurring of the expense for counsel fees.

4. SAME—CLERK'S FEES.

An item for clerk's fees for filing defendant's notice of motion to dismiss the action, is properly stricken out of defendant's cost bill as having been unnecessarily incurred, the notice having been filed after defendant had dismissed the action, as might have been ascertained by an examination of the clerk's register.

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by W. V. Gaffey against Samuel Mann. From an order, defendant appeals. Reversed.

H. C. Wyckoff and J. E. Gardner, for appellant. Charles B. Younger, Jr., for respondent.

HALL, J. Appeal by defendant from an order of the court striking out all the items of defendant's cost bill.

Respondent's objection that this court has no jurisdiction of the appeal for the reason that the entire amount of the costs claimed did not amount to $300 is not well taken. The amount claimed in the complaint was $50,000, which brings the case within the jurisdiction of the Supreme Court. See Harron v. Harron, 123 Cal. 508, 56 Pac. 334, which overrules earlier cases to the effect that the amount of the cost bill governs the question of jurisdiction upon an appeal from an order taxing costs.

Plaintiff commenced an action against defendant for slander May 8, 1903, but no summons was ever issued thereon. On May 19, 1904, defendant, by his attorneys, served on plaintiff's attorney a notice that he would move the court on May 27, 1904, for an order dismissing the action, and for a judgment in favor of defendant for $100 counsel fees, and $2.50 costs, upon the grounds that more than one year had elapsed since the filing of the complaint and no summons had been issued and no bond filed for costs. May 20, 1904, plaintiff, by his attorney, dismissed the action by entry on the register of actions in the clerk's office; and on the same day, but we assume subsequently, to plaintiff's dismissal, defendant filed the notice above referred to as served on the 19th day of May, 1904. This motion was never orally made, but was withdrawn May 27, 1904. On May 27, 1904, defendant filed and served his cost bill duly verified, wherein he claimed costs in the sum of $102 being clerk's fees $2, and counsel fees $100. In due time plaintiff moved the court to strike out all the items of said cost bill, and upon the showing of the facts as above set forth the motion was granted. No effort was made to prove that defendant had not incurred an expense of $100 for counsel fees; but it is insisted by counsel that inasmuch as the action was dismissed before defendant ever appeared in the action he is not entitled to any costs.

The act concerning actions for libel and slander requires the plaintiff to give a bond for costs, and in section 6 of the act (St. 1871–72, p. 533, c. 377), provides that if the bond be not filed in five days after the order therefor the action shall be dismissed. Section 7 (page 534) of the act provides that plaintiff, if he recover judgment, shall be allowed as costs $100 to cover counsel fees, and also provides: "In case the action is dismissed, or the defendant recover judgment, he shall be allowed one hundred dollars to cover counsel fees, in addition to the other costs, and judgment therefor shall be entered accordingly." In this case, before the action had been dismissed, defendant employed counsel to take steps to bring about a dismissal, which he had a perfect legal right to do under section 581, Code Civ. Proc., without entering a general appearance to the action. After defendant, through his attorney, had moved in the matter plaintiff dismissed the action. This brought the case squarely within the terms of section 7 of the act. The action had been dismissed; and if defendant had in fact before such dismissal, in an effort to procure such dismissal, incurred an expense for counsel fees, no reason is perceived why he should not be allowed such costs up to the sum of $100, as provided by the statute. The affidavit of counsel for the defendant to the cost bill, supported as it was by the documentary evidence that he had served on plaintiff's attorney a notice of motion to dismiss the action on May 19th, in the absence of one word of evidence to the contrary, proved the incurring of the expense. Miller v. Highland Ditch Co., 91 Cal. 103, 27 Pac. 536; Barnhart v. Kron, 88 Cal. 447, 26 Pac. 210.

Neither can we agree with counsel for the respondent that the right to counsel fees on a dismissal is limited to a dismissal for failure to file the bond for costs. It extends to dismissals under section 581, Code Civ. Proc., as well. As to the item of $2 for clerk's fees, we cannot say that the court was not justified in striking it out, upon the theory that there was no necessity for incurring the same, as the action had, at the time it was incurred. been dismissed, which fact might have been ascertained by an examination of the clerk's register.

The order is reversed so far as it strikes out the item in defendant's cost bill of $100 for counsel fees.

We concur: HARRISON, P. J.; COOPER, J.

3 Cal. App. 127

SAUER v. EAGLE BREWING CO.

(Court of Appeal, First District, California. Feb. 17, 1906. Rehearing Denied by Supreme Court April 18, 1906.)

1. EXCEPTIONS, BILL OF—TIME OF SERVICE—DEFAULT—RELIEF.

Under Code Civ. Proc. § 473, authorizing the court to relieve a party from a proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, the trial court may, upon a sufficient showing of mistake, inadvertence, or excusable neglect, relieve a party from his default in failing to serve a bill of exceptions or statement in time.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exceptions, Bill of, § 72½.]

2. APPEAL — ERRORS REVIEWABLE — DISCRETIONARY ACTION.

The appellate court will interfere with the action of the trial court in relieving a party under Code Civ. Proc. § 473, from his default in failing to serve a bill of exceptions in time, only when it appears that the trial court has been guilty of a gross abuse of discretion.

3. EXCEPTIONS, BILL OF—DEFAULT IN SERVICE—RELIEF BY COURT.

Under Code Civ. Proc. § 473, authorizing the court to relieve a party from a proceeding taken against him through his mistake, surprise, or excusable neglect, it was not an abuse of discretion for the trial court to relieve a party from its default in not serving a bill of exceptions in time, where it appeared that the party's counsel thought, and with good reason, that he had, through his managing clerk, obtained an order extending the time to serve the bill, and moved for a relief as soon as he discovered his mistake, and the order granting him relief gave him only such time as he might have originally obtained within which to file the bill of exceptions.

4. SAME — NOMENCLATURE — IDENTITY WITH STATEMENT.

There is no substantial difference between a bill of exceptions and a statement, and a bill of exceptions or statement would be considered although the motion in the trial court was for leave to serve a statement, and the notice of intention to move for a new trial stated that it would be made on a bill of exceptions.

5. APPEAL—RESERVATION OF GROUND OF REVIEW—PROCEEDINGS IN LOWER COURT.

Where respondent resisted a motion for leave to serve a statement on the sole ground that there was no mistake, inadvertence, or excusable neglect such as to authorize the court to grant relief from appellant's original default in the matter, she could not contend on appeal that the bill of exceptions should not be considered for the reason that the leave granted was to serve a statement and not a bill of exceptions.

6. SAME.

Where an amended complaint was filed, and no answer was filed thereto nor default entered for failure to answer, but the case was tried in all respects as if the issues raised by the answer to the original complaint were applicable to the amended complaint, respondent could not first raise the point on appeal that there were no issues to be tried by the jury.

7. NEGLIGENCE—RES IPSA LOQUITUR—APPLICATION OF DOCTRINE.

The rule raising a presumption of negligence from the fact of the occurrence of an accident is not limited to injuries to passengers and exists wherever the circumstances impose upon one party alone the obligation of special care, but has no application where the injured party and the alleged wrongdoer were both in the exercise of an equal right and were each chargeable with the same degree of care, as in case of two travelers upon a highway.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 218.]

8. SAME—LAST CLEAR CHANCE—APPLICATION OF DOCTRINE.

In order to bring the doctrine of "last clear chance" into operation, defendant must have actual knowledge of the dangerous position of plaintiff.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 115.]

Appeal from Superior Court, City and County of San Francisco; F. H. Kerrigan, Judge.

Action by Louise Sauer against the Eagle Brewing Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

H. G. W. Dinkelspiel, for appellant. Frank J. Castelhun, for respondent.

HALL, J. This is an appeal by defendant from a judgment in favor of plaintiff, and also from the order denying defendant's motion for a new trial.

It first becomes necessary to dispose of some objections raised by respondent to the consideration of the appeal upon its merits. It is first objected that the bill of exceptions cannot be considered because not served in time; and secondly, that though the court, on application of defendant, relieved defendant under section 473, Code Civ. Proc., of its default in not serving its bill in time, it granted leave to serve a statement on motion for a new trial, and not a bill of exceptions. From the record it appears that the verdict was rendered December 8, 1903, and on the 18th day of December, 1903, defendant served and filed its notice of intention to move for a new trial, wherein it stated that said motion would be made on a bill of exceptions thereafter to be settled.

First, as to the point that the bill of exceptions or statement was not served in time, it is allowable for the trial court to relieve a party under section 473, Code Civ. Proc. from his default upon sufficient showing of mistake, inadvertence, or excusable neglect. Stonesifer v. Kilburn, 94 Cal. 33, 29 Pac. 332; Sprigg v. Barber, 118 Cal. 592, 50 Pac. 682; Banta v. Silla, 121 Cal. 414, 53 Pac. 935. And where such an order has been made by the trial court all doubts as to the propriety of such order must be resolved in favor of the action of the lower court, and this court will only interfere with such action when it appears that the trial court or judge has been guilty of a gross abuse of discretion. Banta v. Silla, supra. Applying these principles to the case at bar, it is clear that the trial judge was not guilty of an abuse of discretion. The affidavit of appellant's counsel shows that he thought, and had good reason to think, that through his managing clerk he had in due time obtained an order from the court extending his time to serve the bill for 30 days. As soon as he discovered that he had not, he moved, under section 473, to be relieved of his default, and the order of the court gave him only such time as he might have originally obtained—that is to say, the bill was under the order served within the 30 days that the court might have originally granted.

Neither do we think that we should disregard the bill of exceptions or statement (it is headed "Bill of Exceptions" and is described in the certificate allowing the same as the "foregoing statement"), for the reason that the motion made to the court was for leave to serve a statement, although the notice of intention to move for a new trial stated that it would be made on a bill of exceptions. There is no substantial difference between a bill of exceptions and a statement. People v. Lee, 14 Cal. 510; People v. Crane, 60 Cal. 279; Witter v. Andrews, 122 Cal. 1, 54 Pac. 276. In People v. Crane, supra, the trial judge was compelled by writ of mandate to settle as a bill of exceptions a document that the appellant had entitled a statement of the case. In Witter v. Andrews, supra, the court said: "But he was entitled to a bill of exceptions, and, as there is no substantial difference between a statement and a bill of exceptions, he should not be deprived of the fruits of his appeal because he called the document presented a statement rather than a bill of exceptions." The objection of respondent is not tenable for a further reason, in this, that she does not seem from the record to have resisted the motion for leave to serve a statement on the ground that the notice of intention to move for a new trial stated that it would be made on a bill of exceptions, but she contented herself with presenting such facts as tended to show that there was no mistake, inadvertence, or excusable neglect.

Respondent also makes the point that as no answer was ever filed by defendant to plaintiff's amended complaint the judgment and order appealed from must be affirmed. Upon this point the record shows that plaintiff's original complaint was filed June 20, 1903, and charged, in substance, that a servant of defendant carelessly drove a team of horses and wagon against plaintiff at the crossing of Howard and Twenty-Second streets, whereby plaintiff was greatly injured, etc. To this complaint defendant filed an answer, wherein it took issue with the material allegations of the complaint, and also expressly pleaded contributory negligence on the part of plaintiff. Subsequently plaintiff, by leave of court, filed an amended complaint, wherein she charged that the injury and accident occurred at the crossing of Howard and Twenty-Third streets, and somewhat more particularly described the manner in which the servant of defendant drove the team. No answer was filed to this amended complaint, nor was a default entered or taken for failure to answer thereto; but when the case came on for trial the cause was tried in all respects, both in the matter of taking the evidence and in charging the jury, as if issues arising out of denials of all the material allegations of the complaint, as well as the issue of contributory negligence, were before the court and jury. Under these circumstances we do not think that respondent can for the first time in this court raise the point that there were no issues to be tried by the jury. In the case of Gale v. Tuolumne Water Co., 14 Cal. 26, no answer was filed to an amended complaint, but the parties went to trial as if on issues joined by the pleadings; and it was held that the objection that there were no issues to be tried could not for the first time be made in the appellate court by the losing party. The only difference between that case and the case at bar is that in that case the losing party in the trial court was the plaintiff, while here it is the defendant. But the principle involved is the same. See, also, McDougald v. Hulet, 132 Cal. 154, 64 Pac. 278.

Having disposed of the preliminary objections made by respondent, we now take up a discussion of the points urged by appellant for a reversal. It is contended that the evidence is insufficient to support the verdict, in that there was no evidence of negligence on the part of defendant, and that the evidence shows without conflict that plaintiff was guilty of contributory negligence, and that the verdict is excessive. The action is one for damages claimed to have resulted to plaintiff from injuries received by her while crossing Twenty-Third street along the easterly crossing of Howard street, by being struck by the pole of a wagon driven by the servant of defendant. Inasmuch as we think the judgment and order must be reversed for errors of law, we do not think it advisable to pass upon the questions in this paragraph stated.

The defendant asked the court to charge the jury as folows: "In order for the plaintiff to be entitled to recover against the defendant, the plaintiff must show, by preponderance of evidence outside of the mere proof of the fact that a collision occurred, that such collision was due to the negligence of defendant; and, if the plaintiff has failed to show by preponderance of evidence satisfactory to your mind that the accident or collision in which the plaintiff received her injuries was caused by the negligence of the defendant, then the plaintiff is not entitled to recover against the defendant, and your verdict must be in favor of the defendant." The court struck out the words "outside of the mere fact that a collision occurred," and as thus modified gave the instruction. We think the instruction should have been given as asked. There are cases where the mere fact of the accident raises a presumption that defendant was negligent, as in cases of injuries to passengers on vehicles of common carriers, because of the special care that the common carrier owes to its passengers. This rule is not limited to injuries to passengers, but exists wherever the circumstances impose upon one party alone the obligation of special care. Cooley on Torts, 799. The application of the rule that proof of the accident alone may raise a presumption of negligence on the part of defendant is quite fully discussed in Judson v. Giant Powder Co., 107 Cal. 549, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146. The rule has no application, we think, where, as in this case, both the parties were in the exercise of an equal right and each chargeable with the same degree of care. The modification of the instruction, however, was probably not important, for the plaintiff, the driver of the team, and bystanders gave testimony in detail as to the circumstances of the accident; and it is almost inconceivable that the jurors would have drawn any deductions as to the cause of the accident from the mere fact of the accident. The simple omission of the words under discussion from an instruction is quite a different affair from an affirmative instruction that negligence on the part of defendant may be inferred from the mere proof of the accident. We therefore pass without further comment to the discussion of another question of more importance.

After instructing the jury that plaintiff could not recover if she and defendant were both guilty of negligence that proximately contributed to the injury complained of, the court, in an instruction numbered 19 in the record, charged the jury as follows: "But there is a further principle firmly established in this state, that one having an opportunity, by the exercise of proper care, to avoid injuring another, must do so, notwithstanding the latter has placed himself in a position of danger by his own negligence. Another statement of the same rule is as follows: He who last has a clear opportunity of avoiding the accident by the exercise of proper care to avoid injuring another must do so." No fault is found with this instruction by appellant as a generally correct statement of a proposition of law; but appellant does complain of the refusal of the court to give two instructions asked by appellant (Nos. 11 and 13), each of which embodies the proposition that before a defendant can be held liable for failing to use ordinary care to avoid injuring a plaintiff who has, by his own negligence, placed himself in a position of danger, the defendant must have actual knowledge of the dangerous position of the plaintiff. Each of these instructions correctly stated the law, and should have been given, as there was evidence in the case to which such instructions were pertinent. In Herbert v. S. P. Co., 121 Cal. 227, 53 Pac. 651, the court said: "Doubtless notwithstanding the negligence of a plaintiff has put him in peril, yet if his danger is perceived in time by the defendant so that, by the exercise of ordinary diligence on his part, injury can be avoided, the defendant will be held for the injury. But that is based upon the fact that a defendant did actually know of the danger—not upon the proposition that he would have discovered the peril of the plaintiff but for remissness on his part. Under this rule a defendant is not liable because he ought to have known." To the same effect are Esrey v. S. P. Co., 103 Cal. 541, 37 Pac. 500, and Wahlgren v. Market St. Ry. Co., 132 Cal. 656, 62 Pac. 308, 64 Pac. 993.

In his brief, counsel for respondent does not attempt to dispute the soundness of the law of the requested instructions now under discussion, but contents himself with the statement that they were substantially given. He does not, however, call our attention to any instruction that was given that he claims to be in substance the same, and, after a careful examination of the record, we have found none.

The order and judgment must be reversed, and it is so ordered.

We concur: HARRISON, P. J.; COOPER, J.

3 Cal. App. 134

CONEY v. LOVETT et al.

(Court of Appeal, First District, California. Feb. 17, 1906.)

1. LANDLORD AND TENANT—UNLAWFUL DETAINER—FINDING—EVIDENCE.

In an action of unlawful detainer, evidence *held* to sustain a finding that defendant M. entered into possession of the premises as tenant from month to month under implied agreement to pay rent at a specified rate in advance, and that he agreed to pay such rent according to such implied agreement.

2. SAME—PLEADING—ISSUES.

Where, in an action of unlawful detainer, an allegation in a complaint that a three days' notice to pay rent or surrender possession was given, and served on defendant M. was not denied, the giving of such notice was not in issue.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by C. Coney against A. E. Lovett and another. From a judgment in favor of plaintiff, defendant Lovett appeals. Affirmed.

Pringle & Pringle, for appellant. L. G. Traugh, for respondent.

COOPER, J. Unlawful detainer. Judgment for plaintiff for restitution of the leased premises and against defendant Lovett for $250, being two months' rent. Defendant Munro has not appealed, and Lovett, the appellant, only contests his liability for the rent.

The court found that appellant entered into possession of the premises as tenant from month to month under an implied agreement to pay rent at the rate of $125 per month, payable monthly in advance, and that appellant agreed to pay the rent according to the terms of said implied agreement. It is claimed that this finding is not supported by the evidence. We think the evidence justified the court in making the finding. It appears from the evidence that prior to November 10, 1903, the premises were in possession of one Holliday as tenant of plaintiff. Whether the premises were leased to Mrs. Holliday from month to month, or by a lease in writing, does not appear. The agent of plaintiff testified that on the 10th of November, 1903, he went to the premises to demand the rent from Mrs. Holliday and found appellant in possession; that the appellant said to witness that he had bought out Mrs. Holliday, and that he was the tenant, and wanted a receipt for the rent in his name; that for the next month a receipt was so given to appellant in his own name. Thereafter and up to March 10, 1904, appellant paid the rent at the rate of $125 per month, generally going to the office of the agents of plaintiff and paying it there. Appellant never surrendered possession to plaintiff, nor did he notify plaintiff of any subletting or change of occupancy. He did not testify or produce any evidence at the trial. It is alleged in the complaint "that on the 10th day of March, 1904, pursuant to the terms of said lease, there was, and ever since has been, owing and unpaid from said defendant Lovett, to said plaintiff for the rent of the said premises for one month, to wit, from and inclusive of the 10th day of March, 1904, to the 10th day of April, 1904, the sum of $125." Although the complaint is verified, the above allegation is not denied. The answer alleges affirmatively that about the 8th day of February, 1904, said defendant Lovett sold and conveyed all the furniture on the premises, together with his "title and interest in the leasehold of said premises," to defendant Munro. No proof was offered in support of the said allegation. Appellant having thus stated that he was the tenant, paying the rent and taking receipts in his own name, remaining in possession by the permission of the landlord, and not having restored the possession, must be held liable for the rent.

There is no merit in the claim that three days' notice to pay the rent or surrender possession was not given. The allegation in the complaint that such notice was given and served upon appellant is not denied, and hence there was no such issue.

The judgment is affirmed.

We concur: HARRISON, P. J.; HALL J.

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3 Cal. App. 121

CLARK v. DALZIEL.

(Court of Appeal, First District, California. Feb. 16, 1906.)

1. WITNESSES—IMPEACHMENT—EVIDENCE.

Where, in an action for broker's commissions, it appeared that plaintiff and defendant met just after the sale, when defendant informed plaintiff that the property had been sold, it was not error to exclude a question asked of plaintiff on cross-examination as to whether he did not, in reply to defendant's statement, ask him if the purchaser was not plaintiff's man, to which defendant replied, "No," and plaintiff then stated: "Don't be too sure of that. Hold your horses"—as such evidence did not tend to impeach plaintiff.

2. EVIDENCE—HEARSAY.

Where a contract appointing plaintiff as defendant's exclusive broker, until the agency was withdrawn by defendant in writing, was thereafter extended by an indorsement thereon, evidence as to whether a witness had a conversation with defendant immediately after such extension in which the defendant stated that the contract was extended to a specified date, was properly excluded as hearsay.

3. BROKERS—CONTRACT—EXTENSION—EFFECT.

Where a contract appointing plaintiff as defendant's exclusive agent for the sale of certain real estate provided that it should remain in full force for 10 days and "thereafter until withdrawn" by defendant in writing and thereafter the parties met, and defendant signed a written memorandum on the contract, extending it to a specific date, such memorandum did not terminate the contract on the date specified, or until the property was withdrawn in writing by defendant as originally provided.

Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by W. A. Clark against Robert Dalziel. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Affirmed.

Edwin L. Forster and Robert R. Moody, for appellant. Chickering & Gregory and George W. Whipple, for respondent.

COOPER, J. This action was tried with a jury, and a verdict returned for plaintiff, upon which judgment was entered. Defendant appeals from the judgment and an order denying his motion for a new trial. No question is raised as to the sufficiency of the evidence to sustain the verdict, nor is any instruction to the jury challenged. The action was brought to recover commissions on the sale of real estate.

On the 19th day of August, 1902, the defendant, by an instrument in writing, employed the plaintiff, as his sole and exclusive agent, to sell certain real estate described in the instrument, being in the city and county of San Franciso, for the sum of $125,000, the plaintiff to be paid in the event of a sale being made by himself, or any one else, while the contract remained in force, 1½ per cent. commission on the selling price. The instrument provided that it should remain in force for the full period of 10 days and "thereafter until withdrawn by me in writing." About the 28th day of October, 1902, the parties met, and the defendant signed a memorandum at the bottom of the contract as follows: "The above contract is extended to November 5th, 1902. I except (accept) the above. R. Dalziel." The property was never withdrawn from sale by defendant in writing or otherwise. It was admitted that the defendant sold the property about the 15th day of December, 1902, and it is not questioned that the amount of the verdict is correct, provided the defendant was liable on the instrument for commissions.

The first error assigned is as to the ruling of the court in sustaining an objection made by plaintiff to a question asked of plaintiff by defendant's counsel in cross-examination. The plaintiff and defendant, it appears, had met at Campi's restaurant just after the sale, and defendant then informed the plaintiff of the fact that he had sold the property. Plaintiff was then asked if he did not, in reply to defendant's statement that he had sold the property, say: "Was it my man?" Mr. Dalziel replied: "No." You then stated to him, "Don't be too sure of that. Hold your horses." The question was asked in the above form. Appellant claims that the evidence sought was for the purpose of showing some kind of admission that at that time the plaintiff did not claim any commission unless the sale had been made to "my man," meaning a purchaser who had been found by the plaintiff. We do not think the court erred in the ruling complained of. The evidence sought would not have tended to impeach the witness; and even if the question was asked for that purpose, the persons present and circumstances were not sufficiently called to the attention of the witness to lay a foundation for impeachment. There does not appear to be anything said making it incumbent on plaintiff to then and there claim his commissions. In fact, the words: "Don't be too sure about that; hold your horses" would indicate that it was in the nature of a warning to defendant that plaintiff was going to insist on his rights. Not only this, but defendant, as a witness in his own behalf, was allowed, without objection, to give his version of the conversation at Campi's restaurant. His account of it is as follows: "I said, 'Mr. Clark, I sold the property.' He says, 'Who to?' or something like that. I did not tell him who to. I said: 'The man who purchased—there was no agent between him and I,' and I told him the purchaser got the benefit of the commission. Q. Then you sold it to the purchaser less the commission? A. I did. Q. What reply did you make then? A. He replied: 'I am sorry it was not my man.' "

Defendant called one Forgie as a witness in his own behalf. Forgie testified that he was present part of the time when plaintiff and defendant met in the office or place of business of one Snow for the purpose of making the indorsement on the instrument extending it to November 5, 1902; that he left Snow's office with defendant to go to the Golden Gate Park. Defendant's counsel then asked Forgie as to whether or not he had a conversation with defendant at the time the two went to the park as to what was understood by plaintiff and defendant by the use of the words, "The above contract is extended to November 5th, 1902." The court properly sustained the plaintiff's objection to the question. It was purely hearsay as to the opinion of defendant as to the understanding of the written extension. If the meaning of the writing could be explained by parol evidence, it certainly could not be so explained by the opinion of defendant expressed in the absence of plaintiff. There were no such circumstances in the case tending to show an improper motive or recent fabrication as would have justified the evidence for the purpose of corroborating defendant, by showing that he had made consistent statements at other times. It is only in certain peculiar cases, wherein a witness has been charged with improper motives, of interest, or improper influences, or with recent fabrication, that the law allows hearsay statements to be introduced for the purpose of showing that the same and consistent statements had been made at a time prior to the fabrication or prior to the time the motive of interest existed. Such evidence is then admitted, not to prove the facts of the case, but, as tending to show that the witness has not been controlled by motives of interest, and that he has not fabricated something for the purposes of the case. The memorandum extending the contract to November 5, 1902, did not have the effect of terminating the contract at that time. It remained in effect until withdrawn by defendant in writing as expressly provided therein. The extension prevented the defendant from terminating it by notice in writing prior to November 5, 1902.

The judgment and order are confirmed.

We concur: HARRISON, P. J.; HALL, J.

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3 Cal. App. 101

ROBERTS et al. v. WARD.

(Court of Appeal, Third District, California. Feb. 15, 1906. Rehearing Denied by Supreme Court April 10, 1906.)

PUBLIC LANDS—TOWN SITES—CONVEYANCES.

Under Rev. St. U. S. § 2387 [U. S. Comp. St. 1901, p. 1457], providing for the granting of public lands settled on as a town site to the judge of the county court in trust for the occupants thereof, a certificate of title to townsite land, executed by the county judge to one who never occupied the land certified to him and who never had any right to occupy it, conveyed no title.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, §§ 88, 89, 96.]

Appeal from Superior Court, Tehama County; C. M. Head, Judge.

Action by Mary E. Roberts and another against Matthew Ward. From a judgment for plaintiffs, and from an order denying a new trial, defendant appeals. Reversed.

Johnson & Chase (J. J. Wells, of counsel), for appellant. McCoy & Gans, for respondent.

BUCKLES, J. This is an action in ejectment to recover a strip of land about six feet wide and 115 feet deep off the south side of lot 9 in block 11 in the town of Red Bluff. Judgment was for plaintiff. The appeal is from the judgment and the order denying a motion for a new trial.

The complainant alleges that plaintiffs are owners in fee of the disputed strip. The answer denies this and also sets up section 318 of the Code of Civil Procedure as a bar, with the further defense of the establishment of a boundary between plaintiffs and defendant by acquiescence for at least 38 years. The land in dispute is a part of the town site of Red Bluff, which town site was laid out on government land, and under act of Congress, Revised Statutes 2387 [U. S. Comp. St. 1901, p. 1457] was, by the government of the United States, patented to the county judge of Tehama county in trust for the several use and benefit of the occupants. Ever since November 25, 1867, the defendant has occupied this six feet of the south side of said lot 9 as a part of his residence grounds and had the same inclosed with his other grounds by a substantial fence. The patent for the town site was issued in 1866. Plaintiff's first grant of title to lot 9 was simply by designation lot 9, and was in the year 1867. The county judge made several certificates of title to lot 9, designating it as lot 9, giving no metes and bounds, to one John F. Jones, July 6, 1868, who never was in possession of any part of said lot 9, never occupied it and, so far as appears, never had any right to do so. This certificate, therefore, conveyed to him no title. Biddick v. Kobler, 110 Cal. 191, 42 Pac. 578. Again, the county judge made certificate of title to lot 9 to B. W. Stewart who was an occupant of said lot 9, except the six feet in controversy. The lot was not described by metes and bounds, but simply as lot 9. Again, on July 31, 1878, the county judge made a certificate of title to J. B. Roberts to said lot, who was then an occupant of said lot 9, except the six feet in controversy, as a grantee from Stewart.

There is no question but plaintiffs established a good title to all of said lot 9, except that part in dispute here. Under the trust evidenced by the patent of the United States government, the county judge could convey to no one but an occupant—one who was in actual bona fide possession thereof at the time. Biddick v. Kobler, supra. A plaintiff in ejectment must show a satisfactory title in himself before he can recover. It is no advantage to him to merely show that the defendant's claim of title is defective. He must show both a legal title and possession, or a right of possession. Buhne v. Chism, 48 Cal. 467; Willus v. Wozencroft, 22 Cal. 607; Harris v. Kellogg, 117 Cal. 484, 49 Pac. 708; Sousa v. Pereira, 132 Cal. 77, 64 Pac. 90.

The plaintiffs have no occupancy whatever, and no legal right to occupy as against defendant who has shown an undisputed possession and actual occupancy in himself and grantor for 40 years. There is no conflict of these facts which can be said to be substantial. It is claimed that defendant has not been in exclusive, uninterrupted occupancy of more than three feet of the said six feet all of the time, but the only testimony which in any way tends to establish this fact is that of the witness W. H. Cox, called by the plaintiffs in rebuttal. Cox was a partner with J. B. Roberts in the livery business from about 1882, to the time Roberts died in 1891. Their stables and corrals occupied lots 10, 11, 12, 13, 14, and that part of 9 north of defendant's inclosure, and of the said six feet in dispute. This witness says when he went there in 1882, he knew the fence and that the division fence was not exactly on the line between lots 8 and 9. It was an old fence, and some years thereafter it was rebuilt. "The old fence was right near that fig tree, right up to it. I think my recollection is good as to that; there was circumstances that I could go by; I am very sure that it was up to the tree; * * * the new fence was not put on the true line and it wasn't where the fence was before. The fence now is fully three feet if not four, from the big fig tree in Mr. Ward's yard. I am sure the old fence was right up to that tree." When pressed for his source of information as to the fence having been moved out three or four feet, he answered: "Well, I have a circumstance to go by that reminds me; I am pretty sure of it." Question by defendant's counsel: "You are pretty sure of it; will you swear it wasn't on that line? (The new fence on the line of the old.) A. Yes, sir. Q. You will swear it wasn't on the line? A. Well, yes, sir. That it's moved over some more, to the best of my recollection it was moved over three feet." When asked to relate the circumstance which fixed in his mind that the old fence was back by the big fig tree, he answered: "Where the old fence stood it was near the tree, right up against the tree, and one of my horses—I had a mare that jumped the fence—the other horses crowded her up in the corner and she jumped the fence, and jumped through the fork of the tree; and there where the fence stands here, the fence is so far away, a horse couldn't do it at all. Q. (by plaintiff's attorney.) That tree —the fork of the tree—that tree forks near the ground? A. Yes, sir; and spreads out wide, and the horse jumped the fence and jumped through the tree." This was the circumstance. Testifying further, he said: "The tree forked out and she jumped from this side and went through into Mr. Ward's yard. Q. (by counsel for defendant.) Did you see the horse when she made that jump? A. No, sir; they told me about it; I see the tracks there; they were deep in the ground where they struck the ground. Q. You saw some tracks, did you, beyond the tree? A. Yes, sir; and the other is based on what they told me."

It would thus seem that this witness' testimony that the fence had been moved three feet further north, is based upon the alleged fact that a horse of his jumped this fence in 1882, and at the same time jumped through the forks of a tree which stood near the fence, and that a horse could not jump the fence as it now stands and jump through the forks of the tree at the same time; and, that the fact of the horse jumping the fence was not a fact within his knowledge, but was told to him by others. This evidence was clearly inadmissible, because hearsay. But there was no objection made to its admission and no motion to strike out, and it therefore remains in the case as testimony. No other witness was called to confirm this acrobatic feat of this horse, which does not appear to have been anything more than the ordinary livery horse, and coming, as this testimony does, as hearsay, it is entitled to but little, if any, weight. The testimony as to the tracks beyond the tree, which the witness observed himself, is entitled to little, if any, weight because he does not pretend to say they were pointing in any particular direction. The defendant, in his rebuttal, testified that the horse did not jump the fence at the point where the tree was. We think the testimony of the witness Cox so uncertain, so slight, and trivial that it does not arise to the dignity of a contradiction of the fact established by all the other witnesses in the case who testified upon that point, including the witness Cramer, the carpenter who rebuilt the fence, that the fence stands now where it has always stood, to wit, 6 feet and 2 inches at one end and 5 feet and 9 inches at the other end—north of the south line of said lot, according to the actual measurement made by the county surveyor on October 7, 1903.

There is, therefore, no substantial conflict in the evidence as to the fact that the defendant has been the occupant of that much of the south part of said lot 9, continuously, ever since the year 1867, and that under the trust created for the benefit of the occupants of lots in the Red Bluff townsite patent, he was and is entitled to continue to occupy the same. Under the said trust we deem it immaterial whether defendant or plaintiffs paid the taxes on said lot. This is a case in all material matters like Biddick v. Kobler, supra. The United States patent creating the trust was issued to the county judge of Tehama county, September 20, 1866, and there is no evidence in this case to indicate that plaintiffs or any of their grantors occupied, possessed or had a right to possess this six feet in controversy at the time this patent was granted. E. W. Darling was the first grantor mentioned and he conveyed to B. W. Stewart, on July 7, 1867, conveying lot 9 by its number. There is no evidence to show what his occupancy was or how long he had been the owner of said lot 9. On the part of defendant there is no evidence to show how his grantors came to occupy said six feet. The immediate grantor of defendant to lots 5, 6, 7, and 8, was one C. F. Olinder, and the deed was executed November 25, 1867, and this is the grant under which defendant came into the occupancy of these six feet, for it was then fenced with the other lots mentioned in the Olinder grant. The evidence shows, without conflict, that the grantor, Olinder, had possession of and was occupying said six feet, and had a line fence dividing it from the other part of said lot 9, for two years before defendant went into possession in 1867. According to this, then, defendant's grantor was in possession of this strip when the patent to the town site was issued, and this precludes the idea of the six feet being occupied by any of plaintiffs' grantors when the trust was created. We have thus seen that there is no evidence to support so much of the findings as would warrant the judgment.

The judgment is reversed, and the cause remanded for a new trial.

For reasons fully stated in Biddick v. Kobler, I concur in the judgment: McLAUGHLIN, J.

I concur: CHIPMAN, P. J.

3 Cal. App. 109

FABIAN et al. v. LAMMERS.

(Court of Appeal, Third District, California. Feb. 15, 1906. Rehearing Denied March 17, 1906; Denied by Supreme Court April 11, 1906.)

1. LIMITATIONS—CONTRACTS—ACTIONS.
Plaintiff and defendant, owning adjoining tracts of swamp lands which could be most advantageously reclaimed by a system of levees including both tracts, entered into a written contract wherein each agreed to build at his own expense a suitable levee on his own land connecting with the levee on the other's land. Plaintiff completed the levee on his land, and built the levee on defendant's land on his failure to do so. *Held*, that an action for the cost of the levee built on defendant's land was an action on the contract, and was not barred by Code Civ. Proc. § 337, section 338, subd. 2, and section 339, subd. 1, prescribing the time for bringing actions on written contracts, etc., when brought within four years from the date fixed for the completion of the levees.

2. SAME—WRITTEN CONTRACTS.
Plaintiff and defendant, owning adjoining tracts of swamp lands, entered into a written contract wherein each agreed to build at his own expense a levee on his own land connecting with the levee on the other's land. The contract provided that the levee should be of the size determined by a designated engineer. The parties knew, the day the contract was signed, what dimensions the engineer had determined on, and then agreed to them, and both parties commenced work according to the engineer's plans. *Held*, that the contract was sufficiently certain as to parties and their agreement, and the rule that a contract partly in writing and partly oral is in effect oral did not apply.

Appeal from Superior Court, San Joaquin County; F. H. Smith, Judge.

Action by P. Fabian and another, partners doing business under the firm name of Philip Fabian & Co. and others, against Martin Lammers. From a judgment for plaintiffs, defendant appeals. Affirmed.

Loutitt & Loutitt and Buck & Middlecoff, for appellant. Nicol & Orr and A. L. Levinsky, for respondent.

BUCKLES, J. The parties to this action were, on March 4, 1898, owners of adjoining tracks of swamp and overflowed lands in San Joaquin county. It was understood and agreed by all said parties that all of their said lands could and would be most effectually and advantageously reclaimed and protected by a system of levees which would include both the lands of plaintiff and defendant, and in consideration thereof, and for their mutual advantage and for the benefit and reclaiming of said lands of both parties, on March 4, 1898, entered into a written contract wherein each agreed that he would at his own expense build a suitable levee on his own land on a line designated and described, connecting with levees on the other's land so as to protect the lands of all the parties then intended to be reclaimed, and each to keep his own levee in repair. The respective levees to be completed by December 1, 1898. After this contract had been duly signed by all the parties and on June 8, 1898, the same parties in modification of the aforesaid contract of March 4th, made and entered into a further and additional written contract, so as to change certain parts and portions of the levees described in the contract of March 4, 1898, to be constructed by each of the parties thereto, so that other lands would be embraced within said reclamation, and all to be completed by December 1, 1898. This latter contract contained a clause that it should not be binding upon either party to it unless Antoinette Naglee Burk should enter into a written contract with plaintiffs granting to them and the said Lammers the right to construct said levees over her lands. Antoinette Naglee Burk did enter into such written contract with plaintiffs. The complaint alleges that defendant failed to construct a part of the levee on his land he had by said written contract agreed to construct, and thereafter the plaintiffs built and completed his said levee at a cost to them of $5,022.22, and that payment was demanded January 20, 1900. The action was brought to recover from defendant the $5,022.22 as damages sustained by plaintiffs by reason of defendant's failure to build his levee. A general demurrer was interposed and overruled. Defendant answered, denying the allegations of the complaint and plead that "said cause of action is barred by the provisions of section 337 of the Code of Civil Procedure, the provisions of subdivision 2 of section 338, and subdivision 1, § 339, all of the Code of Civil Procedure." The case was tried by a jury, which found for plaintiff in the sum of $4,000, and judgment was entered for that sum. The appeal is from the judgment and order denying a motion for a new trial. Appellant and respondent agree that the only point in the case for this court to determine is as to whether plaintiffs' action was barred by the statute of limitations. The action was commenced September 30, 1902. The defendant Lammers failed to build his levee and plaintiffs, after demanding that he build it, and his further neglect to do so, built such levee on defendant's land as he had agreed to build. There is nothing in either the contract of March 4th, or of June 8th, providing that if one party should fail to build the levee he agreed to, the other party should do so. The contract is silent as to that. Plaintiff claims that this is a suit for damages for a breach of the contract on the part of the defendant in not building his levee as he had agreed to. If this can be treated as an action for damages for breach of contract, then it is upon the written contracts and is brought within four years of the time that the work was to be completed, to wit, December 1, 1898. As we understand the contract, the lands of neither would be reclaimed unless the levee should be built on the lands of both, as set forth in the contracts. Plaintiffs completed the levee on their lands, but such levee would not reclaim the land or keep the floods back unless the levee was completed on defendant's land to connect with the levee on plaintiffs' land. Had the floods come after December 1st, and after plaintiffs had completed their levee, and damage done thereby to plaintiffs' land or levee by reason of the failure of defendant to construct his levee, plaintiffs would have had a right of action against defendant for his breach of its provisions, and in that case the damage might have been much more than the cost of completing defendant's levee. The contract of June 8th provided "that the levee to be built by each of the parties hereto shall be of the same size, height, width, character, and in accordance with the said decision of the aforesaid George A. Atherton, civil engineer, and each and both of said levees shall be complete between the date of this contract and December 1, 1898." It is true that the dimensions, which may be called the plans and specifications, were not set forth in the contract, but were left to the civil engineer to determine, but this had been done else plaintiffs could not have completed their levee. The testimony of one of the plaintiffs, P. Fabian, shows that on June 8, 1898, the information was communicated to defendant that Civil Engineer Atherton had determined the size of the levee to be three feet above the high water mark of 1890, with a ten-foot top and a slope of three to to one on the sides, and defendant said that he had no objections to this.

Appellant claims the right of action is on a new contract and a contract not in writing, a mere implied contract, and cites Chipman v. Morrill & Webster, 20 Cal. 131, as authority. In that case the surety on a promissory note paid the note, and the court held that his right of action was not based upon the contract in the note, but upon a new contract not in writing, and his suit must be commenced within two years after he paid the note. We have examined McCarthy v. Mt. Tecarte L. & W. Co., 111 Cal. 328, 43

Pac. 956, cited by appellant, and are unable to see any application to the question here, for the case at bar is not an action in assumpsit, or a promise merely implied by law, as that case clearly was. It is true that where one enters into a written contract for the purchase of land and pays part of the purchase price, and the contract says nothing about refunding money paid in the event of the refusal of the vendor to convey as he agreed to, an action to recover back the money paid, upon breach of the contract on the part of the vendor, is not based upon the written contract but upon an implied contract and is governed by the two years' limitation, as held in Thomas v. Pacific Beach Company, 115 Cal. 136, 46 Pac. 899. But this does not assist in the determination of the case before us. If the case at bar is not one founded upon contract, then it is not assumpsit founded upon an implied contract, for were it not for the contract of March 4th, and June 8th, the plaintiffs would have been no more than mere volunteers in building the levee on Lammers' land, and Lammers would have been under no obligation to pay anything. Appellant seems to ignore the fact that this is a mutual contract in which there is a consideration to each of the contracting parties. The lands of both were to be reclaimed by the construction of the levees as provided in the contract. The consideration to defendant in part was the construction by plaintiffs of their levee. Plaintiffs had paid this consideration by erecting their levee, and were certainly entitled to have the thing for which they had paid, or its equivalent in damages. And what would that damage be? We answer, that before the floods should come and wash away the plaintiffs' levee it would be the cost of constructing defendant's levee, and that is exactly what plaintiff is suing for here. This doctrine was laid down in Taylor v. N. P. C. R. R. Co., 56 Cal. 317. The question was as to the measure of damages. The plaintiff had granted to defendant a right of way over his land for its railroad, the defendant covenanting to build for plaintiff a certain wagon road in lieu of one destroyed by the railroad, and also to fence both sides of the way granted and maintain the same. Defendants failed to construct the wagon road or build the fence, and plaintiff sued to recover damages for a breach of the covenant and was permitted to prove the cost of constructing the wagon road and building the fence as the proper measure of such damage. In passing upon the question, the court said: "The plaintiff granted to the defendant a right of way through his property in consideration of which defendant agreed, among other things, to construct the road and fence in question. The building of the road and fence was a part of the consideration for the grant. The defendant chose to stipulate for the payment of the consideration in this way, and we cannot see why it is not as much bound to perform its agreement as if it had stipulated to pay in anything else." Precisely what was done here. Lammers, on his part, and in consideration for the levee to be built by plaintiffs on their land, which would assist in reclaiming his land, agreed to build a similar and sufficient levee on his land connecting with the levee of plaintiffs. The court in the Taylor Case said further: "Here the agreement was to build a certain road and a certain fence. Failing to build them, we think defendant should be made to pay what it would reasonably cost to construct them." See cases cited.

It is argued by appellant in his brief that the Taylor Case, supra, is not in point here because the only question there was the measure of damages, and the statute of limitations was not invoked. While there was no question of that kind raised in that case, the action was for a breach of the contract and for damages by reason thereof. It was a suit on the contract, exactly as is the case at bar. Appellant covenanted with plaintiffs in effect that in consideration that plaintiffs built a levee on their land which would assist in protecting his lands from the floods, he would build a like levee on his own land which would, in connection with the plaintiffs' levee, reclaim the lands of both. The contracts are pleaded, the breach shown and the claim is for damages by reason of the breach. Plaintiffs claim no other damage than the actual damage caused by the failure of the defendant to keep his agreement, vis., the cost of building the levee defendant promised to build. There seems to us to be no "implied contract" about it. It is simply a suit to recover in damages the consideration defendant contracted to pay.

Appellant argues that the contracts are part in writing and part oral inasmuch as the dimension of the levees is not set forth therein, but is referred to the civil engineer to be determined by him. The evidence shows that defendant, on June 8th, the very day the contract was signed, knew the dimensions Atherton had fixed and then agreed to them and, in fact, defendant commenced work on his levee, and what he did was performed according to the specifications made by the civil engineer, Atherton. In support of this contention, appellant cites section 160, Bishop on Contracts, which reads: "A contract partly in writing and partly oral is, in legal effect, an oral contract. It occurs where an incomplete writing, or one expressing only a part of what is meant, is, by oral words, rounded into the full contract; or, where there is first a written contract and afterwards it is changed orally." But how can this apply to the contracts in this case? Here the thing contracted to be done is to build a levee of sufficient height and width, to be determined by the parties to the contract or by a civil engineer. We think it sufficient that the contract was certain as to parties and their respective agreement. What defendant agreed to do is ascertained therefrom to a common certainty. No question has ever arisen, so far as the record shows, between the parties as to the particular dimensions of the levees to be built. We have carefully considered all the authorities presented by appellant upon this point, as well as all others, and are unable to hold with him as to their application.

The action is upon a written contract and was commenced within four years after the right accrued, and is, therefore, not barred by any section of the Code pleaded by the appellant.

Judgment affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

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3 Cal. App. 115

TOWNSEND v. SULLIVAN.

(Court of Appeal, Third District, California. February 15, 1906.)

1. Principal and Surety—Who are Sureties.

Under Civ. Code, § 2831, defining a surety as one who, at the request of another, and for the purpose of securing him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor, persons who sign a note and execute a mortgage to secure a loan contract by another for his exclusive use and benefit are sureties for the payment of the latter's debts.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Surety, § 34.]

2. Pleading—Denial of Conclusions.

Denials of conclusions of law which necessarily follow from facts admitted by the pleadings raise no issues.

3. Principal and Surety—Rights of Surety—Exoneration by Principal.

Where the administratrix of a surety paid the principal's debt in order to relieve the surety's estate from liability, an entirely new and distinct debt, due from the principal to the surety's estate, was created, and the principal became liable to the estate for the full sum paid by the administratrix, with interest at the legal rate.

4. Same—Parties to Action.

The estate of a surety is not a necessary party to an action by the administratrix of a co-surety to recover from the principal a sum paid by such administratrix in discharge of the debt.

5. Pleadings—Amendment—Repugnancy to Pleading.

Where an administratrix of a surety paid the debt and sued the principal to recover the amount paid, and the latter in his answer alleged that the surety assumed the indebtedness and became the principal maker upon the note which evidenced the same, and defendant became a surety as between himself and plaintiff's intestate, an amendment to the answer, alleging that plaintiff's intestate "gave" defendant the money received on the note, was repugnant to the answer which it was sought to amend, and was an averment of the impossible under the conditions disclosed by the pleadings, and was properly disallowed.

6. Evidence—Parol Evidence—Rule—Contradiction of Written Contract.

Evidence of a declared intention of one who executed a note and mortgage as surety for another to give the money to the principal and to pay the note and mortgage herself was inadmissible in an action by the surety's administratrix to recover of the principal a sum paid in discharge of the debt, as it involved an attempt to vary by parol the terms of a written contract in violation of Civ. Code, §§ 1639, 1698, and Code Civ. Proc. § 1856.

7. Pleading—Issues—Matters to be Proved—Admission in Pleadings.

Courts are not bound to admit evidence in support of admissions contained in pleadings.

8. Gifts — What Constitute — Promise to Pay Money.

Under Civ. Code, §§ 1146, 1147, defining a gift as a voluntary transfer of personal property, and providing that a verbal gift is not valid unless the means of obtaining possession of the thing are given, and there is an actual or symbolic delivery of the thing to the donee if delivery is possible, a gift of money cannot be made by a declaration of intention to pay a note on which the donee is primarily liable and the donor is liable as surety.

9. Principal and Surety—Actions by Surety—Admissibility of Evidence.

Where it was admitted that a surety had hypothecated real property in which she had an interest for the payment of the principal's debt, the extent of that interest was immaterial in an action by the surety's administratrix to recover from the principal a sum paid by the administratrix in discharge of the debt.

Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by Alice Townsend, administratrix of the estate of Nancy Carpenter, deceased, against Daniel W. Sullivan. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

J. H. Magaffey, for appellant. O'Neil & Butler and Gillis & Tapscott, for appellee.

McLAUGHLIN, J. In the complaint in this action it was in substance alleged: That on February 27, 1900, the defendant obtained from N. H. Eddy the sum of $1,500 as a loan for his exclusive use and benefit. That to evidence and secure said indebtedness and its repayment, said defendant procured plaintiff's intestate to join him in the making of a promissory note signed by defendant and James and Nancy Carpenter. That to further secure said indebtedness, said intestate, at the special instance and request of said defendant, and for his exclusive use and benefit, executed and delivered to Eddy a mortgage on real estate owned by her. That the defendant never paid any part of said debt save certain specific sums mentioned. That said Nancy Carpenter died intestate, and that plaintiff was appointed and, in due time, qualified as administratrix of her estate. That defendant refused to pay the note or procure the discharge of the mortgage, and plaintiff was compelled to pay the sum of $1,700 due on said note in order to procure such discharge. That plaintiff requested defendant to repay the said sum to said estate, but he refused to pay any portion thereof. The answer, by failure to deny the averments of the complaint in this regard, admits that the defendant obtained the money as a loan for his exclusive use and benefit, and that the note and mortgage given to evidence and secure such indebtedness were likewise executed for his use and benefit. The only denial in this behalf is confined to a traverse of the allegation that defendant procured said intestate to join him in making the note, and that she did so for the purpose of securing his indebtedness. Coupled with this form of denial is an affirmative allegation that "said Nancy Carpenter assumed said indebtedness, and became the principal maker upon said promissory note, and defendant became a surety on said promissory note as between him and said Nancy Carpenter." There is no denial touching the execution, delivery, or purpose of the mortgage. The only assault made on the averments in this behalf is to the effect that the intestate was not the sole owner of the mortgaged premises, but was a joint owner thereof with James Carpenter. The averments touching payments made on the note are not denied, but defendant "denies that as between the parties to this action and Nancy Carpenter, on the 2d day of July, 1904, there was due and unpaid from said defendant to N. H. Eddy on said note, the principal sum thereof and the interest amounting to $1,700," and further "denies that as between the parties to this action or Nancy Carpenter there was due upon said 2d day of July, 1904, or at any time, any sum from said defendant to N. H. Eddy." There is no attempt to deny that plaintiff paid the note, but there is a denial of the legal conclusion that such payment was made for the use and benefit of defendant. Upon the trial the plaintiff introduced the note and mortgage, together with evidence to prove the payment of the note by plaintiff, and then rested. Thereupon a motion for a nonsuit, based on the insufficiency of the evidence, and the nonjoinder of James Carpenter as a party defendant, was made and denied. The defendant, after a preliminary question had been asked and answered, for the evident purpose of meeting a belated objection, which was sustained, asked leave to amend the answer by inserting at the end of the first paragraph the following averment, to wit: "And defendant became a surety on said promissory note as between him and Nancy Carpenter, and said Nancy Carpenter gave to defendant the money received on said promissory note as a gift." Permission was granted as to the first clause, and denied as to the concluding clause relating to a gift. The defendant then offered evidence touching conversations had with Nancy Carpenter at the time of the execution of the note and mortgage, and subsequent thereto, but objections to such evidence were sustained. Defendant appeals from the judgment against him and from an order denying his motion for a new trial.

The court did not err in its ruling on the motion for a nonsuit. It being admitted that the defendant obtained the loan for his own exclusive use and benefit, and that the note was executed to "evidence and secure to N. H. Eddy said indetedness and its repayment," there can be no doubt as to the legal relation existing between the makers of the note. And it being also admitted that the mortgage executed at defendant's request was for his sole use and benefit, and was an hypothecation of real property owned by his co-makers jointly, as further security for the payment of such indebtedness, the case falls squarely within well-settled rules of law constituting the defendant the principal debtor, and his co-makers sureties for the payment of his debt. Civ. Code, § 2831; Bouvier's Law Dictionary (Rawle's Revision) p. 1073; Brandt on Suretyship, §§ 1, 2, 38; Randolph on Commercial Paper, § 897 et seq.; Am. & Eng. Ency. of Law, vol. 27, p. 431 et seq., vol. 1, p. 334 et seq.; Montgomery v. Sayre, 91 Cal. 207, 27 Pac. 648; O'Conor v. Morse, 112 Cal. 34, 44 Pac. 305, 53 Am. St. Rep. 155. The relation of principal and surety, and defendant's liability for the amount paid by the administrator of the estate of one of his sureties, follow as conclusions of law from the facts admitted, and the denials and averments in the answer to the contrary created no issues. Ohm v. S. F., 92 Cal. 449, 450, 28 Pac. 580; Callahan v. Broderick, 124 Cal. 83, 56 Pac. 782. The debt was his, and when it was paid by the administrator to relieve the estate from liability, and the property of the estate from the mortgage lien, an entirely new and distinct debt, due from principal to surety, was created, and the defendant became liable to the estate for the full sum paid with interest at the legal rate. Am. & Eng. Ency. of Law, vol. 27, p. 486 et seq.; Brandt on Suretyship, § 229; Randolph on Commercial Paper, §§ 978, 979; Ryland v. Com., etc., B., 127 Cal. 526, 59 Pac. 989. It clearly appears from the admitted facts that James Carpenter was also a surety, and this being true, his estate was not a necessary party to the action. Brandt on Suretyship, 229; Ryland v. Com., etc., B., 127 Cal. 526, 59 Pac. 989.

The court did not abuse its discretion in refusing to permit the amendment above mentioned. It was a belated attempt to introduce an entirely new element into the case, and there were many cogent reasons why such an amendment, in this particular connection and form, was properly disallowed. It was incomplete and incongruous, and, viewed in the light of the preceding clauses, was an averment of the impossible. If that portion of the amendment which was allowed was true, then the part rejected could not be true. It is impossible to conceive how the intestate could have been the donor, and the defendant the donee, of money obtained by the latter as a loan, under the circumstances disclosed by the record. If money so obtained can, under any state of facts, be treated as a gift from a third party to the borrower, it can hardly be considered as such when the borrower and the alleged donor have given their joint and several promise to return or repay the sum received. The idea that the defendant could be obligated, either as principal or surety, to repay money received by him as a gift involves a contradiction. An obligation to return or repay the thing received is irreconcilably in conflict with the theory of a gift. While defendant's obligation to repay the money endured there could be no such thing as a gift. He could not be released from such obligation without the consent of Eddy, and a complete change of the contractual relations evidenced by the written contract. Therefore, if it be conceded that such a release could be classed as a gift, there was no hint of any such change, release, or transfer in the offered amendment. A gift was impossible under the conditions disclosed by the pleadings at the time the amendment was offered. Civ. Code, §§ 1146–1147; Hart v. Ketchum, 121 Cal. 429, 53 Pac. 931; Knight v. Tripp, 121 Cal. 679, 54 Pac. 267; Pullen v. Placer County B., 138 Cal. 175, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19. If such conditions had changed, the defendant should have removed the conclusion embodied in the rejected amendment from the realm of the impossible, by stating the substantive facts which would make a legal gift possible. The evidence relating to the intestate's declared intention to make a gift of the money and to pay the note and mortgage herself was properly rejected. So far as such evidence related to a gift, it was not only contrary to the facts admitted, but was an attempt to vary the clear and precise terms of a written contract by parol. Civ. Code, §§ 1698, 1639; Code Civ. Proc. § 1856. Adams v. Wallace, 119 Cal. 70, 51 Pac. 14. Courts are not bound to admit evidence supporting admissions in the pleadings, and her expressed intention to pay the note amounted to no more than an expression of intention to perform the legal duty resulting from her express promise. If the rejected evidence was offered for the purpose of showing that the intestate intended to make a gift of the money, and to consummate such intention by paying the note and relieving defendant from his obligation, it was clearly inadmissible. Civ. Code, §§ 1146, 1147; Knight v. Tripp, 121 Cal. 679, 54 Pac. 267.

It being admitted that the intestate had hypothecated real property in which she had an interest, the extent of that interest was entirely immaterial. For this, as well as other reasons, the inventory and appraisement filed in the estate of James Carpenter was properly excluded. The findings are supported by the evidence.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

3 Cal. App. 98

ERKSON v. PARKER, County Auditor.

(Court of Appeal, First District, California, Feb. 15, 1906.)

JUDGMENT — ENFORCEMENT — TRANSCRIPT — FILING WITH COUNTY AUDITOR—FUNDS DUE DEFENDANT.

Code Civ. Proc. § 710, provides that a transcript of a judgment may be filed with the auditor of any county from which money is owing to the judgment debtor, whereupon it shall be the auditor's duty to draw his warrant in favor of the court from the docket of which the transcript was taken for so much of the money as necessary to cancel the judgment. Section 897 provides a form for an abstract of a justice's judgment showing the parties, date of rendition, amount, etc. *Held*, that the filing of an abstract prepared in accordance with section 897 in the office of a county auditor was insufficient to entitle plaintiff to the benefits of section 710, which contemplates a transcript or copy of the judgment.

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

From a judgment directing W. F. Parker, as auditor of Santa Clara county, to draw a warrant in favor of John T. Wallace, a justice of the peace, to satisfy a judgment of said justice in favor of Laura A. Erkson against Martin Murphy, and from an order denying a motion for a new trial, Parker appeals. Dismissed.

J. H. Campbell, C. C. Coolidge, and Cobb & Rea, for appellant. William M. Beggs, for respondent.

HALL, J. This is an appeal from a judgment directing defendant to draw his warrant in favor of John T. Wallace, justice of the peace, for the sum of $65.90, and also from an order denying defendant's motion for a new trial.

Although there is, as just stated, an appeal from the order denying defendant's motion for a new trial, the only questions discussed by appellant in his brief arise out of the appeal from the judgment, and appear in the judgment roll without regard to the bill of exceptions. The facts, as set forth in the findings, are that one Martin Murphy was the de facto auditor of Santa Clara county until and for many months prior to February 26, 1904, upon which date defendant was let into and took possession of the office in pursuance of the judgment of the Supreme Court of this state; that as such auditor the said Murphy earned as his salary for the portion of February for which he served, the sum of $280, which had not been paid him on March 4, 1904, nor had any warrant been drawn at that time therefor. On the 14th day of August, 1903, plaintiff obtained a judgment in the justice's court of San Jose township, of which J. T. Wallace was the justice, in the sum of $62.65, against said Murphy for board furnished him and his family, which has never been paid. That on the 20th day of February, 1904, plaintiff filed with said Murphy, the then acting auditor of said county, an abstract of said judgment, accompanied with an affidavit of the amount then due on said judgment, and that she desired to avail herself of the provisions of section 710 of the Code of Civil Procedure. On the 3d day of March, 1904, said Murphy assigned and set over unto T. C. Hogan, G. Geoffrey, and Wm. Osterman, to whom he then owed a total of $280, all his claim against said county for his salary for the month of February, 1904, and his claim to his warrant for such salary, of which both the treasurer and auditor of said county had immediate notice. Thereafter, on the same day, plaintiff filed with defendant another abstract of her said judgment, and on the 4th day of March, 1904, filed a duly authenticated transcript of her said judgment against said Murphy, together with the required affidavit as to the amount due, etc., with defendant.

It is claimed by appellant that the judgment must be reversed for the reason that the filing of an abstract of a judgment with the county auditor does not entitle a judgment creditor to the benefit of section 710 of the Code of Civil Procedure, which requires the filing of a transcript of the judgment, and as no transcript of the judgment was filed until after Murphy, the judgment debtor, had assigned his claim against the county to his other creditors, plaintiff was entitled to nothing. On the other hand, respondent urges that the filing of an abstract of the judgment was a substantial compliance with section 710 of the Code of Civil Procedure. The section has been before the court in Ruperich v. Baehr, 142 Cal. 190, 75 Pac. 782; but in that case an authenticated transcript was filed, and, of course, no question arose as to the effect of filing an abstract of a judgment. The section provides that "The duly authenticated transcript of a judgment for money, against a defendant, rendered by any court of this state, may be filed with * * * the auditor of any county * * * from which money is owing to the judgment debtor in such action, * * * whereupon it shall be the duty of such official * * * with whom such transcript shall have been filed, to draw his warrant in favor of, or to pay into the court from the docket of which the transcript was taken, so much of the money * * * as will cancel said judgment." This section was enacted in 1903, and it in terms requires the filing of an authenticated transcript of the judgment, and in this regard differs from section 900 of the Code of Civil Procedure, which provides for the filing of an abstract of a judgment, in order to secure a lien on real estate, the form of which is prescribed by section 897 of the Code of Civil Procedure.

The old practice act (St. 1854, p. 69, c. 54), provided (section 599) that, by filing in the recorder's office a transcript of the judgment of a justice's court, certified by the justice, a lien was created on real estate of the judgment debtor. Under this act it was held in Bagley v. Ward, 27 Cal. 370, that a judgment rendered by a justice of the peace does not become a lien on the real estate of the judgment debtor until a copy of the judgment, certified by the justice, has been recorded in the office of the county recorder, and that the filing and recording of copies of certain docket entries which contained an abstract of the judgment was not sufficient. In this case it was said that a transcript of the judgment is a copy of the judgment. Subsequently, after the adoption of the codes, under which a lien may be created by the filing of an abstract of a judgment (section 900, Code Civ. Proc.), it was held in Frazier v. Crowell, 52 Cal. 399, that an abstract of the judgment must be filed and recorded in order to create a lien, and that the filing and recording of a certified copy of the judgment did not comply with the statute. In this case it is said: "A 'certified' copy is not an 'abstract,' and the statute makes the distinction, and prescribes the exact form in which the abstract is to be prepared." Certainly, if the recording of a certified copy (which is a transcript) is not a compliance with a law requiring the recording of an abstract, a fortiori the filing of an abstract is not a compliance with a law requiring the filing of an authenticated transcript. At the time of the enactment of section 710 of the Code of Civil Procedure, both the term abstract and the term transcript were known to the law, and had been interpreted by the courts and distinguished one from the other, as the cases above cited show. We are therefore obliged to believe that when the Legislature used the term transcript in section 710, it did so advisedly, and did not mean abstract. The abstract relied on by respondent in this case is the abstract prescribed by sections 900 and 897 of the Code of Civil Procedure, and is not the transcript of the judgment required by section 710 of the Code of Civil Procedure.

For the foregoing reasons the judgment is reversed, and as no questions presented by the appeal from the order were argued, the appeal therefrom is dismissed.

We concur: HARRISON, P. J.; COOPER, J.

3 Cal. App. 106

FAIRFIELD v. PACIFIC COAST S. S. CO.

(Court of Appeal, First District, California. Feb. 15, 1906. Rehearing Denied by Supreme Court April 10, 1906.)

1. CARRIERS—CONNECTING LINES—BILL OF LADING—LIABILITY OF INITIAL CARRIER.

Civ. Code, § 2201, provides that if a common carrier accepts freight for a place beyond his usual route he must, unless he stipulates otherwise, deliver it at the end of his route in that direction to some other competent carrier carrying to the place of address or connecting with those who thus carry, and his liability then ceases on making such delivery. *Held*, that where defendant agreed to transport plaintiff's merchandise shipped from San Francisco to Nome, Alaska, by one of its steamers from San Francisco to Seattle, and there deliver to some connecting carrier or forwarder, and delivery was made at Seattle to a connecting transportation company for shipment to destination, defendant was not liable for default of such connecting carrier.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 747–753, 779, 780.]

2. SAME—NOTICE.

Where goods consigned from San Francisco to Nome were shipped on defendant's vessel running between San Francisco and Seattle only, the statement in the bill of lading that the consignee was at Nome was notice to defendant that the goods were not to be delivered to him at Seattle, but were to be delivered to a connecting carrier.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 781–784.]

3. SAME—DESIGNATION OF CONNECTING CARRIER.

Where goods were delivered to a steamship running between San Francisco and Seattle under bills of lading reciting a consignment from San Francisco to Nome, markings on the packages, "Pacific Clipper Line, Seattle," constituted a sufficient designation of the carrier to which the goods were to be delivered.

4. SAME—DELIVERY—PROOF.

Where a bill of lading required a vessel to transport certain freight from San Francisco to Seattle and there deliver the same to a connecting carrier for transportation to Nome, evidence that one of the vessels of the connecting carrier designated by plaintiff brought the freight to Nome, and delivered a portion thereof to him, was sufficient evidence that the initial carrier had delivered the merchandise to that carrier.

Appeal from Superior Court, City and County of San Francisco; F. H. Kerrigan, Judge.

Action by O. E. Fairfield against the Pacific Coast Steamship Company. From a judgment for defendant and from an order granting a nonsuit at the close of plaintiff's case, plaintiff appeals. Affirmed.

Robert Ash, for appellant. George W. Towle, Jr., for respondent.

HARRISON, P. J. The plaintiff herein seeks to recover damages from the defendant for a breach of its contract as a common carrier to transport certain merchandise from San Francisco to Nome and there deliver it to him. At the close of the plaintiff's case the court granted a nonsuit on the motion of the defendant, and from the judgment thereon the plaintiff has appealed.

The contract upon which the plaintiff relies for his recovery is the bill of lading issued by the defendant, in which it acknowledges that it has received "to be forwarded per steamer Pueblo the articles or property enumerated hereon, to be forwarded with as reasonable dispatch as the general business of the carrier will permit, and delivered at vessel's tackle at the port, place of landing, of Seattle unto the consignee; or if shipment is to be carried beyond above named port or landing, to a connecting carrier or forwarder, he or they paying freight at tariff rates on delivery and charges advanced by carrier." The bill of lading also stated as the name and address of the consignee, "O. E. Fairfield, Nome, Alaska," and that the packages of merchandise were marked "Pacific Clipper Line, Arlington Dock, Seattle," and had indorsed upon its face, "Freight prepaid to seaport." It was shown at the trial that in the summer of 1900 the plaintiff had written from Nome to his sister in San Francisco, directing her to purchase certain articles of merchandise for him, and that she had purchased the same and had them boxed and delivered to the defendant, and that she had received from the defendant at its wharf in San Francisco the above-named bill of lading, bearing date September 11, 1900. There was no evidence of any subsequent act of the defendant or of any disposition by it of the merchandise after its receipt, but the plaintiff testified that the Centennial, a steamer of the Pacific Clipper Line, on her last trip to Nome of that year, had his freight aboard and landed a portion thereof, viz., a stove and two sacks of sugar; that a storm came up, and the Centennial, without delivering his freight, returned to Seattle; that the following spring, 1901, the freight was again brought to Nome by the steamer Centennial, with a charge of about $80 for storage and additional freight, which the company, the Pacific Clipper Line, demanded before it would deliver it; that he refused to pay it and had never received the freight.

The order granting the nonsuit must be affirmed. The defendant did not contract, by the aforesaid bill of lading, to carry the merchandise from San Francisco to Nome, but merely agreed to carry it to Seattle and there deliver it to the consignee, or, if it was to be carried beyond Seattle, to deliver it at Seattle to some connecting carrier or forwarder. The statement in the bill of lading that the consignee was at Nome notified the defendant that the merchandise was not to be delivered to him at Seattle, and that it was to be delivered to a connecting carrier. As the defendant did not contract to carry the merchandise beyond Seattle, its liability ceased upon making a delivery there to the Pacific Clipper Line. Civ. Code, § 2201; Palmer v. Atchison, etc., R. R. Co., 101 Cal. 187, 35 Pac. 630. Although there was no direct evidence of a delivery by the defendant to a connecting carrier, the mark upon the packages, "Pacific Clipper Line, Seattle," was a sufficient designation of the carrier to which they were to be delivered; and the testimony of the plaintiff that one of the vessels of that line—the steamer Centennial—brought the freight to Nome, and delivered a portion of it to him, was sufficient evidence that the defendant had delivered the merchandise to that carrier. The plaintiff, therefore, failed to sustain the allegation of his complaint that the defendant had contracted to carry the merchandise to Nome; and as it appeared that the defendant had complied with the contract, which the plaintiff offered in evidence, by delivering the merchandise at Seattle, the nonsuit was properly granted.

The judgment is affirmed.

We concur: COOPER, J.; HALL, J.

3 Cal. App. 95

BRYANT et al. v. McINTOSH et al.

(Court of Appeal, Second District, California. Feb. 14, 1906.)

1. Attorney and Client—Disqualification of Attorney—Adverse Interest.

An attorney for the executors of an estate was disqualified to represent the heirs for the purpose of supervising the proceedings of the executors with reference to the distribution of the estate.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 27.]

2. Executors and Administrators—Distribution of Estate—Payment.

Where executors of an estate paid the balance due to certain heirs under the decree of distribution to one who pretended to be the heirs' attorney and who was also acting as attorney for the executors, which payment was in direct violation of an understanding between them that the money should be paid directly to such distributees, the payment was wrongful, and the heirs were entitled to recover the same from the executors, under Code Civ. Proc. § 1666, authorizing each distributee to demand, sue for, and recover his distributive share from the executor.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 1261.]

3. Same—Discharge—Effect.

Where executors of an estate wrongfully paid the shares of certain distributees to their pretended attorney, their liability therefor was not affected by the judgment discharging them from liability thereafter incurred, as provided by Code Civ. Proc. § 1697.

Appeal from Superior Court, Los Angeles County; C. D. Wilbur, Judge.

Action by Daniel Bryant and others against D. W. McIntosh, and another, executors of the will of Phebe U. Cairns, deceased. From a judgment in favor of plaintiffs, and from an order denying defendant's motion for a new trial, they appeal. Affirmed.

H. T. Gordon, for appellants. E. Edgar Galbreth and Trusten P. Dyer, for respondents.

SMITH, J. The plaintiffs are heirs and legatees under the will of Phebe U. Cairns, deceased, and distributees under the final decree of distribution. The suit was brought to recover a balance alleged to be due the plaintiffs under the decree of distribution. The judgment was for the plaintiffs, and the defendant appeals from an order denying his motion for a new trial.

The case is: The plaintiffs are entitled under the decree of distribution to the aggregate sum of $4,882.08, of which there was paid to them by the defendant the sum of $2,191.88—leaving a balance of $1,690.20, which it is found by the court was paid by the defendant to one O. H. Jones, "who retained and appropriated the whole thereof to his own use, but which last-mentioned payment was made without any right or authority so to do, and * * * was not a proper or legal charge against said estate, or said distributive shares, or any of them." These findings are fully supported by the evidence. But it will be proper to say that it is claimed by the defendant that Jones, who was his attorney, was also the attorney of the plaintiffs, and that he paid the money to him as their attorney. But no proof of Jones' employment as attorney for the plaintiffs was introduced, except his statement that he had "procured powers of attorney from the heirs to represent them." These were not produced, and, upon the facts disclosed by the evidence, and, indeed, upon the facts alleged in the defendant's answer, the court may well have doubted that he, in fact, had such authorization; and it is at all events clear that the services of an attorney for the plaintiffs in the case were unnecessary, except for the purpose of supervising the proceedings of the defendant; for which purpose he was disqualified. It also appears, whether he be regarded as the attorney of the plaintiffs or not, that it was expressly understood between him and the defendant and the plaintiffs that the money due them was to be paid them directly, and not to Jones. It was also claimed by the defendant that Jones was entitled to receive the money under certain powers of attorney from the plaintiffs to him introduced in evidence; but this claim, we think, is untenable.

It is further found by the court that the powers of attorney last referred to, were obtained by Jones as the result of a conspiracy between him and McIntosh to defraud the plaintiffs by obtaining the executor's release and discharge from the court; and that, by the receipts thus obtained, and by false representations to the court that the amounts distributed to the heirs had been paid to them, he procured his discharge. And one of the points made by the appellant is, that these findings are not justified by the evidence. On this point it will be proper to say that we have not been able to find in the record any evidence of intentional conspiracy with Jones on the part of the defendant, or of actual intention to defraud the plaintiffs, further than may be inferred from the assistance rendered to Jones by his letters and the unauthorized payment of money to him with full knowledge of the facts; and this inference, we think, is fairly rebutted by the influence naturally exerted over him by Jones as his attorney. But the question, we think, is immaterial. We have referred to it simply because we think it due to the defendant to do so. The judgment is sufficiently supported by the other facts found; that is to say, the decree of distribution and the defendant's failure to pay to the plaintiffs the amount due thereunder; which the plaintiffs are, by the express provisions of section 1666 of the Code of Civil Procedure, entitled to "demand, sue for, and recover * * * from the executor." Nor was this liability of the defendant in any way affected by the "judgment or decree discharging him from all liability to be incurred thereafter." Code Civ. Proc. § 1697.

The order appealed from is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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3 Cal. App. 94

STOCKTON LUMBER CO. v. BLODGET.

(Court of Appeal, Second District, California. Feb. 14, 1906.)

1. CORPORATIONS — OFFICERS — ACTIONS — PLEADING—VERIFICATION.

A complaint filed by a corporation, verified by one stating that he was "manager of the corporation plaintiff," etc., was properly verified "by an officer" of the corporation.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 2048.]

2. PLEADING — VERIFICATION — FAILURE TO VERIFY—LIMITATIONS.

Where defendant filed an unverified answer to plaintiff's verified complaint, plaintiff was entitled to judgment on the pleadings, and was not bound to resort to a motion to strike out the insufficient answer.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 885, 1052.]

Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by the Stockton Lumber Company against H. A. Blodget. From a judgment for plaintiff, defendant appeals. Affirmed.

Smith & Allen, for appellant. Budd & Thompson and F. D. McClure, for respondent.

SMITH, J. This is a suit on a promissory note made by the defendant to the plaintiff. The note is set out at length in the complaint, and the complaint is verified by Fyfe, who, it is said in the affidavit, "is manager of the corporation plaintiff," etc. The defendant filed an unverified answer, denying generally each and every allegation of the complaint, and upon motion of the plaintiff judgment was entered against him on the pleadings for the amount of the note and interest, from which judgment the defendant appeals. There is no bill of exceptions.

The grounds urged by appellant for reversal are: That the complaint was not verified "by an officer" of a corporation, and that the proper remedy for the plaintiff in the premises was to strike out the insufficient answer. But we have no doubt that the manager of a corporation is an officer thereof. Nor, with regard to the other point, do we see any reason for the practice recommended by appellant's counsel. Hearst v. Hart, 128 Cal. 327, 60 Pac. 846.

The judgment is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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3 Cal. App. 82

JOHNSON v. BEMIS.

(Court of Appeal, First District, California. Feb. 13, 1906.)

MONEY LENT—EVIDENCE.

Evidence *held* to sustain a finding that plaintiff gave the money sued for to defendant not as a loan but to purchase certain stock for plaintiff, which she did according to directions.

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by C. B. Johnson against Elizabeth A. Bemis. From a judgment in favor of defendant, and from an order denying plaintiff's motion for a new trial, he appeals. Affirmed.

H. V. Morehouse and J. E. Alexander, for appellant. Bert Schlesinger, for respondent.

COOPER, J. Appeal from judgment in favor of defendant and from an order denying the plaintiff's motion for a new trial.

The complaint alleges that about November 1, 1901, the defendant came into possession of and still retains $600, which then was and still is the property of the plaintiff, and, although demand has been made, defendant refuses to return the same to plaintiff, or to pay it to him. The defendant admits that $600 was given to her by the plaintiff, but alleges that it was given to her with the express request on the part of the plaintiff that she use it in the purchase for plaintiff of shares of stock of the Giant Powder Company, and that she did pay out and use the money for plaintiff, as directed, in the purchase of such shares of stock. The case was tried before the court, without a jury, and the court found, according to the contention of defendant, that the money was paid out and used by defendant for plaintiff in the purchase of shares of stock of the said Giant Powder Company. The evidence of defendant, although squarely in conflict with that of plaintiff, is sufficient to support the finding. She testified to conversations with plaintiff, that he told her to buy the stock for him, to the fact that she received the money through Mr. Bergez, who had been directed by plaintiff to give it to her. Bergez testified that plaintiff left the money with him to give to defendant, and that he gave it to her as requested. The conflict being thus squarely made as to whether or not the money was given to defendant as a loan, or given to her for a certain purpose and used for such purpose, the determination of the trial court is conclusive here. It is supported by the testimony of the defendant and by other circumstances. It is not alleged in the complaint that it was loaned to defendant. Plaintiff took no note or evidence of any loan. In a letter written by plaintiff's attorney to defendant in the nature of a demand, it is not referred to as a loan, but it is stated to defendant "that the purposes for which the money was given into your charge not being carried out its immediate return is demanded." Plaintiff testified that he explained the matter to his attorney before the letter above quoted was written. No rate of interest was mentioned. No time was specified. Appellant contends that the money was given to defendant November 9, 1901, after she had already bought the stock for herself. Plaintiff did so testify, but again he is met by the defendant, who testified: "I received this money from Captain Johnson on or about November 1, 1901," and this corresponds with the date set forth in the complaint. It is therefore evident that the provision of the Constitution making all contracts for the sale of shares of the capital stock of any corporation on margin, to be delivered at a future date, void, and the decisions cited in support thereof, have no application to the facts of this case. Plaintiff does not claim that he bought any shares of stock on margin or otherwise, but states expressly that he loaned the money to defendant. If we were to disregard his evidence, and hold that he did purchase shares of stock on margin for future delivery, he would have to bring suit against the party with whom he made such prohibited contract, and not against the party he sent as his agent to do the purchasing.

The judgment and order are affirmed.

We concur: HARRISON, P. J.; HALL, J.

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3 Cal. App. 91

KRUSE v. WILSON et al.

(Court of Appeal, First District, California. Feb. 13, 1906.)

1. CONTRACTS—SALE OF MATERIALS TO SUBCONTRACTOR — LIABILITY OF CONTRACTOR — PRIVITY OF CONTRACT.

The fact that a subcontractor purchases materials for the purpose of carrying out his contract with the principal contractor does not create any liability against the principal contractor in favor of the seller of the materials.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 790–795.]

2. MECHANICS' LIENS—SUBSTITUTE FOR LIEN —RIGHTS OF MATERIALMEN—INTERCEPTION OF MONEY DUE CONTRACTOR.

Code Civ. Proc. § 1184, providing that one furnishing materials for a contractor may give notice to the owner of his claim therefor, and declaring that the owner, on notice being given, shall withhold sufficient money to pay for the materials, authorizes a materialman to intercept the moneys due from the owner to the contractor, but does not authorize the interception of any money due from the contractor to a materialman.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, § 148.]

3. SAME—NOTICE TO OWNER—NECESSITY.

A maerialman, attempting to intercept money due from an owner to a contractor, as authorized by Code Civ. Proc. § 1184, authorizing one furnishing materials for a contractor to give notice to the owner of his claim therefor and declaring that the owner on notice being given shall withhold sufficient money to pay for the materials, must allege that he gave notice of his claim to the owner.

4. GARNISHMENT—LIABILITY OF GARNISHEE —PAYMENT OF MONEY TO SHERIFF—EFFECT.

Where a contractor on being served with garnishment in an action by a materialman furnishing materials to a subcontractor paid to the sheriff the money which he owed the subcontractor, the materialman had no further claim against the contractor.

5. SAME — RIGHT OF CREDITOR — JUDGMENT AGAINST PRINCIPAL DEBTOR—NECESSITY.

A materialman furnishing materials to a subcontractor sued the subcontractor and garnished the contractor, who paid to the sheriff the money which he owned the subcontractor. *Held*, that the materialman could not demand the money held by the sheriff until he obtained a judgment against the subcontractor.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by J. H. Kruse against H. E. Wilson and others. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Barna McKinne, for appellant. I. E. Jarrett, for respondents.

HARRISON, P. J. Appeal from judgments rendered sustaining demurrers to an amended and supplemental complaint.

The complaint is in two counts, in the first of which the plaintiff alleges that the defendants Newsom and McNeil were contractors for the construction of a public school building in San Francisco, with whom the defendant Wilson had contracted to perform the labor and furnish the materials for the plastering in said building; and that the plaintiff had sold and delivered to Wilson, laths and lumber therefor of the value of $343.74, which had been used for said plastering, and that no part thereof had been paid. In the second count, the complaint alleges, in addition to the foregoing, that the building was completed and accepted September 17, 1903; that after its completion, and prior to September 23, 1903, Newsom and McNeil were paid the full contract price therefor; that the present action was commenced September 23, 1903; that at the time of its commencement the plaintiff caused a writ of attachment to be issued therein, and that on the same day, by virtue thereof, the defendant John Lachman, as sheriff of San Francisco, garnished all moneys due or owing the defendant Wilson by said Newsom and McNeil; that at the time of the service upon them of said garnishment they had in their hands the sum of $343.74 owing by them to Wilson for labor performed and materials furnished by him in construction of said building, which materials had been purchased by him from the plaintiff; that prior to the commencement of the action the plaintiff informed them of his claim against Wilson, and that they promised to hold said funds until the court should determine to whom they belonged; that after said garnishment they paid the said sum of $343.74 to the sheriff, and directed him to apply the same to the payment of an execution then in his hands against Wilson in favor of one Clark, under which the sheriff had, on September 12th, garnished any moneys then owing by them to Wilson. It is also alleged that the judgment in favor of Clark, upon which said execution was issued, was rendered March 18, 1903, upon a cause of action entirely disconnected with the construction of the building or materials therefor. Although the default of the defendant Wilson was entered, the judgment as rendered was in favor of all of the defendants, but the plaintiff has appealed from only the judgments rendered in favor of Newsom, McNeil and Lachman.

1. The first count of the complaint shows no cause of action against either of the respondents. It states no facts showing any privity between them, or either of them, and Wilson, and the fact that Wilson purchased the merchandise for the purpose of carrying out a contract between him and Newsom and McNeil, did not create any liability against the latter in favor of the plaintiff.

2. The building in which the materials sold to Wilson were used, being a public building, could not be made subject to a mechanics' lien (Mayrhofer v. Board of Education, 89 Cal. 110, 26 Pac. 646, 23 Am. St. Rep. 451), and the plaintiff has not attempted to enforce any lien for his claim. He bases his right of recovery upon the ground that the money in the hands of Newsom and McNeil was a trust fund out of which he had the right to be reimbursed for his claim against Wilson before any payment could be made therefrom to Clark, citing in support of such claim Bates v. Santa Barbara County, 90 Cal. 543, 27 Pac. 438. Section 1184 of the Code of Civil Procedure, under which that case was decided, authorizes a materialman to intercept the moneys which may be coming from the owner to the contractor, but does not authorize the interception of any moneys due from a contractor to a materialman; and in order to effect such interception the section requires him to give notice of his claim to the "owner." The plaintiff has not alleged that he gave any notice of his claim to the "owner" of the building, or to the board of education or other authority by which its construction was authorized, the only notice alleged to have been given by him being to Newsom and McNeil. As Newsom and McNeil, upon being served with the garnishment, delivered to the sheriff the moneys in their hands which they owed to Wilson, the plaintiff can have no further claim upon them by virtue of the writ of attachment. Their direction to the sheriff to apply the money upon the execution in favor of Clark did not confer any authority upon that officer to do otherwise than to comply with the law in the execution of the writs in his hands. It is not alleged that the sheriff has paid the money as directed by Newsom and McNeil, and it must be assumed that it is still in his hands; but until the plaintiff shall obtain a judgment against Wilson, he is not entitled to demand from the sheriff the moneys held under the attachment. As it is not alleged that such judgment has been obtained, the plaintiff has not stated a cause of action against the sheriff. The demurrers of the respondents were, therefore, properly sustained.

The judgments appealed from are affirmed.

We concur: COOPER, J.; HALL, J.

3 Cal. App. 80

JOHN HEINLEN CO. v. CADWELL.

(Court of Appeal, Second District, California. Feb. 12, 1906. Rehearing Denied by Supreme Court April 10, 1906.)

JUSTICES OF THE PEACE—JUDGMENT—LIMITATION OF ACTION.

Code Civ. Proc. § 685, providing that a judgment may be enforced after five years from its entry by leave of court, on motion, or by judgment founded on supplemental pleadings, and section 925, providing that only those provisions of that Code which are in their nature applicable to the organization, powers, and course of proceedings in justices' courts, or which have been made applicable by special provisions are applicable to justices' courts, do not authorize an independent action on a judgment of a justice after the expiration of the five-year limitation of actions on judgments prescribed by section 336.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by the John Heinlen Company against R. R. Cadwell. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Robert W. Miller and F. J. Walker, for appellant. H. P. Brown, for respondent.

ALLEN, J. Action in the superior court upon two certain judgments rendered by a justice of the peace more than five years before the commencement of the action. Demurrer to complaint sustained, without leave to amend. Judgment in favor of defendant, from which plaintiff appeals.

The complaint filed March 21, 1905, sets out the rendition and entry of two certain judgments by a justice of the peace in favor of one John Heinlen and against the defendant; in one case for $266.85, principal debt, $205.47 interest, and $32.50 attorney's fees and costs; in the other for $266.80 principal debt, $119.83 interest, and $33.50 attorney's fees and costs; which judgments were rendered in July, 1899. The nonpayment thereof is alleged, and plaintiff prays for the enforcement of such judgments by execution and judgment thereon in favor of the plaintiff for the aggregate amount thereof. The demurrer to the complaint was general, and upon the ground that the complaint upon its face disclosed that both of said judgments were barred by the provisions of section 336 of the Code of Civil Procedure.

Appellant insists that the ruling of the court sustaining such demurrer was erroneous; that section 685 of the Code of Civil Procedure, which provides that "in all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings," is, in effect, declaring a different limitation than that prescribed in section 336, Code Civ. Proc., which last-named section limits the time for commencement of actions upon judgments to five years after their entry. In our opinion, this is not the effect of section 685. It does not purport to affect the limitation in relation to independent actions upon judgments; it simply extends the time within which the court having jurisdiction of the original action may in particular cases order the issuance of an execution. There is no authority for the superior court to order an execution out of a judgment rendered by a justice of the peace. Section 901, Code Civ. Proc., restricts the authority in that regard to the justice who rendered the judgment, or to his successor in office; and were it conceded that under section 925, Code Civ. Proc., the provisions of section 685 are applicable to judgments before a justice of the peace and under which such justice might order execution after five years, the complaint under consideration involves no such question. The right to base an independent action upon a judgment barred by the provisions of section 336, Code Civ. Proc., is alone presented, and the complaint upon its face showing that such judgments are barred, the same is insufficient when such question is raised by a special demurrer upon that ground.

Judgment affirmed.

We concur: GRAY, P. J.; SMITH, J.

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3 Cal. App. 75

GRAY et al. v. COHEN et al.

(Court of Appeal, First District, California. Feb. 12, 1906.)

JUDGMENT — CONSTRUCTION — LIMITATION BY PLEADINGS.

In an action to foreclose a lien under a street assessment, the answer denied the validity of the lien and concluded with a prayer that plaintiffs be forever estopped from instituting or prosecuting any action against defendants or the real estate described in the complaint. The court found for defendant and rendered judgment in the language of the prayer of the answer. *Held*, that the judgment would be construed as referring to the matter before the court, and not as estopping plaintiffs from prosecuting an action of an entirely different nature or one arising subsequently to the date of the judgment, and consequently was not subject to the objection of granting relief in excess of that asked for and more comprehensive than warranted by law.

Appeal from Superior Court, Alameda County; S. P. Hall, Judge.

Action by G. F. Gray and another, partners, etc., against Emilie G. Cohen and another. From the judgment rendered, plaintiffs appeal. Affirmed.

Fisher Ames, for appellants. Alfred H. Cohen, for respondents.

COOPER, J. Appeal from the judgment on the judgment roll, without a bill of exceptions.

The action was brought to foreclose an alleged lien under a street assessment. The answer denied the validity of the alleged lien, and of the several acts and matters leading up to the assessment, and concluded with a prayer that plaintiffs "be forever barred and estopped from hereafter instituting or prosecuting any action or proceeding against this defendant or the real estate described in the complaint in this action." The findings of the court were for defendant, and judgment was ordered and entered "forever barring and stopping the plaintiff from hereafter instituting or prosecuting any action against said defendant, or the real estate described in said complaint."

The sole point made on this appeal is that the relief granted exceeds that asked for in the answer, and is more comprehensive in its terms than the law warrants. The point is entirely devoid of merit. The judgment follows the language of the prayer of the answer. Its language must be construed with reference to, and in connection with, the case made by the pleadings and the subject-matter before the court. It was not intended that the decree should, nor would it, estop the plaintiff from prosecuting an entirely different action, or one arising after the date of the judgment herein, against defendant or the real estate described in the complaint. The language used must be construed to have been used with reference to the matter before the court, and the law applicable thereto.

The judgment is affirmed.

We concur: HARRISON, P. J.; HALL, J.

GRAY et al. v. COHEN et al.

(Court of Appeal, First District, California. Feb. 12, 1906.)

Appeal from Superior Court, Alameda County; S. P. Hall, Judge.

Action by G. F. Gray and another against Emilie G. Cohen and others. From the judgment rendered, plaintiffs appeal. Affirmed.

Fisher Ames, for appellant. Alfred H. Cohen, for respondents.

COOPER, J. This case involves the precise question presented in case numbered 140 (S. F. No. 3,970) under the same title. Supra. Upon the authority of that case, the opinion being this day filed, the judgment is affirmed.

We concur: HARRISON, P. J.; HALL, J.

3 Cal. App. 79

CONNOLLY v. LOST HORSE MIN. & MILL. CO. et al.

(Court of Appeal, Second District, California. Feb. 12, 1906.)

WORK AND LABOR—ACTION FOR SERVICES—EVIDENCE—SUFFICIENCY.

Evidence in an action for work and labor examined, and *held* to support a finding that the services were performed for defendants in their individual capacity authorizing a judgment against them individually, irrespective of the sufficiency of the evidence to prove a partnership.

Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by H. G. Connolly against the Lost Horse Mining & Milling Company and others. Judgment for plaintiff against defendants T. C. Ryan and another, and they appeal. Affirmed.

Purington & Adair, for appellants. Gill & Densmore, for respondent.

GRAY, P. J. In this case the plaintiff, after a trial before the court without a jury, obtained a judgment against T. C. Ryan and Jepp Ryan for the sum of $533.75, balance due him for work and labor in looking after a mine that was not in operation, and in taking care of about 100 head of cattle, horses and mules, drawing water for the same with a bucket and windlass out of a well 90 feet deep. The defendants, the Ryans, appeal from an order denying them a new trial.

The only point urged as ground for reversal is that the finding to the effect that the services were performed for the appellants, and that there was due and unpaid the plaintiff from appellants the amount for which judgment was given, is not sustained by the evidence. But we think this contention cannot be upheld. The appellants, T. C. Ryan and Jepp Ryan, as clearly appears from the evidence, were doing business together in some capacity under the name of "Ryan Bros." Part of plaintiff's wages while doing the work in question were paid with orders drawn by plaintiff upon "Ryan Bros." in favor of third parties. Some of these orders were paid by checks drawn on a bank and signed "Ryan Bros.," and both the orders referred to and the checks were introduced in evidence by the defendants themselves. They purported to be signed by defendants, and defendants, though both of them were on the witness stand, did not deny that the orders were received by them or that the checks were issued by them; and as they both came from the possession of the defendants at the trial, the checks will be presumed to have emanated from them in the first instance. There is other evidence, unnecessary to here specifically refer to, tending strongly to show that plaintiff was working for the two individuals against whom the judgment was rendered. It is immaterial that the evidence may be insufficient to show a partnership, for the suit is against them in their individual capacity, and so is the judgment. There is no merit in the appeal. The order appealed from is affirmed.

We concur: ALLEN, J.; SMITH, J.

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3 Cal. App. 76

Ex parte LUENING.

(Court of Appeal, Second District, California. Feb. 12, 1906.)

1. CRIMINAL LAW—AFFIDAVIT OF COMPLAINT—COUNTY ORDINANCES.

In a prosecution before a justice of the peace for a violation of a county ordinance forbidding the carrying of concealed weapons except as permitted by the sheriff, it was not necessary to set out in the affidavit of complaint the title and date of passage of the ordinance, notwithstanding Pen. Code, § 963, requiring private statutes to be pleaded by reference to their title and date of passage.

2. WEAPONS — CARRYING — COUNTY REGULATIONS.

A county ordinance prohibiting the carrying of concealed weapons, except by permit from the sheriff, is a reasonable and valid exercise of the county's police power.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Weapons, § 2.]

In the matter of the application of William J. Luening, Jr., for a writ of habeas corpus. Writ dismissed.

R. E. Bledsoe, for petitioner. I. M. Sprecher, Dist. Atty., and Henry M. Willis, Deputy Dist. Atty., for respondent.

ALLEN, J. Application for writ of habeas corpus. The petitioner was charged in a sworn complaint, filed with a justice of the peace of San Bernardino county, "as a person found in a public place with a loaded revolver, a deadly weapon, concealed upon his person, in violation of County Ordinance No. 102." To such charge he entered a plea of guilty, and judgment followed. Under a commitment issued out of said judgment he is held in custody. Ordinance No. 102 was adopted by the board of supervisors of San Bernardino county prior to the arrest of the petitioner, and is as follows: "Section 1. Any person found in any public place with a concealed deadly weapon upon his person, is punishable by a fine of not less than $5.00 nor more than $100.00 or by imprisonment in the county jail not less than five nor more than one hundred days; provided, however, that the sheriff of San Bernardino county may grant permits to carry such weapons to officers and other persons, as he may deem fit."

The claim of petitioner is that the affidavit of complaint did not confer jurisdiction of the subject-matter upon the justice, because the ordinance, being a private statute, was not pleaded by reference to its title and date of passage, as required by section 963 of the Penal Code, and, there being no general law upon the subject of which the justice could take judicial notice, the affidavit was fatally defective. That, as to the superior courts, ordinances of cities and counties are private statutes, and should be pleaded as such, is unquestioned. Tulare v. Hevren, 126 Cal. 226, 58 Pac. 530. That they are private statutes as to inferior local courts is not clear. In Ex parte Davis, 115 Cal. 445, 47 Pac. 258, it is said that when the proceeding is in a municipal court, ordinances of such municipality are the peculiar laws of that forum, and of which judicial notice will be taken, because they are among the things which, as to it, are established by law. Code Civ. Proc. § 1875, subd. 2. And such courts are instituted for the express purpose of enforcing municipal ordinances. We think, upon analogous principles, the same rule should apply to a justice court when the proceedings before it involve the violation of a local ordinance of the county. "Where an offense is created by statute and a penalty inflicted, it is necessary that the party seeking a recovery should, in general, refer to such statute, but we do not understand this rule to apply to pleadings in justices' courts, which are usually without regard to form." O'Callaghan v. Booth and Deal, 6 Cal. 66; Watson v. Whitney, 23 Cal. 378. It is true that these observations were with reference to the rules in civil cases, yet the reason appeals to us in applying it to the pleadings charging the commission of a local offense.

Petitioner contends, further, that the ordinance is unreasonable, oppressive and discriminating, that it leaves to the arbitrary will of the sheriff the right to determine who may enjoy the privileges thereunder, and this upon the theory that the right to bear arms is a natural right which may not be prohibited. Whatever may be the source of the right to bear arms, in the general acceptation of such term, it does not follow as a natural consequence that such right extends to every conceivable manner in which arms may be borne. The habit of carrying concealed weapons is one of the most fruitful sources of crime, and, in our opinion, may be entirely prohibited by the proper authorities. It is true there may be instances and circumstances under which the bearing of arms in that manner may be justified. This ordinance by its terms makes ample provision in relation to such exigencies. Ex parte Cheney, 90 Cal. 617, 27 Pac. 436. It is clear that no general rule could be established beforehand that would meet the emergencies of individual cases; therefore, the power to give relief in particular instances is conferred on certain officers, and it is not to be presumed that they will exercise it wantonly, or for purposes of profit or oppression. In re Flaherty, 105 Cal. 566, 38 Pac. 981, 27 L. R. A. 529. If, therefore, the carrying of deadly weapons concealed about the person, in public places, is a menace to public safety, injurious to the public welfare, no right so to do exists; and if the legislative body has seen fit to confer authority upon certain persons under certain circumstances so to act, it is not taking away a right to do the thing from others, because they have no such right. In re Flaherty, supra. Legislation in this regard is referable to the police power, and the body to whom such legislation has been entrusted is to determine the reasonableness of such regulations as applying to the localities to which they apply. Nothing appearing which would indicate an abuse of discretion in this instance, none will be presumed, and this ordinance must be taken as a reasonable exercise of police power upon the part of the supervisors of San Bernardino county. In our opinion, the ordinance here involved is valid, and the petitioner should be remanded.

The writ is dismissed, and the petitioner remanded to the custody of the sheriff.

We concur: GRAY, P. J.; SMITH, J.

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3 Cal. App. 84

PEOPLE v. ZIMMERMAN.

(Court of Appeal, First District, California. Feb. 10, 1906. Rehearing Denied March 12, 1906; Denied by Supreme Court April 9, 1906.)

1. Criminal Law—Evidence—Proof of Conspiracy.

Where, in a prosecution for robbing certain bank messengers, the state claimed that a conspiracy had been entered into by defendant and three others some time previous to committing the robbery, evidence of one of the conspirators that defendant, another, and himself had entered into a conspiracy to rob such messengers; that they had made four unsuccessful attempts to do so, when witness had been arrested and placed in prison, and that he knew nothing further of any of the acts of defendant or of the subsequent robbery which was actually committed, was not objectionable as hearsay evidence offered to prove the fact of conspiracy.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1014–1016.]

2. Same—Act of Conspirators—Furtherance of Common Purpose—Other Offenses.

The prior attempts to rob the messengers being part of a common plan and design to commit the robbery for which accused was being tried, evidence thereof was admissible, and the fact that the evidence also tended to show that defendant had committed other crimes did not render the same objectionable.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 823, 825, 989–994.]

3. Same—Trial—Redirect Examination—Prejudice.

Where a witness for the state testified on cross-examination as to his ill feeling towards defendant, defendant was not prejudiced by a question asked by the state on redirect examination as to whether the fact that witness disliked defendant had colored his testimony, to which the witness answered in the affirmative, saying that he had testified against defendant "for the purpose of squaring up with him."

4. Witnesses—Corroboration.

Where, in a prosecution for robbing bank messengers, the state claimed that a conspiracy had been formed to commit such robbery and one of the conspirators testified that they were together about the time of pay day for laborers for certain oilworks for the purpose of committing the robbery, but that they were deterred by the presence of certain workmen, testimony of another that he saw the conspirators together at a certain brewery in O. in the early part of December was admissible to corroborate the evidence of conspiracy.

5. SAME—CROSS-EXAMINATION—SCOPE.

Where, in a prosecution for robbery, defendant, in support of an alibi, testified that he was in neither A. nor C. counties as alleged on the day of the robbery, and that on none of the days mentioned by a state's witness, who testified to a conspiracy to commit the offense to which defendant was a party, was he present at the places, and that he did not do any of the things testified to by such witness, the state was properly permitted to cross-examine him as to the transactions and conversations to which the state claimed he was a party which were material to the investigation.

Appeal from Superior Court, Contra Costa County; W. S. Wells, Judge.

John Zimmerman was convicted of robbery, and he appeals. Affirmed.

M. R. Jones and P. F. Benson, for appellant. U. S. Webb, Atty. Gen., for the People.

COOPER, J. Defendant was convicted of the crime of robbery. He made a motion for a new trial, which was denied, and this appeal is from the judgment and the order denying the motion.

There is no question as to the sufficiency of the evidence to sustain the verdict. It shows that on the 20th of March, 1905, one Daly, as a messenger of the Central Bank of Oakland, in company with one Roche, was carrying $10,000 in gold and silver coin, the property of said bank, from its place of business in Oakland, to the Bank of Point Richmond, in Contra Costa county. On the trip, which was made in a buggy in open daylight, Daly and Roche took the main road to Point Richmond, and while driving along Potrero avenue, some 40 feet beyond the track of the Southern Pacific Railroad, defendant jumped out from behind a post, raised a rifle which he had in his hand, leveled it at Daly's head, and told him to hold up. At the same instant a companion of defendant stepped out from behind a buggy with a revolver, which he pointed at Roche's head. With the rifle and pistol pointed at them, Daly and Roche were compelled to get out of their buggy, and the coin was taken from them, after which they were made to go a short distance from the scene of the robbery, and lie down with their faces to the ground. They were then tied and gagged by defendant and his companion, and in this condition left upon the ground.

During the trial the prosecution called one Mulcahey as a witness, who testified, in substance, that he, defendant, and one Collins knew the fact that Daly, as a messenger for the Central Bank of Oakland, had for some time been in the habit of making trips from the Central Bank to Point Richmond about twice a month, for the purpose of conveying a large amount of coin on each trip, which was used in paying the laborers in the oilworks at Point Richmond, and, knowing the above facts, and the habit of Daly as to carrying the coin, they entered into an agreement to waylay and rob Daly of the coin in his possession on one of these trips; that this agreement or conspiracy was entered into some time prior to, or about, the 1st of October, 1904, and, in pursuance of the common plan, four unsuccessful attempts were made to rob Daly after October 1st and prior to December 20, 1904. The witness testified that, on December 23, 1904, he was arested and placed in prison, and knew nothing further of any of the acts of defendant, or the subsequent robbery of Daly. The evidence, both as to the conspiracy and the acts done in pursuance of the common plan was admitted under the defendant's objection, and to its admission he duly excepted.

The defendant claims—and it is his principal contention—that it was error to permit Mulcahey to testify as to the fact that a conspiracy was entered into by himself, defendant, and Collins, for the alleged reason that the fact of a conspiracy cannot be proved by the declarations of a co-conspirator. Defendant is correct in his contention that the fact of a conspiracy cannot be proved by evidence of the declarations of the one of the co-conspirators. The existence of a conspiracy is a fact, and the declaration of a stranger is but hearsay, unsanctioned by the solemnity of an oath, or the test of cross-examination. Evidence as to such declaration not being admissible, the objection to its admissibility cannot be removed by the party makng such declaration further declaring that he was one of the conspirators. His declaration is hearsay, and equally so would be the declaration made by him that he was one of the conspirators. But the record shows that no attempt was made to prove a conspiracy by evidence as to the declarations of Mulcahey. He testified directly to the fact, and to what was said and done. He was under oath and subject to cross-examination. We know of no rule of evidence that would prevent Mulcahey, when called as a witness, from testifying as to any material fact within his knowledge. This would, of course, include the fact as to a conspiracy being formed. That the witness was, by his own admission, a co-conspirator, and that, after taking part in four unsuccessful attempts to do the thing that they had agreed to do, he was arrested and placed in jail, are facts which affect his credibility and the weight to be given to his evidence, but the evidence was not inadmissible for this reason. We are of opinion that the evidence was admissible, and also the evidence as to the acts and conduct of the co-conspirators in furtherance of the common object and before its termination. Cohea v. State, 11 Tex. App. 153; People v. Brown, 59 Cal. 345; Roscoe's Crim. Ev. (8th Ed.) vol. 1, pp. 570, 572, 574; Code Civ. Proc. § 1870, subd. 6.

It is contended that the evidence of Mulcahey as to the prior attempts at robbery was erroneously admitted because it tended to show that defendant had committed, or attempted to commit, other offenses distinct from the offense charged in the information; but, after a careful examination, we are of opinion that the evidence was properly admitted. The prior attempts to rob were all in furtherance of the original conspiracy. They were each of them attempts to rob Daly, the very person who was finally robbed. They were each attempts to rob Daly while carrying coin from the Central Bank of Oakland to the bank at Point Richmond. It was part of the common plan and design to rob Daly while so engaged on some one of the trips which he was in the habit of making, and defendant persevered until finally the plan was carried out and the crime committed. The fact that the evidence tended to show that defendant had committed other crimes did not make the evidence inadmissible, when such other crimes were committed in furtherance of and in attempting to commit the very crime which the defendant finally committed. The prior attempts tended logically and directly to establish one coherent and consistent method pursued by the defendant and his co-conspirators from the beginning to the final accomplishment of the robbery. As they were admissible for the purpose of showing the object of the conspiracy and the intention to commit the crime which was finally committed, they could not be excluded because of the fact that they tended to show that defendant had committed other crimes. People v. Winthrop, 118 Cal. 85, 50 Pac. 390; Roscoe's Crim. Ev. vol. 1, pp. 138–9. The evidence of Mulcahey was sufficiently corroborated to justify the verdict of the jury. In fact, the testimony of Daly and Roche is sufficient to sustain the verdict if we were to entirely disregard that of Mulcahey.

Defendant complains of the ruling of the court as to his objection to certain questions asked by the prosecution in redirect examination of the witness Mulcahey, who had testified in cross examination to his ill feeling toward defendant. The questions were directed to the purpose of finding out as to whether or not the fact that Mulcahey disliked defendant had colored his testimony. We do not think the rulings were erroneous, but the answer of the witness was favorable to defendant, as he said, in effect, that it had colored his testimony, and for this reason the objections are without merit. Defendant, in cross-examination, had succeeded in getting the witness to say that he had testified against defendant "for the purpose of squaring up with him."

It was not error to permit the witness Mathews to testify that he saw Malcahey in company with defendant and Collins in Oakland at the brewery in the early part of December, 1904. This was after Mulcahey testified that the conspiracy had been entered into by the three men who were seen together. Mulcahey testified that the three were together about the time of pay day in December for the purpose of robbing Daly, but that on account of some workmen putting up telegraph or telephone wires, Daly got past them and they did not succeed. The evidence tended in some degree to corroborate that of Mulcahey.

The defendant testified on his own behalf to the effect that he was not in either Alameda or Contra Costa county on the day of the robbery, and that on none of the days mentioned by Mulcahey in October, November, or December, 1904, was he present at the places, nor did he do any of the things testified to by Mulcahey. His testimony in direct examination was confined to the places and transaction mentioned by Mulcahey. The prosecution was allowed, under defendant's objection, to cross-examine him as to other dates on which he was with Mulcahey or Collins or both. It is now urged that the court erred in permitting the cross-examination to take too broad a range, and to go entirely outside of the matters concerning which defendant was examined in chief. There is no doubt of the rule that when a defendant offers himself as a witness, his cross-examination must be confined to the matters about which he was examined in chief. Defendant, in his examination in chief, had covered a pretty wide range. He gave his whereabouts on the day of the commission of the crime from the time he rose at 7:30 in the morning until 5 o'clock in the afternoon. He stated that he was not in Alameda or Contra Costa county on that day between 8 o'clock in the morning and 4 o'clock in the afternoon. He testified further that he had heard Mulcahey testify that he had talked with him (defendant) in the months of October, November, and December, 1904, up to the 20th day of December, 1904; that he had no conversations with Mulcahey at any of the times named by him, and that he was not in either Alameda or Contra Costa county at the dates mentioned by Mulcahey, and that he never was in Contra Costa county in his life but once, about 10 years before. Now, the matters concerning which defendant was examined in chief were as to the facts tending to show a conspiracy. He denied each and every conversation testified to by Mulcahey. The prosecution had the right to cross-examine him as to the whole matter. If Mulcahey had not given the date or the hour correctly, the prosecution had the right to ask defendant if he did not have the conversations, or do the things testified to by Mulcahey about the time or near the time as given by him. If he never, in October or November or December, 1904, had any conversations with Mulcahey and Collins, and never tried to rob Daly, he could have so stated. He will not be allowed to deny the dates, which are immaterial, and shield himself under the statute from being asked about the transactions and conversations, which are material. The statute does not mean that the cross-examination shall be confined to the precise sentences, names, or dates mentioned in the direct examination, but it must be given a reasonable construction and held to include a fair scope of questions to test the accuracy of the subject-matters concerning which a defendant has testified in chief. People v. Gallagher, 100 Cal. 466, 35 Pac. 80; People v. Teshara, 141 Cal. 636, 75 Pac. 338.

We have examined the other alleged errors, but find nothing that would justify a reversal of the case.

The judgment and order are affirmed.

We concur: HARRISON, P. J.; HALL, J.

3 Cal. App. 62

PEOPLE v. SMITH.

(Court of Appeal, First District, California. Feb. 9, 1906. Rehearing Denied by Supreme Court April 6, 1906.)

1. Criminal Law — Trial — Remarks of Court.

On a prosecution for false pretenses as to the assets of a mining company on a sale of the company's stock by defendant to prosecutor, a witness was asked as to the value of certain mining property held by the corporation, and he stated that he knew it from the report of a mining engineer, which report had placed the value at a certain sum. The court struck out the answer, and stated that, if the report had been in evidence, it would not prove the value. *Held*, that there was no error in the remark; there being no report before the jury.

2. Same—Evidence—Hearsay.

Testimony of a witness as to the contents of a report made on a mining property by an expert, and his opinion as to the value of the property derived from information from other sources, without designating the source from which it had been derived, was inadmissible as hearsay.

3. False Pretenses—Defenses—Credulity of Victim.

On a prosecution for false pretenses, the weak credulity of the victim is no defense.

4. Same — Lack of Diligence on Part of Prosecutor.

On a prosecution for false pretenses, the fact that prosecutor with reasonable diligence could have ascertained the falsity of the representations, but failed to make any investigation, was no defense.

5. Same—Issues.

On a prosecution for false pretenses, it was not necessary for the state to prove all the representations contained in the information, but it was sufficient to prove that defendant made any of them.

6. Same—Instructions.

The Code requires the court in charging the jury to state all matters of law necessary for their information. On a prosecution for false pretenses, the court instructed that every person who "knowingly and designedly" defrauds another of money by false pretenses is guilty of the crime. *Held* that, in view of such instruction, it was not necessary for the court to enumerate the element of knowledge on the part of defendant in each instruction as to the facts warranting a conviction.

7. Criminal Law—Review—Failure to Request Instructions.

Defendant cannot complain on appeal of the court's failure to instruct on any particular proposition of law, where he did not request such instruction.

8. False Pretenses—Instructions.

Pen. Code, § 1110, provides that on a trial for false pretenses, defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token or writing, unless the pretense be proven by the testimony of two witnesses or that of one witness and corroborating circumstances. On a prosecution for false pretenses, a witness testified, as to a statement made by her in the presence of defendant and prosecutor, that the defendant had made to witness the same representation which was the basis of the prosecution. *Held*, that an instruction that to constitute the offense it is necessary that the particular representation or pretense complained of should have been made to the person alleged to have been defrauded was not contradictory to another instruction that a statement by a third person in the presence of the defendant and prosecutor is not of itself evidence of the fact related in the statement, but that it is admissible primarily to show, or to tend to show, the conduct of defendant, as the latter was relative to the testimony as to the statement in defendant's presence.

9. Same—Evidence—Corroboration.

Pen. Code, § 1110, provides that on a trial for false pretenses defendant cannot be convicted, if the false pretense was expressed in language unaccompanied by a false token or writing, unless the pretense be proven by the testimony of two witnesses or that of one witness and corroborating circumstances. *Held*, that the conduct of defendant in a prosecution for false pretenses, at the time a third person made a statement in the presence of defendant and prosecutor to the effect that defendant had made to such third person the same representation as was the basis of the prosecution, was a corroborating circumstance under the statute.

10. Criminal Law — Trial — Conduct of Jury.

After the jury retired they returned and requested certain testimony to be read to them, including defendant's, and after reading the other testimony and some of defendant's they stated that they had heard all they cared to, whereupon they were permitted to retire. *Held*, that it was not error for the court not to have insisted upon the jury remaining and hearing the whole of defendant's testimony.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

J. J. Smith was convicted of obtaining money by false pretenses, and he appeals. Affirmed.

William B. Hardy, for appellant. U. S. Webb, Atty. Gen., and J. P. Sex, for the People.

HARRISON, P. J. The appellant is charged in the information herein with having willfully and designedly defrauded one Kate Boyle of the sum of $100 by means of certain false and fraudulent pretenses and representations made to her for the purpose and with the intent of inducing her to purchase from him certain shares of the capital stock of a corporation known as the Altadena Mining & Investment Syndicate; and having been convicted thereof and afterwards sentenced to confinement in the state prison at San Quentin for one year, has appealed therefrom.

The evidence set forth in the bill of exceptions was sufficient to authorize the jury to find therefrom that on the 14th of August, 1903, the defendant sought to induce the said Kate Boyle to purchase from him some shares of stock in the said corporation, and at that time represented and stated to her that the assets of the corporation amounted to $125,000 over and above all its liabilities, and that it had during the previous year paid a dividend of 25 per cent. to its stockholders; that by reason of these representations and her belief in their truth she purchased the stock from him and paid him $100 therefor; that the representations were false and were known by the defendant to be false; that the corporation had never paid a dividend upon its stock, and that its assets did not amount to $125,000, and that the stock sold to her was worthless. Upon these facts the verdict of the jury cannot be said to be unsustained by the evidence.

For the purpose of showing the value of certain mining property in Nevada held by the corporation a witness called by the defendant was asked it he knew its value; and after stating that he knew it only from the report of a mining engineer, stated, without being interrogated thereon, that the latter placed its value at $20,000. Upon motion of the prosecution the court struck this out, and in its ruling said: "Even if the report is here it would not prove the fact of value. A report don't prove anything." The defendant took an exception to this remark, and now urges the same as error upon the ground that the jury were prejudiced thereby We are unable to see how the jury could have been affected by this remark. There was no report before the jury. The defendant did not, either at that time or at any time during the trial, offer to introduce any report, and the remark was not made with reference to any evidence which the jury could consider. The further question asked the witness as to what report the expert made only called for hearsay evidence, and was properly excluded, as was also the question asked him as to his opinion of the value derived from information from other sources without designating the sources from which it had been derived.

The court instructed the jury that the defendant could not escape the consequences of his making any false representations on the ground of the weak credulity of his victim, if it appeared that the false representations were made with the design to deceive and thereby obtain money from her, and that they had that effect. There was no error in this instruction. People v. Cummings, 123 Cal. 269, 55 Pac. 898. The party so deceived is none the less defrauded of his money because he might have made an investigation and determined that the representations were false. It was no defense for the defendant to say: "I intended to deceive and defraud you and have succeeded in my purpose, but it is not my fault that you believed what I said and did not look out for yourself."

The court refused to instruct the jury, as requested by the defendant, that they should render a verdict of not guilty if they believed from the evidence that between the making of the representations and the payment of the money for the stock Miss Boyle could, with reasonable diligence, have ascertained that the representations were false, and failed to make any investigation of the matter. It instructed them that the rule in a civil action for deceit, under which a prospective purchaser is required to investigate for himself, does not apply in a prosecution for obtaining money under false pretenses, for the reason that in a criminal case the offense is committed against the public and not against the individual, and is prosecuted in the interests of the public and not of the prosecuting witness. The instruction, as well as the refusal to give the instruction requested by the defendant, is in harmony with the principles declared in People v. Martin, 102 Cal. 538, 36 Pac. 952; People v. Howard, 135 Cal. 266, 67 Pac. 148.

The instruction that it was not necessary for the prosecution to prove all of the alleged false representations contained in the information, but that it was sufficient to prove that the defendant made any one of them, and that Miss Boyle relied upon such representation, and was thereby deceived, and parted with her money on the strength thereof, was a correct statement of the law. 1 Bish. New Cr. Pro. § 434; People v. Gibbs, 98 Cal. 661, 33 Pac. 630. The offense charged is the defrauding of another of his money or other property, and proof of any one or more of the false pretenses by which the party was defrauded establishes the offense.

The appellant, however, contends that the court should have included in the above instruction a direction that, in order to convict the defendant, they must also find that he knew that the representations were false, and that he made them with the intent to defraud her. A court is not required in each specific instruction which it may give to a jury to enumerate all of the elements of the crime with which the defendant is charged, but it will be sufficient if it shall appear from the entire charge that the jury were properly and sufficiently instructed. The court had previously instructed the jury that every person who knowingly and designedly defrauds another of money by false or fraudulent pretenses and thereby obtains possession of the money is guilty of the crime of obtaining money under false pretenses; that the defendant herein is charged by the information with the public offense commonly known as obtaining money under false pretenses; that the burden rests upon the prosecution to establish each element of the offense charged in the information; and that any false pretense sufficient to impose upon the person to whom it was made, if made with intent to cheat and defraud him, if money is obtained thereby from such person, is sufficient to sustain an information for obtaining money under false pretenses. The Code requires the court, in charging the jury, to state to them "all matters of law necessary for their information;" and under the above instructions they could not have failed to understand that the intent of the defendant to defraud Kate Boyle of her money was an essential element of the crime with which he was charged and that it must be established by the prosecution. If, in addition to such charge, the defendant had desired to have them instructed upon any particular proposition of law he should have manifested such request to the court. People v. Byrnes, 30 Cal. 206; People v. Williams, 32 Cal. 285.

The court also gave the following instructions to the jury: "To constitute the offense of obtaining money by false pretenses it is necessary that the particular representation or pretense complained of should have been made to the person alleged to have been defrauded." "A statement by a third party in the presence of the defendant and the prosecuting witness is not itself evidence of the fact related in the statement, but such statement is admissible primarily for the purpose of showing or tending to show the conduct of the defendant at the time of the alleged false representations." The contention of the appellant that these instructions are contradictory is not tenable. The latter instruction had reference to the testimony of Mrs. Allen respecting a statement made by her, in the presence of the defendant and Kate Boyle, that the defendant had made to her the same representation, which is one of those set forth in the information. The conduct of the defendant when the statement was made in his presence would be evidence of a "corroborating circumstance" authorized to be shown by section 1110 of the Penal Code, and the court stated in the instruction that the statement would not be evidence of that fact.

After the jury retired they came into court and requested certain testimony to be read to them, including that of the defendant. After the reading of the other testimony and about one-third of that of the defendant had been had, the jury stated that they had heard all the testimony read which they desired to hear, and did not desire the further reading of the defendant's testimony. Thereupon the court permitted them to again retire. The defendant now insists that it was error for the court not to have insisted upon the jury remaining and hearing the whole of his testimony read. There is no merit in this contention. If the jury did not wish to hear it read the court was not required to compel them to listen to it. It may be assumed that the portion of his testimony which they heard included all upon which they desired to have their memory refreshed.

The judgment and order denying a new trial are affirmed.

We concur: COOPER, J.; HALL, J.

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3 Cal. App. 59

DONNELLY v. GRAY BROS. et al.

(Court of Appeal, First District, California. Feb. 9, 1906.)

1. APPEAL—PARTS OF ORDERS—NEW TRIAL—TERMS.

Under Code Civ. Proc. § 940, providing that an appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same or some specific part thereof, etc., an appeal may be taken from so much of an order granting defendants' motion for a new trial as imposed terms.

2. NEW TRIAL—TERMS.

An action was brought against a firm alleged to consist of five members who were charged by fictitious names, three corporations and two other defendants also charged by fictitious names. The true names of the defendants so charged were not indicated by answer, but on the trial the evidence disclosed that the firm consisted only of two identified persons, and no cause of action was proved against the others. Plaintiff did not amend by inserting the true names of the members of the firm, and defendants took no steps to have the action dismissed as to the other defendants, but requested instructions that, if any of the defendants were liable, all were liable, whereupon a judgment was rendered on a verdict against all the defendants. *Held*, that defendants were only entitled to a new trial because of such irregularities on terms.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Bernard Donnelly against Gray Bros. and others. From a judgment in favor of plaintiff, and from an order granting defendants' motion for a new trial on terms, they appeal. Affirmed.

Fisher Ames, for appellants. Kinley & Kinley, for respondent.

HALL, J. This is an action brought against Gray Bros., a copartnership alleged to consist of five members, who are charged by fictitious names, three corporations, and two other defendants charged by fictitious names, for damages to a lot belonging to plaintiff, resulting from certain blasting and grading operations alleged to have been carried on by defendants. The complaint is unverified, and the answer is a general denial. It begins, "Now come the defendants herein," and is signed, "Fisher Ames, Attorney for Defendants," and in no other way is the identity or names of the various defendants indicated by any pleading or motion filed or made by "the defendants" prior to the entry of judgment. The case was tried before a jury, and a verdict rendered against "the defendants" and in favor of plaintiff. The evidence disclosed that the partnership consisted of Harry N. Gray and George F. Gray only, and that the blasting and grading operations complained of were carried on by such firm only, and there was no evidence tending to connect either of the defendant corporations or any of the other defendants with the matters complained of by plaintiff. The complaint was not amended by inserting the true names of the members of the firm, nor was the action dismissed as to any of the defendants, nor was any motion made on behalf of any of the defendants for a nonsuit, but the entire case was submitted to the jury by the court without the attention of the jury being any way directed to the fact that a verdict might be rendered against some of the defendants and in favor of the others. Nor was the attention of the court called to this condition of affairs, by either counsel, until after the verdict. "The defendants and each of them" moved for a new trial, which the court granted upon terms that the defendants pay the costs of the trial in the sum of $104. From this order defendants have appealed.

The notice of appeal is in form from the entire order thus: "From the order granting defendants' motion for a new trial 'upon the payment by defendants to plaintiff herein of the sum of $104 within 20 days from the date of the entry of this order,' which said order was made and entered in the minutes of said superior court on the 4th day of April, A. D. 1905"—and it is only by inference resulting from the inclosing of that part of the order requiring the payment of the $104 in quotation marks that we can determine that appellants only intended to appeal from that particular portion of the order. At the oral argument, however, counsel stated that he only asked for the reversal of that portion of the order, and by no means wished a reversal of the entire order, but professed to know of no procedure by which he could appeal from a portion of an order only. In this connection we may suggest that a litigant dissatisfied with a portion of an order has the same right to appeal from a portion of an order that he has to appeal from a portion of a judgment. "An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party or his attorney." Code Civ. Proc. § 940.

But, passing this point, we think the order made by the trial court was just, and should be affirmed. An examination of the record not only shows that counsel for defendants did not call the attention of the court or opposing counsel to the various defects, which doubtless would have at once resulted in an amendment by inserting the true names of the members of the firm, and a dismissal or nonsuit as to the defendants against whom there was confessedly no word of evidence, but that he affirmatively asked the court to give various instructions which carried out the theory that if any of the defendants were liable all were liable; and nowhere in any instruction asked by defendants is any different theory of the case remotely suggested. Thus the following instructions were given at the request of the defendants: "(4) The defendants are only liable for such damages as their acts have proximately caused. (5) If you find from the evidence that the property of plaintiff has been damaged by the negligent acts of defendants, you are to estimate to what extent only the market value of plaintiff's property has been lessened or depreciated." "(7) You can only estimate the damage which plaintiff's property has sustained by reason of the acts of the defendants during the period of two years next before the commencement of this action."

We are not called upon to determine that the bare silence of a party litigant, or his attorney, ought to subject him to any penalty; but where by any affirmative act he has lulled the court into a lack of vigilance which results in error that necessitates a new trial he ought not to complain if reasonable terms be imposed as a condition of the new trial. In this case plaintiff, through his attorney, seems to have been at fault for not amending his complaint and dismissing as to the defendants against whom no case was made by the proof; for this he suffers the setting aside of his judgment, and a new trial. On the other hand defendants, through their attorney, were at fault in the matters pointed out, and suffer the payment of the costs of the first trial.

The defendants have also appealed from the judgment; but inasmuch as the order granting a new trial, which is now affirmed, has the effect to vacate the judgment, the appeal therefrom is without any support.

The appeal from the judgment is therefore dismissed, and the order granting a new trial is affirmed.

We concur: HARRISON, P. J.; COOPER, J.

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3 Cal. App. 68

PEOPLE v. SMITH.

(Court of Appeal, Second District, California. Feb. 9, 1906.)

PERJURY — EVIDENCE—SUFFICIENCY OF CORROBORATION.

Pen. Code, § 1111, provides that a conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence which, in itself and without the aid of testimony of the accomplice, tends to connect defendant with the commission of the offense. Code Civ. Proc. § 1968, provides that perjury must be proved by testimony of two witnesses, or of one witness and corroborating circumstances. In a prosecution for burglary, defendant testified on his own behalf that one L. was at his house on the night of the burglary and remained there all night. L. testified to the same effect, and subsequently defendant was indicted for perjury, and L. testified that his testimony and that of defendant on the burglary trial was false. Other witnesses testified that they saw L. about five or six miles from defendant's house on the afternoon or about sundown of the day in question, and that L. was seen about half past 5 o'clock on the next morning about a mile from the place where he was seen on the afternoon before. *Held*, that the corroborating evidence was not sufficient to sustain a conviction of perjury.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Perjury, §§ 125–132.]

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Frank Smith was convicted of perjury, and appeals. Reversed.

M. E. Power, E. T. Cosper, and Hannah & Miller, for appellant. U. S. Webb, Atty. Gen., J. C. Daly, Deputy Atty. Gen., and H. Scott Jacobs, Dis. Atty., for the People.

SMITH, J. The defendant was convicted of the crime of perjury, and appeals from the judgment, and from the order denying his motion for a new trial.

The defendant had been tried and acquitted of the crime of burglary, and the present charge relates to his testimony on that trial—the language charged to be false being: "That one Vincent Lopez was at the ranchhouse of said Frank Smith, the defendant in the said above-mentioned case and the defendant herein, about 13 miles south of the town of Angiola in the county of Tulare, state of California, the place of the burglary, on Thursday night, the 10th day of November, 1904, and that the said Vincent Lopez remained at said ranchhouse all night the night of said November 10, 1904, and did not leave said ranchhouse until the next morning, November 11, 1904, and that said Vincent Lopez played cards with said Frank Smith and one Steve Rias on the said night of November 10th, 1904, at said ranchhouse." This evidence was on the former trial supported by the testimony of Lopez and Rias; but after the trial Lopez was arrested on the charge of perjury in his evidence at the trial of the burglary case, and on the present trial testifies that his evidence and that of the defendant was false.

Lopez's testimony is the only direct evidence of the crime charged, and to support the conviction it was necessary for the prosecution to sustain it by corroborating evidence. Code Civ. Proc. § 1968. This, it is claimed by the defendant, it failed to do, and this contention, we think, must be sustained. The testimony relied upon for this purpose by the prosecution was that of Roberts, the two Valencias and one Hugh Wilson. Roberts testified that he thinks he saw Lopez on the 10th of November at the Smyrna camp, which was about five or six miles from the defendant's house. Ross Valencia testified that he saw Lopez at the camp between 3 and 4 o'clock p. m., of the 10th, or about sundown, and that he did not see him afterward; but he also testified, in answer to a leading question, that he saw him "after dark that night." Abe Valencia testified that he saw Lopez at the camp about 3 or 4 o'clock of that day. Each of these witnesses admits that Lopez could have left the Smyrna camp and not have come back until the next morning. Wilson testified that he met Lopez about a mile east of the Smyrna camp at about half-past 5 o'clock on the morning of the 11th. But none of this testimony is inconsistent with the alleged false testimony of Smith, and it is therefore manifest that it has no tendency in itself "to connect the defendant with the commission of the offense" charged. Pen. Code, § 1111. It is, indeed, argued for the prosecution that the testimony of Ross Valencia and of Wilson tends to show the falsity of other testimony of the defendant upon the burglary trial. But this we do not think to be true of Valencia's testimony; and with regard to Wilson's, though it seems to be incompatible with certain testimony of the defendant on the burglary trial, in which he testified that Lopez left his ranch on the 11th about 10 o'clock, yet the discrepancy is not of a very serious character; and assuming it to be otherwise, it cannot be regarded as corroborating the testimony of Lopez as to the statements of Smith constituting the alleged perjury. Nor could it be expected of the latter that he would come prepared to prove the truth of his testimony on a former trial in a matter not charged to be false.

We are of the opinion, therefore, that the judgment and order appealed from must be reversed; and it is so ordered.

We concur: GRAY, P. J.; ALLEN, J.

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3 Cal. App. 54

CALIFORNIA TITLE INS. & TRUST CO. v. MULLER et al.

(Court of Appeal, First District, California. Feb. 9, 1906.)

1. Mortgages — Foreclosure — Parties — Grantee of Premises as Party.

A suit to foreclose a mortgage may be brought against a grantee of the mortgaged premises without joining the mortgagor.

[Ed. Note—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 1280.]

2. Same—Relief Against Grantee.

Though the mortgagor is joined as a party defendant with his grantee of the mortgaged premises in a suit to foreclose the mortgage, the only relief that may be had against the grantee is a decree for the sale of the premises, and the application of the proceeds to the payment of the debt and costs.

3. Limitation of Actions—Death of Party.

A right of action against a grantee of mortgaged premises to procure a sale thereof accrues on the debt falling due, and limitations, beginning to run at that time, are not interrupted by the death of the mortgagor, since Code Civ. Proc. § 353, providing that if a person against whom an action may be brought die before the time limited for the commencement thereof an action may be commenced against his representatives within one year after the issuance of letters of administration, only interrupts the running of the statute as against the representatives of the deceased mortgagor.

4. MORTGAGES — DEATH OF MORTGAGOR — MORTGAGEE'S RIGHT TO FORECLOSE—PARTIES.

Where a mortgagor who has conveyed the premises dies, the mortgagee may, at the maturity of the debt, sue the grantee and bring in by amendment the administrator of the mortgagor subsequently appointed and obtain full relief in one action. within Code Civ. Proc. § 726, declaring that there can be but one action for the enforcement of any right secured by a mortgage.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, §§ 1280, 1290.]

5. LIMITATION OF ACTIONS — ACCRUAL OF CAUSE—NOTICE—RECORD OF DEED.

A finding that a deed conveying mortgaged premises was duly acknowledged and recorded more than five years before the action to foreclose the mortgage was brought sufficiently showed that the mortgagee or his executor had notice of the deed and that the action as against the grantee was barred.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by the California Title Insurance & Trust Company, as executor of Thomas W. Sweeny, deceased, against P. J. Muller, as administrator of Edwin A. McDonald, deceased, and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Page, McCutchen & Knight and Page, McCuthen, Harding & Knight, for appellant. F. W. Hall and P. J. Muller, for respondents.

HALL, J. This is an appeal by plaintiff from a judgment in favor of defendants, and comes here upon the judgment roll.

On April 15, 1896, Edwin A. McDonald executed a mortgage on real estate to Thomas W. Sweeny to secure the payment of his promissory note to Sweeny, payable April 15, 1897. On April 27, 1896, Edwin A. McDonald, the mortgagor, for love and affection deeded the mortgaged property to his mother, Letitia McDonald, one of the defendants. The deed was in terms made subject to the mortgage, and was properly acknowledged and duly recorded May 4, 1896. McDonald, the mortgagor, died March 18, 1898, but there was no administration on his estate until March 27, 1901, when letters of administration were issued to P. J. Muller, one of the defendants. Sweeny, the mortgagee, died January 24, 1900, and on February 9, 1900, letters testamentary were issued to the plaintiff. This action to foreclose the mortgage was commenced against the administrator of the deceased mortgagor and the grantee of the mortgagor May 29, 1901, four years and six weeks after the note became due, and more than five years after the deed to Mrs. McDonald had been made and recorded, but within about two months after the issuing of letters of administration upon the estate of the deceased mortgagor. Mrs. McDonald, the grantee of the mortgagor, pleaded in her answer that the cause of action was barred by section 337, Code Civ. Proc. The court found the facts as above set forth, and found both as a fact and as a conclusion of law that the action was barred by section 337, Code Civ. Proc., and rendered judgment for defendants.

Appellant in its opening brief concedes that if the trial court was right in holding that the mortgage could not be foreclosed as against the grantee of the mortgagor no recovery could be had against the administrator of the deceased mortgagor. We therefore shall consider the only question presented, to wit, was the action barred as against the grantee of the deceased mortgagor? It is well settled in this state that the grantee of a mortgagor may avail himself of the bar of the statute, although the running of the statute against the mortgagor has been interrupted by his absence from the state, and the like. Wood v. Goodfellow, 43 Cal. 185; Watt v. Wright, 66 Cal. 205, 5 Pac. 91; California Bank v. Brooks, 126 Cal. 198, 59 Pac. 302; Brandenstein v. Johnson, 140 Cal. 29, 73 Pac. 744.

Appellant insists, however, that the above cases were decided upon the proposition that the mortgagor could not, by his voluntary act, prevent the running of the statute as against his grantee, and that said cases do not control this case, where the running of the statute as against the mortgagor was interrupted by his death. We cannot agree with this contention. While it is true that in the leading case (Wood v. Goodfellow), where the mortgagor had absented himself from the state, the court referred to the fact that the mortgagor could not, by his voluntary act, prejudice the rights of his grantee, this statement is followed by this language: "Where the mortgagor has parted with his title to the property, and ceased to have any interest therein, those who have succeeded to his rights stand in the same relation to the mortgage as if they had originally made the mortgage on their own property to secure the debt of the mortgagor. The mortgagor has no interest in the property, nor are they under obligation to pay his debt. Their property, however, is bound as collateral security for its payment, under the mortgage, which is a contract in writing, by which the property is pledged as a security for the debt. The mortgage, in such a case, has the same effect in law as if it had been originally made, as a separate instrument, by the parties succeeding to the rights of the mortgagor to secure his debt."

Manifestly it is for the reasons set forth in the above-quoted language that the mortgagor cannot, by his act, prejudice the rights of his grantee. In Filipini v. Trobock, 134 Cal. 441, 66 Pac. 587, upon a rehearing, the court, in speaking of Wood v. Goodfellow, says: "The doctrine of the case is contained in the following extract from Judge Crockett's opinion," and then quotes the language which we have just quoted from Wood v. Goodfellow. This case also we think is squarely against the contention of appellant. In Hibernia Savings & Loan Society v. Herbert, 53 Cal. 375, it was held that where a mortgagor granted the property mortgaged by gift deed to his wife, and died before the debt was barred, the wife or her representatives could plead the bar of the statute, although no administration had been taken on the mortgagor's estate, and in consequence, as to his estate, there was no bar. In this case the same effort was made by counsel to differentiate the case from Wood v. Goodfellow as is made in the case at bar, and the only difference between Hibernia S. & L. Society v. Herbert and the case at bar is that in the former case no administration on the estate of the mortgagor had been taken, and, of course, no deficiency judgment was asked for, and no representative of the deceased mortgagor was a party to the suit. See, also, Hibernia Sav. & Loan Society v. Boland et al., 145 Cal. 626, 79 Pac. 365.

A grantee of mortgaged premises may be sued in forclosure without joining the mortgagor, and whether or not the mortgagor be joined and a deficiency judgment sought, the only right of action against the grantee is one to secure a sale of the mortgaged premises, and the application of the proceeds to the payment of the debt and costs. This right of action exists against the grantee as soon as the debt falls due, and the statute begins to run against this right of action at the same time, and we can see no valid reason why it should be interrupted by the death of the mortgagor. The section relied on (Code Civ. Proc. § 353) only purports to interrupt the running of the statute as against the representatives of the deceased. It is: "If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives after the expiration of that time, and within one year after the issuing of letters testamentary or of administration." The right of action is preserved as against the representatives of the deceased and not as against others who may be necessary parties to the action.

Appellant urges with much earnestness the hardship to a mortgagee in a case where the mortgagor grants the mortgaged property to a third person, and then dies, so shortly before the outlawing of the debt that no administration can be secured before the statute would run in favor of the grantee. He argues that as section 726 of the Code of Civil Procedure permits but one action to recover a debt, or to enforce a right secured by a mortgage, the mortgagee in such case would be obliged either to bring suit against the grantee, and thus waive any recourse against the estate of the mortgagor for a deficiency, or wait and take the risk that the grantee would plead the bar of the statute. We think this hardship more imaginary than real. No reason occurs to us why the mortgagee may not at once sue the grantee, and subsequently, after the issuance of letters of administration on the estate of the deceased mortgagor, by amendment or supplemental pleadings, bring in the representatives of the deceased, and thus in one action secure all the remedies to which he may be entitled.

Appellant also discusses the effect of the provision in the deed that it was "subject" to the mortgage. We do not see what effect that would have upon the running of the statute. Whatever obligation such provision imposed upon the grantee, if any, it was mature and enforceable more than four years before the action was brought.

It is also urged that the court did not find that plaintiff or its testator ever had notice of the execution of the deed. The court did find fully that it was duly acknowledged and recorded more than five years before the action was brought, and under Filipini v. Trobock, 134 Cal. 441, 66 Pac. 587, this was sufficient.

The judgment is affirmed.

We concur: HARRISON, P. J.; COOPER, J.

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3 Cal. App. 71

EXCHANGE BANK v. VEIRS et al.

(Court of Appeal, Third District, California. Feb. 9, 1906. Rehearing Denied by Supreme Court, April 9, 1906.)

1. Bills and Notes—Actions—Sufficiency of Evidence—Prima Facie Case.

In an action on notes, where plaintiff proved itself to be the owner and holder of the notes, showed a due signing and execution thereof by defendant, and a delivery to plaintiff, showed that the notes were unpaid, and placed them in evidence, it made out a prima facie case, and a nonsuit was properly denied.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 1800.]

2. Same—Presumptions—Delivery.

Where a note was signed by the maker, it is presumed that it was delivered to the holder before maturity.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 1649–1651.]

3. Appeal—Review of Facts—Conclusiveness of Findings.

Where the evidence of handwriting experts and others, on the issue of the execution by defendant of the note in a suit, was in direct conflict, the finding of the trial court on the question will not be disturbed.

Appeal from Superior Court, Sonoma County; A. G. Burnett, Judge.

Action by the Exchange Bank against Annie Veirs and another. From a judgment for plaintiff, and from an order denying a new trial, defendant named appeals. Affirmed.

W. F. Cowan and J. R. Leppo, for appellant. W. E. McConnell and J. A. Barham, for respondent.

BUCKLES, J. This is an action to recover on two promissory notes, one dated January 21, 1901, for $200, and one dated March 30, 1901, for $300, both notes alleged to have been given by L. L. Veirs and Annie Veirs, and payable to the Exchange Bank. L. L. Veirs was not served with summons, personally or otherwise, and made no appearance; the service of summons was on Annie Veirs, solely, who appeared and answered for herself only. By her answer she denied that she signed, or authorized any one to sign, the said notes, and avers that she had no knowledge of the signing and delivery of either of the notes mentioned, and also avers that if such notes were in existence with her name appearing thereon, that it was forged and that she had never in any way permitted, or acknowledged, or ratified the signing or delivery of either of the said notes, and denied being indebted thereon to plaintiff. The case was tried by the court without a jury. The findings of the court were that both of the said notes were signed and delivered by both of said defendants to the said Exchange Bank in consideration of the principal sum named in each having been loaned by plaintiff to defendants; that her name was not forged, but was signed by her, and that she authorized the delivery of the said notes; and that the signing and delivery thereof were all known to her, and done with her authority and consent, and that she signed her name as maker of said note; that the plaintiff was the owner and holder of said notes, and that the demand prayed for is now due and unpaid. When plaintiff rested its case, defendants moved for a nonsuit, which was denied. Judgment was for the plaintiff and against the appellant. The appeal is from the judgment and from an order denying a new trial. The appellant attacks each one of the findings on the ground that the evidence does not justify them. The evidence comes up in a bill of exceptions. There are a great many assignments of error as to the admission of testimony, but from the view we take of this case, it will not be necessary to examine many of them.

Nonsuit: The plaintiff had proved itself to be the owner and holder of the notes; had produced testimony tending to show a due signing and execution of the notes by the appellant, and delivery to it; that the notes were due and unpaid; and placed said notes in evidence and had thus made out a prima facie case. The nonsuit was, therefore, properly denied. Does the evidence justify the findings? L. L. Veirs and appellant Annie Veirs were living together as husband and wife, having been married in 1897. L. L. Veirs had been engaged in the butcher business in Santa Rosa, and disappeared on November 13, 1903, had not been heard of since and was not present at the trial, and no evidence was given by him. There was no evidence that any one witnessed Annie Veirs sign her name to either of the notes, and she was never in the Exchange Bank.

Appellant was a witness at the trial, testified that she did not sign the notes, and did not authorize any one else to sign her name thereto, and never saw either of the notes until shown to her at the trial and never heard of them until suit was commenced. There were at the trial two expert witnesses on handwriting, Carl Eisenschimel for the plaintiff, who testified: "I am a professional examiner of forgeries and questions in handwriting; also professor of penmanship and teacher of handwriting, and in the business for 30 years." Said he had photographed and had enlarged Annie Veirs' signature, admitted to be genuine, and also the one signed to the notes, and then declared, in his opinion, the questioned signatures to the two notes in suit to be in the handwriting of the person who wrote the name of Annie Veirs to the papers admitted to be her genuine signature. In other words, that the name of Annie Veirs signed to the two notes sued on, were not forged, but were written there by Annie Veirs. This witness went into many details as to shaping of the letters in the name, and explained in detail how he reached the conclusion that the signatures were both genuine; that is, made by the same hand which wrote the name where it is admitted to have been written by her. Many objections were made to the testimony of this witness, but we think that the rulings of the court were correct in each instance. The defendant called as her expert witness on handwriting Theodore Kytka, of San Francisco, and presumably all parties were satisfied as to his qualifications, for he was not asked to state them. This witness went into detail as to the making of the letters in the name Annie Veirs as signed to the two notes and as signed to other exhibits which were admitted to contain her genuine signature, and also gave testimony as to peculiarities in L. L. Veirs' signature. He nowhere says the name Annie Veirs signed to the two notes was not signed by her, but such is reasonably inferred from what he says about the shaping of the letters and so forth. Here we have two experts with doubtless the same degree of learning and ability in their profession, having submitted to them the same thing, and each declaring in favor of the theory held by the side by whom he was called. The evidence given by each may or may not be entitled to equal weight, but that is a question for the trial court who observed them upon the witness stand. To say the least, the testimony of these two professional experts creates a most substantial conflict in the evidence in the vital point in the case, and the lower court seems to have determined the matter according to the evidence of Eisenschimel. The notes, with other papers and notes bearing the defendant's signature, some admitted to be genuine and many others claimed to be forgeries, used at the trial below, are before us, would not warrant us in saying the conclusions reached were erroneous. The learned trial judge made an inspection and comparison of the signatures, and, in his opinion, says on this point Castor

v. Bernstein (Cal. App.) 84 Pac. 244: "The decisive circumstance, in my mind, however, is the appearance of the signature itself. I cannot resist the conclusion that Annie Veirs wrote her name as it appears on the notes in controversy. The peculiarities of her handwriting, in my judgment, are manifest. Every time it is examined, the conclusion is strengthened that no other hand than hers wrote it. It might be difficult to properly analyze this conviction so as to be entirely satisfactory to those entertaining a different opinion, but it is the result of careful examination of all the evidence presented during the trial." If Annie Veirs signed these notes, as the court found that she did, then the presumption that she delivered them, after signing, to her husband to be delivered to the bank is not overcome. There is a presumption that a note was delivered to the holder thereof before its maturity. Edward on Bills and Promissory Notes, 188; Daniels on Negotiable Instruments, § 65 (2d Ed.)

There were many other witnesses, business men, who had a large experience in comparing handwriting, and passing upon the same, testified on both sides, some that the signature on the notes was genuine, and others with equal experience who testified that such signatures were not made by Annie Veirs. But whether the appellant's name was signed by her own hand to these notes, or was put there by her husband, and without her knowledge, authorization, or consent, we are precluded from saying because of the well-settled rule that where there is a substantial conflict in the evidence, the appellate court will not disturb the judgment of the lower court. Under this rule we are bound to hold the evidence sufficient to support the findings, and as the findings uphold the judgment, we must affirm the same.

Judgment and order affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

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3 Cal. App. 50

PEOPLE v. DARR.

(Court of Appeal, Third District, California. Feb. 8, 1906. Rehearing Denied by Supreme Court April 9, 1906.)

1. Rape—Evidence—Sufficiency.

Where, in a prosecution for statutory rape, the corpus delicti was established by independent evidence, defendant's admissions, including a statement that he could go to prosecutrix's bedroom and have intercourse there with her at any time without her parents hearing him or having knowledge of the fact, were sufficient to sustain a conviction.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Rape, §§ 71–77.]

2. Witnesses—Cross-Examination—Scope.

Where, in a prosecution for rape, the direct examination of a witness was confined to declarations made by defendant in witness' presence, a question calling for her opinion touching defendant's guilt was not proper cross-examination.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 949–954.]

3. Same—Redirect Examination.

Where, in a prosecution for rape, prosecutrix was cross-examined with reference to her first charging another with the offense, she was properly allowed, on redirect examination, to explain her reasons for so doing.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1000.]

4. Criminal Law—Evidence—Relevancy.

In a prosecution for rape, evidence of the trend of the argument of the district attorney on a former trial, for the purpose of showing a change of theory by the prosecution, was irrelevant.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Wert Darr was convicted of rape, and he appeals. Affirmed.

Thomas, Pemberton & Thomas, for appellant. U. S. Webb, Atty. Gen., and Robert Duncan, Dist. Atty., for the People.

McLAUGHLIN, J. The defendant stands convicted of rape upon a girl 13 years of age. He appeals from the judgment and from the order denying his motion for a new trial.

His principal contention is that there was no evidence to warrant the verdict of the jury. After a careful, painstaking examination and analysis of the evidence contained in the record we are convinced that it is sufficient to support the verdict and judgment. That some person committed rape on this mere child is evidenced by the birth of a son when she was but one month over 14 years of age. And we think the admissions of the defendant clearly point to him as the man who committed the particular act upon which the prosecution elected to rely. His rehearsal of the conversation with Pendegast is very damaging, and his story touching statements made to members of the family and in the presence of the officers dovetails with other evidence in the same behalf. In fact, his testimony confirms that given by most of the witnesses to whom he proclaimed his responsibility for the ruin of this unfortunate child. He differs with some of them, but in no instance does he deny having had conversations with the witness for the prosecution whose testimony as to admissions he disputes. On the main vital fact there is a sharp conflict, but in designation of times and places, and in minor details of the conversations, his testimony is strikingly corroborative of theirs. The explanations offered to excuse the admissions not denied by him are far from satisfactory. Having admitted that he was at her bedroom window, and that he opened the window and placed a stick under it, the jury were not bound to accept his version of what subsequently transpired. They were authorized to believe that he spoke from experience, and to accept the verity of his boast that he could go to that bedroom and have intercourse with the prosecutrix at any time, without her parents hearing him, or having knowledge of the fact. It is said that these admissions were the mere mouthings of a drunken prevaricator. But many of them were made when he was sober, and the corpus delicti having been established by independent evidence, such admissions alone were sufficient to prove guilt. It is difficult to imagine how an innocent man, even when drunk, could confess an infamy branding him as the author of lasting sorrow, ruin, and shame to this child. And it is still more difficult to conceive how any man, in his cups or otherwise, could so closely connect his maudlin story with surrounding circumstances and incriminating evidence unless there was a modicum of truth in what he said. But be that as it may, it is dangerous to boast of bestial and shameless acts, to the commission of which the law attaches a penalty. Many have gone to the gallows to forfeit a life for a life through the medium of their own admissions, and we can see no reason why such evidence should not be as potent in cases where the punishment is less severe, though in the sight of heaven the crime is more atrocious.

We do not think there was error in the rulings made during the examination of jurors on their voir dire. Argument to a jury is sanctioned by law, and the probable or possible effect of that which the law sanctions is hardly a legitimate subject of inquiry in determining the qualifications of a juror.

We will notice only those assignments of error relating to the admissibility of evidence, which were deemed worthy of notice in the briefs and argument. The objection to the question asked Mrs. Dearborn on cross-examination was properly sustained. The direct examination of this witness was confined to declarations made by the defendant in her presence. Her expression of opinion touching defendant's guilt was not germane to such inquiry. There was no error in permitting the prosecutrix on redirect examination to explain her reasons for first charging Harry Docker with the offense. This matter was gone into on cross-examination, as tending to discredit her testimony, and hence explanations were in order and were perfectly legitimate. The father was asked on cross-examination touching his presence at a former trial, and his knowledge of the trend of the argument then and there made by the district attorney. The real object of this line of questions was to place before the jury portions of such argument seemingly inconsistent with the theory of the prosecution in the trial then pending. Such evidence was both irrelevant and incompetent. Even the shrewdness and ingenuity displayed by counsel in leading up to and framing the questions could not make such evidence admissible as bearing on the animus of the witness. It had nothing to do with the question of animus, which had been fully exploited in other parts of the cross-examination. There was no error in refusing the requested instruction relating to the duty of each individual juror. People v. Perry, 144 Cal. 755, 78 Pac. 284; People v. Rodley, 131 Cal. 259, 63 Pac. 351. The charge of the court fully, clearly and fairly stated the law to the jury. The district attorney was not guilty of misconduct calling for reversal. It would have been better had the prosecuting officer been more careful, but we cannot say that he so far forgot himself as to inject reversible error into a record otherwise clear. Besides, the court gave a pointed instruction referring directly to the objectionable remarks, and, under these circumstances, no harm could have resulted to appellant. Other errors assigned and argued have been examined, but it could serve no useful purpose to lengthen this opinion by referring to each of them. It is enough to say that there is no prejudicial error in the record.

The judgment, and order are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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3 Cal. App. 47

AH GETT v. CARR et al.

(Court of Appeal, Third District, California. Feb. 8, 1906.)

1. Appeal—Review of Facts—Presumptions in Favor of Finding.

Where the evidence introduced on the trial was conflicting, the appellate court will indulge every intendment in support of the verdict by assuming the truth of the evidence tending to support it.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3935-3943.]

2. Payment—Evidence—Sufficiency.

In an action on an account stated, evidence *held* sufficient to sustain a finding for plaintiff on the plea of payment interposed by defendants.

Appeal from Superior Court, Trinity County; J. W. Bartlett, Judge.

Action by Ah Gett against Mary E. Carr and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

William C. Bissell, for appellants. D. J. Hall and H. R. Given, for respondent.

McLAUGHLIN, J. The defendants prosecute this appeal from a judgment against them and from the order denying their motion for a new trial. The action is based on two accounts stated. One of these accounts was stated with plaintiff and the other with one Ah Teet, for whom plaintiff acted in making the settlements hereinafter referred to. The statement of the accounts was admitted, and the principal question presented involves the sufficiency of the evidence to sustain the verdict on the issue of payment. The evidence was conflicting, and in stating the substance thereof we will, as in duty bound under well-settled rules, indulge every intendment in support of the verdict by assuming the truth of evidence tending to support it.

The testimony of plaintiff shows that he had been working in the mine owned by defendants for many years and had made repeated settlements with them. Up to the time of the settlement out of which this controversy arose, he had never given nor been requested to give a receipt. All previous settlements had been made at his cabin near the mine. He and his assignor, one Ah Teet, had been working in the mine for some time, and plaintiff, acting for both, as he, admittedly, had authority to do, was insisting on a settlement. Contrary to the unvarying custom which had been followed for years, he was told to bring his book to the Carr house, where the settlement would be made. When he reached the house the defendant, Mary E. Carr, her son Charles and nephew Homer Robbins were there. As he went in, Robbins left the house for the ostensible purpose of filing some saws. Mrs. Carr remained in her bedroom, and plaintiff and Charles Carr were seated near a table in the dining room. A settlement of both accounts was reached and the amount due to each of the Chinamen agreed upon. The plaintiff was then requested to sign receipts, which were written in a memorandum book carried by Charles Carr. The request was unusual, but plaintiff signed both receipts. Immediately after this was done, Charles Carr left the house and remained outside for awhile. Upon his return he procured a sack of coin from his mother and counted out the two sums previously agreed upon, at the same time saying to plaintiff, "that is your money." Thereupon, and before plaintiff had touched the money which was lying on the table, a masked robber with a pistol appeared in the doorway and said it was his money. The plaintiff attempted to escape from the house, but was kicked back by the intruder, whereupon he sought refuge in Mrs. Carr's bedroom. During his stay in the bedroom he heard two shots outside of the house. When the plaintiff came back into the dining room he asked for his money, but was told that the robber had taken it, and asked what he was going to do about it. The equanimity displayed under conditions calculated to create great excitement was remarkable. There was no commotion other than that made by the Chinaman, who was up on a bed endeavoring to make his escape through a window. A gun was hanging in the corner of the dining room, but Charles Carr made no attempt to use it or pursue the robber. The shots outside apparently created no apprehension for the safety of Robbins in the mind of either aunt or cousin. Mrs. Carr remained in her bedroom, Charles stayed in the house, while Robbins says he was filing saws in the blacksmith shop, and paid no attention to the shots which he heard up near the house. Two dogs, usually clamorous when strangers appeared, made no noise, and the serenity of none save plaintiff was seriously disturbed. After the lapse of several minutes Charles Carr rang a bell, and Robbins, thinking he had received a belated summons to the dinner which his aunt had no apparent intention of preparing, came up to the house. There is some evidence to show that the custom obtaining in that household did not include a midday meal unless the men were working. The defendant Charles Carr and his mother contradict the plaintiff in some important particulars, but on the main fact as to the reception of the money by plaintiff the circumstances narrated by them support the version of plaintiff, who says the money was lying on the table. They say nothing about the robber rifling the pockets of plaintiff or taking the money from his hands. It was not scattered on the floor, and his conduct does not bear out the theory that he calmly replaced it on the table from which the thief "scooped" it with both hands. A constable came from Weaverville, and was met by the dogs barking loudly as he approached the Carr house. The Carrs displayed no anxiety for the apprehension of the robber and manifested no interest in the quest being made by the officer. The action of the robber in firing two shots was strange and unusual. Robbers usually resort to the use of firearms only when necessity compels such course. Noise invites attention, and this they do not crave. True, the shots scared the frightened plaintiff from the window, but this was possibly a mere coincidence. The appearance of the masked individual at the opportune moment was another strange coincidence, but, unfortunately for defendants, there is testimony to show that he appeared on the scene a trifle before the money had passed to the plaintiff. The officer followed the course pointed out as that taken by the robber and found tracks leading down to the not distant river. There the tracks turned into a gulch leading up to the rear of the cow barn, and, by a third coincidence, the Chinaman saw Robbins coming from the direction of the barn when summoned by the bell. It would consume time and space to no purpose if analysis of the evidence was continued further. It is sufficient to say that there is evidence sufficient to sustain the verdict.

Nor could it serve any useful purpose to discuss the interesting and intricate questions presented in appellant's brief. The whole field of inquiry can be covered by the statement that the evidence objected to was a part of res gestæ, and was admissible on the general issue of payment. We find no error in giving or refusing instructions.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

3 Cal. App. 39

In re BOUYSSOU'S ESTATE.

(Court of Appeal, First District, California. Feb. 7, 1906.)

1. APPEAL AND ERROR—PRESUMPTIONS—BURDEN OF SHOWING ERROR.

The action of a court in vacating its former decision in the same cause will be presumed regular and correct, and a person complaining of such an order must show affirmatively that it is erroneous.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3670.]

2. ADMINISTRATORS — APPOINTMENT — JURISDICTION.

Where the court refuses to admit a will to probate, it cannot appoint an administrator with the will annexed, nor can it appoint an administrator, unless the proceedings are in conformity with the steps prescribed in cases of intestacy.

3. APPEAL AND ERROR—PRESUMPTIONS.

Where, on appeal from an order vacating an order appointing an administrator, the record does not show that the clerk had set a day for the hearing of appellants petition to be appointed administrator, or whether there was any proof that the notice required by Code Civ. Proc. § 1373, had been given, it will be presumed that the court found that there was no notice, so that its action in vacating the appointment was proper.

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Application for probate of the alleged last will and testament of Paul Bouyssou, deceased. The application was denied on objections of Alexandre Vayssie, and from an order granting a motion to vacate an order appointing an administrator, Jean Bouyssou appeals. Affirmed.

Phillip I. Manson and Lucius L. Solomons, for appellant. Jacob Samuels, for respondent.

HARRISON, P. J. The appeal herein, as stated in the notice of appeal, is from the order "vacating and setting aside the order refusing probate of the will of the above-named decedent, and appointing Jean Bouyssou administrator of the estate." Upon the motion of the respondent the appeal from the order vacating the order refusing probate to the will was heretofore dismissed (82 Pac. 1066), leaving for consideration only the appeal from the order vacating the appointment of the administrator. The order itself is set forth in the bill of exceptions as follows: "Motion to vacate order refusing probate of will and appointing administrator granted." But the bill of exceptions does not set forth or show any of the proceedings upon which the appointment of the administrator was based, except that it appears therefrom that when the will was filed for probate the appellant filed a petition "for the probate of said will and the issuance to him of letters of administration on the estate with the will annexed"; that a printed copy of a notice fixing a day for the hearing of said petition was received by the respondent through the mail; and that on the day so fixed the will was denied probate and the appellant appointed administrator.

In dismissing the appeal from the other portion of the order we said: "The proceedings for the appointment of an administrator of the estate of a deceased person and for admitting the will to probate are entirely distinct, and are conducted upon different lines of procedure. The appointment of an administrator with the will annexed is to be made in the manner as provided for the granting of letters in cases of intestacy." That motion having been made upon the ground that the order was not an appealable order, we were not called upon to examine the record for the purpose of determining the propriety or correctness of the action of the superior court in making it. Error is never to be presumed; and upon an appeal from an order or judgment of the superior court every presumption will be indulged in support of such judgment or order. It is always incumbent upon the appellant to show affirmatively that the order or judgment from which he has appealed is erroneous; and in the absence of any showing of error the action of the superior court will be affirmed. Estate of Bates, 105 Cal. 646, 38 Pac. 941. As the superior court denied probate to the will, it was not authorized to appoint an administrator with the will annexed; nor was it authorized to appoint an administrator unless the proceedings therefor were in conformity with the steps prescribed in cases of intestacy. The record herein does not show that the clerk had set a day for the hearing of the appellant's petition to be appointed administrator, or whether there was any proof that notice thereof had been given by posting as required by section 1373, Code of Civil Procedure; and for the purpose of sustaining the order appealed from it may be assumed that the absence of such notice was presented to the court, or that the court ascertained that fact by its own inspection of the records in the proceeding. If so, it necessarily held that it was without jurisdiction to make the appointment, and very properly set aside its order therefor. See People v. Greene, 74 Cal. 400, 16 Pac. 197, 5 Am. St. Rep. 448. That the action of a court in vacating its former decision in the same cause will be presumed to have been regularly performed and to be correct, in the absence from the record of any showing of error, see Ingerman v. Moore, 90 Cal. 410, 27 Pac. 306, 25 Am. St. Rep. 138; Paige v. Roeding, 96 Cal. 388, 31 Pac. 264; Von Schmidt v. Von Schmidt, 104 Cal. 547, 38 Pac. 361.

The order of the court vacating its previous order appointing the appellant administrator is affirmed.

We concur: COOPER, J.; HALL, J.

3 Cal. App. 41

PEOPLE v. FLANNERY.

(Court of Appeal, First District. California. Feb. 7, 1906.)

1. LARCENY—EVIDENCE—SUFFICIENCY.

Evidence *held* sufficient to sustain a conviction of grand larceny committed by stealing a scarf pin from the person of another.

2. CRIMINAL LAW—EVIDENCE—DEPOSITIONS—GROUNDS OF ADMISSION—ABSENCE OF WITNESS.

Under Pen. Code, § 686, providing that when a witness has been examined before the committing magistrate, and his testimony has been taken down in question and answer in the presence of defendant, who has cross-examined or had an opportunity to cross-examine him, the deposition of such witness may be read, on its being shown that the witness "cannot with due diligence be found within the state," the people, on the trial of accused, are entitled to read the deposition of a witness taken in compliance with the statute, where such witness cannot with due diligence be found within the state, although they did not move the committing magistrate to put the witness under bonds to secure his appearance, in pursuance of Pen. Code, § 879.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1233, 1234.]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

William Flannery was convicted of grand larceny, and appeals. Affirmed.

J. J. Guilfoyle, for appellant. U. S. Webb, Atty. Gen., for the People.

HALL, J. Defendant was convicted of the crime of grand larceny, and appeals from the judgment and the order denying his motion for a new trial.

He was charged with stealing a diamond pin from the person of Walter N. Kelly. The only grounds urged for a reversal are that the evidence is insufficient to justify the verdict, and that the court erred in allowing the deposition of one L. R. Sargent, taken at the examination of the defendant before the committing magistrate, to be read at the trial. The evidence in the record strongly tends to show that defendant stole the diamond pin from Kelly. Kelly and his friend, Lieutenant L. R. Sargent, were returning from a visit to the U. S. S. New York, and boarded a car of the Sutter street line. Kelly took a position on the front platform, with his back to the front door. When near Powell street defendant and three other men got on the car, which was then quite crowded. Defendant took a position directly in front of Kelly, and placed his left arm, upon which he carried an overcoat, against Kelly's breast, and kept it there until the car approached Taylor street, when he said, "Excuse me, I will go inside," and passed into the car. Kelly at once placed his hand to his scarf, and found that his diamond pin, which he had felt of and found in its place just before boarding the car, was gone. Kelly followed the defendant, who passed through the car and immediately jumped off. Kelly and Sargent followed, and Kelly taxed defendant with the theft. They were then joined by the other three men, who had boarded the car with the defendant. Defendant finally offered to take up a subscription among his friends and pay for the pin, but the episode finally ended in a fight. Shortly after Kelly examined carefully his scarf, and found that some cotton in the makeup of the scarf had been pulled through where the pin (it was a screw stud) had apparently been pulled out of the scarf. The matter particularly urged is that it is not shown that the pin was in place at any time subsequent to the time when Kelly felt it just before boarding the car near the water front; but we think the jury were amply justified in believing that it remained in its proper place until it was deftly removed by defendant.

As to the alleged error in allowing the deposition of the witness Sargent to be read, it is now urged that it was not shown that he was out of the state at the time of the trial, or could not with due diligence be found within the state. An examination of the record, however, discloses that the real point of the objection made to the reading of the deposition was that the prosecution, after learning from the testimony of Sargent, taken at the examination, that he expected to leave for Chile in a few days with his ship, the United States steamship New York, did not move the magistrate to place him under bonds to appear and testify at the trial. It was shown that Sargent gave his testimony before the magistrate September 27, 1904, and left with his ship the following Monday, and that the ship was bound for Valparaiso, Chile, and that Sargent did not expect to return to California until the following March. The trial took place in November, 1904; and throughout the discussion that took place between the court and counsel it seems to have been conceded that Sargent was out of the state and had been ever since the cause had been set for trial. As before stated, the real point of the objection was that the prosecution had not caused the witness to be put under bonds to appear at the trial. The colloquy between the court and defendant's counsel ended as follows: "The Court: Your objection narrows down, then, to the point that this deposition is not available because due diligence was not exercised to produce the witness. Mr. McCloskey: That is the point. The Court: That under section 879 of the Penal Code it was incumbent upon the People, in order to avail themselves of this testimony at this time, to move the magistrate to order that the witness be put under bonds to secure his appearance, and that, having failed to bring that matter to the attention of the magistrate, they are deprived now of the right to offer his deposition. Mr. McCloskey: That is the point."

The objection made at the trial was not tenable and was properly overruled. Under section 686, when a witness has been examined at the examination before the magistrate, and his testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined, or had an opportunity to cross-examine the witness, the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead, or insane, or cannot with due diligence be found within the state. The testimony having been properly taken, the prosecution was not required to cause the witness to be put under bonds.

The judgment and order are affirmed.

We concur: HARRISON, P. J.; COOPER, J.

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3 Cal. App. 36

PEOPLE v. HOWARD.

(Court of Appeal, First District, California. Feb. 7, 1906.)

1. Robbery—Information—Sufficiency.

It is not necessary that an information for robbery should state that an assault was made, nor the kind of fear that was produced, upon prosecutor.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Robbery, §§ 16, 23.]

2. Same—Evidence—Sufficiency.

On a prosecution for robbery, evidence *held* sufficient to show what actuated prosecutor in parting with the money in question.

3. Same—Information—Sufficiency.

On a prosecution for robbery, an allegation of the information that the property taken was a specified sum in lawful money of the United States, the personal property of prosecutor, was sufficient, without further alleging that it was gold coin.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Robbery, § 19.]

4. Criminal Law—Appeal—Review—Assignments of Error.

On appeal the appellate court will not examine instructions upon a general statement in appellant's brief that all the instructions requested by him were improperly refused.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2964, 2966.]

Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

Harry Howard was convicted of robbery, and he appeals. Affirmed.

William Hoff Cook and A. P. Black, for appellant. U. S. Webb, Atty. Gen., for the People.

COOPER, J. Defendant appeals from a judgment convicting him of the crime of robbery, and from an order denying his motion for a new trial.

The first point relied on is the claim that the information is defective and does not state facts sufficient to constitute a public offense, and that the court erred in overruling the defendant's demurrer thereto. The information, omitting the formal parts, alleges that the defendant did "unlawfully and feloniously, and by means of force and fear, take from the person, possession, and immediate presence of one William Little the sum of $20.75, in lawful money of the United States of America, then and there the personal property to said William Little." This is substantially in the language of the statute defining the crime. It also states, in addition to the language contained in the definition, that the $20.75 was the personal property of William Little. It is not necessary that an information, in such case, should state that an assault was made, nor the kind of fear that was produced upon the party robbed. That the information in this case is sufficient, see People v. Riley, 75 Cal. 98, 16 Pac. 544; People v. Ah Sing, 95 Cal. 654, 30 Pac. 796.

It is next urged that there is no evidence to determine what actuated the complaining witness in parting with the money, and that the evidence shows that the money had been previously given by the defendant to the complaining witness. Appellant's counsel, in support of the above claim, cites us to the cross-examination of the witness Meyers, who had testified in behalf of the prosecution at folios 128 to 132. We find by reference to the evidence cited that the witness said: "Do not remember of defendant giving Little any money. He gave him money for the drinks. Don't know whether he gave him money to keep for him." As to what actuated the complaining witness in parting with the money, the evidence shows that defendant was in the saloon of the prosecuting witness at about 11 o'clock at night; that he took a revolver out of his pocket, made the bystanders hold up their hands, told them if anyone turned around he would blow his head off, went to the bar and told Little, who was behind the bar, to give him the money in the cash register and to be quick about it. After Little handed the defendant the money defendant ran out of the door of the saloon, and was afterwards caught by the officer. The above seems to be sufficient to make it "possible to determine what actuated him [Little] in parting with the money." It was not necessary for the information to allege that the $20.75 was gold coin. It is alleged that it was lawful money of the United States, and a person of ordinary understanding knows that $20.75 in lawful money of the United States is personal property. The allegation is sufficient. People v. Millan, 106 Cal. 320, 39 Pac. 605; People v. Richards, 136 Cal. 127, 68 Pac. 477; People v. Stevens, 141 Cal. 488, 75 Pac. 62.

Finally, it is said in appellant's brief that all the instructions requested by defendant were improperly refused. We have often said, and adhere to what we have heretofore said, that we will not examine instructions upon such a general statement. Counsel might as well have said: "We insist upon all the errors assigned in the bill of exceptions."

The judgment and order are affirmed.

We concur: HARRISON, P. J.; HALL, J.

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3 Cal. App. 1

PEOPLE v. MORRIS.

(Court of Appeal, Third District, California. Feb. 3, 1906.)

1. RAPE—EVIDENCE.

In a prosecution for rape, evidence *held* sufficient to sustain a conviction.

2. SAME—PRIOR AND SUBSEQUENT LASCIVIOUS CONDUCT.

In a prosecution for rape, acts of lascivious conduct and of sexual intercourse between defendant and prosecutrix, prior and subsequent to the particular act relied on by the district attorney for a conviction, are admissible to prove the adulterous disposition of the parties.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Rape, § 63.]

3. CRIMINAL LAW—MISCONDUCT OF COUNSEL—FAILURE OF ACCUSED TO TESTIFY—ARGUMENT.

Under Pen. Code, § 1323, declaring that defendant's neglect to testify as a witness cannot in any manner prejudice him, nor be used against him on the trial or proceeding, a statement made by counsel for the state in argument with reference to certain evidence, asking the jury if it was not true why defendant had not taken the stand and denied it, constituted reversible error, though the court promptly rebuked counsel for making the statement, and instructed the jury to disregard it.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1672, 1693.]

4. SAME—ALIBI—BURDEN OF PROOF—INSTRUCTIONS.

In a prosecution for rape, the court, with reference to the defense of alibi, charged that such defense was legitimate if proved, and that defendant was not bound to prove it beyond a reasonable doubt to entitle him to an acquittal, but it was sufficient if he proved it by a preponderance of the evidence, or to create a reasonable doubt as to his presence at the time and place where the crime was alleged to have been committed. *Held*, that such instruction was objectionable as misleading the jury to believe that the defense of alibi was one which defendant was required to prove by a preponderance of the evidence.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1290, 1834, 1835.]

5. SAME.

Where, in a prosecution for rape, the crime relied on under the evidence was narrowed to an act alleged to have been committed at about 4 o'clock on a certain day, and there was evidence given by witnesses for both parties that they were both at the house of the witnesses on that day from half-past 2 until near 6 o'clock in the afternoon, the court at defendant's request should have charged on defendant's defense of alibi, requiring the jury to find beyond a reasonable doubt the commission of the act at or about the hour of the day relied on, and not permitted the jury to find defendant guilty on evidence justifying an inference that the act was committed at some other hour of that day.

Appeal from Superior Court, Napa County; H. C. Gesford, Judge.

J. T. Morris was convicted of rape, and he appeals. Reversed.

Bell, York & Bell, for appellant. U. S. Webb, Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was informed against for the crime of rape upon a female child under the age of 16 years. He was found guilty by the jury and was sentenced to imprisonment for the term of 15 years at San Quentin. He appeals from the judgment of conviction on bill of exceptions.

1. It is urged that the evidence was insufficient to justify the verdict. Much of the evidence is too revolting to be permitted a place in published reports. It appears that the particular act on which the district attorney elected to rely occurred about 4 o'clock p. m., December 25, 1903, at a house particularly located in the city of Napa by the prosecuting witness. Evidence was admitted, against defendant's objection, of prior and subsequent lascivious acts and sexual intercourse before and after the particular act relied upon. Error is assigned as to this evidence, which will be noticed later on. It appears that defendant formerly resided in Kansas and was the owner of a farm which he leased to the father of the prosecuting witness, and the family took possession. The prosecuting witness was then a girl of nine years of age. Her evidence was that defendant commenced at that early period in her life to tamper with her sexually, and debauch her mind preparatory to the accomplishment of his purpose of having sexual intercourse with her when physically practicable. This latter he succeeded in doing when she reached the age of 12 years, although he had made ineffectual efforts at an earlier date. This was in one of the defendant's houses in Emporia, Kan., which the family was occupying. Subsequently the defendant and the prosecuting witness (just when is not shown) came to California together, and five weeks later the father and mother of prosecuting witness followed and went to Fresno county. Defendant was there, and it is in evidence that he continued his adulterous relations with her there. Later this family and defendant returned to Kansas, and some months afterwards, about September, 1903, defendant brought the family to Napa. They first lived at what is called the Boxall house and next moved to 118 Main street some time prior to Christmas, 1903. It appears that some time prior to Christmas the parents were living at Santa Rosa, and the house 118 Main street, Napa, was occupied by defendant, prosecuting witness and her two sisters. The house consisted of two back bedrooms, a kitchen and a front room, the latter used by defendant as a bedroom, in which the prosecuting witness also slept. She was then under the age of 16. Her mother testified that she was 16 on May 31, 1904. Defendant continued his sexual intercourse with her while in this house. Witness Bower came to room at that house in January, 1904, and occupied one of the back bedrooms. The two younger sisters

of prosecuting witness had joined their parents at Santa Rosa before Christmas and defendant and prosecuting witness were alone in the house; she still occupying defendant's room. Bower became engaged to her, and early in March he went to Stockton, and soon afterwards she followed him to Stockton to be married, and they were married there on April 17, 1904. Defendant went with the prosecuting witness to Stockton and remained there, continuing his sexual intercourse with her before and after her marriage, and in April took her to Santa Cruz, where he occupied the same room with her and repeated the acts previously indulged in. It was here the conduct of the parties was so flagrantly indecent and revolting that the prosecuting witness was arrested, and this information against defendant followed in July. The only evidence in rebuttal was the testimony of certain witnesses tending to establish an alibi as applying to the particular hour or near that time as testified to by the prosecuting witness. There was also some evidence tending to contradict certain of her statements as a witness. There was, we think, sufficient evidence to sustain the verdict, though confined to the specific act as elected by the district attorney. The evidence as to defendant's absence from the place alleged at the particular hour testified to by the prosecuting witness produced a conflict in the evidence, but was not sufficient to warrant this court in overriding the conclusion reached by the jury. A question arises as to whether the jury were permitted to give due weight to this evidence under the instructions of the court, which will have attention later.

2. It is contended that the court erred to defendant's prejudice in admitting evidence of acts of lascivious conduct and of sexual intercourse with the prosecuting witness prior and subsequent to the particular act relied on by the district attorney at the trial. In the case of the People v. Koller, 142 Cal. 621, 76 Pac. 500, the information charged incest. The court quoted from People v. Castro, 133 Cal. 11, 65 Pac. 13, as follows: "The doctrine appears to be fairly well settled that, in actions of adultery, seduction, etc., evidence of sexual intercourse between the parties, both before and after the particular act charged, may be introduced in evidence, as tending to sustain the allegation." That was a case of rape upon a female under the age of consent. A new trial was granted by the lower court and the order was affirmed on the ground, however, that the court did not direct the minds of the jury to the particular act of intercourse which it was incumbent on the state to establish by the evidence. Speaking of the evidence of other similar acts, both before and after the particular act relied on, the court adopted the view expressed in the dissenting opinion in the case of State v. Hilberg (Utah) 61 Pac. 215, as follows: "Where, as in this case, there is a continuation of the relation of intimacy and illicit intercourse between the parties to the offense (which was rape in that case), evidence of familiarity and adulterous acts both before and after the act charged is admissible. Such evidence is received to prove the adulterous disposition of the parties implicated. This appears to be the rule sanctioned by the weight of authority." Referring to the rule stated in People v. Castro, the court in the Koller Case said: "We think this is a correct statement of the prevailing rule, and in principle applies not only in prosecutions of adultery, but in prosecutions for all cognate offenses involving sexual intercourse by consent, including incest." In the Koller Case, Mr. Justice Lorigan, speaking for the court, reviewed the authorities with much care and amplification and has relieved us from further examination of the question. The evidence, as we have shown, presents the case of an uninterrupted and intimate adulterous relation for several years, continued up to the time of the arrest of the parties. It is true that the element of consent was immaterial, but the fact of consent is undisputed, and that fact would differentiate the case from one where actual force accompanied the act. What the rule would be as to some remote individual act subsequent to the forcible act charged, is not involved. In such a case as we have here there can be no doubt that the rule in People v. Castro and in People v. Koller should govern.

3. Objection was made to the fact that the court permitted the reading of a certain letter which was finally excluded and the jury told to dismiss it entirely from their minds. Objection was also made to a remark made in his address to the jury by the associate counsel for the prosecution as follows: "If that is not true (referring to certain evidence), why has the defendant not taken the stand and denied it?" The court immediately on objection of defendant to the remark said to counsel that he "had better retract that" and informed the jury of defendant's constitutional right to refrain from testifying, and cautioned the jury to wholly disregard the statement of counsel, and also in the instructions again called the matter to the attention of the jury and instructed them as to the right of the defendant and to disregard the remarks of counsel. It was error for counsel to comment upon or allude in any way to the fact that defendant had refrained from testifying. In People v. Tyler, 36 Cal. 522; People v. McGungill, 41 Cal. 429, and People v. Sanders, 114 Cal. 216, 46 Pac. 153, similar misconduct of the prosecuting officer was deemed prejudicial error, where the court permitted the comment to pass unrebuked. Such misconduct should, we think, work a reversal even where the court promptly, on objection, checks counsel and directs the jury to disregard the statement and instructs them as to defendant's right in the matter, as was done in this case. We are

unable to see that the prejudicial impression irresistibly made upon the minds of the jury by such comment can be entirely removed by anything the judge may say or do after the mischief is done. For similar misconduct several courts of last resort have granted new trials. Hunt v. State (Tex. Cr. App.) 12 S. W. 737; Brazell v. State (Tex. Cr. App.) 26 S. W. 723; Washington v. State (Tex. Cr. App.) 77 S. W. 810, and other cases in that state; Long v. State, 56 Ind. 182, 26 Am. Rep. 19; Angelo v. People, 96 Ill. 209, 36 Am. Rep. 132; Austin v. State, 102 Ill. 261; Yarbrough v. State, 70 Miss. 593, 12 South. 551; Sanders v. State, 73 Miss. 445, 18 South. 541. In this last case a new trial was granted, although the court rebuked counsel and instructed the jury to disregard the comment and counsel himself asked that the remark be considered as withdrawn. Section 1323 of the Penal Code expressly declares that the neglect of defendant to testify as a witness "cannot in any manner prejudice him, nor be used against him on the trial or proceeding." In the face of so plain a provision of law, we cannot say that it may be openly violated without prejudice to the defendant. As to the letter offered by the prosecution it was properly ruled out and will not probably again be offered. It should not have been read in the hearing of the jury. While the misconduct of special counsel was such as to require the case to be remanded for a new trial, there is one other matter calling for attention.

4. The court gave the following instruction: "To the information in this case the defendant has interposed his plea of not guilty, which puts in issue every allegation of the information, and entitles the defendant to the defense known in law as an alibi; that is, that defendant was not at the place where the crime charged is alleged to have been committed at the time when it is alleged to have been committed, but at another place. And I instruct you that such a defense is as proper and legitimate, if proved, as any other. The defendant is not bound to prove his defense of an alibi beyond a reasonable doubt to entitle him to an acquittal, for it is sufficient if he prove it by a preponderance of evidence, or to sufficiently prove it to create a reasonable doubt in your mind as to his presence at the time and place where the crime is alleged to have been committed." The objection made by defendant to this instruction is, first, that it requires proof of the defense of alibi, and, second, that the burden is cast upon defendant of making such proof by a preponderance of the evidence. Citing People v. Cheong Foon Ark, 61 Cal. 527; People v. Bushton, 80 Cal. 160, 22 Pac. 127, 549; People v. Roberts, 122 Cal. 377, 55 Pac. 137, respondent replies by citing People v. Winters, 125 Cal. 325, 57 Pac. 1067. In the latter case a somewhat similar instruction was given, but it was there said that strictly speaking the matter of alibi is not a matter of defense and that the words "if proved," standing alone would be seriously misleading, for, said the court, "an alibi in no sense in order to be successfully involved need be proved, as that word is ordinarily used." In that case, however, we do not find the expression used here, namely, "for it is sufficient if he prove it by a preponderance of evidence." True, the instruction here continues to read: "Or to sufficiently prove it to create a reasonable doubt in your mind as to his presence at the time and place where the crime is alleged to have been committed." It might be urged that this alternative clause removes the objection to the clause immediately preceding. The most favorable view to be taken is that it leaves the jury in doubt as to what is meant, but yet it also authorizes the jury to deal with the issue as one to be proven by a preponderance of evidence; whereas, in fact it need not be proved at all unless the prosecution has established prima facie the facts of time and place, and then not by preponderance or beyond a reasonable doubt, but only "to such a degree of certainty as will, when the whole evidence is considered, create and leave in the minds of the jury a reasonable doubt of the guilt of the accused." Am. & Eng. Enc. Law (2d Ed.) p. 56.

After the jury had retired to consider of their verdict they returned to the court, when the following proceedings occurred: "Juror Robinson—May it please your honor, we would like the instructions read again concerning the hour of the day when this transaction is alleged to have been committed, the instructions upon that point." The court then read a number of instructions, concluding with the one above set forth. All these instructions referred to "the act as charged in the information," namely, December 25, 1903. The court then asked if there was anything further. "Juror Cook: I notice you say the time and place alleged. Does that mean in the information alleged time and place alleged in the information? The Court: That is the instruction, Mr. Cook, time and place alleged, in the information, as I have already instructed you. Under the instruction of an alibi, if you have any doubt, any reasonable doubt in your minds as to whether the defendant was at the place where the crime is alleged to have been committed at the time it is alleged to have been committed, then you must give the defendant the benefit of the doubt and acquit him. Juror Cook: And the time is on the 25th of December, 1903? Would the hour and the minute have anything to do with it? The Court: You must consider all the testimony in the case, and the minute, I will say to you, is not absolutely necessary, but you must believe from the evidence in the case, all of the testimony, that on the 25th day of December, 1903, the defendant committed the act charged against him at No. 118 North Main street, in the city of Napa, county of Napa, state of California, and if you do not believe he committed it at that place you cannot find him guilty. Juror Wing: According to the evidence, the time is alleged to be about 4 o'clock, as I understand it. The Court: You are the judges of the evidence, gentlemen. If there is nothing further, the sheriff will conduct you to the jury room. Juror Robinson: To be a little more explicit, your honor, about this certain hour that is alleged, I think some of the jury have asked this: Does the day cover the ground, or has it got to be confined, as you said, to a certain hour, or a certain minute? The Court: I will charge you this way, gentlemen, as I have already instructed you, which covers the proposition: The act charged here by the people and under the statement of the district attorney in the commencement of this trial, is charged and fixed at 118 North Main street on the 25th day of December, 1903. Now, unless you believe from the evidence to a moral certainty, and beyond a reasonable doubt that on the 25th day of December, 1903, at No. 118 North Main street in the city of Napa, county of Napa, state of California, the defendant had sexual intercourse with this prosecutrix, May Penrice, your verdict must be not guilty. Mr. Bell: To which statement of the court the defendant duly excepts. Now, if your honor please, in behalf of the defendant and in the interest of fair play, we ask this court to instruct the jury that any finding they may make upon what occurred upon the 25th day of December, 1903, as between this defendant and the prosecuting witness in this case, must be based upon the testimony produced here. The Court: That is what I have already instructed them, Mr. Bell, over and over again. The request of the defendant was denied and exceptions taken."

It is clear that the trouble the members of the jury were having grew out of the fact that the prosecuting witness had testified to but one act on the day charged and that it occurred about 4 o'clock in the afternoon, while the information fixed no hour of that day. As the evidence stood the crime charged was narrowed down to about 4 o'clock. There was testimony given by three witnesses that both defendant and the prosecuting witness were at the house of these three neighbors from about half-past 2 until near 6 o'clock and until after dark and lamps were lighted before they departed. The jury manifestly desired some instruction as to whether they were confined to the hour or about the hour, fixed by the prosecuting witness, or could apply the evidence to any hour of the day charged. As this was the only act relied on by the prosecution it seems to us that the court should have given an instruction meeting the difficulty the jury were having. Instead of doing so the court in effect and in terms charged the jury that they could consider the evidence with reference to the entire day. In this view of the case the jury might have found the evidence of alibi sufficient to overcome the evidence of the particular act relied on by the prosecuting attorney, and yet from all the circumstances the jury may have found the defendant guilty of a similar act at some other hour of the day. But there was no evidence of sexual intercourse at any other hour of that day on which a conviction could rest. The fact that the parties occupied the same room and at that time were the only occupants of the house in which they were living, went to the jury as a circumstance tending to support the particular act sworn to, as did also the evidence of a long course of adulterous cohabitation, but it was not sufficient to establish the charge although the jury might have thought it sufficient. Sexual intercourse was the physical fact that had to be established, and it could not be inferred from the mere fact alone that the parties were living together in the same house. Proof of alibi need not include the whole of the day on which the offense was alleged to have been committed; it was sufficient if it created in the minds of the jury a reasonable doubt of defendant's presence at the commission of the offense. As the case was finally submitted by the court we do not think the jury were sufficiently or correctly instructed as to the issue of alibi. The request of defendant's attorney for more definite instruction on this point was reasonable and should have been complied with. The court doubtless refrained from instructing the jury further lest it might err by instructing as to the facts. We think, however, an instruction might have been framed so as to reach the point and yet not invade the prerogative of the jury. It does not often happen that an alleged crime is narrowed to a particular hour; often not even to a particular day. But, when it is so narrowed, the time, even the hour, may become important. It is true, as urged by the Attorney General that the jury may have disbelieved defendant's witnesses and believed the prosecuting witness. Had the jury reached the verdict after sufficient and correct instructions it could not have been disturbed, for the jury had the right to judge of the credibility of the witnesses as well as of the weight of the evidence.

The judgment and order denying a new trial are reversed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

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2 Cal. App. 659

NATIONAL BANK OF CALIFORNIA v. LOS ANGELES IRON & STEEL CO. et al.

(Court of Appeal, Second District, California. Jan. 8, 1906. On Rehearing, Feb. 7, 1906.)

1. JUDGMENT—PAYMENT—EXTINGUISHMENT.

Where none of the proceedings specified in Code Civ. Proc. § 709, were taken to keep a judgment alive for the benefit of one of the judgment debtors paying the same, the judgment was extinguished by such payment.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1653-1655.]

2. Same—Assignment of Judgment—Rights of Assignee.

Where a judgment is paid by one of the defendants, and is assigned for his benefit, the right of the assignee is equitable in its nature, and extends no farther than the right to use the judgment as a security for the payment of the amounts properly due from the other judgment debtors.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1655.]

3. Same—Revival of Judgment—Notice—Hearing.

Since an order for the enforcement of a judgment over five years old is to be granted only, in the exercise of a sound discretion of the court, on a showing sufficient to overcome the presumption that the judgment is barred, such proceeding can be properly taken only on notice and hearing.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1611.]

Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by the National Bank of California against the Los Angeles Iron & Steel Company, and others. From an order for the enforcement of a judgment over five years old, and from an order refusing to set aside such former order and recall an execution issued thereon, defendant John Rebman appeals. Reversed. Opinion modified on rehearing.

J. L. Murphey and James Taylor Rogers, for appellant. Charles H. McFarland, for respondent.

SMITH, J. Appeals from an order for the enforcement of a judgment over five years old, and from an order refusing to set aside the former order and to recall the execution thereon issued. The latter order was issued on affidavits, and, among others, on that of R. H. Herron, a defendant in the suit, from which it appears that at some date unspecified, but before the original order, "he paid the full amount of the judgment to [the plaintiff] with interest." And as it does not appear that any of the proceedings specified in section 709 of the Code of Civil Procedure were taken by him, it is clear that the judgment was extinguished. Civ. Code, § 1474; Reynolds v. Lincoln, 71 Cal. 184, 9 Pac. 176, 12 Pac. 449; Estate of Baby, 87 Cal. 202, 25 Pac. 405, 22 Am. St. Rep. 239. It appears, indeed, from the affidavit of Herron, that the judgment was, at his instance, assigned to one Hays in trust for himself and his attorney but the date of the assignment is not given, and, from aught that appears to the contrary, years may have elapsed between the payment and the assignment; and, indeed, from the careful omission of dates in the affidavit, it may, perhaps, be inferred that such was the case. But at all events, it clearly appears that the assignment was subsequent to the payment; or, at least, the contrary does not appear. Indeed, giving to the term payment its strict and proper construction, it may be inferred from the payment itself that there was no assignment; for if there had been, there would have been no payment of the judgment, but a purchase of it only; a payment and an assignment being essentially different transactions.

In this connection, it should be observed that, assuming the validity of an assignment of a judgment to one of the defendants (Williams v. Riehl, 127 Cal. 365, 59 Pac. 762, 78 Am. St. Rep. 60; Freeman on Judgments, § 472), yet the right of the assignee to the judgment in such case is rather an equitable than a legal right, and extends no further than to the use of the judgment as a security for the payment of the amounts properly due from other parties. It, therefore, would seem to be a right that can be exercised only after an affirmative showing to the court and a determination of the indebtedness of the other defendants: By which we mean, not that a new suit is required, but that, at least, application should in all cases be made to the court. As to the original order, it appears that this was made without notice to the defendant, and without any showing to the court other than such as was furnished by the record itself. On the latter account, the order was clearly erroneous; for it has been held that the order is to be granted only "in the exercise of a sound discretion by the court" (Wheeler v. Eldred, 121 Cal. 28, 53 Pac. 431, 66 Am. St. Rep. 20; Id., 137 Cal. 38, 69 Pac. 619), which implies that it is not to be issued as of course, but that a showing must be made to overcome the presumption arising from the bar of the statute.

For the same and other reasons it was also error to entertain the motion without notice; and, indeed, we are of the opinion that notice was essential to give jurisdiction to the court, and this for several reasons: (1) By the terms of the act, the order can be made only "upon motion or by judgment for that purpose founded upon supplemental pleadings." In the latter case, repeated notice would be given, as in other proceedings in court, and the coupling of the two clauses together would seem to imply that where the proceeding is by motion it should substantially conform to the regular proceeding in the matter of notice and other matters. The case, therefore, presents an obvious occasion for the application of the maxim, "Noscitur a sociis." (2) The conclusion thus reached from the language of the act in confirmed by a regard to its intention; for it is impossible to conceive of any reason for a distinction in the matter of notice between the two modes of procedure; and (though the assumption may be sometimes a violent one) we must assume that the Legislature did not act without reason. (3) This conclusion is also confirmed by the consideration that the proceedings under this section are a substitute for the writ of scire facias; where notice was always required. Bouvier's Dict. "Scire Facias"; McDonald v. Dickson, 85 N. C. 250. (4) Finally, after the expiration of five years, the action is barred (Code Civ. Proc. § 336), and hence, there no longer exists any cause of action upon the judgment. A new life may, indeed, be given to the judgment in the manner prescribed in section 685 of the Code of Civil Procedure; but in the absence of such action the defendant stands free of any liability on account of the judgment, or otherwise, and it seems clear that to revive or create a liability against him without giving him an opportunity to be heard would be in contravention of the constitutional provision that forbids any man to be deprived of his property without due process of law.

It may be proper here to note that in Bryan v. Stidger, 17 Cal. 270, involving section 214 of the practice act as it originally stood (Hittell, Gen. Laws, art. 5153, note "d"; Mann v. McAtee, 37 Cal. 11), it was held that the order for issue of execution might be made ex parte; but the provisions of the original section are essentially different from those of the section of the Code now under consideration; and, indeed, the decision of the court in that case is apparently disapproved in the subsequent case of Mason v. Cronise, 20 Cal. 214, where it is said that the decision in Bryan v. Stidger probably led to the repeal of the act.

For these reasons, the orders appealed from must be reversed, and it is so ordered.

We concur in the judgment: GRAY, P. J.; ALLEN, J.

On Petition For Rehearing.

SMITH, J. It will be proper to say, in denying the petition for rehearing in this case, that our attention is called by the petition to the decision in Harrier v. Bassford, 145 Cal. 529, 78 Pac. 1038, which it is assumed had escaped our attention. But in that case, the judgment on which execution had been issued was not barred by the statute, and this fact was decisive of the case. But the court also considered the question, whether—assuming that after five years from the date of the judgment's becoming final, an order could be made, without notice—the act would be unconstitutional; and it was held that it would not be. And in deference to this expression of the court (which was not present to my mind when I was writing the opinion in this case) it will be proper to modify the opinion by striking therefrom what is said as to what would be the constitutionality of the act upon the construction contended for.

But the question whether the act was to be construed as authorizing such an order, without notice to the defendant, was not discussed or, apparently, considered in that case; and what is said upon the subject should, I think, be construed as referring to the question then under consideration, and, hence, as qualified by the assumed hypothesis. Nor have we any reason to suppose that what was said was intended to be decisive of the important question involved in the construction of the act. The question is, therefore, I think, to be regarded as an open one, and I can see no reason for altering my opinion that it is, in all such cases, error for the court to order an execution to be issued on an ex parte application; and this, I think, is necessarily implied in the decisions in Wheeler v. Eldred, 121 Cal. 28, 53 Pac. 431, 66 Am. St. Rep. 20; Id., 137 Cal. 38, 69 Pac. 619. I am of the opinion, therefore, that the opinion heretofore filed in this case should be amended by striking therefrom the passage, commencing "(4) Finally," etc. (to the end of the paragraph), and that the petition for rehearing be denied; and it is so ordered.

We concur: GRAY, P. J.; ALLEN, J.

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2 Cal. App. 659

NATIONAL BANK OF CALIFORNIA v. LOS ANGELES IRON & STEEL CO. et al. (L. A. 1,696, 1,697.)

(Supreme Court of California. March 17, 1906.)

COURTS—TRANSFER OF CAUSES—TIME FOR APPLICATION.

Where a judgment was rendered by a District Court of Appeal on January 8, 1906, reversing the order appealed from, and on February 7th following the court denied a petition for rehearing, but modified its opinion, without changing the final judgment, the judgment became final 30 days after January 8, 1906, and hence an application to transfer the case to the Supreme Court in bank, filed March 12, 1906, was not filed within 60 days, as required by Const. art. 6, § 4, and was therefore too late.

In Bank. Appeals from Superior Court, Los Angeles County; Waldo M. York, Judge.

On application to transfer an appeal from a District Court of Appeal to the Supreme Court in bank. Application denied.

J. L. Murphey and James Taylor Rogers, for appellant. Charles H. McFarland, for respondent.

PER CURIAM. In this cause the District Court of Appeal of the Second District, on January 8, 1906, rendered its judgment, reversing the order appealed from. 84 Pac. 466. Afterwards, within 30 days, the respondent made application to the District Court for a rehearing of the cause. Supra. On February 7, 1906, the District Court denied the petition for a rehearing, but modified the opinion rendered on January 8th, by striking out certain parts thereof. The original judgment of January 8th was not in any respect changed or affected by the order of February 7th, but remained in full force and effect, as from its date. On March 12, 1906, one of the respondents filed in this court an application for an order transferring the cause to this court for reconsideration, after judgment of the District Court of Appeal. This was more than 60 days after the rendition of the judgment by the District Court, reversing the order of the court below, and more than 30 days after the cause became final in the District Court. The order of the District Court made on February 7th, was not the final judgment of that court in the cause. It did not purport to make any change in the final judgment, but merely denied the application for rehearing. The modification of the opinion did not affect the judgment previously rendered. Under the provisions of section 4, art. 6 of the Constitution, the judgment of the District Court of Appeal became final in that court on February 7th, and in this court on March 9, 1906. This court is therefore without power, after the lapse of 60 days from the giving of the judgment of the District Court, to act upon the present application to transfer the cause. It was presented too late.

The application for transfer is dismissed.

149 Cal. 67

In re DUNSMUIR'S ESTATE. (S. F. 4,323.)

(Supreme Court of California. March 28, 1906.)

WILLS—PROBATE—VACATION OF ORDER ADMITTING WILL—VALIDITY.

Where a motion to vacate an order admitting a will to probate is not made within the time prescribed by Code Civ. Proc. § 473, and the order admitting the will to probate is not void on its face, an order granting such motion is erroneous and void.

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Motion by Edna Wallace Hopper for the vacation and amendment of an order admitting the last will of Alexander Dunsmuir to probate and appointing James Dunsmuir executor. From an order vacating and annulling the order admitting the will to probate and appointing the executor, James Dunsmuir appeals. Reversed.

Andrew Thorne and Charles S. Wheeler (J. F. Bowie, of counsel), for appellant. Campbell, Metson & Campbell (G. D. Woods, of counsel), for respondent.

PER CURIAM. On May 9, 1900, an order was made in the superior court of the city and county of San Francisco, Cal., admitting to probate the last will of Alexander Dunsmuir, deceased, upon an authenticated copy of the will and of a decree of a court in British Columbia admitting it to probate, and appointing James Dunsmuir executor; he being named in the will as executor thereof. The administration of the estate of said Dunsmuir, deceased, proceeded regularly and culminated in a decree of final distribution and the discharge of the executor. This decree was entered June 4, 1901, and the estate was distributed to said James Dunsmuir, who was the sole devisee and legatee under the will. On March 30, 1905—nearly five years after the said order admitting the said will to probate, and four years after the order of final distribution and discharge of the executor—on motion of Edna Wallace Hopper claiming to be an heir of the deceased, the said superior court made an order vacating and annulling the said order admitting said will to probate and appointing said Dunsmuir executor. From that order James Dunsmuir appeals.

As the motion to vacate the order admitting the will to probate was not made within the time prescribed in section 473, Code Civ. Proc., the order granting said motion was erroneous and void, unless the order admitting the will to probate was itself void on its face. But this court has definitely determined in the case of James Dunsmuir, Petitioner, v. Coffey, Judge of Superior Court (Cal. Sup.) 82 Pac. 682, that said order admitting said will to probate was not void on its face, and that the order vacating it, from which this present appeal is taken, was void. On the authority of that decision the order herein appealed from must be reversed. The decision in the Estate of Clark (Cal. Sup.) 82 Pac. 760, cited by respondent, is not in point. That case came here upon a regular appeal and directly involved the question whether or not the order there appealed from was erroneous; it, therefore, is not inconsistent with the decision in Dunsmuir v. Coffey.

The order appealed from is reversed.

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149 Cal. 35

MANNING v. APP CONSOLIDATED GOLD MINING CO. (two cases). (Sac. 1,198, 1,257.)

(Supreme Court of California. March 27, 1906.)

1. MASTER AND SERVANT—INJURIES TO SERVANT — COMPLAINT — SUFFICIENCY — CAUSE OF INJURY.

In an action by a servant for injuries sustained while working in a mine, the complaint alleged that defendant operated a skip attached to a cable, by means of which skip timbers and other articles used in the mine were lowered, and that on a certain day while plaintiff was employed at the bottom of the shaft defendant negligently lowered in the skip mining poles which were longer than the depth of the skip, without lashing them to the cable. It was also alleged that defendant negligently failed to provide ropes with which to lash such timbers and that while defendant was negligently lowering poles which were longer than the depth of the skip and were not lashed, a pole fell down the shaft and injured plaintiff. *Held*, that under Code Civ. Proc. § 452, declaring that for the purpose of determining whether a pleading states a cause of action it must be liberally construed with a view to substantial justice, the complaint was sufficient to show that the pole which fell down the shaft and injured plaintiff was one of those which defendant was negligently lowering without being lashed, although there was no direct allegation to this effect.

2. TRIAL — INSTRUCTIONS — CHARGING AS TO MATTERS OF FACT.

In an action by a servant for personal injuries resulting from being struck by a mining pole, which fell down the shaft because of the alleged negligence of defendant in failing to lash the pole to the cable of the skip, an instruction that if the jury found that the pole was lowered by defendant without being lashed and the failure to lash the pole contributed directly to the injury of the plaintiff, the omission to lash the pole was evidence of negligence and the verdict should be for plaintiff, was in conflict with Const. art. 6, § 19, prohibiting the court from charging the jury as to matters of fact.

3. SAME—OPERATION OF MINES—REGULATION—CONSTRUCTION OF STATUTE—LASHING TIMBERS TO BUCKET.

St. 1893, p. 82, c. 74, § 1, requires the installation in all mines of a system of bell signals. Section 2 declares that for the purpose of enforcing the code of signals established certain rules are to be established, and rule 4 provides that all timbers, tools, etc., longer than the depth of the bucket must, before being hoisted or lowered, be securely lashed at the upper end to the cable and that miners must know that the timbers, etc., will ride up and down shafts without catching on rocks and timbers and being thrown out. Rule 5 provides that the foreman shall see that a printed sheet of rules and signals shall be posted, and rule 6 states that all rules must be obeyed and that any violation will be sufficient ground for discharging the party or parties. Section 3 declares that any person or company failing to carry out any of the provisions of the act shall be responsible for all damages to any person working in the mine during the time of such failure. *Held*, that rule 4 does not impose a positive personal obligation on persons and corporations operating mines to see that timbers longer than the bucket are lashed to the cable so as to render such persons and corporations absolutely liable for all injuries resulting from a failure to lash such timbers.

In Bank. Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by Daniel Manning against the App Consolidated Gold Mining Company. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendants prosecute separate appeals. Affirmed as to the appeal from the judgment, and reversed as to the appeal from the order denying the motion for a new trial.

A. H. Ricketts and Carter, Ricketts & Dolph, for appellant. J. P. O'Brien, for respondent.

LORIGAN, J. In this action two separate appeals are taken by defendant, one from the judgment in favor of plaintiff for the sum of $5,000, which is taken on the judgment roll, the other an appeal from the order denying the motion of defendant for a new trial, which is presented upon a statement of the case.

Upon the appeal from the judgment the only point made is that the complaint fails to show by proper averment that the injury complained of by plaintiff was caused by the negligent act of the defendant. The complaint alleges that the defendant is a corporation, and at the time plaintiff was injured was the owner and engaged in working the App mine in Tuolumne county; that said mine was operated by and through an inclined shaft sunk to a depth of about 1,140 feet from the surface; that levels and drifts were run at various points between the surface and the bottom of the shaft; that tracks were laid in and along said shaft over and upon which a skip was run; that said skip was attached to a cable and was lowered and hoisted by means of it, and that the skip was used for the purpose, among others, of lowering into the mine through said shaft timbers, mining poles and other things that were used in the mine; that on the 16th day of February, 1902, the plaintiff was in the employ of the defendant as a miner and was working in said mine at the bottom of the shaft in sinking the shaft; that on said day the defendant negligently lowered in the skip and down the shaft into said mine mining poles that were longer than the depth of the skip without lashing them at the upper end of the cable, and without lashing them at all. Also that the defendant on said day negligently failed to provide ropes with which to lash to the cable mining poles that were longer than the depth of the skip; that defendant also negligently failed to provide a safe and secure place for the plaintiff to work in said mine; that on the 16th day of February, 1902, while plaintiff was working as a miner in the bottom of said shaft, and while the defendant was carelessly and negligently lowering down the shaft in the skip mining poles that were longer than the depth of the skip without being lashed, and while the defendant was working and operating said App mine without providing ropes with which to lash the mining poles, and while the defendant was operating said mine without providing a safe and secure place for the plaintiff to work in the bottom of the said shaft, a mining pole that was longer than the depth of the skip, to wit, a mining pole about 18 feet long fell down the shaft to the place where plaintiff was working and struck him, causing very serious injuries; that the falling of said mining pole down said shaft was caused by and through the carelessness and negligence of the defendant in lowering down the said shaft in said skip mining poles that were longer than the depth of said skip without lashing them, and also in not providing safe and suitable appliances with which to lower down the shaft in the skip mining poles that were longer than the depth of said skip, and also in not providing a safe and secure place for the plaintiff to work in said mine.

Defendant interposed a general demurrer to the complaint which was overruled. The particular point urged against the legal sufficiency of the complaint on this appeal is that, while it alleges that the defendant at the time mentioned negligently conducted itself in lowering down the shaft mining poles that were longer than the depth of the skip, without lashing them to the skip cable, or lashing them at all, it is not alleged that the fall of the mining pole which caused the injury to plaintiff was the result of that negligence; that there is an absence of any allegation that the act of negligently lowering said poles was the direct or proximate cause of such injury. In this view it is contended that, as far as appears from any allegation in the complaint, the pole by which plaintiff was injured may have fallen from the surface while being placed in the skip and before it was in a position to be lashed, or have fallen from some point within the shaft after being safely landed at some station in the shaft below the surface, or escaped down the shaft while being handled at some station above the point where plaintiff was at work, after it had been unloaded from the skip and when danger from failure to lash had passed.

It must be conceded that the complaint is open to criticism in not directly and distinctly alleging that the pole which fell and injured plaintiff was one of those which was being lowered unlashed down the shaft in the skip. The most, however, that can be urged against the complaint in this respect is that the causal relation between the alleged negligent lowering of unlashed poles in the skip and the injury to plaintiff is not alleged with sufficient certainty; that the allegation is too general. Conceding this to be true, there was no entire absence of averment upon this subject, but simply a defective averment which should have been reached by special demurrer. Silveira v. Iversen, 128 Cal. 187, 60 Pac. 687; Eachus v. Los Angeles, 130 Cal. 496, 62 Pac. 829, 80 Am. St. Rep. 147; Hunt v. Davis, 135 Cal. 35, 66 Pac. 957. Besides, in construing a pleading for the purpose of determining its effect the rule is that its allegations must be liberally construed with a view to substantial justice between the parties. Code Civ. Proc. § 452. All the allegations in the complaint previous to the one which deals with the falling pole are addressed to alleged negligence of the defendant in the method of lowering and the act of lowering poles in the skip which were longer than the skip itself. The gist of the negligence is alleged to consist in lowering them in the skip unlashed.

As to the fall of the pole, it is then alleged that while such lashing of poles was going on, a pole longer than the depth of the skip fell down the shaft and injured plaintiff. It is true that it is not directly alleged that the pole which fell was one of the unlashed poles which were then being lowered, but, taking the allegation as to the falling of a pole in connection with the allegation immediately preceding, that it occurred while unlashed poles were being lowered, we think the complaint must be fairly construed as substantially charging that the pole which fell was one of those which were being lowered unlashed in the skip down the shaft. It would hardly be a fair construction to hold, in view of the reiterations in the complaint of negligence on the part of defendant in lowering unlashed poles, with the further and accompanying allegation that plaintiff was injured by a pole falling while such lowering was going on that all this might have reference to some other pole than one of those which were being lowered in the skip at the time. Evidently the only poles which were referred to in the complaint were those which were being actually lowered unlashed at the time of the accident, and, fairly construed, the allegation that a pole fell while this was being done had reference to the falling from the skip of one of the poles which were being lowered therein. So construed, the complaint stated a cause of action and is sufficient to sustain the judgment.

As to the second appeal which is taken by the defendant from the order denying its motion for a new trial. We have already referred to the allegations in the complaint. In its answer defendant denied any negligence on its part in lowering said poles in the manner stated in the complaint; denied that it had failed to and did not furnish rope with which to lash all mining poles sent down into the mine, and affirmatively averred, among other things, that at the time the accident occurred, the most approved method and manner of lowering them down the shaft had been adopted and was then in use, and that it had supplied suitable appliances and safe materials for that purpose. To these issues the evidence in the case was addressed. It appears from the evidence that the plaintiff was injured by the fall of a pole, one of four which were being sent down in the skip to the 900-foot level of the mine; that these poles were longer than the depth of the skip, which measured about 11 feet, and were sent down by the skip tender of defendant, whose duty it was to lower timbers and mining poles down the shaft; that these mining poles were sent down unlashed, save that chains attached to the middle of the skip on each side of it were brought around them, but evidently were not sufficiently tightened to hold them securely in place; that in the descent of the skip one of these poles—18 feet long—fell out of it and lodged in the shaft; that immediately thereafter this pole became dislodged, fell to the bottom of the shaft and injured plaintiff who was working there. There was evidence on the part of defendant that the chains on the skip could have been adjusted, by the skip tender, about the skip and poles so as to securely hold in the skip the poles sent down, and that the chains were sufficient for that purpose, though there was also evidence on the part of plaintiff that these chains, from their position in the skip, could not be tightly fastened about such a small load and that these poles could not be secured in the skip without being lashed with rope. Upon the issue as to whether the defendant had furnished lash ropes for use by the skip tender in lashing the poles, the evidence in the case was conflicting; that introduced on the part of the plaintiff tending to show that it had not, while that upon the part of the defendant tending to show that it had furnished ample rope to the skip tender for that purpose, with instructions to use it in lashing the poles. It is unnecessary to further detail the evidence, as enough of it is shown under which to consider the grounds urged by appellant for a reversal of the order.

The principle point made by appellant is that the court erred in its instructions to the jury. The instruction particularly complained of was one given at the request of the plaintiff, and reads: "(3) If you believe from the evidence that the defendant, the App Consolidated Gold Mining Company, on the 16th day of February, 1902, lowered in the skip and down the shaft in the App mine any mining pole that was longer than the depth of said skip, without being securely lashed at the upper end of the cable by means of which cable said skip was hoisted and lowered in said mine, and if you also believe from the evidence that the failure of the defendant to securely lash at the upper end of the cable any mining pole longer than the depth of said skip, that was being lowered down the shaft in said mine, contributed directly to the injury of the plaintiff, provided, however, that you also believe from the evidence that the plaintiff sustained any injuries, then I charge you that such omission on the part of the defendant is evidence of negligence, and your verdict should therefore be for plaintiff." This instruction, under the issues and the evidence in the case, was clearly in violation of section 19, article 6 of the Constitution prohibiting the court from charging the jury as to matters of fact, unless the giving of it can be sustained for the reasons presently to be considered. It was a question exclusively for the jury to determine whether, under all the evidence presented to it, the defendant was guilty of negligence in the respect charged. By its instruction the court told them that the fact itself that poles were sent down unlashed constituted negligence on the part of defendant; that this fact constituted negligence per se. In so doing it determined the sufficiency of the evidence as to the very matter which in this case was within the exclusive providence of the jury from all the evidence to determine. While it was proper for the court to instruct the jury as to the degree of care to be exercised by an employer in the prosecution of his business, towards ensuring the safety of his employés, still, whether, under the evidence in a case, he did exercise due care and vigilance in that respect, or was guilty of carelessness and negligence by failing to do so, is a question of fact upon which the defendant has the right to the judgment of the jury. Weiderkind v. Tuolumne Water Co., 65 Cal. 431, 4 Pac. 415; Kerrigan v. Market St. Ry. Co., 138 Cal. 506, 71 Pac. 621; Hampton v. Occidental and Oriental S. S. Co., 139 Cal. 706, 73 Pac. 579.

When the court instructed the jury that if mining poles longer than the depth of the skip were sent down the shaft unlashed to the cable it constituted negligence on the part of defendant, it assumed a determination of the very question at issue. In effect, by this instruction the court told the jury to return a verdict for the plaintiff. This was necessarily that effect, because there was no dispute in the case but that poles, longer than the depth of the skip, were sent down by the skip tender unlashed to the cable, nor any reasonable question under the evidence but that this fact contributed directly to the injury of plaintiff. The question, however, was whether, under all the evidence in the case, the defendant was shown to have been negligent in the discharge of any duty it owed plaintiff. In determining that question there was more to be taken into consideration by the jury than the mere fact that the skip tender sent down mining poles unlashed. It was an issue in the case whether the defendant had furnished reasonable and adequate appliances with which its skip tender could have carefully and safely secured these poles in the skip, and there was evidence tending to show that it had. There was no personal duty devolving on the defendant to lash the poles, unless it was cast on it under the terms of a statute shortly to be referred to. While the law required defendant to furnish suitable and proper appliances with which the work to be performed by its employés might be safely done, when these had been furnished the duty of defendant in that particular had been discharged. If in the case at bar the defendant had furnished to its skip tender sufficient lash rope with which he could have fastened the mining poles before they were sent down into the mine, then its duty to furnish proper appliances was fulfilled because it is not claimed by the plaintiff that it was derelict in any other particular as regards such appliances. It was not responsible for the negligence of the skip tender in failing to properly adjust the appliances and materials after they had been furnished to him. Having furnished the necessary appliances, the matter of adjustment pertaining to the duties of the skip keeper was a mere detail in the discharge of his work. Burns v. Sennett, 99 Cal. 368, 33 Pac. 916; Callan v. Bull, 113 Cal. 593, 45 Pac. 1017; Kerrigan v. Market St. Ry. Co., 138 Cal. 510, 71 Pac. 621; Leishman v. Union Iron Works (Cal.), 83 Pac. 30. In fact, the court so instructed the jury to this effect at the request of defendant in the case at bar, but it will be perceived that such an instruction was radically at variance with the instruction now in question.

If, as contended for by defendant, it furnished sufficient appliances to the skip tender for use in securing and lashing the poles during their descent into the mine, and the latter failed to use them for the designed purpose, the defendant could not be made responsible for that failure. Any injury sustained by plaintiff through such failure would be the result of negligence on the part of a fellow employé with plaintiff in the same general employment for which, under a familiar principle of law, the defendant would not be responsible. The defendant was entitled under proper instructions from the court to have these matters considered by the jury upon the question of its alleged negligence. This right, under the instruction complained of, was denied, and the jury erroneously instructed that the act of the skip tender in sending down the poles in the manner referred to therein was negligence per se and the defendant responsible for the resultant injury. In supporting this instruction of the court we do not understand counsel for respondent to question but that, under the general rule of law the duty of defendant to furnish suitable appliances to its employés for the purpose of safely performing their labor was discharged, when it furnished the necessary rope to the skip tender with which to have lashed the mining poles in question when he sent them down in the skip. On the contrary, the position of counsel for respondent is, conceding this to be the general rule, that it has no application to the case at bar because he claims that by a statute of this state it is made the positive personal duty of defendant to securely lash, in the manner as stated in the instructions, all mining poles of the length which were being sent down in the shaft when plaintiff was injured, and that irrespective of all other considerations, it was negligence per se on the part of defendant under the statute to send them down without being lashed to the cable, as the statute required.

The statute to which counsel for respondent refers as sustaining this claim is one passed by the Legislature of this state at its session of 1893 (St. 1893, p. 82, c. 74), and is entitled: "An Act to establish a Uniform System of Mine Bell Signals, to be used in all the Mines operated in the state of California and for the protection of Miners." Referring to such portions of this act as are germane to the present inquiry, section 1 thereof declares: "Every person, company, corporation, or individual, operating any mine within the state of California—gold, silver, copper, lead, coal, or any other metal or substance, where it is necessary to use signals by means of bell or otherwise, for shafts, inclines, drifts, crosscuts, tunnels, and underground workings—shall, after the passage of this bill, adopt, use, and put in force the following system or code of mine bell signals, as follows:" Here immediately follows, as part of this section a system of mine bell signals with a statement as to the meaning and purpose of each, for example: "1 bell, to hoist. 1 bell, to stop if in motion. 2 bells, to lower," and a number of other bell signals and their meanings. Among these signals is found: "6 bells, send down timbers (See Rule 4)." Section 2 provides: "For the purpose of enforcing and properly understanding the above code of signals, the following rules are hereby established." Immediately following are six rules. Rule 4 reads: "All timbers, tools, etc., 'longer than the depth of the bucket' to be hoisted or lowered, must be securely lashed at the upper end of the cable. Miners must know they will ride up or down the shaft without catching on rocks or timbers and be thrown out." Rule 5 reads: "The foreman will see that one printed sheet of these rules and signals for each level and one for the engine-room are attached to a board not less than 12 inches wide by 36 inches long, and securely fasten the boards up where signals can be easily read at the places above stated." Rule 6 reads: "The above signals and rules must be obeyed. Any violation will be sufficient grounds for discharging the party or parties so doing. No person, company, corporation, or individuals operating any mine within the state of California, shall be responsible for accidents, that may happen to men disobeying the above rules and signals. Said notice and rules shall be signed by the person or superintendent having charge of the mine, who shall designate the name of the corporation or the owner of the mine." "Sec. 3. Any person or company failing to carry out any of the provisions of this act shall be responsible for all damages arising to or incurred by any person working in said mine during the time of such failure."

It is insisted by respondent that rule 4 of this statute, supplemented by the closing section of the act—section 3—imposed a personal duty upon the defendant as a mining corporation to securely lash all mining poles of a certain character in a designated manner, when they were to be sent in a skip down the shaft, and made it responsible for any injury occasioned through a failure to comply with the statutory rule, and it is only fair to say that it was doubtless upon such a construction of the statute that the lower court based the instruction complained of. If the construction contended for by respondent were true, it would no doubt support the correctness of the instruction, because it is well settled as the law in this state that failure to perform a duty imposed upon one by statute or other legal authority, which omission has proximately contributed to an injury, is always to be considered as evidence of negligence. Siemers v. Eisen, 54 Cal. 418; Driscoll v. Market St. Ry. Co., 97 Cal. 563, 32 Pac. 591, 33 Am. St. Rep. 203; McKune v. Santa Clara, etc., Co., 110 Cal. 486, 42 Pac. 980. But we do not think the statute can be reasonably construed as counsel for respondent and the lower court undoubtedly construed it. The statute certainly in no direct or positive terms imposes any such personal duty or fixes any such responsibility, and without some indication in the statute that it was intended to impose a greater liability upon persons operating mines than is generally imposed upon other corporations and individuals, a court will not give it that effect by construction. Conceding the power of the Legislature to impose a personal liability upon those operating mines, such as respondent contends is imposed here, there is no reason why courts, unless the Legislature has clearly evidenced that intention in the statute, should industriously construe indefinite and uncertain language as imposing the liability when the effect of the construction is to deprive such person of defenses similar to those interposed in the case at bar, and which are available to all other employers who are conducting a business in which injuries to their employés may occur.

We do not think, however, that under any reasonable construction of the statute it could be held that such personal liability is imposed. The statute is not a model of perspicuity. It is lacking in that clear expression of intention and coherence of provision which generally characterizes legislative enactments. When, however, it is carefully examined it is apparent that the enactment was intended to serve a twofold purpose. It was intended, first, to establish a uniform system of signals and accompanying rules to be put in operation and use in all mines of the state, so that no matter in what mine he worked, or how often he changed his employment from one mining locality to another within the state, a minor would find the same system of signals and rules in operation in every mine, and not be required to learn a new system of signals and rules accompanying them, each time he changed his employment from one mine to another. In the second place, the establishment of this system of signals and rules was intended to afford an additional protection to the miners in the operation of the mine upon their part. It is, of course, a matter of common experience in operating mines that, notwithstanding an employer has selected competent employés, furnished proper appliances for doing the work, and a safe place to do it, still accidental injuries happen through negligence of fellow employés after all these precautions are taken by the employer. The signals and rules were intended to afford an additional security to the men in their operation of the mine among themselves, after the employer has discharged the duties cast upon him of furnishing for their protection, among other things, the proper appliances for doing so. When the act is examined it will be seen that all the signals prescribed are signals which are to be given by the employés in the mine, either from the levels or shaft, to their co-employés in the engine room or at the mouth of the shaft as to their wants below; mainly as to hoisting or sending down tools or materials into the mine. As to the rules themselves, they are not formulated as independent provisions, but, as the act distinctly says, are established "for the purpose of enforcing and properly understanding the above code of signals." As the signals, from their character, are clearly devised for use among the employés of the mine, and the rules are established expressly for the purpose of enforcing and understanding these signals, it is quite evident that the signals and the rules constitute one system, designed to be used among the employés with regard to their common employment, and as an additional protection against the carelessness or negligence of fellow employés, particularly in the use of or failure to use the proper appliances which the employer has furnished for the work.

When rule 4 is considered without relation to the general scope and purpose of the act, or its other provisions, it will be observed that there is an entire absence of any language in it, which in any manner indicates upon whom is cast the duty of doing the lashing. As far as any intention is expressed, it amounts to no more than that the Legislature deemed that mining timbers or poles of certain character should be lashed. Whether the Legislature intended to fix a personal duty upon the employer to do this, or whether it considered that in the exercise of ordinary care the employer would furnish the necessary lashing material, and that the employé whose duty it was to respond to the signal to send down timbers should lash them before sending them down is a matter upon which there is not the faintest indication in the rule. On this subject it is absolutely silent. In this indefinite condition of the rule itself as to what was intended in this respect, it is not to be assumed that the Legislature intended, by a system of signals and rules designed for the benefit of the employés in the mine, to be used in relation with each other in prosecuting their common employment, to interfere with the general rule of law that the duty of the employer is discharged when he furnishes to his employés suitable and proper appliances to do their work, and that it is their negligence and not his should one of their fellow employés neglect to use them. If the Legislature designed to change the general rule, it required a clear expression of intention to that end; a clear indication that as to this particular matter and its application to mining operations, the general rule should be changed and a different rule of liability on the part of the employer established. This statute rule 4 itself expresses no such intention, directly or inferentially. The general scope and purpose of the statute indicates that, aside from requiring the employer to adopt and enforce the system of signals, and to post them, and the rules established in connection with them, at certain points in the mine, and making the employer liable for damages incurred during the time of his failure to do so, there is nothing to indicate any intention in any manner to change or interfere with the general rule of liability between employer and employé. That there was no intention to interfere with the general rule is indicated by the terms of rule 4 itself. Its indefinite language, which simply directs that timbers must be securely lashed, without declaring who shall do it or who shall be responsible for the failure to do so, is significant to the effect that it did not intend to legislate on the matter of duty or responsibility at all, but to leave that to be determined under the general law. It contented itself with making a declaration of what in its judgment should be done, without prescribing upon whom the legal responsibility should be cast of doing it. And that the entire scheme, with reference to signals and rules, was intended to afford additional security to the employés, and to be used and adhered to by them in discharging the duties of their common employment for the protection of each other, is apparent from an inspection of rules 1, 2, and 3, which we have not quoted, but which have relation to matters pertaining to the conduct of the employés under the signals and rules as between themselves, with a view to their protection from accident.

It is also apparent from rule 6 that all the signals and rules are for the government of the employés. It provides for discharging parties disobeying them, and relieves the person operating the mine from responsibility for accidents to the men disobeying such rules and signals. These provisions of this particular rule clearly indicate that all the signals and rules are designed for the use and government of the employés, impose duties upon them, and that none of them impose any personal obligation upon the employer. Nor is the construction of rule 4, contended for by respondent, at all strengthened by the language of section 3 of the act, making any person or company failing to carry out any of the provisions of the act, responsible for all damages arising to or incurred by any person working in the mine during the time of such failure. This provision could only have application in the event of a failure of defendant to discharge some duty it owed to plaintiff, imposed by the terms of rule 4. But, as under our construction, that rule imposes no such liability, the section can have no application as far as that rule is concerned. This section has reference to the particular duties imposed on the defendant under the act; these duties are to adopt and put in force the system or code of mine bell signals designated, and to see that a copy of these signals and the accompanying rules is posted at each level in the mine and in the engine room. It is for a failure to discharge these imposed duties that the mine operator shall be held responsible under section 3 of the act. What the extent of that responsibility might be, in the event of a failure to comply with the statute in these particulars, is a matter of no present concern. It is not alleged in the complaint, nor is there any evidence, that the defendant failed to do any of these things, and under the theory of counsel for respondent, whether the defendant did or did not was of no moment, because if rule 4 imposed a personal duty on defendant to lash the poles, it would be clearly liable, whether it put in force the signals and posted a copy of them and of the rules or not.

It is unnecessary to pursue this subject further. In the view we take of the statute, rule 4 imposed no personal duty on the defendant. It does not do so in terms or by reasonable or necessary implication. On the contrary, considering it with reference to the signals and the rules and the general scope and purpose of the act, it is apparent that it was not intended to do so. The conclusion we have reached upon the proper construction to be given to the provisions of the statute in question destroys the only support upon which the instruction given by the lower court can rest. As no personal liability was imposed on the defendant under the statute, the instruction complained of, given upon the theory that it did so, was erroneous. It was a question for the jury to determine whether, under all the evidence in the case, the defendant had been guilty of negligence as alleged, and that matter should have been submitted to them under instructions which would have left it exclusively to them to determine this controverted fact.

Another instruction given by the court, No. 4, is also complained of. This instruction need not be quoted at length. The court by it instructed the jury that if the defendant "failed to and did not provide ropes with which to lash at the upper end of the cable any mining poles longer than the depth of the skip that were being lowered down the shaft of said mine in said skip * * * that the omission of the defendant in that behalf is evidence of negligence." Much that we have heretofore said applies to the giving of this instruction, and it should not have been given. As we have said, the court should not have assumed that this fact constituted negligence, but under proper instructions as to the degree of care to be exercised by defendant in operating the mine should have left it to the jury to determine under the evidence in the case whether or not that care had been exercised by defendant.

As we have heretofore stated, two appeals are taken in this case upon separate records; an appeal from the judgment and an appeal from the order denying the motion for a new trial, both prosecuted by defendant. We have considered and disposed of both in this opinion. In the appeal from the judgment the only point involved is as to the legal sufficiency of the complaint, and, as we have decided that is is sufficient, the judgment appealed from is affirmed. As to the appeal from the order denying the motion for a new trial, discussion of which we have just finished, for the reasons we have given with respect to the error committed by the court in giving the instructions complained of, that order must be and is reversed, and the cause remanded for a new trial. As these appeals are taken and presented upon separate records, the plaintiff is entitled to his costs on the appeal from the judgment and the defendant to its costs on the appeal from the order denying the motion for a new trial.

We concur: ANGELLOTTI, J.; SHAW, J.; HENSHAW, J.; McFARLAND, J.

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149 Cal. 32

SMITH'S CASH STORE v. FIRST NAT. BANK OF SAN FRANCISCO. (S. F. 3,576.)

(Supreme Court of California. March 25, 1906.)

LIMITATION OF ACTIONS—BANKS—REFUSAL TO PAY CHECK.

An action by a depositor against a bank to recover consequential damages arising from defendant's unwarranted refusal to pay a check drawn by plaintiff was barred in two years, under Code Civ. Proc. § 339, as an action upon a contract obligation or liability not founded upon a written instrument.

Department 2. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Smith's Cash Store against the First National Bank of San Francisco. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

E. R. Bellew, Denson & Schlesinger, for appellant. Lloyd & Wood, for respondent.

McFARLAND, J. The demurrer to the complaint was sustained, and judgment rendered for defendant, and from this judgment plaintiff appeals.

The demurrer was upon the grounds that the complaint does not state facts sufficient to constitute a cause of action, and that the alleged cause of action is barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure. The substantial averments of the complaint are these: That at the times mentioned in the complaint the plaintiff was engaged in conducting a "general merchandise and commission business," and the defendant was carrying on "a general banking business"; that for several years prior to January 29, 1900, plaintiff as a depositor had an account with defendant; that on January 29, 1900, plaintiff deposited with defendant $4,000, and on said day drew checks for certain amounts upon defendant in favor of various persons, such checks amounting in the aggregate to $3,679.55; that said checks were presented by the holders thereof to the defendant for payment on January 30, 1900, and on said day the defendant refused to pay or honor said checks, or any of them, and returned them to the holders thereof with the statement that defendant had not sufficient funds on deposit to insure their payment. It is then averred that by the refusal of the defendant to pay checks plaintiff was greatly injured in its credit; that its creditors threatened litigation and attachments, and to avoid the same plaintiff was compelled to make certain assignments of its property, and in making such assignments, and in matters incident thereto, plaintiff was put to large expense, and compelled to pay out large sums of money amounting to $25,000; that it was compelled to sell large quantities of its goods at a sacrifice, and suffered a loss thereby in the sum of $25,000; that in order to meet the demands of its creditors it had to borrow large sums of money at large rates of interest, and suffered other damage, all to the amount of $100,000. The purpose of the action, and the prayer of the complaint, is not to recover judgment for the amount of the $4,000, and interest deposited with defendant, but to recover $100,000, damages, alleged to have been the consequential result of the refusal of the defendant to pay the said checks for $3,679.55.

We need not definitely pass upon respondent's contention that no cause of action is stated because the complaint merely shows that the alleged wrongful act of defendant was the breach of an obligation to pay money only, and that the damage for such breach is, as declared in section 3302, Civ. Code, "the amount due by the terms of the obligation, with interest thereon"; for, even if plaintiff had a cause of action as alleged, it was barred by the statute of limitations. The alleged cause of action, whether good or not, was clearly "upon a contract, obligation, or liability, not founded upon a written instrument," and therefore, under section 339, Code of Civil Procedure, was barred in two years after it accrued. The alleged cause of action in the case at bar was the refusal of the defendant to pay the checks, and it accrued on January 30, 1900, the time of said refusal, and as the action was not commenced until more than two years thereafter, it was barred by the provisions of said action. Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115; Wood v. Currey, 57 Cal. 209. Appellant seems to contend that there was some sort of a trust relation between the parties which respondent fraudulently violated, and that therefore the action may be considered as founded on fraud, and within the three years' limitation of subdivision 4 of section 338, but it is well settled here that the relation between a general depositor and the bank in which his deposit is made, is simply that of debtor and creditor. The moneys deposited immediately become the property of the bank, and the latter becomes the debtor of the depositor for the amount of the deposit, the same being payable on demand, and on checks of the creditor. San Francisco v. Lux, 64 Cal. 483, 2 Pac. 254; Janin v. London & San Francisco Bank, 92 Cal. 14, 27 Pac. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82. This relation is stated by Morse on Banking, p. 26, as follows: "The ordinary relation existing between a bank and its customer, if not complicated by any further transaction than that of the depositing and withdrawing of moneys by the customer from time to time, is simply that of debtor and creditor at common law. The original and every subsequent deposit by the customer is in strict legal effect a loan by the customer to the bank, and e converso every payment by the bank to, or on account of, the customer is a repayment of the loans pro tanto. Wherefore it follows that the customer can never hold or charge the bank as a trustee, quasi trustee, factor, or agent." In Foley v. Hill, 2 House of Lord Cases, 37, the principle is stated as follows: "The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it, or deal with it as the property of his principal, but he is, of course, answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands." There was, therefore, no relation of trust between plaintiff and defendant. The averment of the complaint, that defendant, "with intent to defraud the plaintiff out of said sum of money, did then and there, secretly, willfully, knowingly, and fraudulently withdrew from plaintiff's account at said bank the sum of $4,000, being the money deposited by plaintiff for the payment of said check, and converted said money to its own use and benefit," is of no significance. The money deposited by plaintiff was the property of defendant and the latter could not convert its own money.

The judgment appealed from is affirmed.

We concur: HENSHAW, J; LORIGAN, J.

(148 Cal. 745)

JOHNSON v. GUNN. (S. F. 3,640.)*

(Supreme Court of California. Feb. 27, 1906.)

STATUTES—SPECIAL LEGISLATION—COMPENSATION OF JUSTICES OF THE PEACE.

County Government Act (St. 1897, p. 538, c. 277) § 184, subd. 13, as amended by St. 1901, p. 750, c. 234, providing that for the purpose of regulating the compensation of justices of the peace townships in the twenty-seventh class of counties are classified according to their population "as shown by the federal census of 1900," is not local or special legislation in violation of Const. art. 11, § 5, providing that the Legislature by general and uniform laws, shall provide for the election or appointment of county and township officers, and shall regulate the compensation of such officers in proportion to duties, and for such purpose may classify the counties according to population, though in other sections of the act, relating exclusively to other classes of counties in which townships are classified by population for the purpose of fixing the compensation of the officers of such townships, a different mode for determining the population is provided, and a different ratio of population to compensation is provided by other sections in fixing the compensation of township officers in other classes of counties.

In Bank. Appeal from Superior Court, Napa County; H. C. Gesford, Judge.

Mandamus proceedings by William D. Johnson against H. L. Gunn. From an adverse judgment, plaintiff appeals. Affirmed.

Bell, York & Bell, for appellant. R. Benjamin, for respondent.

SHAW, J. This is a proceeding in mandamus to compel the defendant, as county auditor of Napa county, to draw a warrant upon the county treasurer for the sum of $55 in payment of the salary of plaintiff, for his services in criminal cases, as justice of the peace of Yount township of that county for the month of January, 1903. The defendant refused to draw such warrant for a sum exceeding $30, as the full salary for that month. Judgment was given in the court below in favor of the defendant upon a demurrer to the complaint.

The question raised is, whether the salary of the plaintiff is by law fixed at $55 a month or $30 a month, and it depends upon the validity and effect of provisions thereunto relating, found in the act of March 23, 1901, amending section 184 of the county government act of April 1, 1897. St. 1901, p. 750, c. 234; St. 1897, p. 538, c. 277. Section 184 relates exclusively to the subject of the compensation of the county and township officers of counties of the twenty-seventh class, which consists of counties having a population of 16,000 and under 16,475, and includes Napa county alone. The provision for the compensation of township officers, so far as material to the question presented, is as follows: "(13) For the purpose of regulating the compensation of justices of the peace and constables, townships in this class of counties are hereby classified according to their population, as shown by the federal census of nineteen hundred, as follows: Townships having a population of five thousand or more shall belong to and be known as townships of the first class; townships having a population of three thousand and less than five thousand shall belong to and be known as townships of the second class; townships having a population of one thousand and less than three thousand shall belong to and be known as townships of the third class; and townships having a population of less than one thousand shall belong to and be known as townships of the fourth class. Justices of the peace and constables shall receive the following salaries, which shall be paid monthly, in the same manner as salaries of county officers are paid, and which shall be in full for all services rendered by them in criminal cases, to wit: In townships of the first class, seventy-five dollars; in townships of the second class, fifty-five dollars; in townships of the third class, thirty dollars; and in townships of the fourth class, twenty dollars." According to the census of 1900 the population of Yount township at that time numbered 2,982. The complaint alleges that its actual population then and thereafter was over 3,000.

The principal objection to the validity of this provision is that it is not a "general and uniform law" within the intent and purpose of section 5, art. 11, of the Constitution, which declares that "the Legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of boards of supervisors, sheriffs, county clerks, district attorneys, and such other county, township, and municipal officers as public convenience may require, and shall prescribe their duties and fix their terms of office. It shall regulate the compensation of all such officers, in proportion to duties, and for this purpose may classify the counties by population." Another objection, which is practically the same, is that it is contrary to the provisions of section 11, art. 1, requiring all laws of a general nature to be of uniform operation, and also to section 25, art. 4, subds. 9 and 33, which forbid the passage of special or local laws regulating county and township business, or in any case where a general law can be made applicable. It is not contended that this provision is local or special, or not uniform, when it is considered solely with respect to its application to the several townships of the class of counties to which, alone, it relates, nor that the classification made by the subdivision quoted does not show such a substantial difference in the population of the different classes established as would justify a difference in the respective salaries allowed. The part of the subdivision quoted, which, it is claimed, violates these constitutional restrictions, is the provision whereby the classification of townships is to be made according to their population "as shown by the federal census of 1900." The proposition that it is local and special and not uniform in its operation, is deduced from the fact that in other sections of the county government act, relating exclusively to other classes of counties in which the townships are classified by population for the purpose of fixing the compensation of the officers of such townships in those classes of counties, a different mode is established for determining the population. In 12 of these classes no method of ascertaining the population is prescribed. In others it is respectively to be determined by multiplying by five the vote of the particular township at the last general election for governor, or the vote for presidential electors, or the number of registered voters at the last preceding election; in others the supervisors are to determine the population in such manner as they may see fit, and in seven of the classes the mode here involved is adopted. The consequence of the adoption of these different methods of ascertaining the population of the townships in the respective classes of the counties is, according to the theory of the appellant, that it renders void a provision applying to any particular class and not to the others, and, presumably, in its logical results, that it destroys the uniform operation of the law as a whole and makes all the provisions on the subject, in every one of the 57 classes established by law, wherein a classification of townships is made, unconstitutional and void, not only as to the mode of ascertaining such population, but also as to the compensation of township officers fixed by reference to such classification. We are of the opinion that this proposition cannot be successfully maintained.

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*For opinion in Court of Appeal, see 84 Pac. 370.

The general principles which determine the validity of such legislation are well settled, in this state and elsewhere. "A law which applies alike to all the subjects upon which it acts, or, in other words, a law which applies equally to all persons or things within a legitimate class to which, alone, it is addressed, does not violate the provision requiring laws of a general nature to have a uniform operation, and it is neither local nor special. People v. Henshaw, 76 Cal. 446, 18 Pac. 413; Ex parte Halstead, 89 Cal. 472, 26 Pac. 961; Cody v. Murphey, 89 Cal. 524, 26 Pac. 1081; Abeel v. Clark, 84 Cal. 230, 24 Pac. 383; Summerland v. Bicknell, 111 Cal. 569, 44 Pac. 232; Hellman v. Shoulters, 114 Cal. 147, 44 Pac. 915, 45 Pac. 1057." Ex parte Sohncke (Cal. Sup.) 82 Pac. 956. "It has been uniformly held that a law is general which applies to all of a class—the classification being a proper one—and that the requirement of uniformity is satisfied, if it applies to all of the class alike." Hellman v. Shoulters, supra. The classification is a proper one if the subjects included in it have some natural, or intrinsic, or constitutional distinction which differentiates them from other subjects of like general character, a distinction which bears some relation to, furnishes reasonable cause for, or makes appropriate, the particular legislation. Pasadena v. Stimson, 91 Cal. 249, 251, 27 Pac. 604; Darcy v. Mayor, 104 Cal. 645, 38 Pac. 500; Bruch v. Colombet, 104 Cal. 351, 38 Pac. 45; Rauer v. Williams, 118 Cal. 401, 50 Pac. 691; Deyoe v. Superior Court, 140 Cal. 476, 481, 74 Pac. 28, 98 Am. St. Rep. 73; Ex parte Sohncke, supra; 26 Am. & Eng. Ency. of Law (2d Ed.) 683; 8 Cyc. of L. & P. 1052.

In the present case the distinction necessary for the justification of the particular legislation involved is furnished by the section of the Constitution above quoted. That section, under the principles above stated, authorizes the Legislature to create these classes of counties and to make laws applying exclusively to any one of such classes. It furnishes a constitutional distinction for the separate legislation, and thus renders it unnecessary that there should be any natural or intrinsic distinction which might also serve to make the legislation appropriate. The section empowers the Legislature to make the classification of counties for the purpose of regulating the compensation of all the officers therein named. It therefore includes the township officers in the respective classes of counties and puts them in the same category in this respect as the county officers. Hence, a law which classifies the counties by population, for the purpose of regulating the compensation of the township officers of such counties, or which, for that purpose, creates a single class of counties embracing all which fall within certain limits of population, and which regulates the compensation of such township officers, without operating at all on the township officers of other counties not coming within the class, is valid and constitutional because it is law specially permitted by this clause of the Constitution, although, in the absence of such permission, we might not be able to discover a natural or intrinsic difference between the particular county and other counties, not within the class, sufficient to justify the different legislation. In Summerland v. Bicknell, supra, speaking with reference to a classification of counties, made for the purpose of regulating the compensation of county and township officers, the court says: "When such a classification of counties as the Constitution warrants has been made by the Legislature, a statutory provision which applies equally to all the counties of that class is neither local, special, nor wanting in uniformity." In Welsh v. Bramlet, 98 Cal. 226, 33 Pac. 68, it is said: "When such classification has been made, a statute providing for the compensation of the officers within any class is a general law, and it is immaterial whether such provision be in a special statute for each class, or in a single act providing for all of the classes, and an amendment to such statute which affects an entire class is equally a general law, as was the original act." The same doctrine was announced in Cody v. Murphey, 89 Cal. 522, 26 Pac. 1081, and Farnum v. Warner, 104 Cal. 679, 38 Pac. 421.

We have, therefore, a classification authorized by the Constitution and one which is sufficient to justify distinct and separate legislation for each class, and a law which regulates the compensation of the township officers of all the counties in the class to which it is directed and which applies equally to all the counties of that class. Its validity must be determined by the same standards and principles as if it had been enacted in a separate act applying to this class of counties alone and had been passed at a different time and independently of legislation respecting any other class. Under these circumstances and in view of the principles heretofore stated, we must conclude that the provisions made by the Legislature in other acts, or in other sections of the same act, regulating the compensation of officers in others classes of counties, cannot be referred to, or taken into consideration, for the purpose of determining from them that the provisions relating to the townships in this class of counties are unconstitutional because special or local or not uniform with those adopted for the other classes. This proposition was practically decided in Tulare Co. v. May, 118 Cal. 308, 50 Pac. 427. The same doctrine has been announced by this court in other cases and with respect to other subjects. In every county government law enacted since the adoption of the present Constitution the Legislature has prescribed different standards of compensation and different modes of determining the same, in the different classes of counties created, and in some cases there have been similar differences as to the different officers within the same class. In some classes there has been a fixed salary at so much a year or month, while in others there has been allowed a certain fee for each item of service, and the precise amount for each year or month is thereby left indeterminate and variable from month to month. Nevertheless, this want of uniformity in the provisions governing the several classes does not affect the validity of the law. Vail v. San Diego County, 126 Cal. 36, 58 Pac. 392; San Luis Obispo County v. Drake, 76 Cal. 94, 18 Pac. 118. So, also, in the case of cities, the Legislature has express power by the Constitution to classify them by population for the purpose of providing for their incorporation and organization, and it has done so by a general law providing for six different classes of cities. The manner of carrying on the city government in each class differs in material respects from that provided in any other class. And changes have been made from time to time by laws applicable solely to a particular class. It has not been contended that the enactment of such law for a single class of cities providing a form of government radically different from that of any other class has any effect upon the validity of the law applying to the other classes, nor that the fact that it was a different plan of government from the others brings it within the constitutional limitations prohibiting local and special laws or laws not of uniform application. It is different with regard to laws upon a subject not pertaining to the purpose for which the classification is permitted. With respect to such laws the constitutional distinction does not exist, and there must be some natural or intrinsic distinction to authorize the difference in the legislation. This is pointed out in Pasadena v. Stimson, supra, on page 249 of 91 Cal., page 606 of 27 Pac. where the court says: "It is true that the Legislature is empowered by section 6 of article 11 of the Constitution to classify cities in proportion to population for the purpose of incorporation and organization, and it is undoubtedly true that a law limited to these purposes is not unconstitutional because it makes different regulations for the different classes. But the mode of exercising the power of eminent domain, and the conditions upon which it may be invoked (which were the statutory provisions there involved) are no part of municipal organization. They are the subject of general laws applicable to every person alike, and the Legislature has no power to make arbitrary discriminations in this respect between different classes of persons." The same proposition has been applied to laws expressly made applicable to certain classes of counties according to the classification made for the purpose of fixing compensation of officers but which did not relate at all to the subject of compensation. Such discrimination is held unconstitutional, unless there exists, as a reason therefor, some natural or intrinsic distinction, as distinguished from the constitutional distinction which it was held was not applicable to the particular legislation. Bloss v. Lewis, 109 Cal. 497, 41 Pac. 1081; Pratt v. Browne, 135 Cal. 652, 67 Pac. 1082.

The provision of the law declaring the mode of ascertaining the population of the respective townships in counties of the twenty-seventh class, for the purpose of adjusting the salaries of the respective officers of such townships in proportion to duties, is a provision relating directly to the purposes for which such classification of counties is permitted, and it is limited to those purposes alone. Under the principles established by the decisions to which we have referred, such a law was properly made applicable exclusively to counties of that particular class and cannot be said to be either local or special or lacking in uniformity. Section 5, article 11, of the Constitution does not expressly confer power to classify by population the townships within any particular class of counties, for the purpose of regulating the compensation of the officers of such townships. The power to make such classification for that purpose is a part of the general power of the Legislature to classify whenever there is a natural or intrinsic distinction sufficient to justify different legislation. But the power to make a classification of this character is now established by the decisions of this court. In Tucker v. Barnum, 144 Cal. 269, 77 Pac. 919, the court said: "Since, within the view of the framers of the Constitution, this (classifying counties by population) was the proper mode for fixing the compensation of county officers, if there be no constitutional inhibition to the contrary, no reason can be perceived why a like method of classification of townships should be other than proper. And, notwithstanding the dictum in Sanchez v. Fordyce, 141 Cal. 427, 75 Pac. 56, we can discover no such inhibition in the Constitution. * * * When the Legislature undertakes to salary such township officers it is difficult to perceive how this can fairly be done within the requirements of the Constitution if it were not permissible so to classify townships." McCauley v. Culbert, 144 Cal. 277, 77 Pac. 923, is to the same effect, both decisions being by the court in bank. The decisions in Tucker v. Barnum, supra, and Millard v. Kern County (Cal. Sup.) 82 Pac. 329, holding that, with respect to the different townships of a given class of counties the method of fixing the compensation of townships officers must be uniform and in substantially the same proportion to duties, when applied to such townships, have no application to the question on which the present case depends. They manifestly go upon the proposition we have stated, that such laws are not valid unless they operate uniformly upon all the subjects as to which there exists no natural or intrinsic distinction justifying the different legislation.

The argument has been advanced that the law in question is unconstitutional because, when compared with the provisions of law applying to townships in other classes of counties, in which also the compensation is fixed in accordance with population, it is found that an entirely different ratio of population to compensation is adopted, and hence, it is said, that the law as a whole is not uniform, and that it violates that provision of section 5, article 11, commanding the Legislature to fix the compensation in proportion to duties. The argument implies that the duties must always bear the same proportion to population. In respect to this contention it must be observed that the Constitution does not declare that the compensation of officers must be regulated in proportion to population. Its command is that such compensation is to be regulated in proportion to duties. In Longan v. Solano County, 65 Cal. 122, 3 Pac. 463, the same argument was made with regard to the county government act of 1883, the first act passed in pursuance of this section of the Constitution. Perhaps no subsequent act of this character has presented such striking disparities in the amount of compensation fixed for officers of the same kind in different counties having substantially the same population. In the briefs of counsel in that case this was made the principal subject of attack upon the constitutionality of the law. The court, however, in that case refused to adopt this argument as a sufficient objection to the law, saying: "Counsel argues this proposition as if the constitutional provision was that the Legislature should regulate the compensation of the officers of the various counties, townships, etc., in accordance to this classification by population. But this is not at all so. The requirement is that the compensation shall be regulated in proportion to duties, and as a means of doing that, the Legislature is authorized to classify the counties by population." This has ever since been considered the settled law of the state. The population, therefore, is not the controlling factor in the determination of the proper compensation. It is but a convenient method of classification, in order the better to approximate the just proportion of compensation to duties, and it is the duties to be performed which the Legislature must particularly have in mind, so far as it is practicable to ascertain them, when it considers the question of proper compensation to be given. It is consequently a matter of no great importance that the method of arriving at the number of the population of the townships shall be the same in one class of counties as in the others, since the Legislature may, and generally does, to some extent disregard the measure afforded by the population, and fixes the compensation according to its judgment as to the duty to be performed. The courts cannot say, as matter of law, that the duties would bear the same proportion to population in one community as in another. The Constitution does not establish the rule that the compensation allowed to the officers of townships in the several counties of the state must bear the same proportion to population in one township as it does in the others, nor the same proportion in all the classes of counties. We are of the opinion that the law in question is valid, that under it the plaintiff was entitled to but $30 a month for his salary, and that the superior court properly sustained the demurrer to the complaint, and rendered judgment in favor of the defendant.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

(148 Cal. 755)

CHINN v. GUNN. (S. F. 3,639.)

(Supreme Court of California. Feb. 27, 1906.)

JUSTICES OF THE PEACE — COMPENSATION — COUNTY GOVERNMENT ACT.

County Government Act, (St. 1897, p. 538, c. 277) § 184, subd. 13, as amended by St. 1901, p. 750, c. 234, which for the purpose of regulating the compensation of justices of the peace in township of counties of the twenty-seventh class classifies the townships according to their population as shown by the federal census of 1900, and according to the population of the township gives the justices salaries for services in criminal cases, authorizes no salaries for justices in a township created after the census of 1900, where that census affords no means of ascertaining the population of such townships.

In Bank. Appeal from Superior Court, Napa County; H. C. Gesford, Judge.

Mandamus proceedings by H. J. Chinn against H. L. Gunn. From an adverse judgment, plaintiff appeals. Affirmed.

For opinion in Court of Appeal, see 84 Pac. 374.

Bell, York & Bell, for appellant. R. Benjamin, for respondent.

SHAW, J. This is an application by the plaintiff for a writ of mandate to compel the defendant, as auditor of Napa county, to issue his warrant upon the treasurer of that county for the sum of $55 for plaintiff's services as justice of the peace of St. Helena township in criminal cases for the month of January, 1903, and for a like sum for similar services for February, 1903. The auditor refuses to issue his warrant for a larger sum than $30 per month. A demurrer was sustained to the complaint and a judgment rendered thereon in favor of the defendant, from which the plaintiff appeals.

The case is similar in its facts to that of Johnson v. Gunn (S. F. 3,640) 84 Pac. 665, but it differs in one important particular. The act of 1901 (St. 1901, p. 750, c. 234) provided that the townships of counties of the twenty-seventh class should be classified by population "as shown by the federal census of 1900." At the time this act was passed, and at the time the census of 1900 was taken, the township of St. Helena did not exist. It was created in August, 1902, by dividing one of the previously existing townships of the county and forming therefrom two townships. The census of 1900 does not show the population of the territory now composing the township of St. Helena, nor does it furnish any means by which such population can be determined. The question therefore arises whether the compensation is to be fixed according to the actual population or whether it is to be considered that the law makes no provision by salary for the compensation of the officers of St. Helena township, leaving them to receive such fees as may be provided by law, or whether the law makes no provision whatever for such compensation. The contention of the plaintiff is that, the clause referring to the census of 1900 being inapplicable, owing to the fact that the census does not show the population of this newly created township, the law must be construed to declare that the class of the township, and the corresponding salary, is to be determined by ascertaining the actual population of the township at the time of its creation, or at the time the services were rendered. He avers that at the time the township was created, and ever since, the township has had and now has a population of over 3,000 inhabitants. Upon this he contends that it is a township of the second class, and that he is therefore entitled to a salary of $55 a month for his services in criminal cases. Where a law is so framed as to make the classes of townships or counties depend upon the actual population, difficulties may arise. Whether it is taken to refer to the population at the time of the passage of the law, or at the time it takes effect upon the particular township, or to the time the services are performed, in either case there will be no certain means of ascertaining the exact number from which to determine the class to which a given township belongs. If the population is near the point dividing two classes, and it is left to be determined by evidence of witnesses, it might easily happen that upon a first inquiry it would be adjudged to be in one class, while upon a second investigation it would be determined to be of a higher class. The actual population varies from day to day, and if the time of the service is to govern, then, in some cases, it would be necessary to make a new enumeration for every month to ascertain the actual population, and determine the salary to which the officer is entitled. It is to be presumed that the Legislature had these objections in mind, and that in order to avoid them and secure a fixed and permanent standard, of which there was a public record from which the facts could be easily and accurately ascertained, the classes were made to depend on the census of 1900 of which the courts take judicial notice. We are, therefore, not at liberty to say that this provision for determining the classes can be disregarded as an unimportant part of the plan, and, consequently, that where such census, for any reason, fails to show the population of a particular township, or to give data from which it can be ascertained, the class of such township is to be determined by the actual population at the time of such census, or at some other time, by the testimony of witnesses, or by an enumeration, or other evidence. It would be impossible for the court to ascertain or determine, from the act, the precise time at which the population should be taken as the standard, or the nature of the evidence necessary to prove it. The auditor would be required to issue warrants for the salaries of the township officers, and would be afforded no means of ascertaining what the salaries were, except by himself taking evidence, or making an enumeration. And neither he, nor the board of supervisors, is authorized to determine the question conclusively. The officer would be at liberty to assert and maintain that the population was greater, and to demand a salary accordingly. While these difficulties might not be sufficient to justify the court in declaring invalid a law which fixed the classes by population without providing for the determination of such population, we think they are sufficient to prevent a construction which will give the law that effect, where the construction is based solely on the ground that the law, as enacted, does not provide for the classification of a township created after its passage. It follows that the contention of the plaintiff cannot be approved.

The act of 1895 (St. 1895, p. 8, c. 2), regulating the fees of county and township officers, provides that justices of the peace may, for their own use, collect, for all services in a criminal action, $3.00. Section 228 of the county government act (St. 1897, p. 575, c. 277), declares that all charges for services of justices of the peace in criminal cases, not otherwise provided for and allowed by law, are chargeable to the county. These provisions apply to all cases where the law relating to a particular class of counties fails to provide for the compensation of justices for such services, and, under them, the plaintiff would be entitled to the fees thereby allowed for such criminal cases as had come before him and had been disposed of by him. But as the complaint does not allege that he had performed any such services, nor that they amounted to the $55 demanded, the court below properly sustained the demurrer thereto. We are of the opinion that section 184 of the amendment of 1901 to the county government act does not provide any salary for justices of the peace of townships created after the census of 1900 was taken, where that census affords no means of ascertaining the population of such townships, and that as the complaint did not show that the plaintiff had performed any services in criminal cases which would entitle him to the sum demanded, it failed to state a cause of action.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

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3 Cal. App. 178

PEOPLE v. BROWN.

(Court of Appeal, Second District, California. Feb. 27, 1906.)

1. Homicide — Appeal — Harmless Error — Refusal of Instructions.

Where the court directed the jury, unless it found defendant guilty of either murder in the first or second degree, to acquit him altogether, defendant cannot complain of the refusal of an instruction relating to the evidence required to justify a verdict of manslaughter, as it is presumed that, unless the jurors are satisfied beyond a reasonable doubt of defendant's guilt of the higher offense, they will perform their duty and acquit, even though they be satisfied that he is guilty of a lesser offense.

2. Witnesses—Refreshing Memory—Use of Memorandum—Copy.

Under the direct provisions of Code Civ. Proc. § 2047, a witness may refresh his memory from a memorandum written under his direction at a time when the facts were fresh in his memory, and he knew that the same was correctly stated in the writing; and the rule is not different where the witness has a copy of the original in his hands, which he has compared, and swears that the same is an exact copy of the original memorandum.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 878.]

Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Anson Brown was convicted of murder in the second degree, and from the judgment, and an order denying him a new trial, he appeals. Affirmed.

H. S. Utley and E. E. Capps, for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Deputy Atty. Gen., for the People.

ALLEN, J. Defendant was convicted of murder in the second degree, and from the judgment, and an order denying him a new trial, he appeals.

The court upon the trial charged the jury fully as to what constituted the crime of murder, both in the first and second degree, and directed the jury that unless it found the defendant guilty of one of such offenses to acquit him altogether. The defendant contends that the trial court erred in refusing to give certain other instructions tendered by defendant pertinent to the issue. The first of these instructions related to the duty of the jury, in the event it should determine that death resulted from an accidental fall; the second related to the evidence required to justify a verdict of manslaughter. There is nothing in the record rendering either of these charges so tendered applicable, and were the contrary true as to the second charge, nevertheless appellant could not be heard to complain. The natural presumption is that, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt of the higher offenses, they will perform their duty and acquit, even though they be satisfied that he is guilty of a lesser offense. People v. Lopez, 135 Cal. 25, 66 Pac. 965; People v. Clark, 145 Cal. 730, 79 Pac. 434.

There was no error in permitting a witness to refresh his memory from a memorandum written under his direction at a time when the facts were fresh in his memory and he knew that the same were correctly stated in the writing. Code Civ. Proc. § 2047; Paige v. Carter, 64 Cal. 490, 2 Pac. 260. And the rule is not different where the witness has a copy of the original in his hands, which he has compared, and swears that the same is an exact copy of the original memorandum.

We find no error in the record, and the judgment and order appealed from are affirmed.

I concur: GRAY, P. J.

I concur in the judgment: SMITH, J.

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3 Cal. App. 180

TOUT v. BLAIR.

(Court of Appeal, Second District, California. Feb. 27, 1906.)

1. OFFICERS—SALARY.

The general principle that the salary annexed to a public office is incident to the title of the office, and not to its occupation and exercise, is subject to the legislative power of a state to establish a different rule.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Officers, §§ 132–162.]

2. SAME—PENDING CONTEST.

Under Pol. Code, § 936, which provides that, when the title of the incumbent of any office is contested, no part of his salary can be paid until the contest is finally determined, amended by St. 1891, p. 28, c. 44, by the proviso that such section will not apply to any party to a contest who holds the certificate of election or commission of office and discharges the duties thereof, and that such party shall receive the salary the same as if no contest was pending, the successful contestant of an office is not entitled to compensation for the time during which the contest was pending, where the salary for such period had been paid to and the duties discharged by another, to whom a certificate of election had been issued.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Officers, § 136.]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Mandamus by Elias Tout against T. H. Blair. From a judgment for defendant, and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Charles G. Lamberson, for appellant. Daniel McFadzean, Dist. Atty., and Roth & McFadzean, for respondent.

ALLEN, J. Plaintiff, Tout, and one W. E. Hawkins, were, at the general election of 1902, opposing candidates for the office of supervisor of district No. 4 in Tulare county. Upon a canvass of the returns Hawkins was declared elected and a certificate of election regularly issued to him, and he thereupon, within the time required by law, took the oath of office, executed his bond, and, on the 5th day of January, 1903, entered upon the discharge of the duties of such office and continued so to act until the 31st day of May, 1904. Plaintiff, within due time after the canvass of vote, instituted in a proper court his contest of the right of Hawkins to hold the office, upon the ground that he had received at such election a greater number of votes than any other candidate, and averring that he was duly elected to such office. A trial was had and judgment went for plaintiff, which judgment became final May 31, 1904. The salary of the office for the period within which Hawkins performed the duties of supervisor under his certificate was regularly paid to him by warrants drawn by the auditor upon the treasury. Plaintiff, on June 28, 1904, demanded of the auditor that he draw his warrants upon the treasury in his favor for the salary covering the period between January 5, 1903, and May 31, 1904, which demand was by the auditor refused. Plaintiff thereupon instituted a proceeding in the superior court of Tulare county in mandamus to compel the issuance of his warrants. Judgment went for defendant auditor, from which, and an order denying a new trial, plaintiff appeals.

The principal contention of appellant is that the salary annexed to a public office is incident to the title of the office, and not to its occupation and exercise. This established principle received recognition by our Supreme Court in Stratton v. Oulton, 28 Cal. 45, and in succeeding cases; and appellant claims that, being actually elected to the office, the right to receive the salary follows as a natural consequence. The general principle before stated should not be carried to the extent of asserting that the legislative power of a state may not establish a different rule. To obviate consequent difficulties involving the personal liability of public officers entrusted the duty of disbursing salaries, section 936 of the Political Code was adopted, which provides: "When the title of the incumbent of any office in this state is contested by proceedings instituted in any court for that purpose, no warrant can thereafter be drawn or paid for any part of his salary until such proceedings have been finally determined." This section was amended in 1891 by the following proviso: "Provided, however, that this section shall not be construed to apply to any party to a contest or proceeding now pending or hereafter instituted who holds the certificate of election, or commission of office, and discharges the duties of the office; but such party shall receive the salary of such office, the same as if no such contest or proceeding was pending." St. 1891, p. 28, c. 44. The salary mentioned in this act is the compensation which, by section 5, art. 11, of the Constitution, the Legislature may regulate in proportion to duty. "There is no mandate in section 5 directing the Legislature to provide for the payment of salaries to county officers." San Luis Obispo Co. v. Darke, 76 Cal. 95, 18 Pac. 118. It is therefore within the power of the Legislature to determine what salary or compensation, if any, shall be paid for duties performed by a county officer, and to provide that when no duty was actually performed no salary shall be allowed. The county government act fixes the salary of a supervisor of a county of the class to which Tulare belongs. But one compensation, however, is attempted to be fixed. The Legislature has seen fit by this proviso to give that compensation to the holder of a certificate of election who is performing thereunder the duties of the office, and to withhold from any other person claiming title to such office any part of such salary. The proposition is most aptly, and, in our opinion, correctly put by the trial judge in his opinion, as follows: "While it may be a hardship for one elected to office to have his term abridged and his salary diminished because the supervisors may have erroneously declared his opponent elected, it must be remembered that an officer elect takes his office subject to all of the limitations imposed by law, including that, that a portion of the salary may in case of a contest be paid to another." There is nothing in Bledsoe v. Colgan, 138 Cal. 36, 70 Pac. 924, counter to this. In that case the effect of the proviso was not involved. No one holding the legal indicia of title had performed the duties. While Wilson v. Fisher, 140 Cal. 188, 73 Pac. 850, and Anderson v. Browning, 140 Cal. 222, 73 Pac. 986, both give support to the proposition here advanced, in those cases it is determined that the holder of a certificate of election is entitled to his compensation until final judgment is entered against him. If such incumbent is entitled to the salary, even pending appeal, and there being but one salary to which any one is entitled, it must follow that no other person can receive it.

It is suggested that it is possible so to construe section 936, Pol. Code, as to hold that the Legislature was intending to be generous and thereby give two salaries. This construction can scarcely be maintained, when we consider the constitutional limitation of legislative power in the matter of fixing the compensation of county officers.

We are of the opinion that appellant is entitled to no part of the salary accruing before he assumed the duties of the office; and the judgment and order appealed from are affirmed.

We concur: GRAY, P. J.; SMITH, J.

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3 Cal. App. 174

CLEU v. BOARD OF POLICE COM'RS et al.

(Court of Appeal, First District, California. Feb. 26, 1906.)

1. MUNICIPAL CORPORATIONS—BOARD OF POLICE COMMISSIONERS—RULES—REASONABLENESS.

Under a city charter giving the board of police commissioners power to appoint, promote, suspend, disrate, or dismiss any member of the department and to prescribe reasonable rules and regulations for the government of the department, and declaring that any member of the department guilty of a violation of the rules should be punished by reprimand, or fine, the board had authority to adopt a rule that any member of the department neglecting to pay any debt should be punished by reprimand, fine, or dismissal.

2. SAME—POWERS OF BOARD—DISOBEDIENCE OF RULES—PUNISHMENT.

Where a rule adopted by a board of police commissioners of a city provided that any member of the police department neglecting to pay a debt should be punished, the board were not required to wait until a court had passed on the question of indebtedness before taking action against an officer charged with neglecting to pay his debts.

3. SAME—PROCEEDING TO PUNISH OFFICER—SUBSEQUENT LEGAL PROCEEDING—EFFECT.

Neither did the fact that after a charge had been filed the officer accused filed his petition in bankruptcy oust the jurisdiction of the board.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Petition for writ of review by Paul E. Cleu against the board of police commissioners of the city of San Francisco to review the action of respondents in removing plaintiff from his office as member of the police department. From a judgment for plaintiff, defendants appeal. Reversed.

P. V. Long, City Atty., W. G. Burke, City Atty., and A. S. Newburgh, Asst. City Atty., for appellants. J. J. Scrivner and Leonard Stone, for respondent.

HALL, J. This is an appeal by defendants from a judgment vacating and annulling the proceedings of the defendants, the board of police commissioners of the city and county of San Francisco, removing plaintiff from his position as a policeman of said city and county.

Upon the petition of plaintiff a writ of review was issued to the board of police commissioners, to which they made return; from which and the petition it appears that the said board had adopted a rule that "any member of the police department, neglecting to pay any debt owing by him, shall, on complaint by one of his creditors, be punished by reprimand, or fine, or by dismissal from the police department." It was for a violation of this rule that plaintiff was, after trial, dismissed from the department. Plaintiff contends that the said rule is unreasonable and void, and that the board of police commissioners had no power to make or enforce such a rule.

The charter of the city and county of San

Francisco (article 7, c. 3, § 1) provides that: "The board of police commissioners shall have power: (1) To appoint, promote, suspend, disrate, or dismiss any member of the department in the manner hereinafter provided. (2) To prescribe rules and regulations for the government, discipline, equipment, and uniform of the department, and from time to time to alter or repeal the same, and to prescribe penalties for the violation of any of such rules and regulations. All such rules and regulations must be reasonable." Another chapter (7) provides that "any member of the department guilty of any offense, or violation of rules or regulations, shall be liable to be punished by reprimand, or by fine to be fixed by the commissioners, or by dismissal from the department; but no fine shall ever be imposed at any one time for any offense exceeding one month's salary." Provision is also made for the manner of making charges, giving notice and for trial. It is from the above provisions of the charter that the board of police commissioners must derive their power to make the rule in question. If the rule concerns the government and discipline of the police department and is reasonable, it must be held to be valid. The board has the right to make all reasonable rules to secure efficiency and good service in the department. Whether or not the rule in question tends to secure efficiency and good service may be tested by contemplating the probable effect on the efficiency of the department if every member thereof violated the rule—if every policeman neglected to pay his debts. In such a case can it be doubted that the efficiency of the department would be greatly impaired; that the public would soon lose all respect and confidence in the department, which would necessarily greatly militate against its usefulness.

In State ex rel. McKenzie v. Hyman, 22 Ohio Cir. Ct. R. 213, a similar rule of the fire department of the city of Cleveland was upheld. It provided that an officer of the department shall "not sell or assign his salary, or incur or contract any debts or liabilities which he is unable or unwilling to pay, or neglect or refuse to honorably discharge and promptly pay all indebtedness, claims, and judgments and satisfy all executions that may be held or issued against him." In speaking of this rule the court said: "That a strict enforcement of this rule might work great hardship in some cases may be conceded, and yet we are not prepared to say that the rule is an unreasonable one. If members of the department may constantly contract debts without paying them, discredit is likely to come to the department, and the head of the department may be subject to constant annoyance by creditors of those in his department. If one undertakes service in the department, certain important advantages come to him, and it is not unreasonable that he should be required to look after his debts with greater promptness than one not in the public service." Slackness in payment of debts by a fireman would have much less effect on his efficiency as a fireman than would the same slackness on the part of a police officer. A fireman in the discharge of his duties is mainly confined to work in extinguishing fires, and he touches the public at fewer points than does a police officer in the discharge of his duties. A police officer is intimately connected with the enforcement of all laws and ordinances concerning crimes, and is an important factor in preserving the peace and good order of the community. His efficiency in this regard largely depends upon the respect and confidence in which he and his associates are held by the citizens. A course of conduct, such as neglecting to pay his debts, that forfeits such respect tends to interfere with his usefulness as an officer. It must be borne in mind that the rule under discussion, as to penalty for a violation thereof, is quite elastic. The penalty may be a reprimand, a fine, or dismissal, as the special circumstances of the case may warrant. It must be presumed that the board, in enforcing such a rule, will act in good faith for the welfare of the service, and not for purposes of oppression. A wide discretion must be lodged in the board in determining what conduct on the part of members of the department is injurious to the efficiency of the department. We cannot say that the rule in quesion here is not reasonable, and does not tend to promote the efficiency of the department.

In such a case as this the board of police commissioners are not required to wait until a court has passed on the question of the indebtedness of the party charged before them. People v. French, 32 Hun (N. Y.) 112; People v. Commissioners, 93 N. Y. 97; People v. Commissioners, 77 N. Y. 153; People v. Commissioners, 11 Hun (N. Y.) 403. The fact that after the charge had been lodged against plaintiff with the board, and the evidence taken, plaintiff filed his petition in bankruptcy did not oust the board of its jurisdiction to proceed. The breach of the rule had already occurred, and the plaintiff had already subjected himself to the penalty that the board might see fit under the rule to impose.

For the reasons above set forth, the judgment is reversed.

We concur: HARRISON, P. J.; COOPER, J.

3 Cal. App. 155

TAIT v. McINNES.

(Court of Appeal, First District, California. Feb. 24, 1906.)

1. APPEAL — BRIEFS — FAILURE TO REFER TO TRANSCRIPT.

Where an appeal is taken on the ground that the findings of fact are not sustained by the evidence, and appellant fails to point out, in his brief or otherwise, the evidence, or any of the particulars thereof, and makes no reference to the transcript except in certain respects, the appellate court will confine its examination to those particulars.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3093–3095.]

2. SALES—EVIDENCE OF UNCONDITIONAL SALE.

A receipt by the seller, merely acknowledging payment of a certain sum by the purchaser on sale of the property, was insufficient to show that the sale was complete and unconditional.

3. SAME — ACTION FOR PRICE — BURDEN OF PROOF.

Where the seller of the business of a hotel and its contents was required to tender to the purchaser a lease by the owner of the hotel as a condition precedent to his right to recover the price, it was incumbent on him to show affirmatively that the lease had been tendered.

4. SAME—BILL OF SALE—DELIVERY.

Where the seller of goods tendered the necessary papers of transfer at the purchaser's house, and, failing to see the purchaser personally, put the papers in a bank, there was no sufficient tender of such papers.

Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by George L. Tait against J. S. McInnes. From a judgment for plaintiff, defendant appeals. Affirmed.

J. H. Campbell, for appellant. William Hoff Cook, for respondent.

HARRISON, P. J. Action for money had and received. Judgment was rendered in favor of the plaintiff, and the defendant has appealed.

The complaint sets forth the plaintiff's cause of action in two counts; in the first of which he alleges that he paid to the defendant $900 as part payment upon a contract for the purchase of the business of a hotel and its contents in Los Gatos, and that the contract was thereafter mutually rescinded. In the second count he alleges that on August 24, 1903, the defendant received from him the sum of $900 to and for his use, and has refused to pay the same upon demand therefor. The defendant denied that the contract of sale had been rescinded, or that he had received any money to the use of the plaintiff. He also filed a cross-complaint against the plaintiff, setting forth the contract referred to in the complaint and the receipt thereon of $900; that the plaintiff agreed to pay the further sum of $2,000 "when a good and sufficient lease of said premises for the term of three years had been obtained from the owner thereof"; that he had secured and tendered said lease to the plaintiff, together with a sufficient bill of sale; and that the plaintiff had refused to accept the same or to pay the $2,000. Wherefore he prayed judgment against the plaintiff for the sum of $2,000 in pursuance of said contract of sale. The cause was tried by the court, and findings of fact were made sustaining the allegations of the second count of the complaint and against the allegations of the cross-complaint. The present appeal is directly from the judgment upon the judgment roll, with a bill of exceptions setting forth the evidence, and is urged solely upon the ground that the findings of fact are not sustained by the evidence.

As the appellant has failed to point out, in his brief or otherwise, the evidence, or any of the particulars thereof, wherein it fails to sustain the findings, and has made no reference to the transcript except in two respects, we shall confine our examination to those particulars. See Brovelli v. Bianchi, 136 Cal. 612, 69 Pac. 416.

(a) He refers to a receipt signed by the defendant, concerning which he says: "The receipt proves that the sale was unconditional and complete; $2,000 remained to be paid, and this was never tendered to Mr. McInnes." This receipt is as follows, viz.: "August 24, 1903. Received from George L. Tait nine hundred and 00-100 dollars. In payment on sale of Los Gatos Hotel and contents. J. S. McInnes." There is nothing upon the face of the receipt from which it can be ascertained that $2,000 remained to be paid; and, instead of "proving" that the sale was complete and unconditional, it merely shows that the defendant received $900 from the plaintiff as a payment on the same. The terms of the sale are not given therein; and, if, as found by the court, the parties entered into no agreement for a sale, but made only an attempt at an agreement, the plaintiff is entitled to a return of the money paid by him.

(b) The court found that the defendant never tendered to the plaintiff the necessary papers for the consummation of any sale of the property, and did not tender to the plaintiff a bill of sale of said property, or a lease by the owner of the hotel to the plaintiff. Upon this finding the specification in the bill of exceptions is as follows: "There is no evidence that the defendant did not tender to the plaintiff a bill of sale of said property, and a lease by the owner of said hotel to said plaintiff." The tender of this lease was a condition precedent to be performed by the defendant in order to establish his right to the $2,000 claimed in his cross-complaint; and it was incumbent on him to show affirmatively that it had been tendered. In support of his specification of error the appellant says in his brief: "The appellant tendered the necessary papers of transfer at Dr. Tait's house, and failing to see the doctor personally put the papers in a bank at Los Gatos and notified Dr. Tait thereof." Assuming that this is a full and correct statement of all the evidence in the record which tends to show that any tender was made, it is in itself an admission that the defendant did not tender the necessary papers of transfer to the plaintiff. We have not been cited to any provision of law by which the defendant was authorized to make such deposit of the papers, merely because he failed to see the plaintiff personally, or that a deposit of the papers in a bank and notice thereof to the plaintiff was equivalent to a tender of them to the plaintiff.

The judgment is affirmed.

We concur: HALL, J.; COOPER, J.

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3 Cal. App. 168

MERRITT v. TRINITY COUNTY.

(Court of Appeal, Third District, California. Feb. 24, 1906.)

EVIDENCE—JUDICIAL NOTICE—BOUNDARIES OF COUNTIES.

Under Pol. Code, §§ 3918, 3919, defining the boundary line between Trinity county and Mendocino county, it was the duty of the court, in an action against one of the counties to recover taxes paid to it on the ground that the land taxed was in the other county, to take judicial notice as to which county the land was in.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 31–33.]

Appeal from Superior Court, Trinity County; A. I. McSorley, Judge.

Action by George N. Merritt against the County of Trinity. Judgment for defendant, and plaintiff appeals. Reversed.

Hudson Grant, for appellant. H. R. Given and D. J. Hall, for respondent.

BUCKLES, J. This is an action to recover taxes which the plaintiff claims were illegally assessed and collected in Trinity county, the lands, on which the said taxes were levied and collected, as plaintiff claims, are not located within the boundary lines of Trinity county. The answer denies, and also alleges, that the said taxes were properly due to the county of Trinity. The taxes were paid under written protest, and all allegations of the complaint were admitted, except as to the land not being in Trinity county. At the trial the plaintiff offered no evidence tending to show that the land taxed was not in Trinity county, but moved the court to take judicial notice of the location of said lands and to determine of its judicial knowledge and without evidence offered by plaintiff that the said lands were not in Trinity county. The plaintiff then rested his case, whereupon the defendant moved for a nonsuit, which the court granted (without prejudice) and refused to determine the location of the said lands of its judicial knowledge. The appeal is from the judgment of nonsuit.

The bill of exceptions sets forth: "That the court refused to determine the location of said lands, of its judicial knowledge and without evidence introduced by plaintiff, for the reason that it appeared to the court from the records on file in the county clerk, auditor, and recorder's office of Trinity county, California (none of which records or files were introduced in evidence), and by the admission of counsel that the lands described in plaintiff's complaint, as amended, are situated between two surveyed lines, each of said lines purporting to be the true boundary line between Trinity and Mendocino counties, the plaintiff claiming that the most northerly of said two surveyed lines (made in 1891) is the true boundary line between said counties of Trinity and Mendocino, and the defendant claiming that the most southerly of the two surveys, the one made in 1872, is the true boundary line between said counties." The land is described in the complaint as sections and parts of sections and as all being in township 5 S., range 6 and 7 E., Humboldt meridian, according to government survey. Trinity county lies directly north of Mendocino county, and section 3918, Pol. Code, defines the boundaries of Mendocino county making the fortieth parallel north latitude the northern boundary, while section 3919, Pol. Code, makes the same line the southern boundary line of Trinity county. The only question in the appeal is: Did the court err in refusing to determine by that class of evidence known as "judicial knowledge," the county in which the said land is located?

Under the authority of Rogers v. Cady, 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100, we are compelled to hold that the question of the situs of the land as to the county in which it is located, is one of which the trial court must take judicial notice, and the refusal thereof was reversible error. The boundary line between Trinity and Mendocino counties is fixed by law. Sections 3918, 3919, Pol. Code, or the survey made, under the provisions of Pol. Code, §§ 3869, 3872, and the surveys by the surveyor general are public and official acts (under direction and sanction of law) of the executive department of the state government; and the government surveys of the public lands are the public and official acts of the executive department of the United States government and are both matters of official record. And as held in Rogers v. Cady, supra: "It was therefore a matter for the court to determine, either from the personal knowledge of the judge or from an examination by him of those records" whether the said land was in Trinity county. The Supreme Court further said in that case, "for the purpose of informing itself, the court might inquire of others, or refer to books or documents, or any other source of information which it might deem authentic, but its action in this respect is no part of the trial of issues in the action."

On the authority of Rogers v. Cady, supra, the judgment is reversed, and the case remanded.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

3 Cal. App. 162

PEOPLE v. BLIS.

(Court of Appeal, Third District, California. Feb. 24, 1906.)

CRIMINAL LAW — APPEAL — BILL OF EXCEPTIONS — TIME FOR SETTLING — EXTENSION —NECESSITY OF NOTICE AND AFFIDAVIT.

Under Pen. Code, §§ 1171, 1174, as amended by St. 1905, p. 761, c. 569, requiring notice in writing to be given the district attorney of the intended presentation of the bill of exceptions to the judge at least two days before such presentation, and declaring that the time specified for the presentation of the bill of exceptions to the judge may be extended for a reasonable period by the judge, but only for good cause, and upon affidavit showing the necessity therefor, presented upon written notice of at least two days, the judge cannot, in his discretion, extend the time for the presentation of a bill of exceptions without notice to the district attorney, or any affidavit showing the necessity for such extension.

Petition for a writ of prohibition by the people of the state of California against Louis Blis to restrain respondent from settling a bill of exceptions. Writ issued.

R. Benjamin, Dist. Atty., for the People. Bell, York & Bell, for respondent.

CHIPMAN, P. J. It appears that defendant was, on the 4th day of August, 1905, duly convicted of the crime of obtaining money by false pretenses. Thereafter, on August 7, 1905, his motion for a new trial was denied, and judgment of conviction was thereupon rendered. On August 8th he served upon the district attorney, and filed in said superior court, notice of appeal. Thereafter, on August 16th, the judge of said court made an order extending the time in which defendant might prepare and present his bill of exceptions, to and including August 26, 1905. On August 28, 1905, the said judge made and entered an order further extending the time to and including September 6, 1905. It appears, also, that neither the defendant nor his attorney served any notice on the district attorney of defendant's intention to present a bill of exceptions for settlement, nor made, presented, or filed any affidavit of any kind whatever with the judge of said court or with the district attorney showing any necessity or reason for any extension of time within which to present or file said bill of exceptions, nor was any notice given to the district attorney by the defendant or by his attorney of any intention to apply for an order extending the time within which to present and file a bill of exceptions, nor was the district attorney given any opportunity to oppose, by affidavit or otherwise, such extension of time as granted by the said court. On September 6, 1905, the defendant in the action, presented and filed his proposed bill of exceptions with the clerk, but at no time prior thereto had the district attorney notice of such intended presentation or filing with the clerk of said bill of exceptions. Subsequently, to wit, on September 22, 1905, the said bill of exceptions was presented to the judge of said court and was placed upon the calendar, and, thereafter, the settlement thereof was postponed from time to time until October 23, 1905, on which day the district attorney filed his affidavit objecting to the settlement of said proposed bill of exceptions, in which were set forth the facts above appearing. On November 15, 1905, the said court made an order overruling the objections made to the settlement and ordered "that the settlement of said bill of exceptions be placed on the calendar for hearing for Monday, November 20, 1905." Whereupon this proceeding was brought to prohibit the court from settling the said bill, it being alleged that the court will settle the same unless prohibited from so doing by this court.

The defendant made no counter showing, by affidavit or otherwise, either at the hearing of the objections of the district attorney on November 15th or at the hearing of this petition; and at no time during any of said proceedings did defendant make or offer any excuse for his failure to present his bill of exceptions for settlement as required by the statute. Prior to the filing of the information against the defendant, sections 1171 and 1174 of the Penal Code were amended by the Legislature, materially changing the practice in some particulars relating to the preparation of bills of exceptions. St. 1905, p. 761, c. 569. Section 1171 requires notice in writing to be given the district attorney of the intended presentation of the bill to the judge, "at least two days before such presentation or delivery." "The judge must, immediately upon the draft being presented or delivered to him, designate a time for the settlement of the bill, and, if the parties are not present, require the clerk to notify them in writing of such date. The time so fixed must not be changed for inconvenience to a party, except upon good cause shown by affidavit of necessity therefor." Section 1174 provides that "the time specified in this section and section 1171 within which the draft of a bill of exceptions must be presented to the judge or delivered to the clerk, may be extended for a reasonable period by the trial judge, or, in his absence from the county or inability to act, by a justice of the Supreme Court, but only for good cause and upon affidavit showing the necessity therefor, presented upon written notice of at least two days to the adverse party, who shall have the right to file counter affidavits. In no case can the time be extended by stipulation of the parties." These provisions are not found in the former statute. See Code commissioner's note in supplement to the Codes, p. 353, as to the object of the amendments. It is not pretended that the statute was complied with in this case.

It was held in an early case, People v. Woppner, 14 Cal. 437 (followed in People v. Lee, Id. 510; People v. Sprague, 53 Cal. 422; Brown v. Prewett, 94 Cal. 502, 29 Pac. 951, and perhaps others), "that the statute directing the statement or bill of exceptions to be settled within 10 days, and signed by the judge, in a criminal case, was directory merely." In Brown v. Prewett it was conceded "that the judge of the superior court has the power to settle a bill of exceptions in a criminal case presented after the 10 days prescribed by the statute, and after such additional time as may have been granted by him, or by a justice of this court, and even in a case like this, where it is presented long after the lapse of the statutory time, and no effort has been made to procure an extension." It was also held that it is the duty of the judge to settle the bill so presented, "if the failure to comply with the statute is shown to have been unavoidable or excusable." The court said, however, that the "rule, though directory, was intended to be enforced in proper cases, and it is the duty of the court to uphold it. It was meant to avoid unnecessary delays and to enable the judges to settle bills of exceptions while the facts are fresh in their memory." It was also said that the rule is inconsistent with the notion "that a defendant in a criminal action, after appealing and giving bail pending the appeal, can take his own time in bringing the appeal to a hearing." The court said, if not presented within the statutory time, "the bill may still be settled if the court, in the exercise of its discretion, finds that the delay is excused. But if the delay is not excused, the court not only may, but ought to, deny the application.

The statute now is much more explicit than when these cases were decided, and introduces some additional and material requirements. It now provides that the time can be extended "only for good cause and upon affidavit showing the necessity therefor, presented upon written notice of at least two days to the adverse party, who shall have the right to file counter affidavits." The code commissioner, in his note, says: "The design of the amendment to these sections is to bring about, as far as possible, an avoidance of the delay now so common in getting criminal cases to a hearing in the Supreme Court, and to require bills of exceptions in criminal cases to be settled as expeditiously as is compatible with the circumstances of the case." Even under the former statute, and in the cases first announcing the rule in criminal cases (People v. Wopper and People v. Lee, supra), it was said: "But though the statute is only directory to the judge, it is not on that account to be the less observed by him," and it was held that the defendant must show good and sufficient excuse for his failure to prepare his bill. Said the court: "When such excuse is shown, the judge should settle the bill; otherwise not." In the case of People v. Sprague, supra, the trial judge refused to settle the bill for the reason, among others, that the defendant had not served the statutory notice on the district attorney. The Supreme Court, on appeal, affirmed the order. The court said: "When it is intended to apply for the settlement of the bill of exceptions after the expiration of the statutory period, the two days' notice should be given to the district attorney: First, because section 1171 of the Penal Code requires such notice, whenever a bill of exceptions shall be presented or filed; and, second, because that officer should have an opportunity not only to prepare amendments to the draft-bill, but also to contradict the statements in the affidavits on which the application is based, or otherwise to prove that unnecessary delay has occurred."

It was objected, to the first extension of time given by the court—first, that the time in which the bill must be presented to the judge can be extended only for good cause and upon affidavit showing the necessity therefor; and, second, that there must be written notice of at least two days given to the adverse party when an extension of time is sought, and in no case can the time be extended by stipulation. To the second extension the same objections are made as to the first extension above mentioned, and further, that the time given in the first extension had expired and the court lost jurisdiction to make any further order extending the time. The case of Brown v. Prewett, supra, seems to hold that under the former statute jurisdiction is not lost to settle a bill or to extend the time within which to settle it, although the statutory period has expired before the bill is presented or an extension of time has been asked. The question was there treated as one of discretion, and its abuse or nonabuse, rather than one of power. The present statute introduces additional requirements which we cannot hold to be merely directory. The judge may extend the time "for a reasonable period," but the statute expressly provides that he may do this "only for good cause and upon affidavit showing the necessity therefor," on notice to the district attorney, "who shall have the right to file counter affidavits." And the right of the parties to stipulate for further time is expressly taken away. If the judge can, in the ex parte manner here shown, grant extensions of time without requiring the defendant to conform in any particular to the provisions of the statute, we might as well have no statute; the whole subject would be at large and the procedure absolutely nullified. The statute is a reasonable one and imposes no hardship and its constitutionality is not questioned. In holding that the time within which the bill must be presented was directory, the court heretofore gave, for the benefit of the defendant in a criminal case, a different interpretation to the then statute from that given to like provisions in the Civil Procedure. But we do not think the reasons expressed for the departure in the particular in the early cases mentioned can be so applied as to justify the utter disregard of all the present existing legislative directions. To do so would be equivalent to the court's substituting its own procedure for that prescribed by statute. This would be far beyond the rightful exercise of power by the court whose function it is to interpret and enforce the law, not to enact it or annul it.

We think it was clearly the duty of the court to have refused to settle the bill or fix a definite time when it would do so. Had the court refused, it is certain the defendant could not, under the facts shown, have compelled it by mandamus. To have obtained the benefit of such writ he would have been required to show compliance with the statute or have shown good cause for not having done so, thus having brought the case within the jurisdiction of the court to exercise the power given it by the statute. We can conceive of no circumstances under which the defendant would not at least be able to show why he should be excused for failure to comply with the statute. If he fails to do this much, he fails to give the court jurisdiction to extend his time. It was admitted by defendant's counsel at the argument that the procedure laid down in the statute "is absolutely necessary to be taken by defendant to give him an absolute right to have the bill settled." But it is claimed that it was nevertheless within the discretion of the court, "after hearing the whole matter, to make the order setting down the bill for settlement and giving the district attorney time in which to file his amendments to the bill"; that the people had the right of appeal under subdivision 5, § 1238, of the Penal Code, and therefore prohibition will not lie. We cannot concur in this view of sections 1171 and 1174, and must hold that when a defendant, in a criminal action, seeks to obtain an extension of time within which to have his bill of exceptions settled, he must proceed substantially as directed by the statute. Doing this the judge is then clothed with discretion and his action would be disturbed only where its abuse is made to appear. Brown v. Prewett, supra.

Let the peremptory writ of prohibition issue.

We concur: BUCKLES, J.; McLAUGHLIN, J.

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3 Cal. App. 151

HARRIS v. MORRIS et al.

(Court of Appeal, Third District, California. Feb. 24, 1906.)

PROCESS—SERVICE BY PUBLICATION—PROOF.

Where an order for publication of summons required a mailing of copies to each of the defendants, an affidavit setting forth that "a copy of said summons attached to a copy of the complaint, directed to" numerous defendants, was deposited in the post office, does not show complete service on any of the defendants, mailing being as much a part of the service as publication; and there was no abuse of the court's discretion in setting aside a default based thereon.

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by Ike Harris against Walter B. Morris and others. From an order setting aside default of defendants, and from an order setting aside a judgment entered in favor of plaintiff, plaintiff appeals. Affirmed.

A. M. Drew, for appellant. George Cosgrove, for respondents.

BUCKLES, J. This is an appeal from an order setting aside default of defendants and from the order setting aside the judgment entered in favor of plaintiff and against defendants on May 14, 1904. The suit was to quiet title to certain lots in the city of Fresno and service of summons was by publication and mailing. The judgment by default was rendered May 14, 1904, and on May 25, 1904, the motion to set aside the default and judgment was served on plaintiff's attorney and the same was heard exclusively on affidavits on June 9, 1904, and the motion granted upon condition that defendants pay to plaintiff the sum of $20 within 20 days from date. The defendants were permitted to and did file an answer on June 9, 1904. Payment of the $20 was tendered and refused. As said by the Supreme Court in Bailey v. Taaffe, 29 Cal. 423, setting aside a default rests very much in the discretion of the court below and will not be disturbed unless the appellate court is satisfied that the order is so plainly erroneous as to amount to an abuse of discretion, and this discretion must be an impartial one guided and controlled in its exercise by fixed legal principles. It is to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. These rules have been followed by our Supreme Court ever since. Measured then by these general rules, should the default have been set aside and the judgment vacated?

The motion was made and heard upon the following grounds: (1) insufficient service of summons; (2) that the default of defendants was improvidently entered and that no sufficient affidavit for an order of service of summons by publication has been made; (3) that no sufficient return of service is on file; and, (4) the further grounds of inadvertance, mistake, surprise and excusable neglect. Taking these up in their order:

The summons was published in compliance with an order made for that purpose, which order was founded upon the affidavit of A. M. Drew, the attorney of plaintiff. As no errors are pointed out in either the affidavit for publication of summons, or the order of the court made thereon, they are held to have been sufficient. The summons was published in the Fresno Morning Republican, and the affidavit of publication of said summons was made by J. T. Holden, the principal clerk of said newspaper, setting forth, apparently, all the law required, for the period of 60 days in every issue of said paper during that period. No error in affidavit for publication, order for publication of summons, or the publication itself has been pointed out to us, and we have discovered none. The affidavit made to procure publication of summons set forth that the "defendants reside out of the state of California and cannot, after due diligence, be found therein" and their last known place of residence was the city of Los Angeles, and the order issued on said affidavit "directed that a copy of the summons and complaint in this suit be forthwith deposited in the United States Post Office at the city of Fresno, county of Fresno, state of California, post-paid, directed to the said defendants and to each of them at their said last known place of residence, to wit, the city of Los Angeles, state of California." The affidavit of A. M. Drew, the attorney for plaintiff, shows: "That forthwith, to wit, on the 17th day of February, 1904, and in pursuance of the said order of court he deposited in the United States Post Office at the city of Fresno a copy of said summons attached to a copy of the complaint, directed to Walter B. Morris, Ethel Morris, Anna D. Morris, and Lewis S. Morris, the said defendants, at Los Angeles, county of Los Angeles, state of California, the last known place of residence as aforesaid, and paid the postage thereon in advance." There is much doubt as to whether this evidence shows a compliance with the order. The order required a mailing of copies to each of the defendants, and the proof of mailing does not affirmatively show that a copy was mailed to each. The language is: "A copy of said summons and a copy of the complaint." Does it clearly, or at all, appear from the affidavit that one copy of the summons and one copy of the complaint was mailed to each of the defendants? The service was not complete unless a copy of the summons and complaint was deposited in the post office for each defendant and directed to each. The mailing is as much a part of the service as the publication. For this reason, and a failure of the return to show proper service by mail, the service was not complete on any of the defendants. Schart v. Schart, 116 Cal. 93, 47 Pac. 927. In Cohn v. Kember, 47 Cal. 144, it is declared that: "In proceedings against an absent defendant upon mere constructive service, the conditions of the statute must be strictly pursued or the judgment cannot be supported upon appeal." Also Ricketson v. Richardson, 26 Cal. 149.

As we have seen, the matter of setting aside a default is very largely in the discretion of the court. If true, as it clearly appears here, that the constructive service attempted was not complete, then the trial court never acquired jurisdiction of the defendants, and the setting aside of the default was not only the exercise of legal discretion in a sound way, but it was the duty of the court, upon the fact appearing that the defendants had not been served either personally or constructively, to set aside the default. Appellant sets forth in his brief many very sound reasons why the default should not be set aside, and which might lead us to different conclusions than the one we have reached did the record show the service by publication to have been complete. But, as the conclusion reached upon this one point compels us to affirm the order setting aside the default and judgment, we see no reason for pursuing the matter farther, or announcing any opinion upon other points and the points made by appellant as to want of diligence on the part of defendants, their mistake, surprise, or defense without merits.

The order setting aside the default and judgment is affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

3 Cal. App. 171

McRAE v. BLAKELEY.

(Court of Appeal, Third District, California. Feb. 24, 1906.)

1. Trespass — Wrongful Construction of Ditch—Action for Damages—Evidence—Sufficiency.

In an action for damages for constructing a ditch across plaintiff's land and for an injunction restraining the maintenance of the ditch, evidence merely that plaintiff owned the land, and that defendant constructed the ditch justified a finding that plaintiff was in possession, and that defendant constructed the ditch without right, and against the wish of plaintiff, and that plaintiff was damaged.

2. Same.

In an action for damages for the construction of a ditch across plaintiff's land, and for an injunction to restrain the maintenance of the ditch, evidence that plaintiff had title to the land, and that defendant had constructed the ditch from 110 to 122 feet wide and 4 to 5 feet deep, was sufficient to justify findings that defendant intended to maintain the ditch and run water through it, and that plaintiff would suffer damage from the continuance of the ditch.

3. Injunction—Continued Trespass—Maintenance of Ditch—Relief.

Where defendant wrongfully constructed a ditch from 110 to 122 feet wide across plaintiff's land, plaintiff was entitled to an injunction compelling defendant to fill up the ditch.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 101.]

4. Trespass—Complaint—Sufficiency.

In an action for damages for constructing a ditch across plaintiff's lands and to enjoin the maintenance of the same, a complaint alleging that plaintiff owned the land, and that defendant without right dug the ditch, was sufficient without any allegation that defendant's entry and acts on the land were "wrongful and unlawful."

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trespass, § 83.]

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by P. McRae against Frank Blakeley. From a judgment for plaintiff, defendant appeals. Affirmed.

Charles J. Lamberson and H. P. Brown, for appellant. Hannah & Miller, for respondent.

BUCKLES, J. This action was brought to recover damages against the defendants for constructing a ditch across certain lands belonging to plaintiff and to secure a perpetual injunction restraining defendant from maintaining, using, enlarging, or turning into, running, carrying or conducting water through said ditch and also for general relief. The answer denied all the allegations of the complaint and set up leave of plaintiff to construct said ditch. At the trial the plaintiff called a civil engineer by whom he proved the existence of a ditch on plaintiff's land and its dimensions and that it was from 110 to 122 feet wide and from four to five feet deep. Defendant then admitted that he, Frank Blakeley, built the ditch across plaintiff's land and admitted that plaintiff was the owner of the land across which the said ditch was made. This was all the testimony and both parties rested. Judgment was for plaintiff that defendant fill up said ditch and a mandatory injunction granted. The appeal is from the judgment.

The question to be determined is: Does the evidence justify the findings? The complaint alleges that the defendant "without any right or claim of right, willfully, wrongfully, and unlawfully and against the will and wish of plaintiff, and with force and arms and during plaintiff's absence from the premises broke, and entered the said lands of plaintiff and trod down and destroyed the crops growing thereon, and dug up and excavated, and removed the soil and earth therefrom, and dug a deep ditch or canal through and across said lands * * * to the plaintiff's damage * * *" This the answer specifically denies and by the fifth paragraph alleges that a certain canal or ditch was made across the said lands of plaintiff with the consent of the plaintiff, and that the same is now, and has been of great value to plaintiff, etc. The court found in the language of the complaint as to the construction of the ditch and appellant claims that the evidence does not justify such finding. We think that the ownership of the land and the construction of the ditch being admitted the possession in plaintiff is presumed, as is also the entry of defendant without right; and no evidence on the question of damage being presented by plaintiff, the plaintiff established a prima facie case and it then devolved upon defendant to show his "leave and license" to do the things that he admitted doing, and as he made no attempt to do so, we think the finding correct and supported by the evidence. Brownell v. Fisher, 57 Cal. 150; Lentz v. Victor, 17 Cal. 272.

The third finding is also objected to as not being supported by the evidence. This finding is that defendant has ever since the construction of said ditch wrongfully and unlawfully and without claim or color of right willfully maintained and still continues to so maintain said ditch on plaintiff's lands, and it is his purpose and intention and he threatens to, unless restrained, continue to so maintain the same, and to turn into and carry water through the same, and over the said lands to the damage and injury of said lands, and that said damage will be continuous, and unless enjoined and prevented will ripen into a right to maintain such ditch. Notwithstanding defendant's allegation in his answer that running water through this ditch on plaintiff's land is a benefit to said land, he offered no proof of the fact, and the plaintiff having alleged the damage to his land by reason of said ditch, and the running of water through the same over his land, and the proof showing the ditch having been put there by defendant without claim or color of right, and that the ditch was still there, 110 to 122 feet wide and four or five feet deep, would surely have a tendency to show an injury to plaintiff's land as well as the defendant's intention to maintain the same and to run water through the said ditch. We think the third finding fully supported by the evidence.

The fourth and fifth findings, that the ditch made by defendant is an obstruction to the free use of said land, and the plaintiff's comfortable enjoyment thereof, and that the plaintiff is entitled to a judgment restraining the defendant from maintaining or in any manner using said ditch, enlarging the same, or running water through the same, or in any manner trespassing on plaintiff's land, and entitled to an order commanding said defendant to fill up said ditch and restore the premises to their former condition, are fully supported by the evidence, admissions and presumption aforesaid. To say that a ditch or canal of the dimensions this one is shown to be constructed across the lands of plaintiff by another without any right whatever to do so, under an allegation by the plaintiff of injury to his lands, does not furnish at least a presumption of injury would be contrary to common knowledge and human experience. This injury to the land being done by making the ditch, a judgment of the court enjoining the use thereof or any further maintenance by defendant would not correct the evil or abate the nuisance. Nothing short of filling up the ditch and restoring the premises to their condition prior to the trespass by the defendant can accomplish it. Gardner v. Stroever, 89 Cal. 26, 26 Pac. 618. The findings are all supported by the evidence. That the acts complained of were done willfully and wrongfully appears the moment it is shown that they were done by a trespasser, one without any claim or color of right. The plaintiff herein alleged ownership, and surely this, coupled with an allegation of possession (though unnecessary), and that defendant, without claim or color of right, went thereon and committed some detrimental act, the complaint would be sufficient without an allegation that the entry and the act complained of were "wrongful and unlawful." No statement of fact is comprised within those words. They are merely a statement of a conclusion of law which follow by reason of the existence of the allegation of fact. Payne and Dewey v. Treadwell, 16 Cal. 244; F. A. Hihn Company v. Fleckner, 106 Cal. 95, 39 Pac. 214.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

CHITTENDEN v. BLAKELEY.

(Court of Appeal, Third District, California. Feb. 24, 1906.)

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by L. S. Chittenden against Frank Blakeley. From a judgment for plaintiff, defendant appeals. Affirmed.

Charles J. Lamberson and H. P. Brown, for appellant. Hannah & Miller, for respondent.

BUCKLES, J. This is an action to recover damages from the defendant for constructing a ditch across the lands of defendant, to recover a perpetual injunction restraining defendant from maintaining, using, enlarging or turning into, running, carrying, or conducting water through said ditch, and for general relief in the premises. Judgment was for the plaintiff, without damages, but granting the injunction and commanding defendant to fill up said ditch.

This is a case involving exactly the same questions contained in the case of P. McRae v. Frank Blakeley (No. 165, this day decided by this court) 84 Pac. 679; and on the authority of that case the judgment in this case is affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

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3 Cal. App. 145

HUGHES BROS. et al. v. HOOVER et al.

(Court of Appeal, Second District, California. Feb. 23, 1906.)

1. Appeal—Presentation of Questions in Trial Court—Cross-Complaint.

Where a cross-complaint was filed in an action to foreclose a mechanic's lien, and a motion to strike the cross-complaint was withdrawn, and no further objection made to it, but issues were made upon it, it will be assumed on appeal that the cross-complainant's claims were properly before the court.

2. Mechanics' Liens — Enforcement—Limitations.

Where, on default of a building contractor, the owner, in accordance with the express terms of the contract, terminated the employment and completed the work, the 90 day's limitation of the time to commence actions to enforce mechanics' liens, prescribed by Code Civ. Proc. § 1190, commenced to run against a person who furnished materials to be paid for within 35 days after completion of the building, at the end of 35 days from the owner's completion of the work, and not from the contractor's abandonment of it.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, § 463.]

3. Same—Extension of Credit—Statutory Provisions.

Code Civ. Proc. § 1190, providing that no mechanic's lien shall be binding on the property for more than 90 days, unless proceedings be commenced to enforce it within that time, or if a credit be given, 90 days after its expiration, is not limited, in the application of the proviso relating to credit, to liens based on direct contract with the owner, and if section 1201, forbidding the owner or contractor to impair the liens of others, by contract or otherwise, be construed as invalidating contracts between the owner and contractor for credit when they impair other liens, still section 1190 would apply to other liens.

4. Same—Contract for Payment by Installments.

Under Code Civ. Proc. § 1190, limiting the enforcement of materialmen's liens to 90 days after the completion of the work or after the expiration of credit extended, where a materialman was to be paid in installments during the progress of the work, the last payment to be made 35 days after completion of the building, he did not lose his lien for the first installments where he commenced an action to enforce the lien more than 90 days after the completion of the building, but within 90 days from the expiration of the 35-day period.

5. Same — Personal Judgment Against Owner.

One furnishing materials for the erection of a building, does not, by notice to the owner to withhold money, become entitled to a personal judgment against the owner for the sum due him in excess of the sum due the contractor.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, §§ 632–635.]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Hughes Bros. and others against G. W. Hoover and others. From the judgment, and from an order denying a new trial, plaintiff E. K. Wood Lumber Company appeals. Reversed.

Flint & Barker and Barker & Bowen, for appellant. Hunsaker & Britt, Borden & Carhart, Haas & Garrett, Charles L. Batcheller, J. W. McKinley, Walter Bordwell, George M. Holton, W. D. McConnell, and Walter L. Krug, for respondents.

GRAY, P. J. Appeal by the E. K. Wood Lumber Company from a judgment and an order denying a new trial in an action to foreclose a mechanic's lien.

It appears from the record that the contract between the owner and contractor was valid; that one of its provisions gave to the owner the right, should the contractor neglect to supply a sufficient number of skilled workmen, or materials of the proper quality, or to prosecute the work with promptness and diligence, after three days' notice, to terminate the employment and complete the work; that the contractor, making default, the owner gave the notice, and three days after its service took possession of the building and completed the same; that deducting from the contract price the sum necessarily expended in the completion, and a certain payment made by stipulation, there remained in the owner's hands on February 19, 1903, the date of completion, $5,953.86. That all of the claims of lien in controversy were filed in time, and actions, either original or by way of cross-complaint to other actions, were commenced within 90 days of the filing thereof, except the claim of appellant, which was commenced 92 days after its filing. Appellant's claim of lien, however, which is stipulated to be true in every respect, disclosed that the materials furnished by appellant were payable in installments during the progress of the work, the last payment to be made within or before 35 days from the completion of the building. In one of the original actions brought to foreclose the liens, being case No. 41,412, appellant was not named as a party defendant, but in said action one E. K. Wood, John Doe, and others were named. Appellant answered, alleging that E. K. Wood had no interest in the controversy, but that it had, and set up in proper way its claim of lien. This pleading, denominated a cross-complaint, was served upon plaintiff, service acknowledged, and plaintiff entered an appearance thereto; the same was filed in the action, and subsequently all parties stipulated that they should be deemed as having answered thereto. Subsequently, appellant filed an original action, setting up that it had served the statutory notice upon the owner to withhold money under the contract, and upon this it claimed the right to a personal judgment against the owner and contractor. This case, and all of the other cases involving the question of the rights of the various parties to the unpaid balance on the contract, were consolidated and heard together. Upon the hearing the court found that appellant had never commenced any action upon its claim of lien, and apportioned all of the unpaid balance in the hands of the owner among the lien-claimants other than appellant; but rendered a personal judgment in favor of appellant against the contractor.

This appeal presents two primary and controlling questions: First, was an action comcommenced by appellant upon its claim of lien when it filed the cross-complaint? Second, was the same filed in time to avoid the force of the limitation provided in section 1190, Code Civ. Proc.? The trial court, apparently with the acquiescence of all parties, proceeded upon the theory that all parties plaintiff and defendant in an action of this character who are served with process and appear thereto and answer are actors; and this seems to find support in Grant v. Murphy, 116 Cal. 431, 48 Pac. 481, 58 Am. St. Rep. 188, wherein it assigned the reasons why in proceedings in partition all parties thereto are actors, such reasons therein applying with equal force to a case of the character under consideration. It is apparent in this case, from the fact that the contract was a valid one and that a fixed balance unexpended of the contract price was the fund from which alone the parties were entitled to base their claims, that all lien-holders were entitled to share therein. The cross-complaint of E. K. Wood Lumber Company, appellant herein, was filed, and all parties stipulated, in effect, that its allegations should be deemed to be denied by each of the several parties. To be sure, the cross-complaint was once stricken out by the court on motion, but it was afterwards restored by consent, and was left in the case as if no motion to strike out had ever been made. It was also stipulated that the defense that the 90 day period for bringing action to foreclose the lien should be deemed to be pleaded to the said cross-complaint. It seems clear from the record, therefore, that no question was made in the court below about appellant's lien not being properly before the court; but, on the contrary, by express stipulations, issues were made up fully involving that lien and every defense that could be urged thereto. The trial court was thus, by the consent of all parties, given jurisdiction of the subject-matter of all those issues and of the person of all the parties interested therein. It is too late to urge here for the first time that the appellant and its rights had no place in the trial court. No objection to that effect having been made, or, rather, the objection which was made having been withdrawn and no similar objection thereafter made in the court below, no such an objection will be heard here. From these facts we say we must assume for the purposes of this appeal, that an action was commenced upon appellant's claim of lien when it filed its cross-complaint, and that thereafter the said cross-complainant and its rights of lien and the defenses thereto were properly treated as before the trial court for its adjudication.

We are also of opinion that the cross-complaint was filed in time. It appears from such cross-complaint that credit was extended and the filing thereof was within 90 days after the expiration of such credit. The proposition that this credit should be construed as expiring 35 days after abandonment of work by the contractor cannot be maintained; for it affirmatively appears that there was no actual abandonment of work in the sense contemplated by the statute, wherein abandonment is held to be the equivalent of completion. In cases of actual abandonment the right of the owner to complete, after awaiting the 30-day suspension, is derived from the statute. In this case the right of completion was given by the contract itself, and no cessation of labor for any number of days was a condition precedent to the owner's right of completion. Whatever, therefore, the owner did in the way of completing the building was as much performance under the contract as were similar acts performed by the contractor, and the completion, therefore, by the owner was a completion under the contract. Section 1190, Code Civ. Proc., provides: "No lien provided for in this chapter binds any building, mining claim, improvement, or structure, for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same; or, if a credit be given, then ninety days after the expiration of such credit; but no lien continues in force for a longer time than two years from the time the work is completed, by any agreement to give credit."

There is nothing in this section indicating that the credit therein mentioned refers to liens based upon direct contract with the owner. Its language makes it applicable to all liens, and were section 1201, Code Civ. Proc., construed as invalidating the terms of credit between owner and original contractor when the same affected or impaired other liens, still section 1190 would apply to liens other than those inhibited by section 1201. Nor are we of opinion that the installments maturing during the progress of the work were barred by the provisions of section 1190. In this state the lien of materialmen is a right given by the Constitution, the legislative functions being to provide a system through which such right might be executed and carried into effect; and the language in section 1190, which declares that the lien ceases to exist, may be ignored, as the same exceeds legislative power. Giving to section 1190 the only force which it can possibly have is to interpret it as a statute of limitation which provides the time within which an action may be brought for the enforcement of a right. This constitutional right of lien becomes perfected and enforceable only when a written claim of lien containing certain facts properly verified is filed. It is this written, filed instrument, then, which forms the basis of the action, and it is an action upon this instrument which must be commenced within 90 days. There is no intimation in the section that any items specified in such instrument shall be barred, or when the action is properly commenced, that any part of the claim of lien shall be affected unless the whole thereof is affected in like manner. A different construction has been placed upon a similar section by the Supreme Court of Oregon in Capital Lumbering Co. v. Ryan et al., 54 Pac. 1093. It must be borne in mind, however, that the Constitution of Oregon confers no right of lien, and that such right is a statutory privilege. Brown v. Harper, 4 Or. 89. This being true, it was entirely competent for the Legislature to provide that a lien which exists by virtue of the furnishing of materials, and which attaches as to each item when so furnished, should cease at any time. But a different rule should apply in this state under our Constitution, where the Legislature may not extinguish a lien at the expiration of the credit, or at any time, but may only legislate with reference to the remedy. The Legislature, then, not having attempted to enact a statute of limitations for recovery on account of items entering into the claim of lien, but only as to the right of action upon the lien itself, a cause of action upon the entire claim of lien did not accrue until the expiration of the credit, from which time the 90 days began to run.

The contention of appellant that it was entitled to a personal judgment against the owner, growing out of the notice to withhold money, is not tenable. The equitable garnishment which is said to be occasioned by such notice attaches only to such sum as might be payable to the contractor after the extinguishment of the liens, for until such liens are extinguished no sum is payable from the owner to the contractor. It appears from the record that the claims of lien exceeded the amount of money in the hands of the owner; hence, there was nothing upon which the garnishment could operate. We are of opinion, therefore, that the court erred in its judgment and decree, by which it awarded to the lien claimants other than appellant the whole of the fund unexpended, and that, from the stipulations in the record, the appellant is shown to have been entitled to its proportion of such fund.

The judgment and order of the court are therefore reversed, with instructions to the court below that the judgment be modified and corrected in this, that the fund in the owner's hands, found to be the correct and total amount applicable to liens, be divided pro rata among the said lien-claimants who are entitled to enforce liens against said property, according to the amounts due them, respectively, and in like proportion including appellant's claim of lien so stipulated to be correct.

We concur: ALLEN, J; SMITH, J.

148 Cal. 700

HIGGINS et al. v. CARLOTTA GOLD MINING CO. et al. (Sac. 1,129.)

(Supreme Court of California. Feb. 12, 1906.)

1. Mines and Mining—Liens—Work Done for Lessee.

A lessee of a mine, under a lease providing that he shall continually prosecute the work of exploring, developing, and mining on said premises for a share of the proceeds of the mine, is a person having charge of mining, within Code Civ. Proc. § 1183, giving a lien for work done in or on mines, and at the instance of the owner or his agent, and providing that a person having charge of any mining shall be held to be the agent of the owner, so that work done for the lessee is entitled to a lien.

2. Same—Lien for Extracting Ore.

Under Code Civ. Proc. § 1183, before its amendment by St. 1903, p. 84, c. 76, allowing a lien for work done or materials furnished in the construction of buildings or excavations on land, and giving a lien for work done in a mining claim, whether at the instance of the owner or his agent, and providing that every contractor, builder, or other person having charge of "any mining," or the construction of any building or other improvement, as aforesaid, shall be held to be the agent of the owner, a lien may be had for work done exclusively in the extraction of ores, as well as for work done for development to discover new ore or to facilitate the extraction of ore.

In Bank. Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by Thomas W. Higgins and others against the Carlotta Gold Mining Company and others. From a judgment for plaintiffs, defendant company appeals. Affirmed.

J. E. Foulds, for appellant. J. B. Curtin, J. C. Webster, J. F. Rooney, and G. G. Grant, for respondents.

SHAW, J. In this case a number of persons who had performed labor upon a mine filed separate claims of lien on the two mining claims constituting the mine for the sums due them, respectively, for such labor, and afterwards began the actions involved in this appeal to foreclose their said liens. Several separate actions were begun, but before the trial all were consolidated and tried as one case. The parties defendant were the Carlotta Gold Mining Company, which was the owner of the mining claims, and David Naegle, David Miller, and J. B. Coleman, who were lessees thereof, operating the mine under a lease of the mining claims executed to them by the said owner. The two mining claims were worked together as a single mine, and no objection is made on the ground of misjoinder. The labor for which the liens were claimed was all performed for the lessees, and under contracts made by the lessees alone with the respective claimants. A personal judgment was given in favor of each claimant against the lessees for the amount of his particular claim, and against all the defendants, including the appellant, for the foreclosure of the liens and the sale of the mining claims to pay the same. A motion for new trial, made by the Carlotta Gold Mining Company, was denied. The company alone appeals from the judgment, and from the order denying its motion for a new trial.

It is conceded that the work for which the several liens were allowed was done upon the mine, and was of the value for which judgment was given, and that the interest of the lessees in the mining claims is subject to the liens. The sole question presented is the liability of the interest of the lessor, the Carlotta Gold Mining Company, in the property to the liens, and to sale for the payment thereof. The lease, under which the lessees were operating, gave them the exclusive possession of the mining claims during the term, and provided that they should forthwith begin and "continually prosecute" the work of "exploring, developing, and mining upon said premises," and should mill and reduce the ores extracted, and that they would "pay to the lessor monthly, on the 10th day of each month * * * two-thirds of the net profits of the proceeds derived by him (them), from the working of said mine during the calendar month immediately preceding," less the sum of $2,131 in unpaid bills of a former lessee, and the cost of "such machinery and improvements as he (they, the present lessees) shall have put upon the premises," which amounts were to be first paid from such gross receipts. The agreed statement of facts, set forth in the statement used on motion for a new trial, shows that the work for which the liens were claimed was done in part in extracting ore from the portion of the ledges already exposed by shafts sunk in the mine before the execution of the lease, and in part "in drifting and stoping for the purpose of opening up new ore bodies and discovering better ore." From the findings it appears that certain of the liens were for work done exclusively for the purpose of extracting ore, and not in the process of development, but many of them were for work which, for aught that appears in the record, may have been done either in extracting ore, or in development and improvement, or in both. According to our view of the law, and of the correct interpretation of the lease under which the work was done, the interest of the Carlotta Gold Mining Company is liable for all the liens, whether for work done exclusively in the extraction of ore, and for that purpose only, or for work done for development to discover new or better ore, or to facilitate the extraction of ore, discovered or undiscovered, or for work which served to accomplish all these purposes.

Section 1183, Code Civ. Proc., contains two distinct and separate provisions allowing distinct classes of liens. One provision, stated in the first clause, allows a lien for work done or materials supplied in the construction of buildings or excavations on land, which are made in the way of an improvement, to enhance its value or make it more useful, or available for a new use. The other provision is in the second clause, and relates to, and gives a lien for, work done in or upon mines, which may result either in the construction of an improvement thereto, or in the partial or total destruction thereof, by the extraction of the ore which gives it value. Then follows a provision which, as it stood when these liens were filed, was as follows: "And every contractor, sub-contractor, architect, builder, or other person having charge of any mining, or of the construction, alteration, addition to, or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purposes of this chapter." By an amendment made afterwards there was inserted immediately after the words "any mining," the phrase, "either in the development thereof or in working therein by the subtractive process." St. 1903, p. 84, c. 76. We do not perceive how this changes the effect of the clause as it stood before, but the question is not involved, for this case must be decided upon the law existing at the time the work was done and the liens filed. This clause, as a whole, refers to both classes of liens. The phrase "any mining" refers solely to the working of a mine, and its effect is that the person in charge of any "mining" is made the agent of the owner, although the work he is prosecuting does not in the least improve the property or add anything thereto, but destroys or lessens its inherent value, by removing the ore therefrom. Williams v. Hawley, 144 Cal. 103, 77 Pac. 762. In order to make him the agent of the owner in such a case, however, such person must be in charge, with the consent of the owner, and must be prosecuting or controlling the mining operations, either wholly or in part, for the benefit of the owner. Jurgenson v. Diller, 114 Cal. 491, 46 Pac. 610, 55 Am. St. Rep. 83; Reese v. Bald Mountain , etc., Co., 133 Cal. 285, 65 Pac. 578. Such benefit may be direct, as where the ore extracted, or some share of it, remains the property of the owner, or it may be indirect, as where the ore, when extracted, is the property of the person in charge, but is to be sold by him, and a part or share of the proceeds is to be paid to the owner, or for his use or benefit. The legal effect would be the same in either case. The purpose of the statute obviously, is to allow a lien for mining work done upon a mine against the estate or interest therein of the person who is to be benefited thereby, whether done directly for him and at his request, or indirectly for his benefit, at the request of some other person operating in pursuance of some express or implied contract with him. Such a case we have here. The lease is a contract; by its covenants the lessees undertook to do the mining work, and both the lessees and the lessor were to share in the proceeds and benefits of the work. It might almost be said that such person would in such a case be authorized to bind the estate of the owner for a lien for such work without the aid of the special statutory provision making him constructively the agent of the owner for that purpose, but with the aid of the provision there can be no doubt of the proposition. There is nothing in either Jurgenson v. Diller, supra, or Reese v. Bald Mountain, etc., Co., supra, that is contrary to this conclusion. In the first case the person who caused the ore to be extracted had no authority from the owner to do so, and was doing it for his own exclusive benefit. Although he was occupying the premises with the consent of the owner, he was, as to the mining work, a mere trespasser. In the latter case the decision was put upon the ground that there was no finding that the person who caused the work to be done was the "agent of the owner," nor anything from which such fact would be necessarily implied, nor anything to show that the owner was to receive, or had received, any benefit from or on account of the work done or the ore extracted. All of these facts appear in the case at bar. Section 1192, Code Civ. Proc. has no application to mining work which consists of removing ore, solely by the "subtractive process," as it is termed in Jurgenson v. Diller, supra. That section by its express terms applies only to "every building or other improvement mentioned in section 1183 of this Code, constructed upon any lands," and hence does not include or apply to "mining" work, which does not constitute for any purpose an improvement to the mine to the land. Reese v. Bald Mountain, etc., Co., 133 Cal. 288, 65 Pac. 578; Williams v. Santa Clara M. A., 66 Cal. 200, 5 Pac. 85; Jurgenson v. Diller, 114 Cal. 492, 46 Pac. 610, 55 Am. St. Rep. 83. With respect to the liens wholly or in part for work done for the "purpose of opening up new ore bodies and discovering better ore," if such work consisted in making an "improvement" to the mine, apart from, or in addition to, its effect in obtaining ore from the rock excavated, it would come within the provisions of section 1192, Code Civ. Proc. As the lease expressly provides that such work should be done by the lessees, when they deemed it expedient, the lessor must be presumed to have had notice or knowledge of it from the beginning. Such work would also be for the lessor's benefit, either by reason of the increased receipts of net profits during the lease, or from the increased facility for the extraction of ore from the mine after the lease expired. It is conceded that the appellant posted no notice disclaiming any liability for such work or improvement, and consequently its estate in the property stands charged with a lien for the value thereof. Hines v. Miller, 122 Cal. 517, 522, 55 Pac. 401.

Our conclusions in regard to the validity of the liens as against the appellant's estate in the property renders it unnecessary to consider the objection that as to some of the liens the evidence does not sustain the findings to the effect that the labor for which the liens were allowed was done for the development and improvement of the mining claims and for the repair of the machinery situated thereon. The judgment, with respect to all the liens, for work not of the character indicated in these findings, is fully supported by the other findings made by the court. The allegation in the answer that plaintiffs knew, at the time they began work, that the defendants Naegle, Miller, and Coleman were working the mine as lessees, is immaterial, and no finding thereon was necessary.

The judgment and order are affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J.

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149 Cal. 69

DAVOUST v. CITY OF ALAMEDA.

(S. F. 3,390.)

(Supreme Court of California. March 30, 1906.)

1. MUNICIPAL CORPORATIONS — TORTS — NEGLIGENCE—GOVERNMENTAL FUNCTIONS.

A municipal corporation in operating an electric light plant is not exercising governmental functions, and hence is liable for damages caused by the negligence of its employés in the operation of the plant.

2. SAME — PUBLIC WORKS — ELECTRIC LIGHT PLANT—RIGHT TO OPERATE.

Where one was injured through the negligence of the employés of a city in operating an electric light plant, a contention that the city was not liable because the grant of authority to maintain the plant was given to "a board of trustees of the city" and not to the city was untenable.

3. NEGLIGENCE—LICENSEES.

Where one using a way over a vacant lot which had been used for many years by residents in the neighborhood was injured by coming in contact with a live wire of an electric plant negligently lying in the path, the operator of the plant could not escape liability on the theory that the one injured was a trespasser, as he was a licensee.

In Bank. Appeal from Superior Court, Alameda County; W. E. Greene, Judge.

Action by Martial Davoust against the city of Alameda. From a judgment in favor of defendant, plaintiff appeals. Reversed.

J. C. Campbell, W. H. Metson, and Reed & Nusbaumer (J. R. Glascock and J. M. Poston, of counsel), for appellant. M. W. Simpson and Chapman & Clift, for respondent.

McFARLAND, J. This action is to recover damages for the death of plaintiff's wife alleged to have been caused by the negligence of defendant, the city of Alameda, in operating an electric lighting plant owned by defendant, and used for the purpose of lighting said city and furnishing light to its inhabitants for domestic purposes. The trial court granted a nonsuit and gave judgment for defendant, and from this judgment plaintiff appeals. There is a bill of exceptions which presents the evidence, and the rulings of the court.

It does not appear upon what ground the nonsuit was granted; but the main point argued by counsel for respondent is that because the defendant is a municipal corporation it is not liable to pay any damages, even though the death of plaintiff's wife was caused by the negligent operation of the electric plant. And in support of this contention respondent relies on Winbigler v. City of Los Angeles, 45 Cal. 36; Denning v. State, 123 Cal. 316, 55 Pac. 1000; Chope v. City of Eureka, 78 Cal. 588, 21 Pac. 364, 4 L. R. A. 325, 12 Am. St. Rep. 113, and the cases there cited. These cases undoubtedly establish the rule in this state, although it has been held differently in some other jurisdictions, that a municipal corporation, when exercising governmental functions as an agent of the sovereign power, is not liable for damages caused by the negligence of its employés, unless it is expressly so made liable by statute. But this rule applies to a municipal corporation only when acting in its governmental, political, or public capacity as an instrumentality intrusted by the state with the subordinate control of some public affair. Such a corporation, however, has a double character—governmental, and also proprietary and private—and when acting in the latter capacity its liabilities arising out of either contract or tort are the same as those of natural persons or private corporations. And while we have been referred to no case in this state where the proposition last stated was directly involved, yet in all the cases from this state cited by respondent the acts complained of were connected with the exercise of what has uniformly been held to be governmental functions, such as maintenance of public streets and roads, protection from fire, etc. However, the distinction has been frequently recognized and stated in the California decisions. In Touchard v. Touchard, 5 Cal. 307, the court say: "A corporation, both by the civil and common law, is a person, an artificial person; and although a municipal corporation has delegated to it certain powers of government, it is only in reference to those delegated powers that it will be regarded as a government. In reference to all other of its transactions, such as affect its ownership of property in buying, selling, or granting, and in reference to all matters of contract, it must be looked upon and treated as a private person, and its contracts construed in the same manner and with like effect as those of natural persons." In San Francisco Gas Company v. San Francisco, 9 Cal. 469, Justice Field says: "The distinction alluded to refers to the double character of a municipal corporation; its public and political character in which it exercises subordinate and legislative powers, and its private character in which it exercises the powers of an individual or private corporation." In Ukiah v. Ukiah W. & I. Co., 142 Cal. 179, 75 Pac. 775 (64 L. R. A. 231, 100 Am. St. Rep. 107), this court says: "The distinction between the powers conferred on municipal corporations for public purposes and for the general public good, and those conferred for private corporate purposes, is clearly marked by the decisions"—citing cases. In Denning v. State, 123 Cal. 316, 55 Pac. 1000, it was held that the state was not liable for injury caused plaintiff by negligence of a board of harbor commissioners, because the latter were exercising purely governmental powers; but the distinction above mentioned was clearly stated. The court said, among other things, that the plaintiff, when injured, was employed in a distinct branch of the service: "viz., the protection against or extinguishment of fires, which, even in the case of municipal corporations, is uniformly held to be the exercise of a purely governmental function; and there is certainly as strong ground for distinguishing between the different functions of the board as there can be for distinguishing between the different functions of a municipal corporation, in the exercise of some of which the corporation is liable for negligence, while in others it is not." See, also, Holland v. San Francisco, 7 Cal. 361; Argenti v. San Francisco, 16 Cal. 255; Brown v. Board of Education, 103 Cal. 531, 37 Pac. 503.

In other jurisdictions the rule that municipal corporations are liable like individuals and private corporations when the injury arises out of their exercise of mere proprietary and private rights has been expressly and frequently decided. Indeed, the rule has become text-book law. In Dillon's Municipal Corporations, § 66, the author, having said that a municipal corporation "possesses a double character; one governmental, legislative, or public; the other, in a sense, proprietary or private," proceeds as follows: "In its governmental or public character, the corporation is made, by the state, one of its instruments, or the local depositary of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state rather than for itself; * * * but in its proprietary or private character, the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual." There are numerous authorities to the general point of the distinction between the governmental and the proprietary character of municipal corporations, but it will be sufficient here, on the general question, to refer to the opinion of the Supreme Court of Oregon in the case of Esberg Cigar Co. v. Portland, 34 Or. 282, 55 Pac. 961, 43 L. R. A. 435, 75 Am. St. Rep. 651, where the authorities are nearly all cited. See, also, South Carolina v. United States, 199 U. S. 437, 26 Sup. Ct. 110, 116, 50 L. Ed. ——.

And that the respondent, in maintaining and operating its electric plant, was exercising, not its governmental functions, but its proprietary and private rights, is entirely clear. There is obviously no distinction, so far as the law on the subject is concerned, between an electric plant for furnishing light, which is comparatively a new thing, and a gas plant maintained for the same purpose; and it has been directly held that a municipal corporation operating a gas plant is liable for injury caused by its careless management. In Dillon's Municipal Corporations, § 954, it is said: "A municipal corporation owning water-works or gasworks which supply private consumers on the payment of tolls is liable for the negligence of its agents and servants the same as like private proprietors would be"; and ample authority is cited sustaining the text. In Western S. F. Society v. Philadephia, 31 Pa. 183, 72 Am. Dec. 730, the Supreme Court of Pennsylvania say: "The supply of gas light is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or a city, it is a special private franchise. * * * The whole investment is the private property of the city, as much so as the lands and houses belonging to it. * * * It [the city] stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred." In San Francisco Gas Co. v. San Francisco, supra, the court say: "The purchase of gas involves only the exercise of a power of a private corporation; it requires no exercise of any political power. It is as much an act of a private character as if made by a private corporation." In Esberg Cigar Co. v. Portland, supra, the facts were that the city of Portland owned and maintained a system of water-works, and the plaintiff therein brought the action for damages for injuries caused by the negligent management of the said water-works; and it was contended for defendant "that the water-works belonged to the city in its public or governmental capacity, and it therefore is not liable in a common-law action for negligence in constructing or maintaining the same." But the court held otherwise, and, after alluding to the distinction above stated, said: "In accordance with this distinction it is quite universally held that when a municipal corporation voluntarily undertakes to construct and maintain water or gas works in pursuance of statutory authority, for the purpose of supplying the inhabitants thereof with water or gas at rates established by the city, it is liable for an injury in consequence of its acts in constructing and maintaining such works, the same as a private corporation or individual." And, surely, this principle applies as fully to the maintenance of an electric lighting plant as to the maintenance of waterworks. In the case at bar, the city of Alameda was merely given the optional privilege of constructing and maintaining an electric lighting plant; no duty was imposed on it to do so. Our conclusion on the main point above discussed is that the respondent cannot escape liability for the negligence averred in the complaint on the ground that it is a municipal corporation.

There are some points made by respondent upon the theory that defendant would not have been liable even if it had been a private person or corporation, which we will allude to briefly. We would not be justified in holding that the evidence was not sufficient to show that the death of appellant's wife was caused by negligence in operating the electric plant. Whatever the evidence may be on another trial, that which appears in the present record is sufficient to establish the negligence. The contention that appellant cannot recover because his wife at the time of the accident was a trespasser is not maintainable. There was, and for many years had been, a street railroad station on Monroe street, and south of that station, and fronting it, there was a vacant uninclosed level lot owned by a person who is in no way involved in this litigation. Across the vacant lot there was a way, or beaten path, about four feet wide, which had been for many years—more than five years—used by residents in the neighborhood in going from their homes to the said station on Monroe street. While plaintiff's wife was walking along this path and when within a few feet from Monroe street, she came in contact with a live wire of respondent's electric plant, which was negligently allowed to lie across the path, and was killed by the current. It is not necessary to inquire what would have been the liability of the owner of the lot if he had also owned the electric plant and had been guilty of the negligence which caused her death, although, even then, the allowance of such a deadly trap probably could not have been excused on the ground that the woman was a trespasser, even if she had been. But no such question arises here. She had a right to be where she was, as least, as against every one except the owner of the lot; and the respondent, itself a mere trespasser, is in no position to raise the question as to what duty the owner of land owes to a trespasser; moreover, she was not a mere trespasser, but a licensee.

Respondent contends that the city was not liable because the grant of authority to maintain the electric plant is given to "the board of trustees of such city," and not, in terms, to the city; but we do not see any force in this contention. A "city" is a mere intangible thing, existing only in legal contemplation; it could not itself use the franchise, and can act only through its governing body, the board of trustees. A grant of a franchise, in terms, to the city, would be, in effect, a grant to the body having the power to use it. In Arnold v. San Jose, 81 Cal. 618, 22 Pac. 877, this court said: "A distinction is made by appellant between cases arising under charters making it the duty of a city, as such, to keep the streets open and in repair, and those which make it the duty of the city council to do so. We are unable to see any merit in the point." And further on in the opinion it is shown that Winbigler v. Los Angeles, supra, does not hold differently.

We do not think that there was a nonjoinder of plaintiffs; and, as to other points, it is sufficient to say that none of them are, in our opinion, tenable or necessary to be specially noticed.

The judgment appealed from is reversed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J; SLOSS, J.

SHAW, J. I concur. The rule is well established in this state that, in the absence of a statutory provision permitting it, an action will not lie against a municipal corporation for damages caused by the negligence of its officers, agents, and servants in the performance of the public or governmental duties of such corporations. Winbigler v. Los Angeles, 45 Cal. 37; Howard v. San Francisco, 51 Cal. 52; Tranter v. City of Sacramento, 61 Cal. 271; Stedman v. San Francisco, 63 Cal. 193; Chope v. Eureka, 78 Cal. 589, 21 Pac. 364, 4 L. R. A. 325, 12 Am. St. Rep. 113; Arnold v. San Jose, 81 Cal. 618, 22 Pac. 877; Doeg v. Cook, 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171; Ukiah v. Ukiah, etc., Co., 142 Cal. 182, 75 Pac. 773, 64 L. R. A. 231, 100 Am. St. Rep. 107; Sievers v. San Francisco, 115 Cal. 654, 47 Pac. 687, 56 Am. St. Rep. 153. The statement of the rule implies that there are other functions and powers of municipal corporations, for the negligent performance of which by its officers and servants such corporations are liable. The distinction is clearly stated in the principal opinion. The authorities uniformly hold that the duties arising from the operation of gasworks, electric works, water-works, and such like public utilities, are of the private nature which is required to make municipal corporations liable for damages caused by negligence therein. It is evident, however, that the division of municipal functions into two classes, one public and governmental, the other private and corporate, is without any real foundation, and is made solely from the supposed necessity of doing so in order to allow a suit to be maintained for such injuries. In its public functions a municipality was said to represent the sovereign power, and as such to be exempt from private action. Hence, with respect to the class of powers here involved, it was considered necessary to designate them as private in character, in order to uphold a suit to recover for these injuries. The only reason given for classifying the power to administer public utilities as private and corporate is that private persons and corporations frequently engage in such enterprises; that they are carried on by the city for its own profit; and, in a few cases, that the municipality has contracted with the sovereign power to do such things, and is, therefore, acting in a private capacity. None of these reasons is of any force. Private persons and corporations also frequently undertake to give police protection and fire protection to the inhabitants of cities. Yet these functions, in all cases where they are performed by a city, are always considered to be public and governmental, thus showing that the fact stated constitutes no reason for the distinction. It may be that in former times cities engaged in such enterprises for the sake of the profit to be made thereby. But, under our system, its charges for service are fixed solely for the purpose of covering the operating expenses and providing a sinking fund, and the profit, if any, is merely incidental. The making of contracts with the state by municipalities to supply such public needs is with us utterly unknown. In our form of government and under our constitutional provisions, a city can have no active powers or functions that are not public and governmental in character. Low v. Marysville, 5 Cal. 214. Its merely passive power to hold and possess property to which it has lawfully acquired title may not differ materially in its effects, with respect to the liability for a misuse of such property, from those of a private corporation or person to hold and possess such property, and after such property has for any reason become no longer necessary for municipal purposes, its continued ownership and possession may have no direct relation to the public welfare or benefit. But its active powers are all given for the purpose of enabling it the better to administer public affairs so as to subserve the public good and promote the general local public welfare, or, as the agency of the state, affairs of a more general concern, which are primarily committed to the state; and all such active powers, whether of one class or the other, are essentially of a public and governmental character.

It must be conceded that the rule holding cities liable for such injuries is more conducive to justice than would be the contrary "The rule of law is a general one, that the superior or employer must answer civilly for the negligence or want of skill of his agent or servant in the course or line of his employment, by which another, who is free from contributory fault, is injured. Municipal corporations under the conditions herein stated, fall within the operation of this rule of law." 2 Dill. Mun. Cor. § 968. Our Civil Code declares that: "No one shall suffer by the act of another" (section 3520), and: "For every wrong there is a remedy" (section 3523). The doctrine here applied is, indeed, the general rule applicable to all cases of tort, and the exemption of cities and other public corporations from liability for negligence in the exercise of some of its public and governmental functions is really in the nature of an exception to that rule. It is against natural justice that it should be made possible by any system of jurisprudence that one should receive an injury at the hands of another who is subject to be sued in every ordinary form of action, and that that other should have immunity from any action for redress by the person injured. Nor is the doctrine unjust or unfair to municipal corporations. Private corporations engaged in enterprises of this character, as is well known, are liable for the neglect of their agents and servants in the line of their duties, and the expenses caused thereby form a part of the necessary operating expenses of the business, and their rates must be fixed with that item in view. When municipal corporations engage in the same business, although they may do so solely for the general public benefit, and not for the profit to be derived therefrom, it is but fair and just that they should be subjected to the same burden. This burden can easily be shifted to the general public who should bear it, by adjusting the rates charged for the service, so as to cover this additional cost of operation.

The question how far, and in the exercise of what powers, a city should be held liable for such injuries, is one of policy, exclusively. The Legislature has the power to dictate this policy. It has been settled at common law, upon various grounds (for it has not always been based upon this supposed distinction), that municipal corporations are liable for injuries caused in the exercise of certain powers, and are not liable for injuries arising from certain other powers, unless such liability is created by statute. Among the powers for which it is held liable in this manner are the power to carry on for the public use gasworks, electric works, waterworks, and other like public utilities, and this was a well-settled rule of the common law. Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332; 1 Dill. Mun. Cor. §§ 26, 27, 66, 67; Id. vol. 2, §§ 961, 966. This common law has been carried into our jurisprudence and made the rule of decision in all the courts of this state by section 4468, Pol. Code. So far as the class of powers here involved is concerned, the rule is manifestly in accordance with justice, and is also in accordance with good public policy. It is not good policy that a person who receives an injury by the negligence of public servants engaged in carrying on such public utilities should be made to suffer the injury without recourse upon the public which receives the benefit of the services, and which, by reason of the proposed exemption of the public from such liability, would be enabled to obtain the service at less cost than if it were performed by private persons. This rule, having been established at common law and being in existence at the time the statute was passed authorizing the creation of cities of the class to which Alameda belongs, must be considered in construing the statutory provision for the creation of such cities. It is provided by the statute (section 750 of the municipal corporation act) that every municipal corporation of the fifth class "may sue and be sued in all courts and places, and in all proceedings whatever." Deering's Gen. Laws 1897, p. 845. I think this provision, in connection with section 4468 of the Political Code, and the established common-law rule, should be construed as a statutory declaration that cities of this class are liable for the negligence of its agents and servants in all cases where such liability was established at common law, and that this can be upheld as a statutory provision without the necessity of resorting for its support to a distinction which is wholly fictitious, and which will produce, as such arbitrary distinctions are apt to produce, embarrassing consequences, if recognized as real and applied to other questions.

(149 Cal. 94)

MIDDLECOFF v. SUPERIOR COURT OF SAN JOAQUIN COUNTY. (S. F. 4,479.)

(Supreme Court of California. March 31, 1906.)

EXECUTORS AND ADMINISTRATORS — SETTLEMENT OF ESTATE—DISTRIBUTION BEFORE ACCOUNT.

Where, after a will had been duly probated, the executrix, both by assignment and under the will, acquired the right to have the entire residue distributed to her absolutely, and, after the time for filing claims had expired, she filed a petition for distribution containing a detailed description of all the property of the estate, and alleging that she had filed no accounts, as executrix, because she was entitled to have the whole of the residue distributed to her, such statement constituted a waiver of an account, and it was therefore proper for the court, after due notice to direct distribution without requiring the executrix to file an account.

In Bank.

Application by Eliza F. H. Middlecoff for a writ of mandate directed to the superior court of San Joaquin county, Hon. Frank H. Smith, Judge. Writ denied.

Thomas S. Louttit and Buck & Middlecoff, for petitioner. Henry E. Monroe, for respondent.

SHAW, J. This is an original proceeding in mandamus to compel the respondent court to issue a citation to the executrix of the estate of Henry F. Hubbard, deceased, to show cause why she should not render a final account as such executrix, and complete the administration of said estate. The case is submitted upon the facts stated in the petition. Henry F. Hubbard died, testate, on March 25, 1887, his will was duly probated in the proceeding in question, and letters testamentary issued to the executrix, Maria S. Hubbard, on April 9, 1887, an inventory and appraisement was filed on May 5, 1887, and notice to creditors duly given on and after April 10, 1887. No formal account was ever presented, filed, or settled. By the terms of the will all the estate, after payment of debts and a small legacy, was given to Maria S. Hubbard, widow of deceased, and to his two daughters Maria Hubbard and Eliza Fitch Hubbard, who is also the petitioner herein. On April 15, 1890, the two daughters, being then of adult age, conveyed and assigned to the widow, who was also the executrix, all their right, title, and interest in the estate, and requested the superior court having jurisdiction of the estate to distribute to said widow the whole thereof. On the same day the executrix filed in the superior court her petition for distribution of the estate. At that time all claims and the small legacy had been paid and the time for filing claims had expired. The petition for distribution averred all the aforesaid facts, gave a detailed description of all the property of the estate, and, in regard to a final account, made the following statement: "That your petitioner has filed no accounts as such executrix, as she is entitled to have the whole of the residue of said estate distributed to her absolutely and forever, and therefore the rendition and settlement of her account as such executrix is not necessary and required, and is useless." In other respects it was in the usual form of such petitions. An order was made by the court fixing the time of hearing thereof, and notices of the hearing were given by the clerk in all respects as required by law in the case of a petition for distribution. The notices stated that the petition asked distribution of the whole estate to the widow, but did not specifically refer to any account nor to the settlement thereof. The petition was heard at the proper time and a decree was made, on April 26, 1890, distributing the entire estate to said Maria S. Hubbard as prayed for, and discharging the executrix from further duties as such.

The position of counsel for the petitioner is that the court had no jurisdiction to entertain a petition for distribution of the whole of the estate, or to make a decree for such distribution except at or after the time of the settlement of the final account; that as such petition was not filed with the final account, nor subsequent to the settlement thereof, the court was without jurisdiction to act, and the entire proceeding for such distribution was absolutely void. In the case of Estate of Sheid, 122 Cal. 528, 55 Pac. 328, the court held, upon a direct appeal from the decree of distribution, that where a petition by an heir for distribution, is not filed with the final account of the administrator, nor after the settlement of such account, but is filed after the rendition of the account and before its settlement, the proceeding for distribution was irregular. For this irregularity, to which objection was made by the opposing heirs at the hearing of the petition, the decree, upon the appeal of the opposing heirs, was reversed. It is said in the opinion that the proceeding is "a special proceeding based upon the statute, and in which the jurisdiction of the court can be acquired only by the observance of its provisions." In Estate of Coursen, 65 Pac. 965 (not reported in California Reports), a similar decision was made, that case also being a direct appeal from the decree of distribution.

The real question involved in these cases was whether or not the irregularity was of sufficient importance to render the proceeding subject to the objection on account thereof, taken at or before the hearing, or reversible on direct appeal from the decree by opposing parties. They cannot be considered as decisive of the question of the validity of such a proceeding or decree, when attacked collaterally. In this case the court had general jurisdiction of the estate, having acquired it by virtue of the petition for letters testamentary, and for probate of the will. The will had been duly probated, letters duly issued, notice to creditors duly given, all claims paid, and the time for filing other claims had expired. The probate of the will determined definitely and conclusively the persons entitled to the estate. After the conveyance to the executrix, the entire estate became vested in her, and she alone had the right to demand an accounting, and the accounting, when made, must have been made with her only, and for the purpose of settling the amount to which she, a sole distributee, would be entitled. It is not claimed that any other person is now adversely interested. The interest of the petitioner for the writ of mandate is derived wholly from the subsequent conveyance to her, by the widow, of a part of the estate covered by the decree. The provisions of the Code of Civil Procedure requiring an executor or administrator to render an account, and for the settlement thereof by the court, are made for the benefit and protection of the executor and the beneficiaries of the estate, respectively, including, of course, the creditors. The widow was, in this case, the executrix and also the sole beneficiary. There was, therefore, no real necessity for an accounting. But if an account would have been convenient, and if it was, regularly, the step preceding a distribution, there can be no doubt that she, as the sole person interested, had the right to waive the rendition and settlement of such account, and to consent that the distribution might be made without such intermediate proceeding. This is the effect of the authorities. 11 Am. & Eng. Ency. of Law, 1185; In re Wagner's Estate, 119 N. Y. 28, 23 N. E. 200; In re Pruyn, 141 N. Y. 546, 36 N. E. 595; McKim v. Harwood, 129 Mass. 77; Piatt v. Longworth's devisees, 27 Ohio St. 186; Estate of Barber, 142 Pa. St. 481, 21 Atl. 986. The statement made by her in the petition for distribution was a waiver of such account. The distribution, when the petition therefor is not filed with the final account, is a separate, and, to some extent, an independent proceeding in the administration of the estate, and, when the petition is filed separately, jurisdiction of that proceeding is acquired, as in other separate proceedings such as the sale of real property, by the filing of a proper petition and the giving of the notice required. This was done in the case at bar. All persons who might wish to assert or claim an irregularity in the proceeding were regularly notified to appear for that purpose. Thereby the court obtained jurisdiction of that proceeding, subject to the objection which might be made in the course of the proceeding or on appeal, that the final account had not been settled. When it was made to appear by the record, as was here done, that no account was really necessary and that it had been waived, the irregularity was effectually cured as to the distributee, and, there being no objection or appeal by any other person, the decree of distribution was thereby rendered valid and secure against collateral attack. The superior court correctly refused, under these circumstances, to require further proceedings in the estate.

The petition for a writ of mandate is denied.

We concur: ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

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149 Cal. 79

Ex parte QUARG. (Cr. 1,316.)

(Supreme Court of California. March 31, 1906.)

1. THEATERS—TICKETS OF ADMISSION—PROPERTY RIGHT.

As by Act Cal. 1893 (St. 1893, p. 220, c. 185), a ticket of admission to a public place of amusement, when sold, is made an irrevocable license to the purchaser to occupy a place in such place of amusement during the performance, the ticket represents a right of property and is itself a species of property and therefore transferable, in the absence of stipulations to the contrary.

2. CONSTITUTIONAL LAW—RIGHTS OF PROPERTY—THEATER TICKETS.

Act Cal. March 18, 1905 (St. 1905, p. 140, c. 140), prohibiting any person from selling tickets to theaters or other public places of amusement for a price higher than that originally charged by the management of such amusement places is void as infringing on the right of property guarantied by the Constitution.

3. SAME—POLICE POWER.

The enactment is not a valid exercise of the police power of the state as it prohibits an act which is innocent in character and which has no tendency to affect, injure, or endanger the public health, morals, or safety.

In Bank. Application by R. F. Quarg for writ of habeas corpus against J. F. Dinan, chief of police in and for the city and county of San Francisco. Application granted, and petitioner ordered discharged.

Leon Samuels, for petitioner. Lewis F. Byington, Dist. Atty., and David Freidenrich (Naphtaly, Freidenrich & Ackerman, of counsel), for respondent.

SHAW, J. The act of March 18, 1905, added a new section to the Penal Code, numbered 526, which reads as follows: "Every person who sells or offers for sale any ticket or tickets to any theater or other public place of amusement at a price in excess of that charged originally by the management of such theater or public place of amusement is guilty of a misdemeanor. St. 1905, p. 140, c. 140. The petitioner is in custody upon conviction of a violation of this section, and seeks a discharge on the ground that the provisions of the section are unconstitutional, and, consequently, that the judgment of conviction is void.

The constitutional guaranty securing to every person the right of "acquiring, possessing and protecting property," refers to the right to acquire and possess the absolute and unqualified title to every species of property recognized by law, with all the rights incidental thereto, and, in connection with the right of personal liberty, it includes the right to dispose of such property in such innocent manner as he pleases, and to sell it for such price as he can obtain in fair barter. Any statute which interferes with this right, except in cases where the public health, morals, or safety, or the general welfare authorizes such restriction as an exercise of the police power is to the extent of such interference unconstitutional and void. 8 Cyc. 886. These rights are in fact inherent in every natural person, and do not depend on constitutional grant or guaranty. Under our form of government by Constitutions the individual, in becoming a member of organized society, unless the Constitution states otherwise, surrenders only so much of these personal rights as may be considered essential to the just and reasonable exercise of the police power in furtherance of the objects for which it exists. Cooley on Stat. Lim. pp. 68, 244; 1 Barb. on Rights, pp. 122, 284.

It is, perhaps, not important in this case to consider and define the precise nature of a theater ticket. It may be either a mere license, revocable at the will of the proprietor of the theater, or, it may be evidence of a contract whereby, for a valuable consideration, the purchaser has acquired the right to enter the theater and observe the performance, on condition that he behaves properly. These are matters which concern only the proprietor and the purchaser. No third person can question the right of the purchaser. However, by the act of 1893 (St. 1893, p. 220, c. 185), a ticket of admission to a public place of amusement, when sold, is made, at least, an irrevocable license to the purchaser of the ticket to occupy a place therein during the performance. Greenberg v. Western Turf Ass'n, 140 Cal. 360, 73 Pac. 1050. Such a ticket, therefore, represents a right, positive, or conditional, as the case may be, according to the terms of the original contract of sale. This right is clearly a right of property. The ticket which represents that right is also, necessarily, a species of property. As such, the owner thereof, in the absence of any condition to the contrary in the contract by which he obtained it, has the clear right to dispose of it, to sell it to whom he pleases and at such price as he can obtain. The statute in question forbids any sale for a price higher than that at which it was sold by the proprietor of the theater, and, to that extent, it infringes upon the right of property guarantied by the Constitution and existing in the individual. It is therefore a void enactment, unless it can be upheld as an exercise of the police power.

The police power is broad in its scope, but it is subject to the just limitation that it extends only to such measures as are reasonable in their application and which tend in some appreciable degree to promote, protect, or preserve the public health, morals, or safety, or the general welfare. The prohibition of an act which the court can clearly see has no tendency to affect, injure, or endanger the public in any of these particulars, and which is entirely innocent in character, is an act beyond the pale of this limitation, and it is therefore not a legitimate exercise of police power. The sale of a theater ticket at an advance upon the original purchase price, or the business of reselling such tickets at a profit, is no more immoral, or injurious to public welfare or convenience, than is the sale of any ordinary article of merchandise at a profit. It does not injure the proprietor of the theater; he must necessarily have parted with the ticket at his own price and upon his own terms before such resale can be made. It does not injure the second buyer; he must have had the same opportunity as the first buyer to purchase a similar ticket, and no greater right thereto, and having neglected that opportunity, or being unwilling to undergo the necessary inconvenience, and willing to pay a higher price rather than forego the privilege which the other by his greater diligence and effort has obtained, the transaction is just so far as he is concerned. The fact that such tickets are obtained and resold at an advance, does not compel the manager of the theater to put the tickets upon the same plane as ordinary articles of merchandise. He can make them nontransferable and place in the contract of sale any conditions necessary for the protection of himself or his patrons, and by printing such conditions on the tickets he can prevent their resale to innocent buyers. He can restrict or limit the number of tickets sold to one person, and, in general, manage his own business according to his own will, except that, by the act of 1893, he cannot refuse admission to a well-behaved and proper person, holding a ticket which he has sold without conditions affecting such holder. There is nothing in that act, nor in the decision in Greenberg v. Western Turf Ass'n, supra, which would operate to prevent the imposition of such conditions. The act of 1893 does not purport to regulate or control the original sales of tickets, nor to make them assignable at all events, contrary to the terms of such sale. Section 526, above quoted, does not purport to forbid the resale of tickets which, by the original contract of sale have been made nontransferable, nor a resale for a price equal to or less than that of the original sale. It only forbids sales at an advanced price, and as to such sales, it forbids them all. It is plainly not enacted for the purpose of preventing such frauds as the sale of tickets to innocent purchasers, contrary to the conditions of the original sale forbidding a transfer. The act must be considered as intended to be operative without regard to the willingness or unwillingness of the manager to allow the transfer, to be directed to the transfer of all tickets, assignable or nonassignable, and to have been intended to interfere with the purchaser who for any reason wishes to engage in the unhurtful transaction or business of reselling at a profit a property right which he has lawfully acquired. It is perhaps unnecessary to add that the right to attend a theater is not so sacred or important in character as to require or justify legislation regulating the price of admission. Viewed in any aspect we think the legislation in question is an unwarrantable interference with the inherent and constitutional rights of individuals, and for that reason is void.

Let the petitioner be discharged.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

I concur in the judgment: McFARLAND, J.

149 Cal. 98

DUNGAN et al. v. SUPERIOR COURT OF FRESNO COUNTY. (S. F. 4,502.)

(Supreme Court of California. March 31, 1906.)

1. COURTS—PROBATE—CONFLICTING JURISDICTION.

Under Code Civ. Proc. §§ 1371–1379, requiring the application for letters of administration to be in writing, filed with the clerk of the court, and referring to the petition and application together as synonymous, and providing for appointment of a time for hearing the application, an application for letters of administration is made when the petition is filed, within section 1295, providing that where the estate of a decedent is in more than one county, the superior court of that county, in which the application is first made for letters testamentary or administration, has exclusive jurisdiction of the settlement of the estate.

2. SAME—CONSTITUTIONAL PROVISIONS.

The constitutional provision conferring jurisdiction in all matters of probate on the superior court does not mean that the superior courts in the state have concurrent jurisdiction in every particular probate matter, but the Legislature has the right to prescribe which court shall exercise the jurisdiction of the particular estate.

3. PROHIBITION—ISSUES.

On an application for a writ of prohibition to prevent a superior court of a particular county from assuming jurisdiction of a decedent's estate on the ground that an application for letters of administration were first made in another county, the question whether the decedent had any estate in the latter county cannot be raised, that being determinable by the superior court.

4. SAME—ADEQUACY OF OTHER REMEDY—APPEAL.

Where a superior court assumed jurisdiction of the administration of an estate where an application for letters of administration has been made in another county, the remedy by appeal is not adequate so as to bar the right to relief by writ of prohibition.

5. SAME — PARTIES—INTEREST—SUBJECT-MATTER.

A public administrator who has made application for letters of administration of an estate of a nonresident decedent and the next of kin of the decedent had such an interest as to entitle them to maintain a proceeding for writ of prohibition to prevent another court assuming jurisdiction of the estate.

In Bank. Application by T. M. Dungan and another for writ of prohibition to the superior court of Fresno county. Writ granted.

C. P. Pomeroy, Hannah, Miller & Miller, and Frank H. Short, for petitioners. Everts & Ewing and Truman & Oliver, for respondent.

ANGELLOTTI, J. This is an application for a writ of prohibition to restrain the superior court of Fresno county from taking any further proceedings in the matter of the settlement of the estate of Jane Davis, deceased. The petitioners are the public administrator of Tulare county and Mary G. Stone, the niece and next of kin of said deceased.

It is claimed that the superior court of Fresno county is without jurisdiction in the matter of said estate, notwithstanding which fact it is asserting jurisdiction, having entertained an application for letters of administration therein, made an order appointing R. D. Chittenden, public administrator of Fresno county, administrator of said estate, issued letters of administration to him, and refused to vacate said letters. There is no controversy as to the material facts. Jane Davis died in the state of New York on September 19, 1904, being at the time of her death a resident of said state of New York. She left estate in various counties of the state of California. On the same day, but after her death, petitioner Dungan, as public administrator of Tulare county, filed with the clerk of the superior court of Tulare county his written petition and application for letters of administration of said estate, in the form and manner prescribed by law, and said clerk thereupon, on the same day, set such petition for hearing by the court, and posted the required notices. The petition contained the allegations essential to the jurisdiction of said superior court, including allegations to the effect that the decedent died out of the state, not being a resident of the state, and that a portion of the estate left by her was situate in the county of Tulare. The hearing of said application was continued from time to time, until, on December 24, 1904, after a hearing, an order was made by said superior court, appointing Dungan administrator of said estate, and letters of administration were thereupon issued to him. An appeal has been taken from said order, which is still pending undetermined. The alleged jurisdiction of the Fresno county superior court is based upon proceedings initiated therein by R. D. Chittenden, public administrator, who did not file his petition for letters of administration until September 23, 1904. His petition alleged that the deceased left estate in Fresno county. His application was heard by the court on October 3, 1904, and an order was thereupon made appointing him administrator, and letters of administration issued accordingly. It is conceded that jurisdiction of proceedings for the settlement of the estate of a deceased person cannot coexist in two superior courts of the state at the same time. "There cannot be two valid administrations at the same time in this state." Estate of Griffith, 84 Cal. 107, 110, 23 Pac. 528, 24 Pac. 381. When any such court has acquired jurisdiction in such a matter, that jurisdiction is exclusive. See Woerner, American Law of Administration, § 204. It is provided by our statute that where the decedent died out of the state, not being a resident of the state at the time of his death, such proceedings may be had "in the county in which any part of the estate may be." Code Civ. Proc. § 1294, subd. 3. Recognizing that such a decedent may leave estate in more than one county, the Legislature further provided as follows, viz: "When the estate of the decedent is in more than one county, he having died out of the state, and not having been a resident thereof at the time of his death, * * * the superior court of that county in which application is first made for letters testamentary or of administration, has exclusive jurisdiction of the settlement of the estate." Code Civ. Proc. § 1295. It thus appears that although, prior to the making of any application for letters, two or more courts may have concurrent jurisdiction to receive and entertain an application, the county of exclusive jurisdiction for the settlement of the estate is as definitely and precisely fixed by the Legislature as it is in the case of a resident of this state, where the exclusive jurisdiction is declared to be the county of which the deceased was a resident at the time of his death. Code Civ. Proc. § 1294, subd. 1. Here it is in that county containing a portion of his estate "in which application is first made."

The only point made as to the construction of this plain and unambiguous statutory provision, is as to the meaning of the words "in which application is first made." When is such an application "made" within the meaning of this provision? In view of our statutory provisions upon the subject (Code Civ. Proc. §§ 1371 to 1379), we are satisfied that the filing of a proper petition with the clerk of a superior court constitutes the making of the application. An application must necessarily precede the hearing. The statute fully prescribes the manner and form for the making of such application. It cannot be oral, but "must be in writing, signed by the applicant or his counsel, and filed with the clerk of the court, stating the facts essential to give the court jurisdiction of the case." Section 1371. This plainly constituted the making of the application in the opinion of the framers of the original Code, in which both sections 1295 and 1371 were contained in their present form, for the headnote to section 1371 was "Applications, How Made." See Barnes v. Jones, 51 Cal. 303, 306; Sharon v. Sharon, 75 Cal. 1, 16, 16 Pac. 345. Thereupon, the court to which the petition or application (which words are used synonymously in the statute), is presented, must assume jurisdiction thereof, through its designated officer, the clerk of the court, by appointing a time "for the hearing of the application" which has been made, and giving the prescribed notice. Sections 1372 and 1373. At the time appointed for the "hearing of such application," or at any time to which such hearing is continued, the court must hear the allegations and proofs. Sections 1372 and 1375. Obviously, in the light of these statutory provisions, what takes place at the hearing is not the making of an application, but is the hearing of the application that has, at a previous date, been made in the manner prescribed by statute.

The question is simply one of contruction of a statute. It is true that the Constitution confers jurisdiction in "all matters of probate" upon the superior court, but this does not mean that all superior courts in the state shall have concurrent jurisdiction in every particular probate matter. The Legislature undoubtedly has the right to prescribe by general laws the rules which shall obtain, in determining which of the many superior courts shall exercise the constitutionally conferred jurisdiction in any particular estate. It follows from the above that Tulare county is the county in which application was first made for letters of administration, and that thereby, if any part of the estate of decedent was situate therein, the superior court of that county obtained exclusive jurisdiction of the settlement of said estate.

It is contended that, as a matter of fact, no part of the estate of decedent was situate in Tulare county. Such contention is not available to respondent here. The petition filed in that county alleged the existence of estate therein, and the question as to the truth of that allegation was one which the Tulare court had exclusive jurisdiction to determine, subject only to review on appeal. While the existence of estate in such county was essential to jurisdiction, it was one of those jurisdictional facts which the Tulare court had to determine from evidence produced before it, and its decision upon that point would be entitled to the same presumption of verity as its decision upon any other point, and could not be collaterally attacked. In re Eichhoff's Estate, 101 Cal. 600, 36 Pac. 11. The case is analogous to those where residence of the deceased within the county is the essential to jurisdiction, and in such cases it is settled that where applications are made in different counties, upon conflicting claims as to the fact of residence, the superior court of the county in which a petition is first filed has exclusive jurisdiction to determine the question of residence, and that the courts of other counties must abide the determination of that court, which is reviewable only upon appeal. See Estate of Latour, 140 Cal. 414, 425, 73 Pac. 1070, 74 Pac. 441; Estate of Damke, 133 Cal. 430, 65 Pac. 889; Estate of Griffith, 84 Cal. 107, 110, 23 Pac. 528, 24 Pac. 381. In Estate of Damke, supra, an order of the superior court of Sacramento county appointing an administrator, upon a petition filed two days after the filing of the petition in San Joaquin county, was reversed, on the sole ground that the superior court of San Joaquin county had taken jurisdiction of the proceeding prior to the filing of the petition in Sacramento county. The effect of the decisions plainly is that jurisdiction in such matters attaches upon the filing of the first petition, to the superior court in which the petition is filed, and continues during the pendency of the proceeding thus instituted, and that this jurisdiction is exclusive, precluding any other court from effectually acting in the matter; in other words, that during the pendency of such proceeding, action by any other court is without and in excess of its power. In this connection, we cite the case of Estate of Worthington, 4 Ohio Dec. 381, where the principles applicable here are fully and learnedly discussed. It is, therefore, immaterial in this proceeding whether or not, as a matter of fact, there was property of the estate in Tulare county. It is enough that the proceeding instituted therein, upon a petition alleging the existence of such property therein, is still pending.

In the answer and oral argument it was contended that prohibition will not lie for the reason that there is a plain, speedy, and adequate remedy by appeal. It appears that Dungan made an application for the revocation of the Fresno letters, and has, in fact, appealed from the order denying his application. Regardless of the question as to whether Dungan could maintain such proceedings for revocation (see Estate of Griffith, 84 Cal. 107, 110, 23 Pac. 528, 24 Pac. 381), an appeal by him from an order refusing to vacate the letters issued by the superior court of Fresno county does not stay the proceedings in that court, or debar the person to whom letters were granted therein from exercising the powers and performing the duties of administrator. In view of the complications which will necessarily follow the attempted exercise of jurisdiction in this matter by two superior courts, we are of the opinion that it cannot be said that there is a plain, speedy, and adequate remedy in the ordinary course of law. We have no doubt that petitioners have a sufficient beneficial interest to entitle them to maintain this proceeding (see Estate of Damke, 133 Cal. 434, 65 Pac. 888), and are of the opinion that the superior court of Fresno county should be restrained from proceeding in the matter of said estate.

Let a writ of prohibition issue directing the superior court of Fresno county to desist and refrain from further proceedings in the matter of the settlement of the estate of Jane Davis, deceased, pending the final determination of the proceeding in the matter of said estate instituted in the superior court of Tulare county on September 19, 1904.

We concur: BEATTY, C. J.; LORIGAN, J.; HENSHAW, J.; McFARLAND, J.

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149 Cal. 104

Ex parte DIETRICH. (Cr. 1,296.)

(Supreme Court of California. March 31, 1906.)

FOOD—REGULATING SALE OF BUTTER—CONSTITUTIONAL LAW.

Act March 20, 1905 (St. 1905, p. 316, c. 302), requiring packages of butter between one-half and six pounds in weight offered for sale to have their exact weight marked thereon in letters or figures not less than one-fourth of an inch in height, is not a valid exercise of the police power, but is unconstitutional and void as being a restriction on the constitutional right to property and privilege of following a legitimate business.

Shaw, Sloss, and Angellotti, JJ., dissenting.

In Bank. Application for writ of habeas corpus by Robert Dietrich against Peter Curtis, sheriff of the city and county of San Francisco. Application granted, and petitioner ordered discharged, from custody.

Titus, Wright & Creed, for petitioner. I. Harris, for respondent.

McFARLAND, J. Petitioner was convicted of violating the provisions of an act of the Legislature approved March 20, 1905 (St. 1905, p. 316, c. 302), and was sentenced to imprisonment, and he seeks to be discharged on habeas corpus upon the ground that the said act is unconstitutional and void because violative of petitioner's common right to the enjoyment of property and to make ordinary and lawful contracts. The title of the act and section 1 thereof—which alone are important here—are as follows:

"An act requiring the marking of packages of butter containing less than six pounds and more than one-half pounds so as to advise the purchaser or others as to the weight of butter contained in such package.

"Section 1. No person or persons, firms or corporations, by themselves or their agents or employés, shall sell, manufacture or prepare for sale, offer for sale or expose for sale, or have in his or their possession for sale, or consign, ship or present to any dealer, commission merchant, consumer, or other person, any butter in packages containing less than six pounds and more than one-half pound, unless the exact weight of such butter contained in such package or packages, rolls, prints or other form of package, expressed in the number of pounds or ounces or in both pounds and ounces, shall be printed or durably and legibly marked upon the wrapper or other container of such butter in letters or figures, or in both letters and figures, not less than one-fourth inch high and upon the same side or face of such package upon which the producer's or seller's name and address appears, and if such name and address does not appear, the weight alone shall be legibly and durably placed upon such package in letters or figures not less than one-fourth of an inch high." A violation of this section is made a misdemeanor.

The clear purpose, as expressed in the title is that of "requiring the marking of packages of butter," which the owner proposes to sell; and the body of the act requires that each package, between certain weights, shall have its "exact weight" marked on it in letters or figures not less than one-fourth of an inch high. In our opinion the act is unconstitutional and void, within the decisions of this court in Ex parte Drexel and Holland (Cal. Sup.) 82 Pac. 429; Ex parte Hayden (Cal. Sup.) 82 Pac. 315; Ex parte Dickey, 144 Cal. 234, 77 Pac. 924, 66 L. R. A. 928, 103 Am. St. Rep. 82; Ex parte Jentzsch, 112 Cal. 468, 44 Pac. 803, 32 L. R. A. 664; In re Kelso (Cal. Sup.) 82 Pac. 241; Ex parte Whitwell, 98 Cal. 73, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152. It would serve no useful purpose to here restate the views and declarations of law expressed in the opinions in those cases. The general principal therein declared is that the Legislature cannot impose onerous and unnecessary burdens upon property and business and the right of contract, except when this may be done under the police power for the protection of the public health, morals, safety, etc. The act in question here is not for the purpose of preventing the sale of impure food, or the adulteration of food, or selling one kind of food under the name of another. The offense which it endeavors to create is that of not marking in the exact manner prescribed by the act. And this manner is certainly a most onerous one. Indeed, it would scarcely be practicable to comply literally with the requirement; and an approximate compliance would be exceedingly expensive and burdensome. The act does not come within the legitimate scope of the police power as described in the cases above cited, and seems to be an unwarranted restriction on the citizen's constitutional right to his property and to his privilege of freely following a legitimate business, and not required by any public necessity. Respondent has cited some authorities, but most of them are not in point, being in the catagory of "oleomargarine cases." Perhaps one or two of them lend some countenance to respondent's contention; but if they can be so construed they do not meet our approval.

It is ordered that the respondent, Robert Dietrich, be and he hereby is discharged from custody.

We concur: BEATTY, C. J.; HENSHAW, J.; LORIGAN, J.

SHAW, J. I dissent. The act is intended to prevent in some degree the practice of fraudulently selling packages of butter at underweight, a practice which we cannot say is infrequent. The prevention of fraud is a legitimate exercise of the police power. That the putting of a label on the outside of every package, showing its weight correctly, will tend to prevent the fraud at which the law is directed, must be admitted. If so, the extent of the preventive effect, and whether the results are sufficient to justify the inconvenience entailed upon a lawful business, are questions which the Legislature must, in the first instance decide. Its decision on such questions is conclusive upon the courts, unless it appears that the interference with the business, as compared with the benefits resulting therefrom, will be so great as to render the law an unreasonable exercise of the police power. This we cannot do without violating the rule of statutory construction to the effect that a statute must, if possible, be so construed as to make it constitutional. The requirement that the package shall be marked with its "exact weight," must receive a reasonable interpretation, and a slight deviation from the precise weight, not willfully or knowingly made, would not be held a violation of the law. Thus construed, I am of the opinion that the burden imposed on the business is not sufficiently onerous to justify this court in declaring it void as an unreasonable interference with business. It is common knowledge that, in this state, butter is almost invariably pressed in molds and wrapped in cloth or paper to prepare it for the market. The weight is always known or very easily ascertained by the maker. With modern facilities for printing, it will not be difficult or expensive to make that weight appear on the outside of the package as required by the law in question. That it may be oppressive in rare instances is not a judicial objection to the validity of a law of this character. The legislative judgment that such frauds are so prevalent as to justify the preventive legislation is not so clearly wrong as to require interference by the court. The error must be beyond reasonable doubt, or the legislative decision must be upheld. Bourland v. Hildreth, 26 Cal. 184; University v. Bernard, 57 Cal. 612; In re Madera Irr. Dist., 92 Cal. 310, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; Cooley Const. Lim. (7th Ed.) 228.

We concur: SLOSS, J.; ANGELOTTI, J.

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149 Cal. 83

SAN FRANCISCO & S. J. V. RY. CO. v. CITY OF STOCKTON et al.

(Sac. No. 1,186.)

(Supreme Court of California. March 31, 1906. Rehearing Denied April 30, 1906.)

1. TAXATION—ASSESSMENT — RAILROAD PROPERTY—BY WHOM ASSESSABLE.

Under Const. art. 13, § 10, declaring that all property shall be assessed in the county, city, town, township or district in which it is situated, except that the franchise, roadway, roadbed, rails, and rolling stock of railroads shall be assessed by the state board of equalization, all the property of railroads not specifically mentioned is to be assessed by the local authorities in the place where the property is situated, and any attempt by the state board of equalization to assess such property is beyond its power and void.

2. SAME — ASSESSMENT BY STATE BOARD — PROPERTY INCLUDED—IMPROVEMENTS.

Under this provision, all improvements erected on space covered by the right of way as well as tangible property lying outside the limits of the right of way, though such improvements and property be absolutely indispensable to the operation of the railroad, are assessable by the local authorities.

3. SAME—"ROADWAY" DEFINED.

The term "roadway" in this provision means the continuous strip of land upon which the railroad is constructed, and Civ. Code, § 465, subd. 4, authorizing railroad corporations to lay out their roads not exceeding nine rods wide and to construct and maintain the same with such appendages and adjuncts as may be necessary, does not broaden the meaning of the term.

4. SAME.

Under Const. art. 13, § 10, requiring roadway of railroads to be assessed by the state board of equalization, tracts of land used for cattle yards, switch yards, and depot purposes, are not roadway, and are assessable by the local authorities.

5. SAME—UNFINISHED TRACK.

Under this provision a section of the tract intended for use in the future as a part of the main line of a railroad, but not so used nor in a condition for such use at the time of assessment, is not a part of the roadway, and not assessable by the state board of equalization.

In Bank. Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by the San Francisco & San Joaquin Valley Railway Company against the city of Stockton and others. From a judgment for defendants, plaintiff appeals. Affirmed.

C. N. Sterry, T. J. Norton, Arthur L. Levinsky, and A. S. Halsted, for appellant. Ed. R. Thompson and A. H. Ashley, for respondents.

ANGELLOTTI, J. This action was brought to recover certain money paid under protest by plaintiff to the city of Stockton for taxes levied by the city for the year 1900, based upon assessments made by the city assessor. Plaintiff was a railroad corporation, operating a continuous line of railroad from said city of Stockton in San Joaquin county, through said San Joaquin county, and other counties in the state. Its claim was that the assessments in question were illegal and void, for the reason that the property therein assessed could be assessed only by the state board of equalization, in the manner provided by section 10 of article 13 of the Constitution, and that it was, in fact, so assessed by such state board for that year, and the taxes thereon paid. As to a portion of the property, the trial court sustained the claim of plaintiff, and, the assessment being such as to enable the court to segregate the tax paid thereon from the total amount, gave plaintiff judgment for the amount thereof, viz., $8.20, with interest and costs of suit. As to the remainder of the property, the trial court found against plaintiff, and denied it any relief. Plaintiff appeals from the judgment and from an order denying its motion for a new trial.

The through line of plaintiff's road commenced in the city of Stockton, on Weber avenue, near the junction of Madison street, and ran thence west on Weber avenue and through block G to Edison street, thence south on Edison street to Taylor street, and thence east on Taylor street, a street 60 feet wide. The assessments complained of included portions of said block G, and it was as to this property that the trial court sustained the claim of plaintiff, so that we are not here concerned with any question as to the validity of that portion of the assessment. The other property covered by the assessments assailed was as follows, viz.: First. Three adjoining blocks of land, each about 200 by 300 feet in area, known as blocks 21, 22, and 23 abutting on the northerly line of Taylor street, acquired, appropriated and used exclusively for station purposes. On block 23 there was a passenger depot. On block 22 there was a small building, and a spur track across the corner running into and terminating in block 21, on which was a freighthouse, and said spur track with sidings. Second. A tract of land containing about 25 acres, lying west of the main line. On this were a roundhouse, machine shops, storehouse and materials to be used for construction purposes. There were about 13 tracks on this tract, used for switching and repairing purposes, and also a water tank. Third. A parcel of land containing about 2.81 acres, lying several thousand feet northwest of the main line and north of Weber avenue, and bordering on the water front line of Stockton channel. This was connected by a switch with the main line, and there were three tracks running across the property. It was known as the cattle yard, and was used for the purposes of keeping stock carried by plaintiff, pending their transfer to and from steamboats. On this property there was a stock corral, covering about one-third of the tract, a water tank, and a chute connecting the corral with the steamboats. Fourth. A right of way 200 by 1,800 feet, extending west from the main line, through the Boggs tract, to the west line of the city. On this had been constructed a roadbed upon which a single track had been laid, the same constituting a portion of the proposed extension of the railroad from Stockton to San Francisco. It had never been actually used or operated for railroad purposes, but has since been made and is now a part of the main line.

Section 10 of article 13 of our Constitution is as follows, viz.: "All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, roadway, roadbed, rails and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts." By this provision of the Constitution a system different and distinct from that provided for the assessment of other property has been furnished for the assessment of certain property of railroads operated in more than one county. The property coming within this special system is, however, only the property specifically designated in the constitutional provision, viz., "the franchise, roadway, roadbed, rails, and rolling stock"; and, as to all other property of such railroads, the general system of assessment by the local authorities in the place where the property is situated is applicable and mandatory, and any attempted assessment by the state board of equalization is beyond its power and absolutely void. People v. Sac. Co., 59 Cal. 321; S. F. & N. P. R. R. Co. v. State Board, 60 Cal. 12, 29; S. F. v. C. P. R. R., 63 Cal. 467, 49 Am. Rep. 98; Santa Clara Co. v. S. P. R. R. Co., 118 U. S.

394, 6 Sup. Ct. 1132, 30 L. Ed. 118; Cal. v. C. P. R. R., 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150. This much is not disputed by plaintiff, and the precise question presented for our determination is as to whether any of the property hereinbefore designated was a part of the "franchise, roadway, roadbed, rails, and rolling stock" of plaintiff, within the meaning of those words as used in the constitutional provision. The opinions in the cases above cited are such as to render this question very easy of determination, and the apparent earnestness of learned counsel for plaintiff, and the elaborate briefs presented, furnish the only excuse for a somewhat extended discussion of the matter.

In view of the well-settled construction that has already been given to our constitutional provision, the contention of learned counsel for plaintiff for such a construction as will include within these terms, so far as possible, all property necessarily used in the operation of the railroad, so as to make all such property assessable as an entirety, is without force. In some states, such a policy in the assessment of railroad property has been adopted, and, perhaps, strong arguments may be made in favor of such a method. That, however, is not a question for the courts. It is settled that California has not adopted any such policy, and that the determination of the question as to whether property of a railroad is to be assessed locally or by the state board is in no way dependent upon the question as to whether it is essential to the operation of the railroad. By another provision of the Constitution (section 2, art. 13) it is required that land and the improvements thereon shall be separately assessed. Ever since the adoption of the Constitution, with the single exception of the amendment of 1883 to section 3665, Pol. Code (St. 1883, p. 66, c. 40), including steamers used in transporting passengers, freights and cars across waters which divide the road, in the property to be assessed by the state board, which amendment was held by the United States Supreme Court to be in violation of our constitutional provision and beyond the power of the Legislature (Cal. v. C. P. R. R., supra), it has been the legislative construction of the two provisions, approved by the courts, that all improvements of a railroad, erected upon the space covered by the right of way, other than roadbed, rails and rolling stock, together with all other tangible property outside of such "right of way," which term is held to be synonymous with the term "roadway" used in the Constitution, must be assessed by the assessor of the district where situated, in the same manner as other property. Prior to 1889 the Legislature attempted to enumerate such property so locally assessable, as depots, station houses, shops, buildings, etc., but ever since 1889 the statute, after declaring that the state board must assess "the franchise, roadway, roadbed, rails and rolling stock of all railroads operated in more than one county," has provided as follows, viz.: "The depots, stations, shops and buildings erected upon the space covered by the right of way, and all other property owned by such person, corporation or association of persons, are assessed by the assessor of the county wherein they are situated."

This legislative construction has, as shown in the cases already cited, been approved by the courts. As to all improvements erected upon the space covered by the right of way, no matter how indispensable they may be to the proper operation of the railroad, it will be sufficient to refer to the case of Santa Clara Co. v. S. P. R. R. Co., supra, where, upon a review of our statutes and the decisions of this court, the assessment of the state board was held invalid by the United States Supreme Court, because of the inclusion therein of fences constructed on the boundary line of the right of way. As to tangible property lying outside of the limits of the right of way, our own case of San Francisco v. C. P. R. R., supra, arising prior to the amendment of section 3665, Pol. Code, in 1883, is in point. There, the local assessment of certain steamers to carry passengers, freight and cars, absolutely essential to the operation of the railroad under the circumstances shown, was upheld, on the ground that they were not included within the category of property enumerated in the constitutional provision to be assessed by the state board. This construction of our constitutional provisions was again followed by the United States Supreme Court in California v. C. P. R. R., supra, where an assessment of such steamers by the state board was held invalid, notwithstanding that the amendment of 1883 to section 3665, Pol. Code, purported to authorize such assessment, on the ground that the Legislature could not make assessable by the state board that which the Constitution required to be assessed locally. It thus appears that the indispensability of the property to the proper operation of the railroad is not a material factor in the determination of the question before us. As clearly appears from the foregoing, it was never designed that all property necessarily used in the operation of the railroad should be assessed by the state board, but only certain specified portions thereof, and in making the division into two classes, the people were not governed by considerations as to the necessity of any of such property to the operation of the road. The classification was made upon a totally different basis. As was said in S. F. & S. M., etc., Co. v. Scott, 142 Cal. 222, 229, 75 Pac. 575, 581: "It is plainly the general policy of the law that property situated in one county or city should be taxable in that county or city for local purposes for its actual value, and that that local subdivision alone should have the benefit of this value for the purpose of raising its revenue. This, indeed, is the basis of all local taxation, and it is recognized by the section in question, that the property which receives the benefit of local government shall pay its proportion of the expenses thereof, apportioned according to actual value."

The only property in the state excepted from the local assessment required by the Constitution, is that portion of the property of railroads operated in more than one county, which is enumerated in section 10, article 13 thereof, and this, as intimated in the above quotation, is not an exception to the general policy that the local subdivision wherein property is situated, shall have the benefit of the value thereof for the purpose of raising its revenue. It is true that the assessment value fixed by the state board on all property assessable by it is apportioned for local taxable purposes to the various legal subdivisions only "in proportion to the number of miles of roadway laid in such" subdivisions, but as long as the class of property to be so assessed includes only property which may be fairly valued at a certain rate per mile for the whole length of the railroad, having no greater value in one place than in another, the general policy heretofore stated is not in the slightest degree infringed upon, each legal subdivision receiving for local taxation purposes its proper proportion of the total value. While such a result may not have been attained with absolute exactness by the constitutional provision invoked here, however strictly it may be construed, it is apparent that such general policy requires such reasonable construction of the provision as is most clearly in accord therewith. The real object of the exception to the general method of assessment was to provide a more uniform and just method of valuing for taxation purposes, what was designated by one of the members of the constitutional convention as the "continuous property" of such railroads, the property which might fairly be considered as being substantially the same, both in quantity and in value, the whole length of the road, and, therefore, capable of being valued at so much a mile. It had been discovered that the former method of valuation of portions of such property in the different subdivisions through which the road ran, by the local officers, had led to much inequality in the valuation of the same kind of property of the railroad, having substantially the same value in the different subdivisions, and to double taxation of some of such property, and it was concluded that the valuation of all such property by one tribunal, and the apportionment thereof to the various subdivisions on a per mileage basis, would more nearly insure a correct valuation of the whole of such property, and the giving to each subdivision its proper proportion thereof. This is manifest from the debates in the constitutional convention.

When we come to consider the character of the property specified in the constitutional provision, in the light of the fact that the terms there used were not intended to include all property essential to the operation of the road, this object is plainly apparent. The intangible thing known as the "franchise" has no local situs but appertains to the whole road, and the assessment of it as a unit and the per mileage method of apportionment afford the only practicable way of giving to each legal subdivision its proper proportion of value. Property included in the term "rolling stock," a definite and precise term as to the scope of which there can be no misunderstanding, which is in one place today and another to-morrow, being continually carried along the line of the road in the actual operation thereof, owing to its character and use has no actual situs entitling any particular subdivision through which the road runs to have the benefit of the taxation thereof, in preference to any other subdivision. Such property is in no sense of the word "local property," and the apportionment of the total value of such property according to the length of the road, as in the case of the franchise, is the only practicable way of preventing double assessments thereof and determining the amount to which each subdivision is justly entitled. The term "roadbed" as used in this provision has been definitely held to include only the bed or foundation on which the superstructure of the railroad rests (S. F. & N. P. R. R. Co. v. State Board, supra; S. F. v. C. P. R. R. Co., supra), and the term "rails" necessarily means simply the rails in place on the roadbed, constituting such superstructure. S. F. & N. P. R. R. Co. v. State Board, supra. Both of these classes of property are manifestly of such a nature that, notwithstanding differences in their original cost in different places, their value for railroad purposes in different places along the whole line of the road is substantially the same, and the mileage method of apportionment of the total value is simply a method by which each subdivision is given a proportion of the total value substantially equivalent to the value of such of the property as is situated within its boundaries.

The only remaining class of property named in the constitutional provision is "roadway." According to the ordinary and popular meaning of this term as applied to railroads, it includes simply the continuous strip of land, within which the railroad is constructed. This court has said that it is synonymous with "right of way," and includes "whatever space of ground the company is allowed by law in which to construct its roadbed and lay its track" (S. F. v. C. P. R. R. Co., supra), which is but another way of saying that it is the continuous strip of land, not exceeding in width the nine rods permitted by law (Civ. Code, § 465, subd. 4), which the company acquires and uses for the construction and maintenance of its roadbed and railroad track. Such strip is, of course, ordinarily wider than the actual roadbed, and portions thereof are often used at points along the line for other than roadbed purposes, but as long as all improvements thereon other than roadbeds and rails are locally assessed, the property remaining for assessment by the state board, although it may have originally cost more in one place than in another, is, considering its use for railroad purposes, substantially of the same value the whole length of the road. See S. F. & S. M. etc. Co. v. Scott, supra. Giving to the term "roadway" its ordinary and popular meaning, which, as we have seen, is the construction already given to it by this court, we give it a meaning which explains and justifies its inclusion with the other classes of property specified in the constitutional provision, and which makes that provision consistent with the general policy of giving to each legal subdivision for local taxation purposes the benefit of the value of all property situated within its limits, while to construe it as including lands lying without such continuous strip, acquired and used exclusively for other purposes than the operation of its trains, not only gives it an unusual meaning, but would be utterly at variance with such policy, and entirely fail to explain its inclusion with the other property mentioned in the section. There can be no doubt that the term "roadway" as here used must be confined as already indicated, and such we understand to be the construction heretofore given by this court.

Under this construction of our constitutional provision we have two general classes of railroad property for purposes of assessment, made entirely regardless of the question as to the necessity of the use of the property for the purposes of the railroad. One contains only such property as may fairly be said to be substantially the same, both in quantity and value, the whole length of the road, while in the other is all such property as may fairly be considered purely local. See Nashville, etc., R. R. Co. v. State, 129 Ala. 142, 30 South. 619. We have examined the various decisions cited from other states by learned counsel for plaintiff, and, with possibly one exception, find none that can be said to at all support their contention for a broader construction of the terms used in our constitutional provision. The exception is the case of Chicago, etc., v. Cass Co., 8 N. D. 18, 76 N. W. 239, wherein, upon a constitutional provision similar to ours, except that it is applicable to all railroads whether operated in one county or more, the conclusion is reached that the term "roadway" includes not only the strip of land upon which the road is constructed, but also all ground necessary for the construction of sidetracks, turnouts, connecting tracks, station houses, and all other accommodations necessary to accomplish the objects of the incorporation. We shall not attempt to distinguish that case from the one at bar, and will only say that the construction therein given to the term "roadway" is so at variance with the definition heretofore given by this court (S. F. v. C. P. R. R., supra), and with the general policy evidenced by our constitutional and statutory provisions, that we cannot follow it here. The other decisions cited are based upon provisions, either constitutional or statutory, so essentially different from our own law that they throw no light upon the question before us.

Plaintiff relies on the words "appendages, and adjuncts" in subdivision 4 of section 465, Civ. Code. That subdivision empowers a railroad corporation "to lay out its road, not exceeding nine rods wide, and to construct and maintain the same, with a single or double track, and with such appendages and adjuncts as may be necessary for the convenient use of the same." There is nothing in this that is inconsistent with our conclusion as to the meaning of the term "roadway." It does no more at most than to give the power of the company to acquire, construct and maintain such appendages and adjuncts as may be necessary for the convenient use of the road, and in no way purports to make such appendages and adjuncts a part of the roadway itself.

Under our views as to the proper construction of the constitutional provisions there can be no serious question as to the correctness of the conclusions reached by the trial court as to the first three assessments hereinbefore described. Clearly none of the land therein mentioned can be held to be a portion of either the franchise, roadbed, rails or rolling stock of plaintiff. Unless then it is within the term "roadway" it does not fall within the class to be assessed by the state board. It is very clear that neither the 25-acre tract, nor the 2.81-acre tract known as the "cattle yard" come within that term as we have defined it. We think it also clear that the city blocks, lying immediately north of the street used for roadway purposes, do not fall within that term. They were acquired and are used for local purposes, to accommodate a local demand, and are purely local in the same sense that the buildings constructed thereon are local. The mere fact that improvements such as a passenger station building and a freight building, and convenient spur tracks for the use of the same, all of which might be constructed on the space covered by a right of way, have been constructed thereon, certainly does not make them "roadway." They constitute no part of the continuous strip acquired and used for roadbed purposes. We think it is manifest from the record that the only "roadway" possessed by plaintiff at this place, within the meaning of that term as used in our Constitution, was within the limits of the public street known as "Taylor street."

A different question is presented as to the remaining assessment, which confessedly was for a right of way to be used in the future as a part of the main line of roadway. The fact that plaintiff had not then commenced to use the same as a part of its railroad is, however, a complete answer to plaintiff's claim that it should have been assessed by the state board. Taking into consideration the object of the constitutional provision invoked by plaintiff, which has already been fully discussed, we are satisfied that it must be construed as applying only to such portions of a road as have, in fact, been made and are a part of the operated system. Doubtless this was the opinion of both plaintiff and the state board of equalization, for this property was not included in the assessment made by that board for the year 1900. It is urged that the property included in the first three assessments hereinbefore described was, in fact, included in the assessment made by the state board for the year 1900. That, however, is entirely immaterial here. Not being within the classes of property specified in the constitutional provision, any attempted assessment thereof by such board was, as we have already seen, absolutely void, and did not preclude a valid assessment thereof by the local authorities. There is no other point requiring notice.

The judgment and order are affirmed.

We concur: SHAW, J.; SLOSS, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

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3 Cal. App. 183

LACKMANN v. KLAUENBERG et al.

(Court of Appeal, First District, California. Feb. 28, 1906.)

1. JUDGMENT—RES JUDICATA.

Where plaintiff had appealed from a judgment against him before a justice in favor of one of two conflicting claimants of property in his hands before filing a complaint in the nature of a bill of interpleader, and on such appeal the action was triable de novo and was still pending undetermined at the time of the filing of such complaint, the judgment appealed from was no bar to the bill.

2. INTERPLEADER—RIGHT TO BRING—DEFENSE OF ACTION.

Code Civ. Proc. § 386, provides that whenever conflicting claims are or may be made on a person for or relating to personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead. *Held*, that where plaintiff was a mere stakeholder claiming no interest in money deposited with him as sheriff to secure the release of property levied on, the mere fact that plaintiff defended a suit brought against him by one of the claimants in a justice court where he was defeated, and from which he appealed, did not establish that he had taken such an antagonistic attitude to such claimant as precluded him from maintaining a complaint in the nature of a bill of interpleader.

Appeal from Superior Court, City and County of San Francisco.

Action by John Lackmann against Sophie Klauenberg and others. From a judgment sustaining a demurrer to a complaint in the nature of a bill of interpleader, plaintiff appeals. Reversed.

George D. Squires, for appellant. S. D. Carr and George H. Whipple, for respondents.

HALL, J. This is an appeal from a judgment entered after order sustaining demurrer to plaintiff's second amended complaint. The action was brought to compel the defendants, Sophie Klauenberg and P. W. Webber to interplead as to their rights to a sum of money in the hands of plaintiff. The demurrer is a general one filed by the Klauenbergs, and the question presented is as to the correctness of the ruling of the court sustaining the demurrer; in other words, does the complaint state a case sufficient to entitle plaintiff to a judgment that the defendants interpleaded as to their rights to the money in the hands of plaintiff?

The essential facts, as set forth in the complaint, are that defendant Webber brought an action against the defendants Sophie and Herman Klauenberg, in which a writ of attachment was issued and placed in the hands of plaintiff, as sheriff, for service, and under which he levied upon certain personal property alleged to belong to Sophie Klauenberg and Herman Klauenberg. Sophie Klauenberg, in lieu of giving an undertaking, deposited with the plaintiff $175, and the property was thereupon released from the levy. Subsequently Webber obtained judgment against Herman Klauenberg for $106 and $45 costs, but did not obtain any judgment against Sophie Klauenberg. Webber thereupon procured a writ of execution to issue, and claims to be entitled to said sum of $175, or so much as will satisfy his judgment against Herman Klauenberg, while Sophie Klauenberg brought an action in the justice's court against plaintiff to recover the said sum of $175, in which she alleged that the said sum of $175 was deposited with plaintiff to secure the release of her property and not that of Herman Klauenberg, and in said action judgment has been given against plaintiff for the said sum. Plaintiff has appealed from said judgment, and said appeal is now pending and has not been decided. The complaint alleges that plaintiff has no claim or interest in said money, and offers to deposit same in court to be disposed of as the court may direct. It does not appear from the complaint what plea, answer or defense plaintiff made to the action in the justice's court. It thus appears from the allegations of the complaint that plaintiff has in his possession the sum of $175, in which he has no interest, and to which he makes no claim, but to which defendant Sophie Klauenberg makes claim to the entire amount, and has brought suit, which is now pending and undetermined, for the entire amount, and to which defendant Webber makes claim to so much as will satisfy his judgment against Herman Klauenberg. Section 386 of the Code of Civil Procedure, after making provision for the substitution of a second claimant in place of the defendant in certain cases, provides that "whenever conflicting claims are or may be made upon a person for or relating to personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves." It is further provided that the action of interpleader may be maintained, and the plaintiff be discharged from liability to all or any of the conflicting claimants, although their titles or claims have not a common origin, but are adverse to one another. The facts set forth in the complaint in this case bring it within the provisions of the statute above quoted, unless the fact that the action in the justice's court had gone to judgment bars the right to an interpleader.

It is undoubtedly the general rule that where either one of the conflicting claimants has secured a final judgment against a stakeholder who had knowledge of the conflicting claims before judgment, such stakeholder cannot maintain an action of interpleader. Cheever v. Hodgson, 9 Mo. App. 565; French v. Robrchard, 50 Vt. 43; Holmes v. Clark, 46 Vt. 22; Mitchell v. N. W. Co., 26 Ill. App. 295; Dodds v. Gregory, 61 Miss. 351; McKinney v. Kuhn, 59 Miss. 186. But that is not this case; no final judgment has been taken against plaintiff. The action brought in the justice's court is undetermined and still pending, and there is now no judgment existing against plaintiff. The taking of the appeal has vacated and set aside the judgment that had been rendered. People v. Frisbie, 26 Cal. 135; Gillmore v. Cent. Ins. Co., 65 Cal. 63, 2 Pac. 882; Bullard v. McArdle, 98 Cal. 355, 33 Pac. 193, 35 Am. St. Rep. 176. Appellant, however, insists that plaintiff has forfeited his right to maintain the action of interpleader by defending the action in the justice's court; that by so doing he has violated the rule that requires the plaintiff (stakeholder) to be indifferent between the conflicting claims. This rule is thus stated in 11 Ency. of Pl. & Pr. 455: "It is of the essence of an interpleader suit that the plaintiff shall be and continue entirely indifferent between the conflicting claims. But the plaintiff is not precluded from filing a bill of interpleading by defending a suit brought against him by one of the claimants to the fund if the defense is not too far persisted in." In the case at bar it does not appear what defense plaintiff made to the action brought by respondent Sophie Klauenberg. It simply appears that the action was brought in the justice's court, and judgment rendered against plaintiff here (defendant there) and an appeal taken. In Curtis v. Williams, 35 Ill. App. 518, it was held that it is no objection to such a bill that the complainant therein had filed an answer in one of the former suits. In Jew v. Wood, 3 Beav. 579, rent was claimed of plaintiff by two sets of claimants. One had distrained goods and chattels for the rent, and plaintiff had brought a suit in replevin for the goods and chattels, but subsequently filed a bill of interpleader. It was urged that he was not entitled to relief because of delay in bringing the action, and because of his attempt to defend himself at law by his action of replevin. The master of the rolls upon this point said: "It does not appear to me that there has been any improper delay; and though I had some hesitation at first, I think that the defense set up at law ought not to preclude the plaintiff from relief in this court." The injunction was sustained, and the interpleader allowed.

A very just and equitable rule was adopted by the vice chancellor in Jacobson v. Blackhurst, 2 Johns. & H. 486. The action was to compel two sets of claimants to interplead as to their rights to 81 crates of crockery in the possession of plaintiff, who had theretofore been sued for the crockery by one of the defendants. The report of the case states that "The only question of interest was, whether the plaintiff was precluded by having set up a lien in defense to an action at law, which, on the face of the bill, he had not offered to withdraw otherwise than by submitting 'to act as the court should direct in order that the defendants might interplead.'" The vice chancellor decided that the case was a proper one for interpleader; and that, though the plaintiff was wrong in pleading a plea of lien to the action at law, yet that was met by the withdrawal of his pleas (he withdrew any claim of lien on the crockery), "and by making him in the first instance pay the costs of the plaintiffs in the action at law and their costs of the present suit up to and including the order for an injunction, getting these costs over again from the absent defaulting defendants." So, in this case, the adoption of a similar rule will result in exact and complete justice. Plaintiff has no claim upon the fund in his hands. It belongs in whole to defendant Sophie Klauenberg, or in part to defendant Webber. It can make no manner of difference to defendant Klauenberg whether she prosecutes her action for the money against Lackmann, the sheriff, or defendant Webber. In either case, as the matter now stands, the action must proceed in the superior court. If the interpleader be ordered she will have the substantial advantage that the money will be deposited with the court; and if it be shown that she has incurred any taxable costs in the action in the justice's court, no reason suggests itself to us why the court may not follow a practice similar to that adopted in Jacobson v. Blackhurst, supra, and impose the payment by plaintiff of such costs as a condition for the order. In Lozier's Executors v. Van Saun's Adm'rs, 3 N. J. Eq. 325, it was held that a bill for interpleader would lie, although plaintiffs had suffered final judgment to be taken against them in an action at law, to which they could make no complete defense at law. The case at bar is analogous to the New Jersey case in that this plaintiff could take no steps in the justice's court to compel an interpleader. In Fox, Executor, v. Sutton et al., 127 Cal. 515, 59 Pac. 939, Fox had accounted to the probate court for certain money as the property of the estate, and yet was allowed to compel the widow of the deceased to interplead with persons claiming the money adversely to the estate. By accounting to the court for the money as property of the estate, he had, in a sense, taken a position antagonistic to the claim of the other claimants; yet as he had no personal interest in the fund he was permitted to deposit the money in court, and the claimants were compelled to interplead.

We think the court erred in sustaining the demurrer to the complaint, and the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

We concur: HARRISON, P. J.; COOPER, J.

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3 Cal. App. 188

McGILLIVRAY v. MILLER.

(Court of Appeal, Second District, California. Feb. 28, 1906.)

1. EJECTMENT—COMPLAINT—SEISIN OF PLAINTIFF.

Where a complaint in ejectment, filed April 20, 1905, alleged that plaintiff was seised in 1905 under a lease for the purpose of putting in a crop, the court, taking cognizance of the laws of nature and the measure of time, as authorized by Code Civ. Proc. § 1875, subd. 8, will take notice of the fact that in Riverside county possession in 1905 for the purposes of seeding and harvesting will include the month of April, and therefore the complaint was not objectionable as failing to tender the issue of plaintiff's seisin at the date of the commencement of the action.

2. SAME—ANSWER—ISSUES RAISED.

Where a complaint in ejectment was filed April 20th, and the answer, filed May 31st, alleged that defendant was in possession of the described premises under a lease from the owner, and had standing and growing thereon a crop seeded under such lease, and the same was nearly ready for harvesting, such answer must be construed as extending to and including the date of the filing of the complaint, as in the nature of things more than 40 days must necessarily elapse between the entry on land for purposes of seeding and the ripening of the crop for harvest, and therefore the title averred by defendant raised by fair implication the right to possession on the date of the filing of the complaint.

Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Ejectment by Nettie McGillivray against A. Blanchard Miller. From a judgment for plaintiff, defendant appeals. Affirmed.

Gill & Densmore, for appellant. Collier & Carnahan, for respondent.

ALLEN, J. Action in ejectment and for damages. Judgment for plaintiff, from which defendant appeals.

Plaintiff, by her complaint filed April 20, 1905, alleges that while she was a lessee of the described premises, seised, possessed, and entitled to the possession thereof, the defendant entered thereon and dispossessed her, and still withholds possession from her. Appellant's contention is that the judgment rests upon a complaint inherently defective, and should be reversed. This form of complaint was criticised in Vance v. Anderson, 113 Cal. 536, 45 Pac. 816, as not tendering to defendant an issue as to the plaintiff's seisin or ownership at the date of the commencement of the action. There is, however, an allegation in this complaint not found in that under consideration in the case cited, which is to the effect that plaintiff was seised in 1905, under a lease, for the purpose of putting in a crop. The court, taking cognizance of the laws of nature and the measure of time (Code Civ. Proc. § 1875, subd. 8), will take notice of the fact that in this part of the state possession in 1905 for the purposes of seeding and harvesting will include the month of April. But assuming in this case, as was assumed in Vance v. Anderson, supra, that the complaint was insufficient, the defendant herein, by his answer filed May 31, 1905, alleged that he is in possession of the described premises under a lease from the owner, and has standing and growing thereon a crop, seeded under such lease, and the same is now nearly ready for harvest. Defendant's claim to possession under this lease should be held to extend to and include the date of the filing of the complaint; for, in the very nature of things, more than 40 days must necessarily elapse between the entry on land for purposes of seeding and the ripening of the crop for harvest. The claim of title averred by defendant raised by fair implication the right to possession on the date of the filing of this complaint, and the affirmative allegations of such answer being deemed denied under our Code, an issue was thereby presented as to the right of possession at the date of the suit.

The pleadings as a whole, therefore, are sufficient to support the judgment, and the judgment is ordered affirmed.

We concur: GRAY, P. J.; SMITH, J.

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3 Cal. App. 198

AKRON CEREAL CO. v. FIRST NAT. BANK OF SAN FRANCISCO.

(Court of Appeal, First District, California. March 1, 1906.)

1. PLEDGES—WRONGFUL SALE OF PLEDGED GOODS.

A bona fide pledgee, having sold the pledged goods to reimburse itself for money advanced to the pledgor on the security of a warehouse receipt for the goods issued in the name of the pledgor, is not entitled, in an action by the owner of the goods for their conversion, to the protection of Civ. Code, § 2991, providing that "one who has allowed another to assume apparent ownership of property for the purpose of making any transfer of it cannot set up his own title to defeat a pledge of the property, made by the other to a pledgee who received the property in good faith in the ordinary course of business and for value," in the absence of proof that the apparent ownership of the goods by the pledgor was authorized or contributed to by the conduct of the owner.

2. Factors—Power to Delegate Authority.

One engaged in an independent business in buying and selling merchandise on his own account is not, merely from his representation of factors in a single transaction, entitled to exercise the authority of the factors in respect to the goods which are the subject-matter of the transaction, nor could their authority be delegated to him in view of Civ. Code, § 2368 (3), providing that factors shall not have power to delegate their authority to any person in an independent employment.

3. Same—Authority of Representative.

As their representative he could receive the goods of his factors' principals and place them in a warehouse for the owner, but he had no authority, by virtue of such relation, to store them in his own name, either directly or indirectly.

Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by the Akron Cereal Company against the First National Bank of San Francisco. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Lloyd & Wood, for appellant. Louis A. Beedy, L. A. Gibbons, and Wm. M. Abbott, for respondent.

HARRISON, P. J. Action for conversion. Judgment was rendered in favor of the plaintiff, and the defendant has appealed.

The facts out of which the plaintiff's cause of action arose, as developed at the trial, are as follows: The plaintiff is a corporation organized under the laws of Ohio, and engaged in that state in the manufacture of an article of merchandise known as "Mother's Oats"; and on March 15, 1900, shipped by railroad from Akron to San Francisco 350 cases of this merchandise. At that time J. R. Moler & Co., a firm doing business in Denver, was acting as manufacturing agent for the plaintiff in several cities, and had one F. Ingold as its own agent and representative in San Francisco. The merchandise so shipped by the plaintiff was consigned to its own order, with a direction on the bill of lading "Notify J. R. Moler, 109 California street, San Francisco, Cal." Upon its arrival in San Francisco the merchandise was first stored in the warehouse of the Haslett Warehouse Co., and was entered on its books in the name of "The Akron Cereal Co., c/o F. Ingold." October 20, 1900, at the request of Ingold, 292 cases of the merchandise were transferred upon the books of the warehouse to the name of "J. R. Moler & Co., c/o F. Ingold." No warehouse receipts were issued in either case. November 8th, 140 cases, and November 9th, 128 cases, were withdrawn from this warehouse by Ingold; he signing "J. R. Moler & Co., per F. Ingold" to receipts therefor from the warehouse. Ingold was himself a manufacturing agent, and was also engaged in business in San Francisco upon his own account; and about this time he applied to the defendant for a loan of $500, offering 250 cases of the above merchandise as collateral security therefor, stating that it belonged to him and was stored in a warehouse in the city in his name. Upon being told by the defendant that it would require a warehouse receipt therefor to be isued in its own favor he shortly thereafter presented such a warehouse receipt from the Lowell Warehouse, and received from the defendant $500, for which he gave his promissory note and the aforesaid warehouse receipt as security therefor. At the expiration of 30 days he paid the defendant $250 upon the account of this loan, and soon after left the country and was not again heard from. In April, 1901, the defendant sold the merchandise for $498, out of which, after deducting the expenses of the sale, it reimbursed itself for the loan and some other expenses, and has in its hands a small balance to the credit of Ingold. Upon these facts the superior court held that the plaintiff was at all times the owner of the merchandise; that the defendant had converted it to its own use, and thereupon rendered judgment against the defendant for $498.

The appellant does not question the finding that the plaintiff was the owner of the merchandise, but it relies for its defense and in support of its appeal upon the provisions of section 2991, Civ. Code. That section is as follows, viz.: "One who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it cannot set up his own title to defeat a pledge of the property made by the other to a pledgee who received the property in good faith in the ordinary course of business and for value." It may be conceded that the defendant received the property from Ingold in good faith and in the ordinary course of business and for value; but in order that, by reason thereof, the plaintiff should be deprived of his right to the property, it was incumbent upon the defendant to show that Ingold had been "allowed" by the plaintiff to assume the apparent ownership thereof "for the purpose of making a transfer of it." Mere possession of property is only prima facie evidence of ownership. The owner may place his property in the name or custody of another, as in the case of a carrier or warehouseman or other bailee, without in any respect affecting his ownership. A warehouse receipt, except as against the warehouseman, is no higher evidence of ownership than would be the physical possession of the property. "While mere possession of goods is frequently prima facie evidence of title, it is merely prima facie. Whoever deals with the possessor does it at his peril, and the purchaser from one having no other apparent title to goods than the possession thereof must see to it that his seller has the title; and if his title fails, and he is obliged to respond to the true owner of the goods, his loss is due to his own misplaced confidence, and not to that of the owner. Owners of goods for commercial and other purposes must frequently intrust others with the possession of them, and the affairs of men could not be conducted unless they could do so with safety. So long as the possession of the goods is not accompanied with some indicia of ownership, or of right to sell, the possessor has no more power to divest the owner of his title or to affect it than a mere thief." Soltau v. Gerdau, 119 N. Y. 380, 23 N. E. 864, 16 Am. St. Rep. 843. A factor or a mere agent who is in possession of property with power to sell the same has no authority to transfer it by way of pledge (Civ. Code, § 2368 [2]); but for the purpose of protecting a pledgee who deals with one who is in possession of property, and takes it from him in pledge under the belief that he is the owner thereof, the Legislature has enacted the above section of the Code; but by the express terms of the section it has limited the grounds of such belief on the part of the pledgee to cases in which the real owner of the property has not only "allowed" the pledgor to assume its apparent ownership, but has done so "for the purpose of making any transfer" of it. The pledgee must show the existence of these conditions as well as good faith on his part before he can claim a title superior to that of the original owner. "It is the act of the owner in intrusting the factor with the possession of the goods, or the documentary evidence of ownership—the apparent ownership and right of disposal—in connection with the fact that innocent third persons deal with him upon the faith of such apparent ownership, that estops the owner from following his property into the hands of bona fide vendees or pledgees, and gives the latter a better title than their vendor or pledgor had." Howland v. Woodruff, 60 N. Y. 73.

The warehouse receipt which Ingold presented to defendant was only prima facie evidence of his ownership of the merchandise therein mentioned, and, as the plaintiff did not authorize, and was in no respect connected with, the issuance of this receipt, its rights as owner of the property could not be affected by it. As between the plaintiff and Ingold it is clearly shown by the record not only that the former had never parted with its ownership of the property, but also that the apparent ownership thereof by Ingold had never been authorized or allowed by the plaintiff, but had been assumed by him without any authority whatever, and with the purpose of defrauding the plaintiff. When the plaintiff shipped the property from Ohio it consigned it to its own order, and on its arrival in San Francisco it was deposited in the Haslett warehouse and entered upon the books of the warehouse in its name; and it may be assumed that such deposit and entry were made at the instance of Ingold. The addition of the words "c/o F. Ingold" to this entry was, however, not made under any authority from the plaintiff, and did not create any right in Ingold. Neither did the fact that he was the agent of Moler & Co., the plaintiff's factor, authorize him to direct such entry to be made by the warehouse company. The subsequent transfer of the property at his direction upon the books of the warehouse to J. R. Moler & Co. was equally unauthorized, and was evidently made for the purpose of facilitating his subsequent withdrawal of the merchandise and in contemplation of obtaining a warehouse receipt therefor in his own name which he might pledge to the defendant. His apparent ownership of the property is limited by its source, and the rights of the defendant to the property as against the plaintiff are limited in the same manner. This apparent ownership was first manifested when he withdrew the goods from the Haslett warehouse and deposited them in the Lowell warehouse, and caused to be issued in his own name the warehouse receipt which he gave as security to the defendant. Whether he accomplished his fraud by a single stroke or by successive steps—whether his apparent ownership be regarded as brought into existence when the warehouse receipt was issued in his name, or as having been planned by him when the merchandise first arrived in San Francisco and held in a state of incubation until then, is immaterial. Whatever he did in the matter was done of his own volition, without any authority or knowledge on the part of the plaintiff. Neither can it be held that he was authorized to assume the possession and control of the property by virtue of his relation to Moler & Co. His relation to that firm is not very clearly shown in the record, other than that he was its representative. It does not appear that the firm had any occasion to be represented by him other than in this particular transaction, but it does appear that Ingold was engaged in an independent business and in buying and selling merchandise upon his own account. Whatever authority Moler & Co. had as the plaintiff's factor in reference to the goods in question was not conferred on Ingold, and could not be exercised by him, nor could Moler & Co. delegate their authority to him. Civ. Code, § 2368 (3). As their representative he could receive the goods and place them in the warehouse for the plaintiff, but he had no authority, by virtue of such relation, to store them in his own name, either directly or indirectly. In support of these principles we refer to Wilson v. Nason, 4 Bosw. (N. Y.) 155; Howland v. Woodruff, 60 N. Y. 73; Soltau v. Gerdau, 119 N. Y. 380, 23 N. E. 864, 16 Am. St. Rep. 843; Collins v. Ralli, 20 Hun (N. Y.) 246.

As defendant failed to show that Ingold's apparent ownership of the merchandise was in any respect authorized or contributed to by any act or conduct of the plaintiff it is not entitled to the protection given by the above section of the Code.

The judgment and order denying a new trial are affirmed.

We concur: COOPER, J.; HALL, J.

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3 Cal. App. 193

In re SULLIVAN.

(Court of Appeal, Third District, California. March 1, 1906.)

1. ASSAULT AND BATTERY—SENTENCE.

Under Pen. Code, § 17, providing that the crime of assault with a deadly weapon is reduced to the grade of a misdemeanor when the court imposes a fine as a punishment, that portion of a judgment which provided for imprisonment in the state prison as a means of enforcing payment of the fine was void.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assault and Battery, § 170.]

2. CRIMINAL LAW — JUDGMENT — PARTIAL INVALIDITY.

Under Pen. Code, § 1205, authorizing the court, in its discretion, to direct that defendant be imprisoned until the fine is satisfied, the imprisonment thus provided for is no part of the punishment, and the clause in a judgment imposing a fine which directs imprisonment for the purpose of enforcing payment is distinct and separable from the rest of the judgment, and its invalidity and resulting elimination does not affect the validity of the rest of the judgment.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2528.]

3. SAME—MODIFICATION OF SENTENCE.

Under Pen. Code, § 1205, providing that when a judgment imposing a fine is rendered the court, in its discretion, may direct that the defendant be imprisoned until the fine is satisfied, the discretionary power conferred must be exercised when the original judgment is rendered, and where a judgment imposing a fine provided for imprisonment in the state prison until payment was invalid as to the provision for imprisonment in the state prison, the court had no power subsequent to the commitment of defendant to modify such judgment by providing for imprisonment in the county jail.

Appeal from Superior Court, Shasta County; G. W. Bush, Judge.

Application for writ of habeas corpus by L. H. Sullivan. From a judgment denying the writ, petitioner appeals. Petitioner discharged.

W. A. Gett, for appellant. T. B. Dozier, Dist. Atty., for respondent.

McLAUGHLIN, J. The petitioner was convicted of the crime of assault with a deadly weapon, and on December 22, 1905, the court rendered judgment that he pay a fine of $700, and directed that if said fine was not paid that he be imprisoned in the State Prison at San Quentin until the fine was satisfied at the rate of $2 per day. Under the provisions of section 1215 of the Penal Code he was forthwith committed to the custody of the proper officer, and a commitment in the usual form was issued under seal of the court. Five days later, and before he was delivered to the officers of the said state prison, he was again brought into court, and, notwithstanding his objection, the said judgment was, on motion of the district attorney, vacated and set aside, and a second judgment was rendered which was identical with the first in every particular save that the County Jail of Shasta County was designated as the place of imprisonment in case the fine was not paid. The motion above mentioned was based on the ground that the first judgment was "invalid, in excess of jurisdiction and voidable." The second judgment as set forth in the return recites the facts above narrated, except as to the issuance of the commitment on the day the first judgment was rendered. The petitioner is now confined in said county jail under the second judgment rendered, and claims his liberty on the ground that the court was without jurisdiction to vacate the first or render the second judgment.

The crime of assault with a deadly weapon is reduced to the grade of a misdemeanor when the court imposes a fine as punishment. Pen. Code, § 17; People v. Gray, 137 Cal. 268, 70 Pac. 20. Hence that portion of the first judgment which provided for imprisonment in the state prison as a means of enforcing payment of the fine was absolutely void. Ex parte Arras, 78 Cal. 306, 20 Pac. 683; Ex parte Wadleigh, 82 Cal. 520, 23 Pac. 190; People v. Brown, 113 Cal. 37, 45 Pac. 181. But the invalidity of this clause in the judgment did not vitiate that portion thereof imposing the fine. A person convicted of the crime in question may be punished; (1) by imprisonment, (2) by imprisonment and fine, (3) by fine. It is thus apparent that a judgment imposing a fine only is perfectly valid. When such a judgment is rendered, the court, in its discretion, may direct that the culprit be imprisoned until the fine is satisfied. Pen. Code, § 1205. This direction and the committal incident thereto is the written mandate or process by which the court undertakes to enforce its judgment. The imprisonment thus provided for is no part of the punishment, for the statutory power of punishment is exhausted when the fine is imposed. The committal is simply a means of collecting the fine. Matter of Tyler, 64 Cal. 434, 1 Pac. 884; In re Fil Ki, 80 Cal. 202, 22 Pac. 146. The clause directing imprisonment for this purpose is distinct and separable from the rest of the judgment, and its invalidity, and resulting elimination, can have no greater effect than if such direction had been omitted when the judgment was pronounced. Ex parte Mitchell, 70 Cal. 3, 11 Pac. 488; Ex parte Crittenden, 62 Cal. 535. The judgment imposing the fine being valid, the question before us involves the power of the court to vacate and set aside a valid judgment containing an invalid directory clause, and render a judgment imposing the same punishment, but containing a valid direction as to the place of imprisonment in case the fine is not paid. Ex parte Gilmore, 71 Cal. 624, 12 Pac. 800, is cited by respondent as sustaining the power of the court to take such action. But the facts in that case were very different from the facts disclosed by the record before us. There, the judgment first announced was in excess of jurisdiction, and hence was "invalid and perhaps void." No judgment which the court had power to render having been pronounced, it was held that the court had power to render a proper and valid judgment. In the case at bar the judgment proper was clearly valid. The directory, or we might say the executory clause, alone was void. That decision, therefore, throws but little light on the problem before us, and Fabretti v. Superior Court, 77 Cal. 308, 19 Pac. 481, is not more helpful. After a careful, painstaking search, we have been unable to find any decision in this state bearing directly upon the point involved in this case.

The prevailing doctrine announced in other states is to the effect that a court has power to revise, correct, or vacate a sentence imposed upon a defendant during the term of the court, and before the original sentence has gone into operation, or any action is had under it. Commonwealth v. Weymouth, 79 Am. Dec. 776, and cases cited in the notes. Granting the soundness of this rule, and conceding the power of the court to vacate, change, or revise a judgment within a reasonable time, and before it has been executed in whole or in part, we are still unable to uphold the judgment under which the petitioner is imprisoned. In State v. Cannon (Or.) 2 Pac. 191, the facts were almost identical with the facts at bar, and the court said: "The question here is, could the court revise its judgment and increase the sentence imposed, although during the same term, after its original judgment had gone into effect? It is clear upon authority that this cannot be done. When a sentence has been passed upon a defendant, and the judgment has gone into effect by commitment of the defendant under it, the court has done all that it had the legal power to do under the proceedings in that case." In Commonwealth v. Foster, 122 Mass. 323, 23 Am. Rep. 326, the court, after an exhaustive review of the authorities, English and American, held that the sentence might have been amended at the same term, and before any act had been done in execution thereof, but not afterwards. In Brown v. Rice, 57 Me. 56, 2 Am. Rep. 11, it was said: "After conviction, if no legal bar is interposed, it is the duty of the court to award sentence, and after such sentence of imprisonment is pronounced and recorded on the docket, it is the duty of the court to issue a warrant to the sheriff or warden, directing him to take the convict into custody, and remove him to the designated place of confinement. When the court has done these acts it would seem to have done all that it had the legal power to do, and its power over the prisoner or his destiny, under the proceedings before it, would be at an end." It was there held that where a legal sentence was in process of execution, the court had no power to annul the first sentence and impose another. To the same effect are the cases of McCarthy v. State, 56 Miss. 295; People v. Brown, 23 Wend. (N. Y.) 47; People v. Duffy, 5 Barb. (N. Y.) 205, and Ex parte Lange, 85 U. S. 174, 21 L. Ed. 872. In some jurisdictions the correctness of the rule above mentioned is doubted or denied, but exhaustive research has failed to reveal a single case hinting that the power of a court extends beyond the limits outlined in the cases cited. Under the provisions of our Penal Code, the enforcement of a judgment imposing a fine commences the moment the judgment is rendered and entered. Such judgment constitutes a lien on realty owned by the defendant, and in addition to this an execution may be issued thereon as on a judgment in a civil action. Pen. Code, §§ 1206, 1214; People v. Brown, 113 Cal. 37, 45 Pac. 181; People v. Sutter St. Ry. Co., 129 Cal. 548, 62 Pac. 104, 79 Am. St. Rep. 137. If the court directs that the defendant be imprisoned until the fine is satisfied, commital follows forthwith. Pen. Code, § 1215. In the case at bar it appears that a formal written commitment was issued, bearing date the same day the original judgment was rendered. This fact set forth in the petition is not traversed in the return. The moment legal restraint was imposed as a means of enforcing the payment of the fine, that moment the execution of the judgment was commenced, and the power of the court was exhausted, and its jurisdiction to recall, annul, or change its judgment was at an end. In our opinion the court must exercise the discretionary power conferred by section 1205 of the Penal Code, when the original judgment is rendered, or else the power to make the direction therein provided for is lost. The judgment originally rendered must, under the very terms of the statute, contain such direction or else this method of enforcing payment of the fine does not exist. If the court had imposed a fine of $700 on petitioner, and said nothing about imprisonment until the fine was paid, it would hardly be contended that such direction could, for any reason or cause, be inserted at some subsequent time. If no such direction is made, the judgment can only be enforced as provided in sections 1206 and 1214. A void direction has the same effect, and in that event the methods of enforcing the judgment just mentioned are exclusive. The invalidity of the judgment last pronounced is apparent on its face, and hence the writ of habeas corpus will lie. See California cases above cited.

The prisoner is discharged from custody.

We concur: CHIPMAN, P. J.; BUCKLES, J.

7 Cal. Unrep. 247

MOODY v. PEIRANO.

(Court of Appeal, First District, California. March 1, 1906. Rehearing Denied March 30, 1906.)

1. SALES — BREACH OF WARRANTY — MEASURE OF DAMAGES.

The measure of damages for breach of a warranty as to the quality or variety of certain seeds sold to plaintiff is the difference of the value of the crop produced and the value of the crop that would have been produced had had there been no breach of warranty.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1294.]

2. SAME—COMPLAINT—DEMURRER.

In an action for breach of warranty of variety of seed wheat sold, plaintiff alleged that defendant warranted the wheat to be "White Australian," but that it was actually wheat of another and inferior variety, and produced a crop of hay inferior to that which would have been grown had the wheat been of the variety warranted, and that by reason of the premises plaintiff had been damaged in the sum of $1,000. *Held*, that the complaint sufficiently alleged that the crop produced was of less value than the crop that would have been produced if the wheat had been as warranted, and was therefore not demurrable for failure to specially allege the damages sustained.

3. TRIAL—FINDINGS—EVIDENTIARY FACTS.

Where, in an action for breach of warranty, the court found the facts as alleged in the complaint as to the sale of the seed wheat in question, the warranty, the breach, the planting of the wheat, and that the crop produced was inferior to that which would have been produced, had there been no breach, and further found that plaintiff had been damaged in the sum of $359.50, for which sum, less a counterclaim, judgment was given, such findings were sufficient to support the judgment, without a finding of the evidentiary facts showing such damage.

4. SALES—BREACH OF WARRANTY—EVIDENCE—RELEVANCY—MATERIALITY.

Where, in an action for breach of warranty in the sale of seed wheat warranted to be "White Australian," defendant testified that he sold to M. wheat from the same lot from which he sold plaintiff, evidence of M. that he bought wheat of defendant near the time when plaintiff bought his wheat, and that, when the crop was grown, it proved to be different wheat from "White Australian," was relevant and material to show that the wheat sold to plaintiff was not of that variety.

5. EVIDENCE—RES INTER ALIOS ACTA.

In an action for breach of warranty of the variety of certain seed wheat sold, testimony of a third person that defendant sold wheat to him in the same season that the wheat was sold to plaintiff, and warranted it to be of the variety warranted to plaintiff, was res inter alios acta, and inadmissible.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 403.]

6. WITNESSES — CROSS-EXAMINATION — COLLATERAL MATTERS.

Where a witness is cross-examined as to collateral matters not testified to in chief, the party conducting the cross-examination is bound by the witness' answers as to such matters, and cannot contradict the same by other evidence for the purpose of impeaching the witness.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1273.]

Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by W. D. Moody against G. Peirano. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Reversed.

Wm. P. Veuve, for appellant. F. J. Hambly, for respondent.

HALL, J. Appeal from judgment for plaintiff and order denying defendant's motion for a new trial.

The action is one for damages for breach of warranty as to the variety of certain seed wheat sold by defendant to plaintiff. It is alleged: That plaintiff purchased of defendant 27,760 pounds of seed wheat for planting. That defendant warranted said seed wheat to be "White Australian." That plaintiff planted the same, and it produced a crop of 275 tons of hay. That said wheat was not "White Australian," but was another and an inferior variety, and produced a crop of hay inferior to that which would have been grown had said seed wheat been of the variety known as "White Australian" seed wheat. That by reason of the premises the plaintiff has been damaged in the sum of $1,000. Defendant demurred for insufficiency of facts to constitute a cause of action, which demurrer was by the court overruled. In this the court did not err. The point relied on is that the damages are not specially alleged. The measure of damages for breach of warranty as to quality or variety of seeds sold for planting is the difference between the value of the crop produced and the value of the crop that would have been produced had there been no breach of warranty. Wolcott v. Mount, 36 N. J. Law, 262, 13 Am. Rep. 438; Wolcott v. Mount, 38 N. J. Law, 496, 20 Am. Rep. 425; 1 Sedgwick on Damages, § 191; Passinger v. Thorburn, 34 N. Y. 634, 90 Am. Dec. 753; White v. Miller, 71 N. Y. 118, 27 Am. Rep. 13; Van Wyck v. Allen, 69 N. Y. 61, 25 Am. Rep. 136. The complaint alleges a breach of the warranty, and in terms alleges that the seed wheat "produced a crop of hay inferior to that which would have been grown had said seed wheat been of the variety known as 'White Australian' seed wheat. That by reason of the premises the plaintiff has been damaged in the sum of $1,000." The word "inferior" is defined by Webster as meaning less important or less valuable. The allegation, therefore, that the wheat produced a crop of hay inferior to that which would have been grown, had said seed wheat been of the variety known as "White Australian," is in substance an allegation that the crop produced was of less value than the crop that would have been produced if the wheat had been as warranted. This was followed by the allegation that by reason of the premises the plaintiff has been damaged in the sum of $1,000. Thus the complaint states the cause of the damage and the amount of the damage, and in the face of a general demurrer only certainly is sufficient. "Where, under the allegation of damages in the complaint or declaration, the plaintiff would be entitled to recover some amount, although merely nominal, the complaint is not demurrable." 5 Ency Pl. & Pr. p. 704; Cowley v. Davidson, 10 Minn. 392 (Gil. 314). See, also, 5 Ency. Pl. & Pr., 738; Sunnyside Land Co. v. Willamette Bridge Co., 20 Or. 544, 26 Pac. 835; Colrick v. Swinburne (N. Y.) 12 N. E. 427; McCarty v. Beach, 10 Cal. 462.

It is urged that the findings do not support the judgment. The facts as to the sale of seed wheat, the warranty, the breach, the planting of the wheat, and that the crop produced was inferior to what would have been produced, had there been no breach of warranty, are found as alleged in the complaint, and that plaintiff has been damaged by the breach of said warranty in the sum of $379.50, for which sum, less a counterclaim found to be due defendant from plaintiff, judgment was given plaintiff. The facts found as above set forth fully cover the allegations of the complaint, and are sufficient to support the judgment. Under the pleadings it was not necessary for the court to find the various evidentiary facts that show that the amount of the damages did amount to $379.50.

The third point relied on by appellant for a reversal is that the court erred in overruling his objections to certain questions asked witnesses Myall and Main. Myall testified, over the objection of defendant, to the effect that he bought wheat of defendant near to the time when plaintiff bought his wheat, and when the crop was grown it proved to be a different wheat from White Australian. Defendant testified in this connection that he sold Myall wheat from the same lot from which he sold plaintiff. It is thus apparent that this testimony of Myall, taken in connection with the testimony of the defendant, tended to show that the wheat sold plaintiff was not "White Australian," and was therefore material and relevant. The witness Myall was also permitted to testify, over the objection of defendant, that defendant represented to him that the wheat he was selling him was White Australian. And also, after plaintiff had rested his case in chief, and defendant had closed his case, plaintiff was allowed to prove by the witness Main, over the objection of defendant that it was not rebuttal, and was incompetent, irrelevant, and immaterial, that defendant had sold wheat to him (Main) in the same season when he sold to plaintiff, and had warranted it to be "White Australian." This was clearly error. Except where the knowledge, notice, or intention of a party is a material fact in the case, the rule is that no evidence of similar transactions with third parties can be given. Such evidence is uniformly rejected. 1 Whar. Ev. § 29; Martinez v. Planel, 36 Cal. 578; King v. La Grange, 61 Cal. 221; Roberts v. Dixon, 50 Kan. 436, 31 Pac. 1083; Gill v. Staylor (Md.) 55 Atl. 398; Davis v. Kneale, 97 Mich. 72, 56 N. W. 220; Roles v. Mintzner, 27 Minn. 31, 6 N. W. 378; McLoghlin v. Bank, 139 N. Y. 514, 34 N. E. 1095; Aiken v. Kennison, 58 Vt. 665, 5 Atl. 757; Repass v. Richmond, 99 Va. 508, 39 S. E. 160; Hartman v. Evans, 38 W. Va. 669, 18 S. E. 810; Kelly v. Schupp, 60 Wis. 76, 18 N. W. 725; Oliver v. Morawetz, 95 Wis. 1, 69 N. W. 977.

The evidence as to representations and warranties made to third parties was clearly res inter alios acta. Such evidence did not tend to prove that defendant warranted the wheat he sold to plaintiff. The fact that defendant, in answer to questions put by plaintiff in cross-examination (also over defendant's objections), had testified that he had not warranted the wheat sold to Main to be White Australian, did not make such evidence admissible. When a witness is cross-examined as to collateral matters not testified to in chief, the party conducting the cross-examination is bound by the answers of the witness as to such matters, and cannot contradict such answers by other evidence for the purpose of impeaching the witness. Trabing v. Cal., etc., Imp. Co.; 121 Cal. 137, 53 Pac. 644; Redington v. Pacific Postal Co., 107 Cal. 317, 40 Pac. 432, 48 Am. St. Rep. 132. The evidence as to warranties to third persons was inadmissible for any purpose, and the objection that it was immaterial and irrelevant was sufficiently definite. Morehouse v. Morehouse, 140 Cal. 88, 73 Pac. 738. In this case the main controversy was as to whether or not the defendant had warranted the wheat sold to plaintiff to be "White Australian," and the erroneous admission of the testimony above referred to was clearly prejudicial. Rulofson v. Billings, 140 Cal. 452, 74 Pac. 35; Estate of James, 124 Cal. 653, 57 Pac. 578, 1008; Helling v. Schindler, 145 Cal. 303, 78 Pac. 710.

The judgment and order must be reversed, and it is so ordered.

We concur: HARRISON, P. J.; COOPER, J.

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3 Cal. App. 204

WILKERSON v. WILKERSON.

(Court of Appeal, First District, California. March 5, 1906. Rehearing Denied. May 4, 1906.)

1. APPEAL—HARMLESS ERROR—PLEADING.

Where the court found defendant not guilty of a charge of adultery with a certain female, defendant was not prejudiced by the overruling of a demurrer to the complaint on the ground that such charge was not alleged with sufficient certainty.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4105.]

2. DIVORCE — PLEADING ADULTERY—NAME OF OTHER PARTY.

In an action for divorce on the ground of adultery, if the name of the person, with whom the act was committed, be known, it should be stated; if the name be unknown, that fact should be stated.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 299.]

3. SAME—TIME AND PLACE.

In an action for divorce on the ground of adultery the time and place of the offense should be alleged with such particularity as to enable the defendant to prepare his defense.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 299.]

4. SAME.

A complaint in an action for divorce on the ground of adultery, alleging a course of conduct with a certain person, covering about 2½ months in time and occurring in four different towns and cities, the particular periods of time in which defendant was at the several towns and cities being stated, was sufficient, though it did not name or describe the particular places or houses where the offenses were committed.

5. SAME—RESIDENCE OF PLAINTIFF—EVIDENCE —SUFFICIENCY.

Evidence in an action for divorce examined, and *held* sufficient to show that plaintiff was a resident of the state.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky Judge.

Action for divorce by Amber Wilkerson against Ira Puerl Wilkerson. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Affirmed.

A. S. Newburgh, for appellant. Lent & Humphrey, for respondent.

HALL, J. This is an appeal from an interlocutory decree of divorce awarded plaintiff, as well as an appeal from the order denying defendant's motion for a new trial.

The only points presented by the appeal relate to the action of the court in overruling defendant's demurrer to plaintiff's amended complaint, and to the sufficiency of the evidence to support the finding that plaintiff had been a resident of this state for one year next prior to the commencement of this action. In the amended complaint plaintiff, upon her information and belief, charges the defendant with having committed adultery with one Jane Doe at divers times between the 16th and 24th days of December, 1902, at the city of Seattle in the state of Washington. It is alleged that the true name of the said Jane Doe is unknown to plaintiff. It is next charged that defendant committed adultery with the same person on the 29th day of December, 1902, at the town of Ellensburg in the state of Washington. Also it is charged that he committed adultery with the same person at the city of Spokane, state of Washington, at divers times between the 29th day of December, 1902, and the 4th day of January, 1903; and that at divers times between the 12th day of January, 1903, and the 28th day of February, 1903, he committed adultery with the same person at the city and county of San Francisco. There is also a charge made, upon information and belief, that defendant committed adultery with one Jane Roe (whose true name is alleged to be unknown to plaintiff) at the city and county of San Francisco between the 17th day of March, 1903, and the 7th day of April, 1903. These separate charges of adultery are set forth in separate paragraphs numbered from 3 to 7. Defendant demurred for uncertainty as to the allegations of adultery in these several paragraphs, in this, that neither the name of the person with whom, nor the particular place, house, or locality where, the adultery was committed are given, and that the several charges are not stated with reasonable certainty as to time, place and persons, so as to enable the defendant to prepare to meet the same at the trial. The demurrer was overruled, defendant answered, denying the several charges, and the court separately found the defendant guilty of each of the charges of adultery with Jane Doe, and ascertained at the trial and stated in the findings her true name (but which we omit). The court found the defendant not guilty of the charge of adultery with Jane Roe, so defendant could not have been prejudiced by the ruling of the court on the demurrer as to the uncertainty of that particular charge, which leaves for consideration the sufficiency of the charges of adultery with Jane Doe. Stephenson v. Deuel, 125 Cal. 660, 58 Pac. 258; Holland v. McDade, 125 Cal. 356, 58 Pac. 9; Alexander v. Central Lumber etc. Co., 104 Cal. 536, 38 Pac. 410; Hirshfeld v. Weil, 121 Cal. 13, 53 Pac. 402; Jager v. Cal. Bridge Co., 104 Cal. 542, 38 Pac. 413; Williams v. Casebeer, 126 Cal. 77. 59 Pac. 380.

It is undoubtedly the general rule that adultery should be charged with such reasonable certainty as to time, place, and person that the defendant may know the charge that he is called upon to meet. If the name of the person with whom the adultery was committed be known it should be stated; if the name be unknown that fact should be stated. The time and place of the offense should be alleged with such particularity as to enable the defendant to prepare his defense. With these general principles in mind we will examine this complaint. It must be conceded that it cannot be considered as a model of good pleading. Plaintiff excuses the failure to allege the name of the paramour by alleging that it was unknown to her, but no reason is given why she does not name or otherwise describe the particular places or houses where the offenses were committed. But though this complaint is not a model to be commended, yet it does not follow that it did not give defendant sufficient information to enable him to make his defense. In determining this question we are not confined to an examination of each charge separately, but may take the complaint as a whole, and the several charges may be correlated with one another. From the several charges in the complaint it appears that defendant was charged with adulteries committed with the same person, at Seattle, at Ellensburg, at Spokane and at San Francisco, and all during a time commencing with the 16th of December, 1902, and ending with February 28, 1903. The period during which the adulteries took place at Seattle was between the 16th and 24th of December, 1902; at Ellensburg on the 29th day of December, 1902; at Spokane between December 29, 1902, and January 4, 1903, and at San Francisco between January 12 and February 28, 1903. From this history it is inconceivable that defendant did not know the identity of the person with whom he was charged with having committed adultery. He was in effect charged with a course of adulterous intercourse with a certain person covering about two and one-half months in time, and four different towns and cities; the particular periods of time in which he was at the several towns or cities being stated within very narrow limits. It seems to us quite certain that from the circumstances detailed in the complaint defendant was informed of the identity of the alleged paramour, and had sufficient information of the circumstances of the charge made against him to enable him to prepare his defense. The court therefore did not err in overruling defendant's demurrer.

We now take up the question as to the evidence touching the residence of the plaintiff. It is not disputed that both the plaintiff and defendant did actually reside in this state, in the sense that they were bodily present in the state, for more than one year prior to the commencement of the action, but it is insisted that the evidence fails to show that plaintiff was in point of law a resident of this state for that time; that it fails to show that her domicile was in this state during that period. The record shows that plaintiff and defendant were married at Kansas City, Mo., December 27, 1890. Plaintiff and defendant are theatrical people, that is to say, plaintiff is an actress and defendant an actor. They came to San Francisco April 4, 1902, and have both been here ever since, save that defendant for a short time visited Oregon and Washington on a business trip. The complaint was filed August 14, 1903, more than one year and four months after plaintiff and defendant came to this state. Prior to coming to this state they resided in a rented flat in New York. When they left New York they left their furniture in the flat, and plaintiff testified that she kept the flat until October, 1902, and then gave it up and stored her furniture in New York. On direct examination plaintiff testified that she had resided in the city and county of San Francisco continuously ever since the 4th day of April, 1902. (The trial was in December, 1903.) How long either she or defendant had resided in New York prior to coming to San Francisco does not appear. They were living there in a rented flat before coming here. Plaintiff testified that she did not think she ever had a residence established in New York; that when she came here she had no idea how long she would remain; that if she got a position out here she would remain here all her life; that in the course of her profession she is compelled to visit different cities, and that she has no permanent residence; that her residence is in any town she happens to be in; that she has lived here ever since April, 1902. She gave other testimony also from which it might well be said that her residence was in New York until at least within a period less than a year from the time of commencement of this action. But it is perfectly certain that plaintiff did not come to this state for the purpose of gaining a fictitous residence in fraud of the divorce law either of this state or of New York. The cause for the divorce arose after she came to this state, and part of the offense of the defendant was committed here, and both parties have been living here ever since April, 1902. From a careful examination of the evidence we cannot say that there is no evidence to support the finding of the court as to the residence of plaintiff, and therefore we cannot reverse either the judgment or order because of this finding. People v. Ross, 115 Cal. 237; 46 Pac. 1059; Dubois v. Spinks, 114 Cal. 293, 46 Pac. 95; Ruiz v. Dow, 113 Cal. 495, 45 Pac. 867.

Judgment and order are affirmed.

We concur: HARRISON, P. J.; COOPER, J.

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3 Cal. App. 208

PRIMM v. SUPERIOR COURT OF SHASTA COUNTY et al.

(Court of Appeal, Third District, California. March 6, 1906. Rehearing Denied May 4, 1906.)

1. PROHIBITION — CONTINUANCE OF ATTACHMENT—ADEQUATE REMEDY AT LAW.

An appeal from an order continuing an attachment in force, pending an appeal from a judgment for defendant in the action in which the attachment issued, is not an adequate remedy at law, precluding the issuance of a writ of prohibition to prevent the court from continuing the attachment.

2. SAME—COMPLETED ACT.

An order continuing in force a writ of attachment, pending appeal from a judgment for defendant in the action in which the attachment issued, is not a full, complete, and accomplished judicial act, which cannot be restrained by prohibition; but the act of the court in continuing the attachment involves a recurring injury, which may be prevented by prohibition.

3. APPEAL — SUPERSEDEAS—CONTINUANCE OF ATTACHMENT.

Under Code Civ. Proc. § 553, relative to attachments, and providing that, if the defendant recovers judgment, all the property attached remaining in the sheriff's hands, must be delivered to defendant, the order of attachment discharged, and the property released therefrom, and section 946, providing that an appeal, when perfected, stays all proceedings upon the judgment and matters embraced therein, except that an attachment is not continued in force unless the appeal is perfected and an undertaking filed as required by the concluding clause of the section, an appeal from a judgment for defendant in an attachment case continues the attachment in force, providing the undertaking required by section 946 is given.

Appeal from Superior Court, Shasta County; C. M. Head, Judge.

Petition by F. P. Primm against the superior court of Shasta county and C. M. Head as judge thereof, to restrain respondent from continuing in force an attachment issued in an action by one Menzel against petitioner. Petition denied.

T. W. H. Shanahan, for petitioner. T. B. Dozier, for respondent.

McLAUGHLIN, J. Application for a writ of prohibition. In an action entitled Menzel v. Primm et al., pending in the superior court in and for Shasta county, an attachment was issued and levied on certain realty owned by the defendant Primm. The trial of the cause resulted in a judgment against the plaintiff and in favor of said defendant. After the judgment had been rendered and entered, the court, on motion of the plaintiff, Menzel, made an order continuing the said attachment in force upon compliance by plaintiff with the terms of said order, which terms conform to the provisions of section 946 of the Code of Civil Procedure. The plaintiff filed the required undertaking, and perfected his appeal within the specified time, and the defendant, who made timely and sufficient objections to the motion and order mentioned, commenced this proceeding to restrain the court fron continuing the attachment in force pending an appeal from the judgment. The right of this court to consider this application or pass upon the main question involved is challenged by respondent, who insists that the petitioner has a plain, speedy, and adequate remedy in the course of the law, and that prohibition will not lie to restrain an act which has been fully accomplished. The rules thus invoked are well settled, and it only remains to determine whether the case at bar falls within either or both of them.

As an appeal from the order here assailed would, in the ordinary course of judicial proceedings, probably consume as much time as the appeal from the judgment, the practical effect of holding that the remedy by appeal is speedy and adequate would be to deprive the petitioner of all redress. The sole purpose of the order was and is to continue the lien until an appeal from the judgment can be passed upon by the appellate court, and we fail to see how a separate, but concurrent, appeal to the same court can be deemed either speedy or adequate, when this purpose would probably be fully accomplished before such concurrent appeal could be heard. If the continuance of the lien is without legal authority, the petitioner is entitled to have his property relieved from the effect of judicial usurpation, and no remedy can be speedy or adequate which would postpone such relief until the unauthorized lien had expired with the order continuing it. Terrill v. Superior Court (Cal.) 60 Pac. 38; White v. Superior Court, 126 Cal. 245, 58 Pac. 450; Bruner v. Superior Court, 92 Cal. 267, 28 Pac. 341; High on Ex. Rem. §§ 770, 771a. We conclude, therefore, that the first rule invoked cannot be applied here. Nor do we think the other rule relied upon, forecloses inquiry touching the merits of this application. The effect of the order is to impose a continuing restraint on petitioner's right to the free, untrammeled enjoyment of his property. The injury is recurring, and the very purpose of the order is to continue such restraint and injury. The court, having imposed the restraint, is continuing it, day by day, as long as the order endures. Under such circumstances the judicial act is not fully accomplished, and prohibition will lie. Havemeyer v. Superior Court, 84 Cal. 394, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192; Cosby v. Superior Court, 110 Cal. 53, 42 Pac. 460; High on Ex. Rem. § 766; Works on Courts, etc., p. 269.

Approaching the principal point presented for decision, we find it involves the construction of sections 553 and 946 of the Code of Civil Procedure. In passing upon the former section it has been held repeatedly that a judgment in favor of a defendant dissolves an attachment. Loveland v. M. Co., 76 Cal. 564, 18 Pac. 682; Hamilton v. Bell, 123 Cal. 95, 55 Pac. 758. If that section stood alone, our task would be at an end. But the latter section provides that an appeal, when perfected, stays all proceedings upon a judgment and matters embraced therein. This general clause, however, is qualified by the proviso that an attachment is not continued in force unless the appeal is perfected and an undertaking filed as required by the concluding clause of the section. To say that an attachment is ipso facto dissolved by a judgment, and yet can be continued in force, at first blush seems incongruous. But due reflection and analysis removes this impression of inconsistency, and leads to a harmonious construction of the two sections in question. The ordinary effect of an appeal from a judgment when proceedings therein are stayed "is to preserve the rights of the parties to the controversy in the same condition as they were prior to the entry of the judgment." State I. & I. Co. v. San Francisco, 101 Cal. 150, 35 Pac. 549; Mark v. Superior Court, 129 Cal. 6, 61 Pac. 436; De Lemos v. Siddall, 143 Cal. 316, 76 Pac. 1115. And it is clear from the context of section 946 that the legislative intention was to stay the dissolution of an attachment, and all affirmative effects or results flowing from the judgment. Any other contention would render the provision relating to attachments meaningless. If it was not intended that the general clause should include attachments; if the dissolvent effect of a judgment would not, and could not, be stayed thereby—then the provisory clause was wholly unnecessary. It would be absurd to guard against something that could never happen, and yet the evident intent and purpose of the concluding clause in the section is to obviate the effect of the general stay by providing that specified additional requirements must be complied with in order to continue an attachment in force.

Petitioner contends that under the provisions of section 553 as interpreted by the Supreme Court, an attachment is finally and irrevocably dissolved the moment a judgment for defendant is entered. It is argued that the writ thus dissolved cannot be revivified by any act of the appellant or order of the court. It needs but a statement of the proposition to show that this contention not only necessitates a limitation on the effect of the general clause in section 946, but emasculates the section by depriving the provisory clause of all meaning and effect. Cardinal rules of construction require that laws be so construed that neither of such results will follow. Courts should not nullify a statute or deprive a law of potency and force unless such course is absolutely necessary. Meaning and effect should be given to every section of the Code in all its parts, if possible to do so. Langenour v. French, 34 Cal. 92; Gates v. Salmon, 35 Cal. 576, 95 Am. Dec. 139; Camp v. Grider, 62 Cal. 26; Gleason v. Spray, 81 Cal. 217, 22 Pac. 551, 15 Am. St. Rep. 47. The two sections in question were enacted on the same day, and must be harmonized and made operative as parts of one general law, if this can be done without doing violence to the evident intent of either. The literal import of one section cannot govern as against the evident intention of the Legislature in enacting both. Sutherland on Statutory Construction, §§ 368–377. A fair, reasonable, unstrained construction leads to the conclusion that the dissolvent force of a judgment is neutralized by a perfected appeal, provided the additional undertaking is filed and the appeal perfected within the specified time. This construction gives harmonious effect to both sections and does not nullify any part of either. While the Supreme Court has not passed directly on the question before us, the language used in cases where the matter was discussed, clearly points to such construction as correct. Flagg v. Puterbaugh, 101 Cal. 584, 36 Pac. 95; Carter v. Paige, 80 Cal. 392, 22 Pac. 188; Aigeltinger v. Whelan, 133 Cal. 113, 65 Pac. 125. The statute so construed does not deprive petitioner of property without due process of law. Due process is not denied where a law operates on every person in the same way under like conditions and circumstances. Kalloch v. Superior Court, 56 Cal. 238; Ex parte Finley (Cal. App.) 81 Pac. 1041.

The writ is denied.

We concur: CHIPMAN, P. J.; BUCKLES, J.

149 Cal. 114

Ex parte BALLARD. (Cr. 1,308.)

(Supreme Court of California. March 31, 1906.)

1. Criminal Law—Reversal of Judgment—Discharge of Defendant.

Under Pen. Code, § 1262, providing that, if the judgment against defendant is reversed without ordering a new trial, the appellate court must direct defendant's discharge if he is in custody, a defendant in a case wherein the judgment has been reversed on an appeal from the judgment and from an order denying a new trial is not entitled to a discharge without a showing as to the disposition of the appeal from the order denying a new trial.

2. Same—Court Empowered to Discharge Defendant.

Pen. Code, § 1262, providing that, if the judgment against a defendant is reversed without ordering a new trial, the appellate court must direct his discharges, only gives the appellate court to which an appeal has been taken jurisdiction to order the discharge, and does not authorize a discharge by any other court.

In Bank. Application by Frank H. Ballard for writ of habeas corpus against Peter J. Curtis, sheriff of the city and county of San Francisco. Application denied.

H. H. McCloskey, for petitioner. L. F. Byington, Dist. Atty., and I. Harris, Asst. Dist. Atty., for respondent.

McFARLAND, J. This is a petition by H. H. McCloskey, on behalf of Frank Ballard, for the latter's discharge on habeas corpus from the custody of the sheriff of the city and county of San Francisco. His claim to be discharged is based on the provision of section 1262 of the Penal Code, which is as follows: "If a judgment against the defendant is reversed without ordering a new trial the appellate court must if he is in custody direct him to be discharged therefrom." In the petition for the writ in the cause at bar the statement of the facts relied on for a discharge are very meager, and are, in substance, as follows: That Ballard was lawfully committed by a magistrate; that afterwards an information based on the commitment was filed against him by the district attorney; that he was tried upon said information in the superior court of said city and county, and was on March 29, 1904, found guilty; that he made a motion for a new trial which was denied; that on June 9, 1904, he was sentenced to 10 years' imprisonment in the state prison; that on June 10, 1904, he appealed from the judgment and from the order denying a new trial; that the appellate court, on June 27, 1905 (81 Pac. 1040), reversed the judgment; that the remittitur was filed in the superior court, and that a copy of the remittitur is attached to the petition, and made a part thereof; that after the remittitur was filed he made a motion in the superior court to be discharged, and introduced said remittitur in evidence, and that the superior court denied the motion. This remittitur shows that in the District Court of Appeals of the First District, in the case entitled "The People, etc., Respondent, v. Frank Ballard, Appellant," the judgment was on the 27th day of June, 1905, reversed without ordering a new trial, and it does not appear that the court ordered the discharge of the defendant. It is averred in the petition "that by virtue of the filing of said remittitur as aforesaid said Ballard has become entitled to his discharge." We do not think, however, that a case has been presented for a discharge on habeas corpus.

1. It has been determined that, when there is an appeal from a judgment and also from an order denying a motion for a new trial, the judgment reversing the order is in effect the ordering of a new trial, and in such case section 1262 is complied with. People v. Hardisson, 61 Cal. 378; People v. Lee Look, 143 Cal. 220, 76 Pac. 1028. Now, in the case at bar, it affirmatively appears from the petition that an appeal was taken from an order denying the motion for a new trial, and there is no showing as to what disposition has been made of that appeal. It may not have been expressly disposed of by the appellate court, or it may have been decided and the order may have been reversed, and Ballard is not entitled upon any theory to be discharged without a showing on that subject.

2. It is to be observed that section 1262 does not provide that a reversal of a judgment without an order for a new trial has, ipso facto, and without any further act or proceeding, the legal effect of discharging the defendant, so that he may demand his release by the trial court, or by any other court into which he can bring the case by habeas corpus or other proceeding. The provision is that, when the appellate court reverses a judgment without ordering a new trial, the "appellate court" must direct the discharge of the defendant, and that court only is given jurisdiction to discharge under that section. There are cases where there are such inherent defects in the prosecution, and such impossibility of a legal conviction of the defendant, that he ought not to be put upon another trial, and the purpose of section 1262 is to give to the appellate court the power, and impose upon it the duty, of directing discharges in such cases. When an appellate court reverses a judgment without an order directing a new trial, and still does not make an order directing the appellant's release, such action is evidently the result of inadvertence and of a temporary forgetfulness of section 1262, or the fault of the clerk. For surely in such a case, if the court had in mind said section, it would, if it desired to discharge a defendant, have so directed, and if it had thought that there should be a new trial it would have so ordered in the judgment of reversal. And if it reversed the judgment without ordering a new trial, and did not direct a discharge, the remedy of appellant would be in the appellate court itself by a motion or application for an order directing a discharge. When the attention of the court is thus called to its action, it will

either make the order directing the discharge of the appellant, if such order should in its judgment be made, or it will make an order affirming or reversing the order denying a new trial. The section does not provide for a discharge of the appellant by any court other than the appellate court to which his case has been appealed.

The said Ballard is remanded to the custody of the sheriff, and this writ is discharged.

We concur: BEATTY, C. J.; SHAW, J.; ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J.; SLOSS, J.

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149 Cal. 129

In re HEYWOOD'S ESTATE. (S. F. 4,515.)

(Supreme Court of California. April 3, 1906.)

EXECUTORS AND ADMINISTRATORS — ALLOWANCES TO CHILDREN—DELAYING APPLICATION.

The right of a child of deceased to have a probate homestead set aside to her out of the estate is forfeited by her failure to apply therefor during her minority.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 703.]

Department 2. Appeal from Superior Court, City and County of San Francisco; F. H. Kerrigan, Judge.

In the matter of the estate of Heywood, deceased. From an order denying application to have a probate homestead set aside to her, Agnes Maud Heywood appeals. Affirmed.

See 82 Pac. 755.

Timothy J. Lyons, for appellant. Powell & Dow, for respondent executors and trustees. Sullivan & Sullivan, Theo. J. Roche, and Cary Howard, for respondents Reinstein and Johnson.

HENSHAW, J. This was an application by Agnes Maud Heywood, the adopted daughter of deceased, for the setting aside to her of a probate homestead out of the separate property of deceased. The appellant was 17 years and 11 months old at the time Franklin Heywood died, and at the time of her application was past the age of 18 years. The court's findings were such in other respects as to entitle her to the homestead, but finding also that at the time of the application she had attained and passed her majority, the application was denied.

The single question thus presented is whether a minor child, under such circumstances, loses her right to a homestead if application be not made for it during minority. Upon behalf of appellant the hardship and injustice of such a construction of the statute is strenuously urged. It is pointed out in this case that the law contemplates that the homestead can be set apart only upon or after the return of the inventory, and as three months time is allowed for the return of the inventory, it could not have been set apart at all during her minority; that the probate laws look to the support of the family, are benevolent and beneficient laws, and should receive most liberal construction. All these things are true, and the argument of personal hardship may well be addressed to the law-making power, but it can have no effect in inducing the court to declare a law to be other than as it is plainly written. All laws, from the very imperfection of human reason, at some time and in some cases work individual hardship. Those great and salutary statutes of frauds and limitations frequently become engines of oppression, and there is little difficulty in pointing out instances in our own probate law where much greater hardships result from its omissions than any which befall in this particular case. For example, this very homestead law makes provision only for minor children. Yet a hopelessly bedridden invalid daughter of 18 is certainly more deserving of the benevolent provisions of the homestead law than would be a lusty, vigorous girl of 17, fully capable of supporting herself. Yet, merely by reason of the difference of years alone, the latter would be entitled to a homestead, and the former denied it. It is settled by the decisions of this state that the right to a homestead is in no sense vested, and is to be determined, in most instances, by the conditions which exist at the time when the order is made. Estate of Boland, 43 Cal. 640; Estate of Moore, 57 Cal. 443. Those cases had to do with the change in the status of the widow by reason of her subsequent marriage. In no case can the right be said to be fixed before the date of the application, and in this case the application was not made until after the appellant's majority. In re Still, 117 Cal. 509, 49 Pac. 463, it is said: "When the widow, Grace U. Still * * * intermarried with William Webb, she lost her right to have a homestead carved out of the property of the estate of her deceased husband; and when all the minors except Samuel W. Still reached their majority without an application for a homestead having been made for or on their behalf, their rights were similarly lost."

It must be held, therefore, that the failure of appellant to apply for a homestead during her minority forfeited the right thereto which otherwise she might have had, and the order appealed from is therefore affirmed.

We concur: McFARLAND, J., LORIGAN, J.

In re HEYWOOD'S ESTATE (two cases). (S. F. 4,525, 4,531.)

(Supreme Court of California. April 3, 1906.)

EXECUTORS AND ADMINISTRATORS—ALLOWANCES TO CHILDREN—DELAYING APPLICATION.

The right of a child of deceased to have set aside to her out of the estate a family allowance and the exempt property of deceased is forfeited by her failure to apply therefor during her minority.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 703.]

Department 2. Appeal from Superior Court, City and County of San Francisco; F. H. Kerrigan, Judge.

In the matter of the estate of Heywood. From orders denying applications, Agnes Maud Heywood appeals. Affirmed.

See. 82 Pac. 755.

Timothy J. Lyons, for appellant. Powell & Dow, for respondent executors and trustees. Sullivan & Sullivan, Theo J. Roche, and Cary Howard, for respondents Reinstein and Johnson.

PER CURIAM. These are appeals, the one from the order of the court denying an application for a family allowance to Agnes Maud Heywood, the other from the order refusing to set aside to her property of the deceased exempt from execution. The facts of these cases are the same as those in S. F. No. 4,515 (this day decided) 84 Pac. 834. The refusal of the court to make the orders was based upon the same ground, namely, that Agnes Maud Heywood had attained and passed her majority before application was made.

For the reason given in S. F. 4,515 (84 Pac. 834), the orders appealed from are affirmed.

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149 Cal. 122

MESSER v. HIBERNIA SAVINGS & LOAN SOCIETY. (S. F. 3,589.)

(Supreme Court of California. April 3, 1906.)

1. Reformation of Instruments—Additional Relief—Specific Performance.

Under the express provisions of Civ. Code, § 3402, a written contract may, in the same action, be first reformed and then specifically enforced.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Reformation of Instruments, § 197.]

2. Same—Monetary Relief—Pleading.

Where, in a suit in equity for specific performance, this remedy cannot be decreed, the court may as an alternative, grant monetary relief, and the fact that a complaint for specific performance seeks monetary relief as an alternative remedy does not render it objectionable as stating two causes of action.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 412–419.]

3. Exchange of Property—Construction of Contract.

A bank contracted to sell a city lot, and on investigation it developed that the building on the lot encroached upon an adjoining lot. A survey showed that there had been a general shifting of buildings along the street, so that other buildings encroached upon lots not belonging to the owners of the buildings. To rectify this the owner of the lot upon which the bank's building encroached agreed to, and did, deed to the bank the strip of land upon which the building encroached, and the bank entered into a written contract to convey to the adjoining owner a good title to a certain described lot. This lot as described included all the land which would be owned by the adjoining owner, after the conveyance by the bank of a strip on the other side of that tract, equal in width to the tract which had been conveyed to the bank. *Held* that, in view of the fact that the adjoining owner already owned a large portion of the land which the bank contracted to convey, the contract should be construed as an agreement to convey a strip equal in width to the strip which had been conveyed to the bank.

4. Adverse Possession—Tacking of Periods.

A claimant of land by adverse possession cannot tack to the time of his possession that of a previous holder, where the land in dispute is not included in boundaries in the deed from such holder.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 213–225.]

5. Specific Performance—Monetary Relief—Amount—Bad Faith.

Where one party to a contract for the exchange of land received a conveyance and immediately reconveyed, and thereafter refused to perform his part of the contract, there was evidence of bad faith, so that in an action for specific performance, or for monetary relief in case specific performance was impossible, it was proper to give monetary compensation to the extent of the value of the property, under Civ. Code, § 3306, declaring that where there has been bad faith the market value of the property contracted to be conveyed is the measure of damages for the breach of the agreement.

Department 1. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by Nat T. Messer, Jr., against the Hibernia Savings & Loan Society. From a judgment for plaintiff, defendant appeals. Affirmed.

Tobin & Tobin and F. S. Brittain, for appellant. Dibble & Dibble, for respondent.

HENSHAW, J. Plaintiff, as assignee of the Pacific Improvement Company, brought his action for the specific enforcement of a contract for the exchange of land, made by the Pacific Improvement Company with the defendant. Such was his original complaint. Upon demurrer he amended by pleading mutual mistake in the original contract, sought a reformation of it, and prayed specific performance of the reformed contract, or compensation by way of damages should specific performance be impossible.

It was made to appear that the Hibernia Bank held a mortgage on a lot owned by one Phillip Freund, having a frontage of 25 feet on Market street in Mission block No. 14, which lot was described as commencing 225 feet from the corner of Market and Brady streets; thence running through to Stevenson street 124 feet between parallel lines. The bank forclosed its mortgage upon this property, it was sold by the sheriff, and the bank became the purchaser. Savings banks being forbidden by law to hold property thus acquired beyond a certain time (Civ. Code, § 574), the bank sought and found a purchaser in the person of one Simon Clayburg, and an agreement of purchase and sale was entered into between him and the bank. In examining the title to the lot the attorneys for Clayburg caused a survey to be made and discovered that the building, supposed to be on the lot, in fact, extended over on the side toward Brady street a distance of 7½ feet on land belonging to the Pacific Improvement Company. Clayburg therefore refused to proceed with the purchase. Thereupon a surveyor, Samuel L. Waller, took steps to straighten out the difficulty. He was agent of the bank to the extent that in his negotiations with the Pacific Improvement Company he claimed to represent the bank, the preliminary contract which was drawn up was taken by him to the bank's attorney and bore the initials of that officer, and he presented his bill and was paid by the bank for his services. Waller's surveys convinced him that there had been a general shifting of the buildings toward Brady street along the Market street front of the block at that place, resulting in several encroachments upon as many different lots. The Pacific Improvement Company owned another piece of land in the same block further out Market street and further away from Brady street. This lot had a frontage on Market street of 33 feet. The company was in possession, however, of only 29.59 feet, owing to the circumstance that the owner of the lot adjoining on the side toward Brady street, Mrs. Fallon, had herself erected a building which encroached on the improvement company's land. After his examination Waller represented that he could adjust the encroachments by obtaining compensating deeds from the various owners between the Freund lot and the Pacific Improvement Company lot last mentioned. He went to the Pacific Improvement Company on behalf of the bank, and asked the company to give the bank a deed to the 7½ feet upon which the Freund building had encroached, and accept in lieu of this a conveyance for an equivalent amount of land adjoining the outlying lot of the Pacific Improvement Company. After negotiations between Waller upon the one hand and C. E. Hayes, representing the Pacific Improvement Company, a contract was duly executed by the defendant bank and delivered to the Pacific Improvement Company, whereupon the Pacific Improvement Company executed and delivered its deed to the bank for the 7½ feet adjoining the Freund lot. By the terms of the bank's agreement with the Pacific Improvement Company, the former covenanted "to furnish a deed conveying a good title to the following described lot." The description was of a lot with a frontage of 40 feet upon Market street, embracing as part of the 40 feet, the 33 feet then actually owned by the Pacific Improvement Company. So that, by the strict letter of its contract, the savings bank agreed to make a deed to the Pacific Improvement Company which would convey title to 33 feet of land which the Pacific Improvement Company then owned. The inutility, if not the absurdity, of this is apparent. The reformation upon the ground of mistake was sought upon the explanation that what in fact it was agreed that the savings bank should do was to make a conveyance of that portion of the 40 feet to which the Pacific Improvement Company did not have good title, so as to make to the Pacific Improvement Company a clear and good title to the full 40 feet. This, it appeared, owing to Mrs. Fallon's encroachment, necessitated a conveyance to the Pacific Improvement Company of 10.41 feet on Market street running back to Stevenson street between radial lines, with a frontage on that street of 6.16 feet —a piece of land of about the superficial area of that conveyed by the Pacific Improvement Company to the defendant bank, and of a valuation, as admitted by the pleadings, of over $8,000. The complaint, in addition to all these matters, set up the fact that the bank had no other title to the 7½ feet than that which the Pacific Improvement Company conveyed to it by its deed, and that immediately after the reception and recordation of this deed the defendant bank was enabled to and did complete its contract of sale with Clayburg, and conveyed this property to him. Thereafter it refused to carry out its agreement with the Pacific Improvement Company, either by causing to be executed to it a deed of the 10.41 feet or by making compensation in money.

The answer of the bank consisted of denials of certain of these matters, and an affirmative allegation to the effect that the specific performance of the contract involved and necessitated the performance of personal service upon the part of defendant in the procuring of title to the 10.41 feet which it did not own, and that the contract was therefore nonenforceable in equity. The trial resulted in findings in favor of the plaintiff, and a further finding in accordance with the allegation of the answer, that the contract was not specifically enforceable for the reasons alleged in the answer, and in lieu of such specific performance the court awarded compensation to the plaintiff in money to the amount of the value of the 10.41 feet as admitted by the pleadings. Defendant appeals from the judgment within 60 days, and the evidence is brought up for review upon the settled statement.

Appellant first argues that its demurrer to the original complaint should have been sustained without leave to amend, that the amendment incorporated a new cause of action, and that as the original complaint was verified, the amended complaint was a stultification which should not have been permitted. Of course, it is well settled, and is declared by our Code (Civ. Code, § 1640), that when, from fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded and the erroneous parts of the writing disregarded. Moreover, it is equally well settled (Civ. Code, § 3402) that a contract in the same action may be first revised, and then specifically enforced. Ward v. Watterman, 85 Cal. 488, 24 Pac. 930; Hallam v. Corlett, 71 Iowa, 446, 32 N. W. 449; Brugger v. Ins. Co., 5 Sawy. 304, Fed. Cas. No. 2,051. And, finally, it is indisputable that where, through no fault of the plaintiff in equity, specific performance cannot be decreed, the court, having obtained jurisdiction of the subject-matter properly within its cognizance, will grant as an alternative monetary relief, which in an action strictly at law would be by way of damages. Fry, Specific Performance, § 972; Pomeroy, Specific Performance, § 295. A demand, as in this case, for alternative monetary relief is not obnoxious to the objection that the complaint states two causes of action. The seeking of different kinds of relief does not establish different causes of action. Hutchinson v. Ainsworth, 73 Cal. 452, 15 Pac. 82, 2 Am. St. Rep. 823; San Diego Water Co. v. San Diego Flume Co., 108 Cal. 549, 41 Pac. 495, 29 L. R. A. 839; Bliss, Code Pleading, §§ 114–115; Maxwell, Code Pleading, pp. 344, 345.

Appellant contends against the sufficiency of the evidence to support the finding of mistake in the contract. The execution of the contract by the defendant is not denied. Why the defendant is insisting that there was no mistake, or, in other words, that it deliberately and with knowledge bound itself to convey to the Pacific Improvement Company a frontage of 40 feet upon Market street, title to three-fourths of which was at that time in the Pacific Improvement Company, it is not easy to see; and we are as little able to perceive how the contention of appellant in this regard, even if it were sound, would be of any avail in this case. Equity does not exact impossibilities nor absurdities, but yet, at the same time, it will not permit a party wholly to escape performance because he has promised to perform more than he can or more than is necessary; so, without revision of this contract upon the ground of mistake, it might well be that it would be interpreted as binding the defendant to make title to such part of the 40 feet as at the time of its execution, the Pacific Improvement Company did not own, and this, in effect, is all the revision and reformation call for. The law enjoins that a contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties (Civ. Code, § 1643), and that where, through mistake, a contract fails to express the real intention, the erroneous parts of the writing must be disregarded (Civ. Code, § 1640). Having consideration to the surrounding circumstances which led to the execution of this contract, and to the additional fact that it will not be presumed that the defendant meant nothing by the engagement in writing, which it solemnly entered into under its corporate seal, the interpretation which is put upon the contract appears to be just, reasonable, and in accurate expression of the true intent of the parties. It is true that Mr. Hayes, who represented the Pacific Improvement Company in the negotiations, testifies there was no mistake so far as he was concerned, "though legally there might be one"; but this statement is qualified and explained by his whole testimony, which shows that what he was endeavoring to express and secure was a good title to so much of the 40 feet as the Pacific Improvement Company might be shown not to own.

The plaintiff established a clear record title to the 7½ feet which it conveyed. The defendant, however, to controvert the allegation that it had no other title when it conveyed to Clayburg than that which it received from the Pacific Improvement Company (an allegation directly affecting the consideration of its contract and the value of the title which it received from the Pacific Improvement Company), undertook to show title in itself to the 7½ feet by adverse possession. The finding of the court was against it upon this proposition and that finding may not be disturbed. It was shown that the defendant had no knowledge that the Freund building stood 7½ feet over on the lands of the Pacific Improvement Company. The sheriff's deed, by which the bank took, following the foreclosure sale under the Freund mortgage, described the lot, excluding the 7½ feet. So, even if it could be said that Freund knew that he was encroaching upon the land of the Pacific Improvement Company, and this is not in evidence, the defendant, by reason of the limitations in its deed, cannot avail itself of such knowledge in its claim of adverse possession. "A claimant of land by adverse possession cannot tack to the time of his possession that of a previous holder, where the land is not included in the boundaries in the deed from such holder." Vicksburg R. R. Co. v. Le Rosen, 52 La. Ann. 192, 26 South. 854.

The contention that the monetary compensation in lieu of specific performance which was decreed is unconscionable is without support. The value of the property is admitted, and if, in the award of monetary compensation in lieu of specific performance, equity follows the law as to the rule of damages, the award here made was not in conflict with section 3306 of the Civil Code bearing upon the matter. That section declares that, where there has been bad faith, the market value of the property contracted to be conveyed is the measure of the damages for the breach of the agreement. The market value of this property was established, and there was justification for the award upon the ground of bad faith, in consideration of the fact that the defendant promptly accepted the deed made to it by the Pacific Improvement Company, and that this title so acquired was immediately conveyed to Clayburg, and that after doing this, without an offer to restore the title which it took, it refuses, in turn, to pay any consideration for what it had accepted.

No other matters seem to call for consideration, and for the foregoing reasons the judgment appealed from is affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

149 Cal. 140

DUFFY v. YORDI. (S. F. 3,579.)

(Supreme Court of California. April 5, 1906.)

PARENT AND CHILD—SUPPORT OF PARENT BY CHILD.

Where a mother was being supported by certain of her children, and there was no threat of a withdrawal of such support, she was not entitled to maintain an action against another child, under Civ. Code, § 206, making it the duty of the children of any poor person unable to maintain himself by work to maintain such persons to the extent of their ability.

Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Leonora Duffy against Sarah J. Yordi. From a judgment in favor of plaintiff, defendant appeals. Reversed.

John O'Gara, for appellant. Joseph Rothschild, for respondent.

McFARLAND, J. The plaintiff, a widow, is the mother of the defendant, also a widow; and the purpose of this action is to obtain a judgment that defendant pay to plaintiff for her permanent support the amount of $100 per month, and also $100 to be paid forthwith for plaintiff's immediate use. It is averred in the complaint that plaintiff is 77 years old, is without any means of subsistence, and by reason of her age and physical condition is unable to maintain herself by work; that defendant has ability to support her, and that $100 a month is a reasonable sum to be allowed her for her maintenance. In the answer of the defendant the material averments of the complaint are denied, and it is averred that plaintiff has other children able to support her, and that, when defendant was about 6 years old plaintiff abandoned her, and gave her to her aunt, Bridget Duffy, and her husband, and agreed that her aunt should rear and support her, and that defendant's obligations as a child should be due to her said aunt; and that since then plaintiff would have nothing more to do with defendant, and defendant was reared and supported by her aunt, and that defendant now supports her said aunt. The court found that plaintiff was destitute and unable to maintain herself by work; that defendant is able to support her; that plaintiff did not abandon defendant as alleged in the answer; that $60 a month is a reasonable amount for plaintiff's maintenance, and that $20 a month is a reasonable proportion thereof to be paid plaintiff by defendant. Judgment was rendered in favor of plaintiff against defendant for $143.30 for her support from the commencement of the action until the date of the judgment, and that thereafter defendant pay to plaintiff $20 on the 15th of each month until further order of the court. From this judgment defendant appeals.

Appellant contends that the material findings of the court are not supported by the evidence, but, under our views of the case, this contention need not be discussed. While some writers speak of the "natural obligation" of a child to support a parent, it is clear that at common law there was no legal obligation on the part of the child to do so; that such obligation depends entirely upon statutory provisions; and that the procedure provided by statute for the enforcement of the obligation must be pursued. In Schouler's Domestic Relations, § 265, it is said that the following is "a well-settled rule at the common law: Namely, that there is no legal obligation resting upon a child to support a parent; that, while the parent is bound to supply necessaries to an infant child, an adult child, in the absence of positive statute, or a legal contract on his own part, is not bound to supply necessaries to his aged parent." In Edwards and Wife v. Davis, 16 Johns. (N. Y.) 281, it is said: "The duty of a child of sufficient ability to maintain its poor and indigent parents, being an imperfect one, not enforced at common law, and the statute having prescribed the manner in which it is to be enforced and the extent of the penalty, the statute remedy is the only one to be resorted to." In England and in many of the American states there are statutes declaring this obligation, and providing how it shall be enforced—who may institute proceedings for that purpose, the court which shall have jurisdiction, etc. The main purpose of the statutes seems to be to protect the public from the burden of supporting poor people who have children able to support them. Our statutory provisions on the subject are very meager, and are all contained in section 206 of the Civil Code, which is as follows: "It is the duty of the father, the mother, and the children of any poor person, who is unable to maintain himself by work, to maintain such person to the extent of their ability. The promise of an adult child to pay for necessaries previously furnished to such parent is binding." Counsel discusses somewhat elaborately the meaning and effect of this section—what rights it gives, who may bring an action under it, what court has jurisdiction, whether there is not a fatal absence of any procedure, etc. The only case in point, under a statute similar to ours, that has been cited, is McCook County v. Kammoss, 7 S. D. 558, 64 N. W. 1123, 31 L. R. A. 461, 58 Am. St. Rep. 854. In that case the county, having supported an indigent father, brought suit against his children to recover for the amount which the county had already expended for such support, and also to recover for his future support; and the court held that the county could recover for the amount already expended, but that under the statute there was no procedure for enforcing future support. We have referred to these questions because they are interesting, and because they should be thoroughly considered in any future cases which may arise under said section 206. But it is not necessary to pass upon them definitely here, or to determine whether McCook County v. Kammoss was properly decided, because we think that the case at bar does not give the plaintiff a right to recover under any reasonable construction of the section, and that defendant's motion for a nonsuit should have been granted. The plaintiff has three children other than defendant—Mrs. Perkins, Mrs. Germaine, who lives in Seattle, and a son who has not been heard from in several years. Mrs. Perkins testified as follows: "My mother is living with me, and I am supporting my mother. I have supported my mother. This sister in Seattle sends $5 or $10 or $15, once a month for the last two years. Otherwise, my mother has been entirely supported and cared for and protected by me." It is apparent therefore that plaintiff, being supported by her other children, and there being no threat of a withdrawal of such support, is in no condition to demand support from defendant. She is demanding from defendant what she is already receiving from another. For instance, what is the judgment of $143.43 for? Evidently not for her support, but for an amount of money independent of and in addition to the support which she had already received. It may be that her other children, having supported her, may maintain an action against defendant for her proportionate contributive share of such support; but that question is not here presented. A mother being supported by one child cannot maintain an action against another child for another support. For this reason the judgment in the case at bar cannot be sustained.

The judgment appealed from is reversed.

We concur: HENSHAW, J.; LORIGAN, J.

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149 Cal. 143

In re HALL'S ESTATE. (S. F. 4,404.)

(Supreme Court of California. April 7, 1906.)

WILLS—WHAT CONSTITUTES—DEED—PROBATE.

An instrument whereby a husband, in consideration of $5 and love and affection, conveys to his wife all his property, stipulating that the same shall be void during the husband's lifetime and to become effective on his death "without court process of any kind," is in substance a deed, and is not a will and probate thereof was properly denied.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, 209.]

Department 2. Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Application by Louisa Hall for the probate of the will of George D. Hall, deceased. From a judgment in favor of contestants, Helena Crocker and another, denying the probate, proponent appeals. Affirmed.

Nowlin & Fassett (Aylett R. Cotton, of counsel), for appellant. S. C. Denson and Thomas M. Osmont, for respondents.

McFARLAND, J. Louisa Hall, widow of George D. Hall, deceased, filed a petition in the probate court to have probated as a will of said deceased a certain written instrument of which the following is a copy:

"Know all men by these presents, that I, George D. Hall, of the city and county of Alameda, state of California, the party of the first part, for and in consideration of the sum of five dollars, gold coin of the United States of America, to him in hand paid as also for and in consideration of the love and affection, and for the better maintenance and support of Louisa Hall (his wife), of the said city and county of Alameda, state of California, the party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the said party of the second part his executors, administrators and assigns, all of the personal property of any and every description whatsoever which I do now possess, or may hereafter own or possess as conclusively as though I had separately designated each and every parcel thereof separately. This conveyance, however, is to remain null and void during my lifetime, but to become of full force and effect immediately upon my decease without court process of any kind. And the said party of the second part is hereby authorized to at said time take full possession and have all the rights of ownership of the whole of said property; The said personal includes moneys, bank accounts, bank books, and all other movable property of every description. To have and to hold, the same to the said party of the second part her executors, administrators and assigns forever. And I do, for myself and my heirs, executors and administrators covenant and agree to and with the said party of the second part her executors, administrators and assigns to warrant and defend the title to the said property, goods and chattels hereby conveyed against the just and lawful claims and demands of all persons whomsoever.

"In witness whereof, I have hereunto set my hand and seal the fourteenth day of December in the year of our Lord one thousand eight hundred and ninety-four. George D. Hall. [Seal.]

"Signed, sealed, and delivered in the presence of E. L. Reese, Charles H. Hubbs."

The probate of said instrument was contested by the respondents herein, who are heirs at law of the deceased, on the ground, among others, that the instrument is not a will. The court rendered judgment denying the probate, and from this judgment and from an order denying her motion for a new trial the said Louisa Hall appeals.

The judgment of the lower court is clearly right. The said instrument is certainly not, in form, a will. It does not contain any of the usual words of devise or bequest, nor any words equivalent thereto. It is in form and substance a deed between two parties by which one grants and transfers to the other certain property. The evidence introduced as to facts relating to the execution of the instrument is of no value to appellant. The evidence merely shows that deceased told the lawyer who drew it up that he wanted an instrument drawn so that all of his property should be "conveyed" to his wife at his death, and that he, the lawyer, drew the instrument "just precisely as he stated he wanted it"; that the lawyer and another person witnessed the instrument at the request of the deceased and in his presence in manner as appears at the end of the instrument; and that deceased then delivered the instrument to the appellant who has since had possession of it. In the whole transaction there was nothing said by the deceased, or by any one, about the instrument being a "will," and there was no publication of it as a will. Indeed, it appears upon the face of the instrument that it was not intended as a will, for by its terms the grantee was to have immediate possession of the property on the death of the deceased "without court process of any kind"; and it purports to have been "signed, sealed and delivered" in the presence of the witnesses. Wills are not delivered. A testator keeps possession and control of his will, and may destroy, cancel or revoke it at any time, and the devisee or legatee takes no right or estate whatever. Apparently the only ground for claiming that the instrument should be held to be a will is that the property mentioned therein is not to go into the actual possession of the grantee until the death of the grantor; but that may be a feature of a deed as well as of a will. In the case at bar upon the delivery of the deed to the grantee it became irrevocable, which feature specially distinguishes it from a will which is in its nature revocable. In Jarman on Wills, volume 1, page 18, the law is correctly stated as follows: "A will is an instrument by which a person makes a disposition of his property to take effect after his decease, which is in its own nature ambulatory and revocable during his life. It is this ambulatory quality which forms the characteristic of wills; for, though a disposition by deed may postpone the possession or enjoyment, or even the vesting, until the death of the disposing party, yet the postponement is in such case produced by the express terms, and does not result from the nature, of the instrument." See, also, the leading case on the subject of McDaniel v. Johns, 45 Miss. 632. The instrument in question here is clearly a deed granting and transferring in præsenti to the grantee named therein the property described, but reserving its enjoyment until the happening of a future contingency; and this was clearly the purpose of the grantor. Whether or not the instrument is effective for the purpose intended is not in question here; if it should be held to be inoperative for that purpose that fact would not turn the deed into a will.

The judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

7 Cal. Unrep. 252

ARCHIBALD ESTATE v. MATTESON.

(Court of Appeal, Third District, California. March 5, 1906.)

TRIAL — NONSUIT — INVOLUNTARY NONSUIT — WHEN GRANTED.

Where the testimony of the plaintiff tends to prove all the material allegations of his complaint, defendant's motion for a nonsuit will not be granted.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 332, 333, 338–340.]

Appeal from Superior Court, Madera County; W. M. Conley, Judge.

Action by the Archibald estate against A. H. Matteson. From a judgment for defendant, plaintiff appeals. Reversed.

R. L. Hargrove, for appellant. R. E. Rhodes, for respondent.

BUCKLES, J. This action is to recover $1,050 as money had and received. The appeal is from an order granting a nonsuit and from an order denying a motion for a new trial. The appeal comes here on a bill of exceptions.

The appellant was duly organized under the laws of the state of California, a corporation by the name of Archibald Estate. On June 4, 1904, the board of directors organized and elected J. F. Archibald president, and on that day passed and recorded in the minutes of the board the following resolution: "Resolved, That the President of this corporation be and he is authorized, empowered and directed to draw from any bank or person or corporation in which may be deposited any of the money or funds of this corporation upon his own signature and request, and the signature of the secretary shall not be necessary to draw said money or funds."

The answer of defendant specifically denies owing the plaintiff anything and claimed upon the trial and argues in his brief that his transaction out of which he received the $1,050 was had with J. F. Archibald individually, and not with the appellant. It appears from the evidence that the property, real and personal, including money, and funds in bank of J. F. Archibald were by him transferred to the appellant corporation. The money received by the respondent was paid to him by two checks, which are in the following words and figures, to wit:

"Madera, Cal., September 1, 1904.

"Commercial Bank of Madera, pay to the order of A. H. Mattison the amount, eight hundred dollars. J. F. Archibald, Pres."

"$800.00.

"Madera, Cal., October 22nd, 1904.

"Commercial Bank of Madera: Pay to the order of A. H. Mattison, amount two hundred and fifty dollars.

"250.00. J. F. Archibald, Pres."

Both these checks were cashed by defendant and paid from the funds of appellant. The evidence offered by plaintiff at the trial tends to show that J. F. Archibald, the president of appellant corporation, died November, 1904. That defendant received the $1,050 as a loan from appellant and had not paid the same. The defendant was called by plaintiff as a witness and testified that the money was loaned him on an agreement that J. F. Archibald would furnish him all the money needed for his farming operations for the years 1904 and 1905, but did not testify as to the amount needed. There was some question as to whether the debt was due when the suit was commenced, but we think the testimony tends in some measure to show that it was due. When appellant rested a motion for nonsuit was granted. This was error. The well-settled rule in this state is that where the testimony of the plaintiff tends to prove all the material allegations of his complaint a nonsuit will not be granted. A nonsuit is denied where there is any evidence tending to sustain the plaintiff's cause. Citing of authorities is unnecessary.

The judgment of nonsuit is reversed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

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3 Cal. App. 213

STEWART v. WHITTEMORE et al.

(Court of Appeal, First District, California. March 7, 1906.)

1. Gifts—Nature of Transaction.

Deceased, being about to undergo a surgical operation, came to plaintiff's office, and stated that he was going to give plaintiff $1,000, and wanted plaintiff to loan him $1,000 on his note. The note was drawn up and delivered to plaintiff, with the statement that, if anything happened to deceased, the note should be taken to his executors who would pay it. Deceased then deposited $1,000 to plaintiff's credit in his bank, gave the deposit slip to plaintiff, and received from him a check for $1,000. Afterwards, at different times, deceased gave to plaintiff various sums in currency, received from plaintiff checks for the amounts of these sums, and gave deceased his notes for the amount of the checks. *Held*, that under Civ. Code, §§ 1146–1148, defining gifts, these transactions constituted gifts of the money to plaintiff, so that he was entitled to recover on the notes against the executors of deceased.

2. Appeal—Harmless Error—Exclusion of Evidence.

The exclusion of a question relating to matter which had already been established by other witnesses, and as to which the witness to whom the question was propounded disclaimed any knowledge, was harmless.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4194–4199.]

3. Same — Briefs — Questions Reviewable.

Alleged error in the refusal of the court to permit proof of a certain fact cannot be reviewed, where the evidence by which it was sought to show such fact is not pointed out in the brief.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3095.]

4. Gifts—Evidence.

In an action against executors, in which the validity of certain gifts by deceased was involved, the exclusion of evidence as to who were the relatives of the deceased and the amount of the estate he left, was proper.

Appeal from Superior Court, City and County of San Francisco, J. M. Seawell, Judge.

Action by Charles Stewart against D. H. Whittemore and others, as executors of Philip Caduc, deceased. From a judgment for plaintiff, defendants appeal. Affirmed.

W. H. Fowler, for appellants. George N. Williams and Andrew Thorne, for respondent.

COOPER, J. The complaint contains two causes of action, the first being upon a promissory note made by the deceased, Philip Caduc, in his lifetime, for $1,000, dated November 15, 1901, with interest from date at the rate of 7 per cent. per annum; the second being for $2,027.50, for moneys alleged to have been loaned and advanced by plaintiff to deceased at his special instance and request, on the 17th day of June, 1902, less $100 paid thereon. It is alleged and admitted that claims properly verified for said amounts were duly presented to defendants as executors, and said claims rejected. Defendants, in their answer, denied that there was any consideration for the said promissory note, and alleged that the same was wholly without consideration or value of any kind, and further denied that deceased, on the 17th day of June, or at any other time, became or was indebted to plaintiff in the sum of $2,027.50, or in any sum, on account of moneys loaned or advanced to deceased, or at all. The answer further contained a cross-demand for $100, being the $100, which plaintiff alleged was paid on the second alleged cause of action. The court found the allegations in plaintiff's complaint to be true, and found against defendants on the allegations as to want of consideration, and also found against defendants on their cross-complaint. Judgment was accordingly entered for plaintiff. Defendants prosecute this appeal from the judgment, on the judgment roll and a bill of exceptions.

It is urged that the findings of the court are not supported by the evidence, and that the evidence shows that the alleged note was without consideration, and that the $2,027.50 was the money of the deceased at the time he received it from plaintiff. We are of the opinion that the findings are supported by the evidence. In regard to the $1,000 note the facts are substantially as follows: In the month of November, 1901, deceased, having been for some time afflicted with cancer of the throat, determined to go to the hospital for an operation, which he evidently deemed a dangerous one. He had been on intimate and friendly terms with plaintiff for some years, and on November 15th he came into plaintiff's office, without solicitation or suggestion, and said to plaintiff, "Charley, whereabouts do you bank?" Plaintiff informed him that he did his business at the First National Bank, whereupon deceased said to plaintiff, "I am going to give you $1,000, and I want you to loan me $1,000 on my note." The note, at the instance of and under the direction of deceased, was then drawn up, due three days after date, and delivered to plaintiff, deceased, at the time saying to him: "Charley, if anything happens to me, take the note to Mr. Kane, and he will pay it. I have appointed Mr. Kane and Mr. Whittemore executors of my will." When asked by plaintiff what he was to do with the money, deceased said: "Keep it. It belongs to you." At the request of deceased plaintiff drew a check in favor of deceased on the First National Bank, which check was kept by plaintiff until November 18th, when deceased again came to the office of plaintiff with a deposit tag for $1,000, which deceased had deposited to plaintiff's credit in the First National Bank, at the same time saying to plaintiff, "I have given you $1,000." The plaintiff then, at the request of deceased, delivered the check which he had drawn on the First National Bank for $1,000. Thus the substance of this transaction is that deceased gave and delivered to plaintiff, by depositing it in his bank to his credit, the sum of $1,000. He then borrowed the sum of $1,000 from plaintiff, giving the promissory note described in the complaint therefor. This shows a gift of $1,000 in money to plaintiff. The consideration for the note is the sum of $1,000, which was given by plaintiff to deceased after the said sum of $1,000 had become the property of plaintiff by gift duly executed.

As to the $2,027.50, the facts are substantially as follows: Deceased had temporarily recovered from the operation on his throat, but was troubled with his eyes, and evidently expected to go to the hospital again for treatment, and about January 16, 1902, he again came into the office of plaintiff, counted out and handed to plaintiff $1,500, mostly in greenbacks, which money so given to plaintiff was kept by him. Deceased then asked plaintiff to loan him $1,500, which the plaintiff did, giving the deceased a check for said sum, and at the same time deceased made to plaintiff his promissory note for $1,500, due five days after date, with interest at the rate of 6 per cent. per annum. Afterwards, on the 22d day of January, 1902, deceased again came to plaintiff's office, and gave plaintiff $500 in coin, made out a note to plaintiff for the amount, and borrowed the money from plaintiff, taking a check for the amount of $500. These two latter notes were not delivered at the time, but were kept by the decedent until a few days before he again went to the hospital for an operation on his eyes some time in March, 1902, when he took them and delivered them to plaintiff. When deceased took these notes to plaintiff he said to him: "Charley, here are notes for the money that I owe you." Plaintiff replied to deceased that he did not see why deceased should do that for him. Deceased replied: "Well, I would rather give my money to those I am fond of, than to somebody I don't care for to get it after my death." Deceased again came out of the hospital, and the two latter notes were paid by deceased to plaintiff by check of the Patent Brick Company, of which deceased was president; the amount with interest being $2,027.50. The money was placed by plaintiff in his bank to his general account. About the middle of June, 1902, the deceased again went to plaintiff's office, and the witness Gunther testified that deceased said, "Charley, I want you to loan me some money," and that, when plaintiff said, "How much do you want?" deceased replied, "Can you let me have the amount I sent you in payment of my notes?" The plaintiff then, at the request of deceased, drew a check in his favor for $2,027.50, which check was paid at plaintiff's bank, and the money received by the deceased. This is the amount for which recovery is sought on the second cause of action.

On the 21st day of December, 1902, Philip Caduc died. What was the intention of deceased when he gave the money to plaintiff? It was evidently to make a gift that was valid. He took the precaution to pay the first $1,000 into the bank to plaintiff's credit, and to subsequently count out and give to him the $2,000 for which the two latter notes were given. These notes were by deceased paid to plaintiff on April 10, 1902, and the money kept by plaintiff until it was again borrowed by the deceased. The money was the money of plaintiff when borrowed by the deceased in June, 1902. It had been given to him by manual delivery, borrowed from him, and again delivered to him when the notes were paid. We think, as said in the opinion of the learned judge of the trial court: "All this matter had its foundation in a gift simply, but it was, nevertheless, the intention of Caduc, as shown by the evidence, to give his friend something after he was dead, and to place the transaction in such form that he would be able to recover it by legal proceedings." In cases where feeble old people in poor health are prevailed upon by designing persons to make gifts or bequests, courts should carefully scrutinize the transactions, and require clear and convincing evidence before upholding them. While this is true as a general rule, it is equally true that when a man of sane mind desires to, and does, by gift dispose of that which is his own to a dear friend or relative, full knowing his own mind, the courts should uphold the disposition so made. The gift made by deceased was by a transfer and delivery of the money, made voluntarily and without consideration. It passed the title to the money, and was not revocable. Civ. Code, §§ 1146–1148. The fact that the money was afterwards loaned to deceased does not show that it was not a gift. In fact it would seem to emphasize the intention of the deceased to make a gift, for the reason that he delivered the money to plaintiff before borrowing it. Deceased ex industria procured the money, and delivered it to plaintiff, so as to make the transaction complete and valid. He could have given the plaintiff the notes without any money having passed; but evidently to avoid any question, he gave the money, delivered it, parted with the title to it, and then borrowed it for present purposes. It was not a gift causa mortis. The circumstances do not show that it was intended to take effect only in case of the death of the giver. It was intended as a present gift. Deceased, even after passing the peril of the operation for cancer of the throat, again went to plaintiff and gave him more money, delivering it with his own hands. His declaration that he would rather give his money to those he was fond of than to somebody he did not care for, tended to show his intention. He gave the money. There is evidence to support the finding that he intended to give it. His intentions must be carried out.

This disposes of the main question, but we will notice such other of the alleged errors as are deemed most important. Defendant placed a witness, Miss Lemaire, upon the stand, who testified that she was present during a portion of the conversation about the first $1,000; that deceased requested plaintiff to give her the check for the $1,000, and that plaintiff did so, and went to the bank with her, and identified her and she received the money. She was then asked: "Do you know where the $1,000 that you mentioned, that was involved in this conversation on the 18th day of November, 1901, came from?" The court sustained an objection to this question, and it is claimed that the ruling was erroneous. It was shown by the testimony of the plaintiff, as a witness for defendants, that the $1,000 was deposited by deceased in plaintiff's bank. That was as far back as defendants had any right to go, and was evidently what they were trying to show by Miss Lemaire. Not only this, but the witness had already testified that she received the check for the $1,000 when given to deceased by the plaintiff, and "All I know is what Mr. Caduc told me outside of Mr. Stewart's presence; know from what Mr. Caduc told me, check was to go to me; was not present at conversation had on the 15th; on the 18th was; can state it over again; that is all there was said; have stated it; the clerk can read it; cannot tell you what was said by each of the parties; it is the same thing over again; you can read it; cannot tell you anything else." The ruling was, therefore, harmless.

It is claimed that, as deceased was a married man, the defendants should have been permitted to show that the gifts were of community property, and for that reason void. It is not pointed out in the brief as to the evidence by which it was sought to show that the money was community property. The question is not presented on this record in such manner that we can review any ruling on said matter. The court did not err in excluding evidence as to who were the relatives of the deceased, and the amount of the estate he left. The question before the court was as to whether or not the gifts were valid. If the money belonged to deceased, in the absence of any question as to community property, he had the right to give it, regardless of the number of relatives he had, or the size of the estate. We find no prejudicial error in the record.

The judgment is affirmed.

We concur: HARRISON, P. J.; HALL, J.

3 Cal. App. 221

PEOPLE v. WONG SANG LUNG.

(Court of Appeal, First District, California. March 8, 1906.)

1. Criminal Law — Modification of Requested Instruction.

Pen. Code, § 1127, requires the judge in charging the jury to state all matters of law necessary for their information. Section 1093 (6) requires him, if requested, to charge on any points pertinent to the issue. Section 1127 authorizes either party to request the court to give any written charge, and if such charge is correct and pertinent, the court is required to give it. If the instruction as requested is not a correct statement of the law, either in part or as a whole, the court is not required to modify it, but may refuse it entirely. *Held* that, where the court modifies a requested instruction, it becomes the court's instruction, and, if erroneous, is subject to the same exception as if given without any request therefor.

2. Same—Sufficiency of Evidence—Reasonable Doubt—Statutory Provisions.

Pen. Code, § 1102, making the rules of evidence in civil cases applicable to criminal actions, includes the provision of Code Civ. Proc. § 2061 (5), that in criminal cases the preponderance of evidence is insufficient for a conviction, and that the guilt of defendant must be established beyond a reasonable doubt.

3. SAME—PLEA OF NOT GUILTY—EFFECT.
By plea of not guilty, defendant denies every fact essential to his guilt, including his identity with the person who committed the offense.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 686.]

4. SAME—EVIDENCE—PRESUMPTIONS — SCOPE.
Code Civ. Proc. § 1959, providing that a presumption is a deduction which the law expressly directs to be made from the particular facts, is not to be interpreted as requiring such deduction to be made, except in the cases named in section 1962, where the presumption is declared to be conclusive.

5. SAME—CONCLUSIVENESS—EVIDENCE REBUTTING PRESUMPTIONS.
Under Code Civ. Proc. § 1961, providing that in all other cases "the presumption may be controverted by evidence either direct or indirect," if such controverting evidence is introduced, the effect of the presumption, as conclusive of the fact, ceases, and the fact in question is to be determined by the jury upon a consideration of such evidence in connection with the presumption.

6. SAME—NATURE OF PRESUMPTIONS.
The presumptions which, under Code Civ. Proc. § 1963, are declared to be disputable, are in effect only inferences which, in the absence of any controverting evidence, the jury is required to make, and, in civil cases, to accept as established evidence creating a preponderance of the evidence.

7. SAME—IDENTITY.
The presumption of identity of the person from identity of name can be invoked only in a case where such name is to be applied to a particular person involved, and if such name be a common one in the vicinity, or if it be shown that there is more than one person to whom the name may be applied, there can be no presumption that such person is the one to whom the jury should apply it.

8. SAME—PROVINCE OF JURY—INSTRUCTIONS.
In a prosecution for homicide, the main question presented to the jury was the identity of defendant with the person who committed the offense; two witnesses testifying that defendant was not the person, and two that he was. A dying declaration of deceased named Wong Lung as the person who shot him; defendant being indicted by the name of Wong Sang Lung. There was testimony that there were other Chinese in the vicinity by the name of Wong Lung. *Held*, that the identity of name was a fact proper to be considered by the jury, and an instruction that identity of person is presumed from identity of name invaded the province of that body.

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Wong Sang Lung was convicted of the crime of murder in the second degree, and appeals. Reversed.

William S. Barnes and H. H. McCloskey, for appellant. U. S. Webb, Atty. Gen., for the People.

HARRISON, P. J. Appeal from the judgment upon a conviction of the defendant of murder in the second degree.

The main question presented to the jury for its determination was the identity of the defendant with the person who committed the homicide—two witnesses testifying that the defendant was not the person who shot the deceased, and two that he was. The dying declaration of the deceased, "I went to Spofford alley, and there Wong Lung shot me," was also given in evidence. It was shown that Wong Lung is a common name among the Chinese, and that there were many Chinese of that name in San Francisco. At the close of the trial the defendant asked the court to give the jury the following instruction: "Identity of person is presumed from indentity of name (but where there is evidence that there are in the neighborhood several persons of the same name this presumption does not prevail. In this case if the evidence shows that there were several persons of the same name, to wit, Wong Lung, the identity of the defendant with the Wong Lung alleged to be referred to in the declaration of the decedent to Dong Tyng at the City and County Hospital is not presumed)." The court declined to give the instruction as asked, but modified it by striking out all included as above in parentheses, and instructed the jury: "Identity of person is presumed from identity of name."

Pen. Code, § 1127, requires the judge, in charging the jury, to state to them "all matters of law necessary for their information," and by section 1093 (6) he is required, if requested by either party, to charge them "on any points pertinent to the issue." Section 1127 authorizes either party to request the court to give any written charge which it may present, and if such charge is correct and pertinent the court is required to give it. If the instruction as requested is not a correct statement of the law, either in part or as a whole, the court is not required to modify it, but may refuse it entirely. The court may, however, if it chooses, modify the instruction so requested, and give a portion and refuse a portion; but in so doing the instruction which is given must be a correct statement of the law and not misleading to the jury. The modified instruction becomes the court's instruction, and if erroneous is subject to the same exception as if given without any request therefor. East St. Louis Ice Co. v. Sculley, 63 Ill. App. 147; Morgan v. Peet, 32 Ill. 281.

The provision of section 1102 of the Penal Code, making the rules of evidence in civil cases applicable to criminal actions, includes the provision of section 2061 (5), Code Civ. Proc., that, in criminal cases, the preponderance of evidence is insufficient for a conviction, and that the guilt of the defendant must be established "beyond a reasonable doubt"; and as in all criminal prosecutions the people must establish all the facts which are essential to establishing the guilt of the defendant, every such fact must be established beyond a reasonable doubt. If any fact essential to his conviction is not so established he is entitled to an acquittal. He is never to be required to introduce any evidence for the purpose of establishing his innocence. By his plea of "not guilty" the appellant denied every fact essential to his guilt, including his identity with the person who committed the homicide, and threw upon the prosecution the necessity of proving this as well as the other facts necessary to establish his guilt. "The plea of 'not guilty' is a denial of the prisoner's identity with the person formerly convicted. No presumptions are to be made against the prisoner. The government must prove every essential allegation." Commonwealth v. Briggs, 5 Pick. (Mass.) 429. "If there was a question of identity it was for the jury to determine." State v. Robinson, 39 Me. 150. Such determination must be made upon all the evidence before the jury, and not upon a presumption from a portion thereof.

Presumptions are only evidence to be considered by a jury in determining the issue before them, and the weight of such evidence will depend upon the circumstances under which the presumption is invoked. The provision of section 1959, Code of Civ. Proc., that "A presumption is a deduction which the law expressly 'directs' to be made from particular facts is not to be interpreted as requiring such deduction to be made except in the cases named in section 1962, where the presumption is declared to be conclusive." Under the provisions of section 1961 that in all other cases "the presumption may be controverted by evidence either direct or indirect," if such controverting evidence is introduced its effect as a presumption, to be accepted as conclusive of the fact, ceases to be operative, and the fact in question is to be determined by the jury upon a consideration of such evidence in connection with the presumption. The presumptions which, under section 1963, are declared to be disputable, are in effect only inferences which, in the absence of any controverting evidence, the jury is required to make, and, in civil cases, to accept as established facts, creating a preponderance of evidence; but as the effect of evidence controverting the presumption will vary with its character and the circumstances of each case, the court should not, by any instruction as to its weight, attempt to influence the jury in determining whether it is sufficient to create a reasonable doubt in their minds, or to establish a fact beyond a reasonable doubt.

The presumption of identity of person from identity of name can be invoked only in a case where such name is to be applied to a particular person involved. If such name be a common one in the vicinity, or if it be shown that there is more than one person to whom the name may be applied, there can be no presumption that such person is the one to whom the jury should apply it. Mr. Wharton says (Crim. Ev. § 802): "Identity of name is not, by itself, when the name is common, and when it is borne by several persons in the same circle of society, sufficient to sustain a conclusion of identity of person." In Jones v. Jones, 9 M. & W. 75, a promissory note had been made by Hugh Jones; and in an action thereon by the indorsee a witness testified that the signature was written in his presence by a certain Hugh Jones, but that he had not seen him since; and he also testified that the name of Hugh Jones was a very common one in the community where the note was signed. The court held that, inasmuch as it was shown that there were many persons by that name in the neighborhood where the note was made, there was no sufficient evidence of the identity of the maker with the defendant. This ruling was approved by Lord Denman in Rodin v. Hyde, 4 Q. B. 626. See, also, 2 Phil. on Ev. 509; 2 Greenl. on Ev. § 278d; Lawson's Pr. Ev. rule 57; Hatcher v. Rocheleau, 18 N. Y. 92.

It may be assumed that at the trial herein the jury gave equal credence to the witnesses who testified that the defendant is not the person who shot the deceased, as they did to the witnesses who testified that he is. Indeed, there is no ground for assuming that they did not. If so, and there had been no other evidence, the prosecution must have failed in establishing an essential element for the conviction of the defendant. The only other evidence for consideration by the jury, which connected the defendant with the homicide was the dying declaration of the deceased that Wong Lung shot him. The name Wong Lung is not identical with Wong Sang Lung, the name of the defendant and the name by which he was indicted; and irrespective of this fact it was shown that there were many Chinese in San Francisco by the name of Wong Lung; and the witness to whom the deceased made this declaration did not give any testimony tending to identify the defendant with the particular Wong Lung to whom the deceased referred in making the declaration; nor was it shown that this witness knew or had ever seen the defendant. The testimony that there were other Chinese in San Francisco by the name of Wong Lung was indirect evidence controverting the presumption that might otherwise have been drawn from the identity of name, or which might have been invoked if it had been shown that the defendant was the only person in San Francisco by that name, and the jury should have been permitted to consider its effect; but, by stating to them the presumption without any qualification, the court told them in effect that they might find from the presumption alone, that the defendant is the person to whom the deceased referred in his dying declaration. If it was the intention of the court to state to the jury the statutory rule authorizing such presumption, it should also have stated to them the provision in the same section of the statute that such presumption might be controverted by other evidence. The identity of name was a fact proper to be considered by the jury in connection with the other evidence; but in view of the other evidence it was error for the court to state to them that there was any presumption therefrom. In thus singling out a particular portion of the evidence and instructing the jury respecting the weight to be given to it, the court invaded the province of that body and disregarded the inhibition of the Constitution against instructing them "with respect to matters of fact."

The judgment and order denying a new trial are reversed.

We concur: COOPER, J.; HALL, J.

3 Cal. App. 226

RUBIO CANYON LAND & WATER ASS'N v. PASADENA & MT. L. RY. CO.

(Court of Appeal, Second District, California. March 9, 1906.)

TRESPASS—TITLE OF PLAINTIFF—NATURE OF PROPERTY.

In an action for damages suffered by the removal of a pipe line from the land of plaintiff, it appeared that the pipe was laid by the defendant's assignor under a contract which gave plaintiff the right of user for 25 years, from April 15, 1893, at the expiration of which time plaintiff was to have the right to purchase the said pipe line from the party laying it if a price could be agreed upon by them. *Held*, that whether the contract was a mere covenant or a covenant running with the land, or whether the pipe line became a fixture to or part of plaintiff's land, either permanently or for the term of 25 years, was immaterial, as on one theory defendant was guilty of trespass and waste, and assuming the pipe to be personal property defendant's act was not only a trespass, but also an invasion of plaintiff's qualified property and right of possession.

Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by the Rubio Canyon Land & Water Association against the Pasadena & Mt. Lowe Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John D. Pope and Arthur L. Hawes, for appellant. W. S. Wright and N. W. Bell, for respondent.

SMITH, J. This is an appeal by the defendant from a judgment against it in the lower court for the sum of $1,420, damages suffered by the plaintiff by the removal of 3,550 feet of steel pipe from the land of the plaintiff, and costs. The complaint contains two counts. In the second it is alleged: That ever since the 15th day of April, 1893, the plaintiff has had the right to use for purposes stated in the steel pipe above referred to, which had been laid in the ground by one Lowe, with the consent of the plaintiff, in and along rights of way then and now owned and possessed by the plaintiff, and of which it had the right of user for the period of 25 years from the date named; that in the month of December, 1899, the defendant removed the pipe and appropriated the same to its own use; and that the plaintiff was thereby damaged in the sum of $4,620. In the first count, in addition to the facts alleged in the second, there is set out at length the contract between the plaintiff and Lowe under which the pipe was laid on the plaintiff's land; by the terms of which Lowe agrees to maintain the pipe line in repair, with certain connections specified, for a term of 25 years from the date of the contract, April 15, 1893; at the expiration of which time "the party of the first part (the plaintiff) shall have the right to purchase the said pipe line from the party of the second part, if a price can be agreed upon by the said parties." It further appears from the allegations of this count that the defendant has acquired the right and interest of Lowe in the pipe line, along with other property to which it was appurtenant or accessory. All the allegations of the complaint are found to be true, except the allegation contained in each count that the plaintiff was damaged in the sum of $4,620; in lieu of which it is found that it was damaged in the sum of $1,420.

The question principally discussed by counsel is whether the covenants of Lowe to maintain the pipe line and not to divert the water from the plaintiff's reservoir are covenants running with the land, and, therefore, obligatory upon the defendant as his assign. But, according to the view we take of the case, the contract is material only as evidence of the interest of the plaintiff in the pipe line, and the allegations of the first count with regard thereto, and also with regard to the succession of the defendant to Lowe's interest, may be disregarded as immaterial; which will leave the first count substantially identical with the second. It will not be necessary, therefore, to consider the argument of counsel as to the nature of the contract as being a mere covenant, or a covenant running with the land. Nor will it be necessary to consider whether the pipe line became a fixture to or part of plaintiff's land, either permanently or for the term of 25 years. Whichever view be taken of the latter question, it is clear that by the agreement of the parties the pipe line was to remain where it was placed on the land of the plaintiff for the term of 25 years, during which time the plaintiff was to have the use of it. Whether it be regarded as realty or personalty, its removal was an invasion of the rights of the plaintiff therein, for which the plaintiff is entitled to damages. Assuming the pipe in question to be a part of the realty, the defendant was guilty of trespass and waste. Assuming it to be the personal property of the plaintiff, the defendant's act was not only a trespass upon the plaintiff's land, but was also an invasion of plaintiff's qualified property and right of possession in the pipe; nor can the general property of the defendant be pleaded in justification. 1 Chitty's Plead., 148–9.

The judgment appealed from is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

3 Cal. App. 219

KELLER v. GRAY et al.

(Court of Appeal, First District. California. March 8, 1906. Rehearing Denied April 7, 1906.)

TOWAGE—INJURY TO TOW—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY.

In an action for compensation for services in towing certain barges, in which defendant pleaded that one of the barges was injured by the negligence of plaintiff, evidence *held* sufficient to justify a finding that the injury was caused by the negligence of defendant's servants and not of plaintiff.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by J. E. Keller against George F. Gray and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Fisher Ames and J. E. Manning, for appellants. John S. Partridge, for respondent.

COOPER, J. This action was brought to recover of defendants the sum of $525 for services in towing certain barges from defendants' quarries to the water front of San Francisco. Defendants denied that the services were of any greater value than $495, and by way of defense alleged that, by the carelessness and negligence of plaintiff in performing said services, and in towing the said barges, one of the barges was allowed to drift beyond plaintiff's control upon the rocks in the Bay of San Francisco, and to become damaged in the sum of $316.12. The fact that the barge became loose and drifted upon the rocks, and that it was thus damaged in the said sum, was not disputed. The question was as to whether or not such damage was the result of carelessness or negligence of the plaintiff in performing the services for the defendants. The trial court found that the barge was not injured by the carelessness or negligence of the plaintiff, but that the injury was due to the carelessness and unskillfulness of defendants' servants.

The only point urged here is that this finding is not supported by the evidence. After a careful examination of the evidence we deem it sufficient to support the finding. The accident appears to have been caused by plaintiff's tug "Annie" picking up and becoming fast in a wire cable, which ran out from defendants' wharf to a buoy some 300 or 40 feet. There is testimony to the effect that the master of the plaintiff's tug had been warned by the defendants' watchman not to attempt to go into the wharf on the west side of this bulkhead by reason of the location of the cable. The master of the tug was in the habit of blowing his whistle as he neared the wharf, and the watchman of the defendants would give a signal from a lantern that all was right. The accident occurred about 3:50 a.m. as the tug belonging to plaintiff approached the wharf. The cable had been moved the evening before so as to make it dangerous to enter on the easterly side of the buoy, but the watchman of the defendants was there with the lantern and gave the signal that all was right as usual, and the master of the tug attempted to enter on the easterly side of the buoy as usual, and caught the wire. The defendants discharged the watchman the next day. There is also evidence that when the tug caught the cable the employé of defendants who was on the barge, threw the rope off, and that if he had not thus thrown the rope off, the barge would not have been loosened and lost control of by the tug; that the barge would have been safe if the man on the barge had not thrown the rope off.

The judgment and order denying defendants' motion for a new trial are affirmed.

We concur: HARRISON, P. J.; HALL,

149 Cal. 108

McCUE et ux. v. BRADBURY et al.

(S. F. 4,486.)

(Supreme Court of California. March 31, 1906. Rehearing Denied May 16, 1906.)

Mortgages — Performance of Condition — Proceedings to Restrain Sale.

Before the maturity of a debt secured by a deed of trust, the debtor informed the creditor of his readiness to pay the debt on the day before its maturity at a bank designated. The creditor made no objection to going to the bank for his money. The debtor was at the bank that day, ready to pay the debt, but the creditor did not appear. The following day was Sunday, and the next day the debtor obtained from the bank a certificate of deposit payable to the creditor, who was on that day informed thereof. He made no objection to the form or conditions of the tender. *Held*, that equity would restrain a sale of the premises and would compel the creditor to accept in satisfaction of his demand the amount due and payable on the day the certificate of deposit was procured; Civ. Code, § 1511, excusing performance if the same is prevented by the act of the creditor.

Department 2. Appeal from Superior Court, Marin County; Thomas J. Lennon, Judge.

Action by J. S. McCue and wife against William B. Bradbury and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

T. C. Kierulff, E. C. Chapman, and R. M. F. Soto, for appellants. H. V. Morehouse and J. E. Alexander, for respondents.

HENSHAW, J. Plaintiffs had executed to trustees a deed of trust in the usual form as security for moneys advanced by defendant William B. Bradbury. The trustees, having declared a default and forfeiture under the terms of the trust, were proceeding to sell the lands, when plaintiffs instituted this action to restrain them, and to compel the defendant Bradbury to accept in extinguishment of their debt to him the moneys due and evidenced by certificates of deposit issued by a bank in San Rafael, Marin county, in which county the land is situated. The history of the transactions and dealings of the parties may best be told in the language of the findings, which findings derive ample support from the evidence. It is first found that plaintiffs were the owners of the property, and that they had executed their promissory note and the trust deed; that they paid the interest on the promissory note regularly according to its terms; that the principal sum of it and the last installment of interest became due and payable on the 22d day of October, 1904, and if not paid on that date the trustees had full power to advertise and sell the land upon the demand of William B. Bradbury, for the payment of the promissory note and the interest, costs, and expenses of sale and $200 attorney's fee, as provided in the trust deed.

The findings then proceed as follows: "That on or about the 19th day of October, 1903, at Corte Madera, in said Marin county, the plaintiff met the said William B. Bradbury and requested him to permit the said trust deed to be continued at a less rate of interest, but the said William B. Bradbury would not consent so to do, and thereupon the said plaintiff J. S. McCue informed the said William B. Bradbury that he was ready, able and willing to pay him said principal and interest and would pay the same to him on the 22d day of October, 1904, at the Marin County Bank at San Rafael, in said Marin county, upon a cancellation of said trust deed. That said Bradbury did not then and there, or at any other time, or at all, make or express any objections to going to San Rafael to get said money, but in reply said, 'All right, but it is not due until the 23d.' That on, and for several hours during said 22d day of October, 1904, said McCue was in San Rafael, Marin county, and was then and there ready, able and willing to pay said Bradbury the full amount of said principal, and interest then due and owing to said Bradbury upon said note, but that said Bradbury did not appear at said bank, or at any other place in San Rafael, on said 22d day of October, 1904. That the 23d day of October, 1904, was Sunday. That thereafter, to wit, on the 24th day of October, 1904, the plaintiffs herein procured from and caused to be issued by the Marin County Bank, a bank of good repute, two certificates of deposit, one in the sum of three thousand two hundred and forty-three and $^{56}/_{100}$ ($3,243.56) dollars, payable to William B. Bradbury, the defendant herein, or his order, and the other in the sum of fifty-three and $^{44}/_{100}$ ($53.44) dollars, payable to W. P. Taylor, or his order. That said W. P. Taylor was and now is the tax collector of said county of Marin, and the amount certified in said last-mentioned certificate of deposit, to wit, the sum of fifty-three and $^{44}/_{100}$ ($53.44) dollars, was the amount of taxes levied and assessed on the 1st Monday of March, 1904, upon and against said trust deed, all of which was then due, owing and unpaid. That thereafter, to wit, on the said 24th day of October, 1905, Kittie G. McCue, one of the plaintiffs herein, prepared and signed, with the knowledge, consent and concurrence of J. S. McCue, the other of said plaintiffs, and caused to be served upon said Bradbury at his home in Corte Madera, in said county, an offer in writing, addressed to said Bradbury, to pay to said Bradbury the full amount then due to said William B. Bradbury upon said note and trust deed upon condition that said Bradbury make, execute and deliver to plaintiffs a reconveyance in due form of the land and premises theretofore conveyed in trust to secure the payment of said note. That said offer of payment was in the words and figures following, to wit: 'To W. B. Bradbury. You will please take notice that the full amount due on my note heretofore executed to you and secured by trust deed has been deposited' at the Marin County Bank at San Rafael, California, payable 'to your order. You will please call at the office of E. B. Martinelli and deliver to him a reconveyance in due form of the premises heretofore conveyed by me in trust to secure the payment of the note aforementioned, and the money deposited to your order will be paid over to you. Respectfully yours, Kittie G. McCue.' That all this was done by the plaintiffs herein in good faith and with the intent and purpose of paying the said William B. Bradbury in full the amount then due and owing him, and that the said plaintiffs were then and there ready, willing and able to pay to said William B. Bradbury the full amount then due and owing to him under said note and trust deed. That said Bradbury received said written offer of payment on said 24th day of October, 1904, at his home in Corte Madera, at or about the hour of 6 o'clock p. m. of that day. That said William B. Bradbury did not then, or at any other time, or at all, make any objections to the form, terms, or conditions of said offer of payment. That said William B. Bradbury was personally acquainted with said E. B. Martinelli, and that said William B. Bradbury was in San Rafael on October 25, 1904, and that he did not then, or at any other time, or at all, accept said offer of payment or signify a willingness to make a reconveyance to the plaintiffs upon payment of the full amount due and owing to him of the property described in said trust deed, as required and conditioned by said offer of payment and the terms and conditions of said trust deed. That on the said 24th day of October, 1904, the said William B. Bradbury demanded of and directed the said Mary M. Bradbury and John F. Allen, as trustees named in said trust deed, to advertise and sell said lands and premises, and thereupon and at the request and direction of said William B. Bradbury a notice of sale of said lands and premises under and by virtue of the terms and conditions of said trust deed, was prepared, and by said William B. Bradbury, in person, on the 27th day of October, 1904, and not before, given for publication to the 'Recorder-Enterprise,' a weekly newspaper of limited circulation printed and published at the town of Mill Valley, in Marin county. That said Recorder-Enterprise is published at a place away from said lands and has no general circulation throughout said Marin county or at Corte Madera, where said lands and premises are situated. That thereafter, to wit, on the 29th day of October, 1904, said notice of sale appeared and was printed and published in said Recorder-Enterprise, and the sale of said land and premises was noticed and specified therein for the 19th day of November, 1904, at the hour of 12 m. of that day in front of the town hall in the town of Mill Valley. That the said sale was thereafter postponed to the 26th day of November, 1904, at 12 m. of that day. That said William B. Bradbury had ample and sufficient time after receiving said offer of payment, and before he personally gave said notice of sale to said newspaper for publication, to withdraw his demand upon said trustees to sell said lands and premises, without cost or expense to himself or plaintiffs. That in attempting to make said sale, as aforesaid, the said William B. Bradbury was not acting in good faith, but sought to take advantage of said plaintiffs and to put them to large and unnecessary costs and expenses. That the said lands and premises are of a value far in excess of the amount due and owing on said note by the said plaintiffs, all of which the said William B. Bradbury then and there well knew, and the said lands and premises were ample security for the payment of said note and interest, and upon a sale thereof, properly made and advertised, would bring a sum of money far in excess of the amount of said indebtedness and the costs and expenses and attorneys fees attending the sale thereof, all of which said William B. Bradbury well knew. That the sale of said lands and premises would cast a cloud upon the title of said plaintiffs to said lands and cause plaintiffs unnecessary expense and litigation, and prevent said plaintiffs from the sale thereof or using the same as security to negotiate a loan or loans upon, all of which said defendant William B. Bradbury well knew, and their value thereof consists in the plaintiffs being able to sell them in lots and would be greatly depreciated by any sale thereof under said notice of sale. That plaintiffs have no plain or speedy or adequate remedy at law, and that the injury which they would sustain by such sale cannot be adequately compensated in damages, and that the sale thereof is wholly unwarranted and unnecessary, all of which defendant William B. Bradbury well knew; and he, the said Bradbury, knew that by complying with said written notice served upon him, and giving the release of said trust deed, he would be paid in full, but, with the fraudulent intent and purpose of annoying and putting said plaintiffs to expense and putting said property in condition to prevent its being used as security for the loan of money, he caused said trustees to advertise said land and premises for sale."

Appellants' principal contention upon appeal is that the acts of the McCues looking to the payment of the obligation to Bradbury were entirely insufficient as a legal tender of payment, and that this being so, and plaintiffs being in default under the terms of the trust, Bradbury's trustees were justified in proceeding with the sale of the property to extinguish the McCues' obligation. But in this appellants mistake the gist of the action. The action is not based upon the assumption that the tender actually made was a full and complete legal tender, but upon the contention that the acts of the defendant William B. Bradbury, in assenting to the proposed mode of payment, in failing to make objection in any form to the tender as made, and in doing all this in bad faith, to lull the plaintiffs into a fancied security, with the end in view of declaring a forfeiture and forcing a sale of their property—that these acts and this conduct are sufficient to induce a court of equity to relieve against the forfeiture, and to compel defendant Bradbury to accept, in full satisfaction of his demand, the amount due and payable upon the 24th day of October, which amount the plaintiffs then and ever since have stood ready, willing, and able to pay. It is based upon the equitable principle, often invoked and as often upheld, that equity will refuse to enforce a forfeiture at the instance of one who has obtained the strictly legal right to it by fraud, deceit, or any other form of oppressive practice; and, upon the other hand, will relieve the innocent when such a forfeiture so secured is sought to be enforced. De Groot v. McCotter, 19 N. J. Eq. 531; Adams v. Rutherford, 13 Or. 78, 8 Pac. 896; Broderick v. Smith, 26 Barb. (N. Y.) 539; Noyes v. Clark, 7 Paige (N. Y.) 179, 32 Am. Dec. 620; Moore v. Sargent (Ind. Sup.) 14 N. E. 466; Wilcox v. Allen, 36 Mich. 160; Bennett v. Stevenson, 53 N. Y. 508. All of this is in consonance with the language and spirit of section 1511 of our Civil Code, which declares that want of performance of an obligation, or any delay therein, is excused, when such performance is prevented or delayed by the act of the creditor. The findings of the court go both to the good faith, the willingness, and the ability of the plaintiffs to pay, and equally to the bad faith of the defendant William B. Bradbury in seeking to avoid the payment. The judgment which the court rendered restores to Bradbury everything of value with which he parted, and that with interest, and, upon the other hand, saves to the plaintiffs the property which is legally and justly theirs.

The judgment appealed from is therefore affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

3 Cal. App. 237

Ex parte SAUER.

(Court of Appeal, Second District, California. March 13, 1906.)

COURTS—DISTRICT COURT OF APPEALS—NUMBER OF JUDGES NECESSARY TO ADJUDICATION.

Where three justices of the District Court of Appeals fail to agree in a proceeding for a writ of habeas corpus for the discharge of one held under an extradition warrant, the writ must be deemed denied, under Const. art. 6, § 4, providing that the concurrence of three justices shall be necessary to pronounce a judgment.

Application of Charles F. Sauer for a writ of habeas corpus. Writ denied.

Hutton & Williams, Bowen & Miller, and Davis, Rush & Willis, for petitioner. J. D. Fredericks, Dist. Atty., and E. J. Fleming, Deputy Dist. Atty., for respondent.

PER CURIAM. This is a petition of Charles F. Sauer for a writ of habeas corpus to John W. Tobin, state agent of Texas, by whom it is alleged that Marguerite Sauer is unlawfully restrained of her liberty.

The majority of the court is of the opinion that the prisoner is in the lawful custody of Tobin, the state agent of Texas, under a warrant for her extradition duly issued by the Governor of this state, and that she ought not to be discharged. Mr. Justice SMITH dissents, for the reason that the certificate of the clerk to the so-called indictment attached to the Governor's warrant is invalid for any purpose for lack of due authentication by the seal of the court, and that this defect is not supplied by the certificate of the Governor. The court is, therefore, unable to concur in a judgment, either for remanding the prisoner or discharging her, but is of the opinion, on the authority of the decision in the case of Ex parte Oates (Cal.App.) 83 Pac. 261, that under article 6, § 4, of the Constitution, the writ must be regarded as denied, and it is so ordered.

It is further ordered that upon the return of the prisoner to the custody of the state agent of Texas, or upon his resumption of her custody, the order for bail pending the proceedings be discharged, and the money deposited by her in lieu of bail be returned to her by the clerk of this court.

3 Cal. App. 235

FLINN et al. v. PETERS et al.

(Court of Appeal, First District, California. March 13, 1906.)

1. MUNICIPAL CORPORATIONS—STREET ASSESSMENTS—LIEN—FORECLOSURE — DEFENSES — VALIDITY OF CONTRACT.

Where in an action to foreclose a street assessment lien it did not appear that the specifications or notices for bids for the work contained any statement that the person to whom the contract should be let would be required to make a contract containing a clause fixing the maximum hours of labor and the minimum daily pay of laborers, and no objection was made either to the board of supervisors or the board of public works as to the regularity of the notices or specifications, the contract having been regularly let to the lowest bidder, it was no defense that the contract in fact contained a clause so regulating the pay and hours of labor of employés of the contractor.

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by James J. Flinn and another against Maria Peters and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Otto tum Suden, for appellants. D. H. Whittemore, for respondents.

COOPER, J. Action to foreclose a street assessment lien. Defendants filed a demurrer to the complaint, which was overruled, and judgment entered for plaintiff as prayed. This appeal is from the judgment, and the sole contention of appellants is that the alleged contract is void, because of the following allegation in the complaint: "that said contract also provided that in the performance of the same eight hours should be the maximum hours of labor on any calendar day, and that the minimum wages of laborers employed by said contractors, in the execution of said contract should be $2 per day."

It is argued that the above provision was placed in the contract because of that portion of section 1 of chapter 3 of article 2 of the charter, which provides: "Every contract for work to be performed for the city must provide that in the performance of the contract eight hours shall be the maximum hours of labor on any calendar day, and that the minimum wages of laborers employed by the contractor in the execution of this contract shall be two dollars a day. Any contract for work to be performed for the city and county which does not comply with the provisions of this section shall be null and void," and that such provision of the charter is unconstitutional, for the reason that it deprives parties of the free right to contract as to wages and the hours which shall constitute a day's work. But if it be conceded for the purposes of this case that the contract was for work to be performed for the city and county, and that the provision of the charter is unconstitutional and void, we think the complaint states facts sufficient to constitute a cause of action against these defendants. It is alleged in the complaint that the resolution of intention, the publication of the notice, the description of the work to be performed, the plans and specifications, the posting of notices, and all other matters in regard to the assessment, were regular. There is nothing to show that the specifications or the notices for bids contained any statement that the person to whom the contract should be let would be required to make a contract with the objectionable clause as to hours of labor and as to minimum wages therein. The plaintiffs were the lowest bidders for the contemplated street improvements. No objection was made in any way to the board of public works, or to the board of supervisors, as to regularity of the notices or specifications. The contract having been thus regularly let to the lowest bidder, it was no concern of the defendants as to any provision of the contract solely affecting the cost of the improvements to the contractor. It is not a matter of concern to the defendants as to the wages paid by the contractor, and the number of hours the laborers should work per day. Williams v. Sav. & Loan Socy., 97 Cal. 122, 31 Pac. 908; United States v. Martin, 94 U. S. 400, 24 L. Ed. 128.

The case of Brown v. Jenks, 98 Cal. 10, 32 Pac. 701, does not support the defendant's theory. In that case the specifications required the contractor to give a bond with two sureties, conditioned for keeping the streets so improved in thorough repair for five years. It is evident that no one could afford to take a contract with such provision in it for as small a sum as he could without it. As the city council had no authority to require any such future contract for keeping the streets in repair by the person to whom the contract was let, the burden of the property owner was increased by such requirement. Here there is no additional burden cast upon the property owner. There is nothing tending to show that the call for bids stated that the contract should contain any provision as to the hours of labor or the wages to be paid to laborers. There is nothing to show that the board of public works required any such provision to be inserted in the contract. The provision, for aught that appears, may have been voluntarily inserted by the contractor.

The judgment is affirmed.

We concur: HARRISON, P. J.; HALL, J.

3 Cal. App. 229

BOWLEY v. MANGRUM & OTTER.

(Court of Appeals, First District, California. March 13, 1906.)

1. MUNICIPAL CORPORATIONS — SIDEWALKS — OBSTRUCTIONS—LIABILITY OF PERSONS CAUSING OBSTRUCTION.

A pedestrian who was injured by the opening of trap elevator doors in the sidewalk by the raising of the elevator was not guilty of negligence in stepping on the doors while walking along the sidewalk, before they had started to open.

2. SAME—EVIDENCE—NEGLIGENCE—FINDINGS.

Plaintiff was injured by being thrown to a sidewalk by the opening of certain trap elevator doors therein by the raising of the elevator. He testified that the doors were not rising when he put his foot on them, and defendant's elevator operator stated that according to defendant's rule he sent his assistant to give the signal, "a tap of the foot," and after sufficient time had elapsed the operator heard what he supposed was his assistant's "tap" and so started the elevator; that after he had started it there seemed a slipping or shuffling of feet off the elevator door, whereupon he directly lowered the elevator. *Held*, that such facts justified a finding that the operator was negligent in mistaking plaintiff's step on the trap door for the signal of his assistant, or that he was negligent in using "the tap of the foot" as a signal for which the step of a person passing over the door might readily be mistaken.

3. SAME—OBTRUCTIONS IN STREET—CARE REQUIRED.

Where defendant maintained trap elevator doors in the sidewalk of a city street adjacent to its place of business. it was bound to use the greatest care and caution in the operation thereof.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1684.]

4. SAME—RES IPSA LOQUITUR.

In an action for injuries to plaintiff by being thrown to a sidewalk by the sudden raising of trap elevator doors in the sidewalk over which plaintiff was passing at the time, it having been admitted that the doors were raised by defendants' servants, it was proper for the court to refuse to charge that defendants' negligence could not be presumed from the happening of the accident.

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by Patrick Kelly, revived after his death in the name of D. B. Bowley, his administrator, against Mangrum & Otter, a corporation. From an order denying defendants' motion for new trial after verdict for plaintiff, it appeals. Affirmed.

Jesse W. Lilienthal and H. G. W. Dinkelspiel, for appellant. F. V. Meyers, for respondent.

HALL, J. This is an action brought by Patrick Kelly for damages for injuries to his person, alleged to have been caused by the negligent opening by defendant of double iron doors in the sidewalk and over an elevator shaft under the sidewalk, whereby plaintiff was violently thrown against the sidewalk, and his ribs fractured and his person other wise injured. Plaintiff secured a verdict, and the defendant appeals from the order denying its motion for a new trial. Kelly has died since the trial, and the administrator of his estate has been substituted as plaintiff, but when we refer to the plaintiff in this opinion we mean thereby said Kelly.

At the close of the plaintiff's case defendant moved for a nonsuit upon the grounds that plaintiff had not shown negligence on the part of defendant, and that he had shown contributory negligence on his own part. The motion was denied, and the defendant introduced evidence in support of its defense, and now insists that the evidence is not sufficient to sustain the verdict in this, that it does not show negligence on the part of defendant, and does show contributory negligence on the part of plaintiff. The doors in question are over an elevator shaft under the sidewalk upon Market street, and at the time of the accident the elevator was being operated and used by defendant. The doors cover the shaft, and are about 6½ feet square, and open east and west on hinges, and are opened or raised by a bar attached to the elevator that comes up and strikes them. The accident happened about 1 o'clock on the afternoon of a wet, drizzly day. Plaintiff was passing along the sidewalk, and as he was passing over the doors they were opened without any warning, and he was thrown down and hurt. There is some confusion in plaintiff's testimony as to whether or not he stepped on the doors before they commenced to rise. While he explicitly stated that the doors were not rising when he put his foot on them, he did say, upon cross examination, that they must have been rising when he stepped on them. This latter answer seems to have been based upon his conclusions rather than actual knowledge. On the other hand, the witness Meyers, who was operating the elevator for the defendant, testified that, pursuant to a rule of the house, he sent his assistant up "to give the signal, a tap of the foot, and after I gave him sufficient time I heard what I supposed was his tap, and so I started the elevator, and after I started it it seemed as if there was slipping and shuffling of feet off the elevator doors, and I directly lowered it and came upstairs. I thought it was the signal."

From this testimony, given by the witness for defendant who operated the elevator, it is quite certain that plaintiff had stepped upon the elevator before the doors were started. If this were the fact plaintiff was not guilty of negligence in so doing unless we are to hold that the walking over trapdoors in sidewalks is per se negligence. It certainly is not. Appellant lays stress upon certain evidence that there elapsed about two seconds between the time plaintiff stepped on the doors and the raising of the doors, and that he could in that time have passed over the doors. Any deduction that might be made upon any estimate of a period of time of two seconds duration given by a witness is too unreliable to merit consideration. Upon the other hand, the jury might well say that defendant's employé was negligent in mistaking the step or footfall of plaintiff upon the trapdoor for the prearranged signal of his assistant, or that defendant was negligent in using a signal, "the tap of the foot," for which the step of a person passing over the door might so readily be mistaken. It may be remarked here that so far as the record shows, this assistant to the man operating the elevator never reached the sidewalk. The evidence was sufficient to justify the verdict, which conclusion also disposes of the point concerning the motion for a nonsuit. Russell v. Pacific Can Co., 116 Cal. 527, 48 Pac. 616; Higgins v. Ragsdale, 83 Cal. 219, 23 Pac. 316; Vaca Valley City R. R. v. Mansfield, 84 Cal. 560, 24 Pac. 145; Schlessinger v. Mallard, 70 Cal. 326, 11 Pac. 728; Perkins v. Thornburgh, 10 Cal. 190.

The trial court instructed the jury as follows: "A person causing an opening to be made in, or an obstruction to be on, the surface of a thoroughfare or public sidewalk where people are constantly traveling, and have an undoubted right to travel, is required by the law to use more than ordinary care, and to exercise the greatest care and caution while causing or maintaining such opening or obstruction, to the end that the same may not cause injury to travelers;" and refused several instructions asked by defendant to the effect that defendant was bound to run and operate its elevator with ordinary care, "that is, with the care that the ordinary prudent man would have exercised under similar circumstances." As stated by counsel for appellant in his oral argument (of which we have been furnished a printed copy), the question presented by these rulings is "whether defendant was held to the exercise of a reasonable or ordinary amount of care, or the greatest care." It is shown without any conflict that the trapdoor, the raising of which caused the accident, is situated in a public sidewalk on Market street, near First street, in the city of San Francisco. Respondent, to support the instruction given, particularly relies on Dixon v. Pluns, 98 Cal. 388, 33 Pac. 268, 20 L. R. A. 698, 35 Am. St. Rep. 180, and Knott v. McGilvray, 124 Cal. 131, 56 Pac. 789.

In Dixon v. Pluns, the plaintiff had been injured by the falling of a chisel from a scaffolding above the sidewalk upon which plaintiff was walking. The court, in discussing the sufficiency of the evidence to warrant a verdict against defendant, said: "Respondent's evidence also established a prima facie case of negligence upon the part of the appellant. He was engaged with tools and materials directly over a thoroughfare where people were constantly traveling and had an undoubted right to travel. Under such circumstances the law demanded of him more than ordinary care. He was called upon to exercise the greatest care and caution in the performance of his work in order that travelers might not be injured. The injury was received at the hands of appellant by the dropping of the chisel while respondent was walking upon the public street. Under the foregoing circumstances the court was justified in submitting the case to the jury." The court was discussing the sufficiency of the evidence to warrant submitting the case to the jury; and although it laid down a rule as to the degree of care required of defendant, it might be urged that on this question the case is not of controlling authority. But in the subsequent case of Knott v. McGilvray, supra, where plaintiff's husband was killed by the falling of a scantling from a building to the sidewalk, the court instructed the jury as follows: "Upon this subject the Supreme Court have said that where one is engaged with tools and materials directly over the thoroughfare where people are constantly traveling, and have an undoubted right to travel, under such circumstances the law demanded of such party more than ordinary care. Such party is bound, under such circumstances, to exercise the greatest care and caution in the performance of his work, in order that travelers may not be injured;" and the instruction was approved as a correct statement of the law. If a person handling tools and materials on a platform above a sidewalk, where people are constantly traveling, is held to the exercise of the greatest care, it is difficult to see why the same degree of care should not be required of a person engaged in opening a trap door in the sidewalk; the operator being under the sidewalk and quite concealed from the view of persons on the sidewalk. While the instruction given speaks generally of the care required of a person causing an opening in the sidewalk, it must be considered in view of the undisputed and admitted facts that the person causing the opening in this case was engaged in opening a trapdoor in the sidewalk from a station underneath the sidewalk, where he was concealed from the sight of passers-by. See, also, Barry v. Terkildsen, 72 Cal. 254, 13 Pac. 657, 1 Am. St. Rep. 55.

In Rider v. Clark, 132 Cal. 388, 64 Pac. 564, the only question involved was as to whether the landlord was liable for the negligence of his tenant in having the doors open. While we have examined the cases from other states cited by appellant, most of which concern the liability of municipalities in keeping highways in repair, we think the two California cases above cited are controlling, and that therefore the court did not err in giving and refusing the instructions now under discussion. The court also refused to give an instruction requested by defendant, to the effect that negligence of defendant could not be presumed from the happening of the accident. In this we do not think the court erred. The court did not instruct the jury that they might presume negligence from the happening of the accident, but simply refused to instruct them that they could not.

The rule of res ispa loquitur is founded upon the doctrine of probabilities. As was said in Judson v. Giant Powder Co., 107 Cal. 556, 40 Pac. 1021, 29 L. R. A. 718, 48 Am. St. Rep. 146, "The presumption arises from the inherent nature and character of the act causing the injury. Presumptions arise from the doctrine of probabilities. The future is measured and weighed by the past, and presumptions are created from the experience of the past." Shearman and Redfield on Negligence (section 60) lay down the rule in these words: "When a thing that causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." To the same effect are Dixon v. Pluns, 98 Cal. 384, 33 Pac. 268, 20 L. R. A. 698, 35 Am. St. Rep. 180, Johnson v. Walsh (Minn.) 85 N. W. 910, and Judson v. Giant Powder Co., 107 Cal. 556, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146, where the rule is fully discussed and cases collated. It having been admitted that the trapdoors were raised by the servant of the defendant, proof that the accident was caused thereby brought the case within the rule above quoted from Shearman and Redfield, at least to that extent that it was not permissible for the court to instruct the jury that they could not presume or infer negligence by the defendant from the accident.

This disposes of the points specially urged by appellants, and we have also examined with care the other points raised in its brief, but find no error in any of the rulings complained of.

The order is affirmed.

We concur: HARRISON, P. J.; COOPER, J.

3 Cal. App. 241

Ex parte CONNER.

(Court of Appeal, Second District, California. March 14, 1906.)

Criminal Law—Warrant—Deposition of Informer—Information—Sufficiency.

Where the deposition of the informer was not taken by the justice before issuing the warrant for defendant's arrest on the charge of threatening to commit an offense against the person of another, and the written information did not show the facts necessary to justify the issue of the warrant, defendant was entitled to be discharged.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 415.]

Application by Thomas Conner for a writ of habeas corpus. Petitioner ordered discharged.

Henry E. Wills and James D. Reymert, for petitioner. J. D. Fredericks, Dist. Atty., and Paul J. McCormick, Deputy Dist. Atty., for respondent.

SMITH, J. The prisoner was arrested under a warrant issued by a justice on the information of Clemenia T. Hill, that he had threatened to commit an offense against the person of another, and on being brought before the justice was ordered to give bond in the sum of $500 to the people of the state to keep the peace, etc., and in case of failure, to be imprisoned in the county jail for a period not to exceed six months; and, having failed to give the bond, he is now in custody of the sheriff under a warrant of commitment, to be held until the bond shall be given, or until the expiration of the six months referred to. The deposition of the informer was not taken by the justice before issuing the warrant, nor do we think the written information verified by her shows the facts necessary to justify the issue of the warrant.

We are of the opinion, therefore, that the prisoner must be discharged; and it is so ordered.

We concur: GRAY, P. J.; ALLEN, J.

3 Cal. App. 239

DEPAULI v. ESPITALLIER (RILONG, Intervener).

(Court of Appeal, Second District, California. March 14, 1906.)

Bankruptcy — Action Against Insolvent—Intervention by Creditor.

Where one has been adjudged a bankrupt, but there is as yet no assignee, any creditor may maintain an action in any competent tribunal, either in an original suit or by way of intervention to prevent the trust fund from being fraudulently appropriated.

Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by James L. Depauli against Francois Espitallier, in which Louis Rilong intervenes. From a judgment against the defendant and in favor of plaintiff, intervener appeals. Reversed.

J. W. Wiley, for appellant. C. L. Claflin, for respondent.

SMITH, J. This is a suit to foreclose a chattel mortgage of date February 27, 1902, for the sum of $6,000, etc. The complaint was filed February 4, 1904, and the defendant made default. The appellant is the holder of a note made to him by the defendant for the sum of $1,134.56 of date December 18, 1899, and having commenced his action January 2, 1904, and having recovered judgment against the defendant for $988.61 February 11, 1904, he filed his complaint in intervention in this case February 14, 1904. The complaint in intervention, besides the above facts, alleges: That in a proceeding in bankruptcy pending in the District Court of the United States for the Southern District of California, the defendant was adjudged a bankrupt; that no assignee has as yet been elected by the creditors, and that none can be or will be appointed until after the time at which judgment may be entered in this case, etc.; that the mortgage in suit was given in the sum of $6,000 to secure an indebtedness not greater than $2,000, and with the design and purpose of hindering, delaying, and defrauding the intervener and other creditors of the defendant; and, finally, that the suit was brought with the consent and connivance and at the request of the defendant with like intent and purpose. To this complaint a demurrer was interposed, and on March 22, 1904, the demurrer was sustained and judgment by default entered against the defendant, from which the intervener appeals.

The question involved is as to the sufficiency of the intervener's complaint. The objection urged to it is that the intervener, being a mere general creditor, has not such an interest in the property involved as to entitle him to intervene. But the intervener's case is something more than that of a general creditor. By the adjudication of the insolvency of the defendant, the property of the insolvent came into the hands of the court for disposition, and thus became a trust fund, in which every creditor of the defendant has a special interest or lien (Rued v. Cooper, 109 Cal. 683, 34 Pac. 98; Argues v. Union Savings Bank, 133 Cal. 139, 65 Pac. 307; Richardson v. Green, 133 U. S. 44, 10 Sup. Ct. 280, 33 L. Ed. 516), and we have no doubt that any of the creditors under such circumstances may maintain his action in any competent tribunal, either in an original suit or by way of intervention, to prevent the trust fund from being fraudulently appropriated (Brandenburg on Bankruptcy, § 1019); nor is the right of a creditor under the circumstances appearing in this case in any way affected by the fact that he may, if deemed convenient, apply in a bankruptcy court for a stay of proceedings.

Judgment reversed.

We concur: GRAY, P. J.; ALLEN, J.

3 Cal. App. 246

BUCHTEL COLLEGE v. CHAMBERLIN et al.

(Court of Appeal, Second District, California. March 15, 1906.)

1. CONTRACTS—OFFER AND ACCEPTANCE.

Plaintiff college offered in writing to deceased to establish in her name, and for the benefit of herself and her heirs, a perpetual scholarship in the college, to be issued at her death, if she would execute to the college her note for $1,000, to be paid on her death. Deceased subsequently executed a memorandum by which she agreed to pay the college $1,000 at her decease to found for herself and her heirs a perpetual scholarship in such college. *Held*, that there was an offer and acceptance, constituting a valid contract.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 71-93.]

2. SAME—CONSIDERATION.

The agreement of the college to establish a scholarship at decedent's death for the benefit of herself and her heirs constituted a sufficient consideration for her promise.

3. SAME—TIME OF PERFORMANCE.

Such contract was not rendered invalid because it was only performable after the subscriber's decease.

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by the Buchtel College against Frances A. Chamberlin, as executrix, and W. R. Guy, as executor, of the last will of Anna A. Johnson, deceased. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Mills & Hizar, for appellant. W. R. Guy, for respondents.

SMITH, J. In this case judgment was rendered against the plaintiff on demurrer to the complaint. The complaint, besides other appropriate allegations, contains the following statement of the transaction out of which the alleged cause of action grew: "That on or about the 14th day of July, 1884, said Buchtel College proposed and offered in writing to the said Anna A. Johnson, that it would establish in the name of said Anna A. Johnson, and for her benefit, and the benefit of her heirs, a perpetual scholarship in said Buchtel College, the same to be issued at her death, if said Anna A. Johnson would execute to the said Buchtel College her promissory note in the sum of $1,000.00 to be paid at Akron, Ohio, on her death. That on or about said 14th day of July, 1884, said Anna A. Johnson accepted the said offer and proposal so made by said Buchtel College by executing and delivering to the said Buchtel College her promissory note to the date aforesaid, in words and figures following, to wit: '$1,000.00 Akron, Ohio, July 14th, 1884. This memorandum witnesseth that I Anna A. Johnson, of Bay City, in the State of Michigan, do hereby agree and promise to pay to Buchtel College, located in the city of Akron, one thousand dollars, to be paid at my decease, for the purpose of founding and securing for myself and heirs a perpetual scholarship in said college. This obligation being given in lieu of a like provision in my last will and testament. Anna A. Johnson.'" It is further alleged, in effect, that the terms of the contract as alleged had been fully performed by the plaintiff, and that the claim of plaintiff had been duly presented for approval to the executors, who rejected the claim for the reason thereon indorsed, which is as follows: "Even if Miss Johnson signed the instrument upon which the above-mentioned claim is based, we do not think it a legal charge against her estate for the reason that, if a contract, it is without consideration, and if a gift, there was no transfer or delivery of the thing given."

The only question involved is as to the sufficiency of the complaint to show a valid contract; and this question, we think, can be answered only in the affirmative. The proposition of the plaintiff is clearly and unequivocally stated, as is also the acceptance of the proposition by the defendants' testatrix. These constitute the essential elements of a contract, and the agreement of the plaintiff was a sufficient consideration. Civ. Code, §§ 1605, 1609, et seq. Nor was the validity of Miss Johnson's contract affected by the time provided for performance. It has frequently been held, with regard even to negotiable promissory notes, that they may be made payable after decease. 1 Daniel on Negotiable Instruments, § 46. And the principle will apply a fortiori to ordinary contracts.

For these reasons, the judgment appealed from must be reversed, and the cause remanded, with directions to the lower court to overrule the demurrer to the complaint, and it is so ordered.

We concur: GRAY, P. J.; ALLEN, J.

3 Cal. App. 242

SANFORD v. MAXWELL et al.

(Court of Appeal, Second District, California. March 15, 1906.)

1. PUBLIC LANDS—LANDS OF STATES—SETTLEMENT—FINDINGS—INCONSISTENCY.

Where, in a contest of purchasers of public land, the court found that plaintiff had been and was an actual bona fide settler on the land, but also found that plaintiff had never been in actual possession thereof, such findings would be construed to mean that plaintiff had made a bona fide settlement on the land without actual possession of more than his house and its environs, in order to reconcile the findings.

2. SAME—STATUTES—CONSTRUCTION.

Const. art. 17, § 3, provides that lands belonging to the state which are suitable for cultivation shall be granted only to actual settlers, and in quantity not exceeding 320 acres to each settler, and Pol. Code, § 3495, declares that any smallest legal subdivision of school lands shall be deemed suitable for cultivation if any part not less than one-half of its area will, without artificial irrigation, but with or without the clearing of timber or other growth therefrom, by the ordinary processes of tillage, produce ordinary agricultural crops in average quantity. *Held*, that such provision of section 3495 was not intended to construe the constitutional provision further than to affirmatively provide that every legal subdivision coming within the description should be regarded as suitable for cultivation, nor as providing that land not coming within the description should be held not suitable for cultivation.

3. SAME—ACTUAL SETTLERS.

Under Const. art. 17, § 3, providing that school lands suitable for cultivation shall be granted only to actual settlers, such land cannot be conveyed to others than actual settlers in case any part of the land in each subdivision of the land in question is suitable for cultivation.

4. SAME—EXTENT OF CULTIVATION.

Const. art. 17, § 2, declares that the holding of large tracts of land, uncultivated and unimproved, by individuals or corporations, is against the public interest and should be discouraged by all means not inconsistent with the rights of private property, and section 3 provides that lands belonging to the state, which are suitable for cultivation, shall be granted only to actual settlers and in quantities not exceeding 320 acres to each settler. *Held*, that the term "suitable for cultivation" must be construed as applying to all tracts of land suitable for settlement of homes, and hence that a tract was subject to grant to an actual settler where nearly a third thereof was susceptible of ordinary cultivation; the purchaser being entitled to use the other lands of the tract for pasturage or otherwise.

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by James Sanford against Edmund L. Maxwell and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

William Shipsey, for appellant. McD. R. Venable, for respondents.

SMITH, J. Plaintiffs and defendants are applicants for the purchase of the subdivisions of land described in the complaint, aggregating 268.80 acres, all of which have been listed to the state; and upon the demand of the plaintiff the contest thus arising was referred to the lower court. It is alleged in the complaint, and in the affidavit filed in the surveyor general's office and attached to the complaint as part thereof, among other things: (1) That ever since June 17, 1901, "paintiff has been and now is an actual bona fide settler thereon"; (2) that the land "is, and at all times herein mentioned was, suitable for cultivation"; and (3) that "more than one-half of each legal subdivision thereof was and is suitable for cultivation," etc. In the answer, besides denials, it is alleged: (1) That the plaintiff is not now and never has been in the actual possession of said land; (2) that "said land is not suitable for cultivation"; and (3) "that no legal subdivision of said land is, or at any time has been, suitable for cultivation within the meaning of section 3495 of the Political Code." The applications of the parties are in due form and sufficient, otherwise than as affected by the facts at issue as above stated.

The court finds the allegations of the complaint as to plaintiff's settlement on the land to be true, and it also finds the allegation of the answer to be true, that the plaintiff has never been in actual possession of said land. But the two facts are not inconsistent, for there may be a bona fide settlement on land without actual possession of more than the settler's house and its environs; and to reconcile the findings we must suppose that the finding of the court as to the actual possession refers to the land as a whole. The issues raised by the third allegation of the complaint and the corresponding allegation of the answer relate evidently to the proviso in section 3495 of the Political Code, which is "that any smallest legal subdivision of school lands shall be deemed suitable for cultivation if any part not less than one-half of its area will, without artificial irrigation, but with or without the clearing of timber or other growth therefrom, by the ordinary processes of tillage, produce ordinary agricultural crops in average quantity," etc. The finding of the court on these issues is, in effect, that in each subdivision there are small areas of open land, clear of brush, etc., and that the subdivision may be further cleared, "more or less, so as to be capable of cultivation by ordinary process of tillage by plowing," but that in no subdivision can more than half of the area be so cultivated. But the proviso in section 3495 cited is not to be regarded as intended in any way to construe the provisions of section 3, art. 17, of the Constitution, further than to provide affirmatively that every legal subdivision coming within the description shall be regarded as "suitable for cultivation"; nor is it to be construed as providing that land not coming within the description shall be held to be not "suitable for cultivation." Otherwise, the act would be unconstitutional. Fulton v. Brannan, 88 Cal. 456, 26 Pac. 506; Albert v. Hobler, 111 Cal. 400, 43 Pac. 1104. It is clear, therefore, that so far as the plaintiff's case is concerned, this issue and the corresponding finding is to be regarded as immaterial. But with regard to the defendants' case it is otherwise. For by the provision of the Constitution cited it is expressly provided that lands "belonging to this state which are suitable for cultivation shall be granted only to actual settlers," which is, in effect, to prohibit the granting of such lands to the defendants; and, as it is found that some portion of the lands in each subdivision of the land in question is "suitable for cultivation," it follows that the judgment in favor of the defendants cannot be sustained.

This leaves us to consider only the plaintiff's case, which requires for its support the affirmative fact that the lands in question are "suitable for cultivation" in the sense of that term as used in the Constitution; and the question is, whether upon the findings of the court this fact appears. On this point, besides the finding already stated and a finding as to the general character of the land, it is found that "as a whole not more than one-third of the area of the whole tract is capable of cultivation by following the ordinary processes of tillage, the other two-thirds [being] rocky, mountainous, and totally unsuitable for cultivation." There are some other findings of a general character, that the land in question is "not suitable for cultivation." But these we take to be mere conclusions of law from the finding of specific facts, which we think are to be construed as finding that about a third of the area of the whole tract, and about a half of some of the subdivisions and some portions of the others, "is capable of cultivation by following the ordinary processes of tillage by plowing." In considering the question thus presented we may disregard the findings as to the character of the several subdivisions and confine ourselves to the finding as to the character of the land in controversy as a whole; and the specific question thus presented is whether a tract of land of which a third, or something in the neighborhood of a third, is susceptible of ordinary cultivation is or is not to be regarded as coming within the description of the constitutional provision. To this question we are of the opinion that an affirmative answer must be given. By section 2 of the article cited it is provided: "The holding of large tracts of land, uncultivated and unimproved, by individuals or corporations, is against the public interest, and should be discouraged by all means not inconsistent with the rights of private property." From this, and the provisions of section 3, "it must be manifest that it was intended that all lands within this state should, so far as governmental action could accomplish it without violating private rights, be held in small tracts, and constitute homes for its owners." Fulton v. Brannan, 88 Cal. 456, 26 Pac. 506. Hence, construing the constitutional provisions in the light of the policy thus declared, we think the words "suitable for cultivation" must be held to apply to all tracts of land suitable for settlement or homes, or, in other words, all tracts of land on which there is arable or tillable land sufficient, with the use of the other lands of the tract for pasturage or otherwise, to furnish a permanent support to the settler. Accordingly, it is said in Jacobs v. Walker, 90 Cal 47, 48, 27 Pac. 49, the question, then, is, was the land, or some portion of it (i. e., sufficient in the sense above indicated) suitable for cultivation?" And we think we must say, as said in that case, "the finding is of somewhat doubtful import, but, as we construe it, we think the question must be answered in the affirmative."

For these reasons, the judgment appealed from must be reversed, and the cause remanded, with directions to enter judgment in favor of the plaintiff; and it is so ordered.

We concur: GRAY, P. J.; ALLEN, J.

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3 Cal. App. 248

HEWEL v. HOGIN, Treasurer of Modesto Irr. Dist.

(Court of Appeal, Third District, California. Nov. 17, 1905. On Rehearing, March 15, 1906.)

1. APPEAL — FAILURE TO URGE OBJECTIONS — ERROR WAIVED.

Only such points as are discussed and argued in the briefs will be reviewed on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4256–4261.]

2. SAME—PRESUMPTIONS—RULING ON APPLICATION TO AMEND PLEADING.

Where the statute of limitations was not raised by answer or demurrer, the failure of the court, after clearly indicating that defendant's application for leave to amend in this particular, made during the trial, would be denied, to make any formal or final ruling was not reversible error, as it would be assumed that the application was denied.

3. LIMITATION OF ACTIONS — PLEADING — AMENDMENT.

Where the petition for a writ of mandate, to compel defendant, as treasurer of an irrigation district, to pay interest coupons on bonds issued by the district, did not show when the money applicable to the payment of the coupons came into defendants' hands, and the answer averred that no funds were, at any time, available for such purpose, the refusal of permission to amend by pleading the statute of limitations was not an abuse of discretion.

4. SAME—NECESSITY OF PLEADING STATUTE.

Under Code Civ. Proc. § 1094, providing that if no answer be made the case must be heard on the papers of the applicant, and that if the answer raises only questions of law or puts in issue immaterial statements not affecting the substantial rights of the parties the court must proceed to hear or fix a day for hearing the argument of the case, the court was not obliged to consider the defense of the statute of limitations, where the same was not pleaded.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 678–680.]

5. PLEADING—DENIAL ON INFORMATION AND BELIEF.

An answer to a petition for a writ of mandate to compel defendant, as treasurer of an irrigation district, to pay interest coupons on bonds issued by the district, denying on information and belief that the board of directors ever levied an assessment for the purpose of paying the bonds and coupons, was insufficient.

6. WATERS AND WATER COURSES—IRRIGATION BONDS—INTEREST COUPONS—PAYMENT.

Where, on the hearing of a petition for writ of mandate to compel defendant as treasurer of an irrigation district to pay interest coupons on 6 per cent. bonds issued by the district, it appeared that when plaintiff demanded payment there was in the bond fund a sum sufficient for the payment, that assessments were levied by resolution of the board of directors for the purpose of paying interest on outstanding 5 and 6 per cent. bonds of the district, and that the balance in the bond fund was a portion of the money collected for this purpose, there was evidence showing that defendant had in his hands available funds for paying plaintiff's demands.

7. Evidence—Parol Evidence.

It was not error to exclude parol testimony showing that the purpose of the assessments was different from that declared in the resolutions of the board adopted when the assessments were levied.

8. Waters and Water Courses—Irrigation Bonds—Interest—Payment.

Where bonds and interest coupons issued by an irrigation district had not been refunded, the board of directors could not, by transfer to the fund applicable to the payment of interest on refunded bonds immediately after demand for payment by the holder of such interest coupons, defeat his right to have money collected for the purpose applied to such payment.

9. Mandamus — Irrigation Bonds—Compelling Payment of Interest.

Under Code Civ. Proc. § 1085, providing that the writ of mandate may be issued to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station, mandate will lie to compel the treasurer of an irrigation district to pay interest coupons on bonds issued by the district.

10. Same—Trial—Submission of Issues to Jury—Discretion of Court.

Under Code Civ. Proc. § 1090, providing that if the answer raise a question as to a matter of fact essential to the determination of a motion for a writ of mandate and affecting the substantial rights of the parties, etc., the court may in its discretion order the question to be tried before a jury, it was no abuse of discretion, on the hearing of a petition for a writ of mandate to compel defendant, as treasurer of an irrigation district, to pay interest coupons on bonds issued by the district, to refuse to order disputed questions of fact to be tried before a jury.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 106.]

11. Waters and Water Courses—Irrigation Bonds—Interest.

Interest is not collectible on overdue interest coupons on bonds issued by an irrigation district, where no provision therefor is made by the district.

12. Mandamus — Enforcement of Personal Liability.

The personal liability, if any, of the treasurer of an irrigation district for interest on overdue interest coupons on bonds issued by the district, resulting from his failure to pay the interest coupons when presented, cannot be enforced by writ of mandate.

On Rehearing.

13. Statute of Limitations—Personal Privilege—Waiver—Municipal Corporations.

Under Code Civ. Proc. § 1089, providing that on the return of the alternative, or the day on which the application for a writ of mandate is noticed, the party on whom the writ or notice has been served may show cause by answer under oath, made in the same manner as an answer to a complaint in a civil action, and section 1091, providing that on the trial the applicant is not precluded by the answer from any valid objection to its sufficiency and may countervail it by proof either in direct denial or by way of avoidance, the defense of the statute of limitations is a privilege personal to the debtor, and a municipal corporation, in common with other debtors, may waive or avail itself of such defense in any legal proceeding, though, where payment is provided out of a particular fund or in a particular way, the debtor cannot plead the statute without showing that the particular fund has been provided or the method pursued.

14. Same—Setting Up by Demurrer or Answer—Necessity.

Unless the statute of limitations is set up by demurrer or answer in a legal proceeding against a public officer to enforce payment of a claim against a municipality which he represents, the defense is waived.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, § 680.]

15. Pleading—Denial on Information and Belief.

An answer to a petition for a writ of mandate to compel defendant as treasurer of an irrigation district to pay interest coupons on bonds issued by the district, denying knowledge or information sufficient to form a belief whether the coupons were ever signed by the secretary of the district, raised no issue on that point.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 247.]

16. Signatures—Sufficiency of Evidence—Lithographic Signatures.

The lithographic signatures of a secretary of an irrigation district, adopted by him and appearing on the interest coupons on irrigation bonds issued by the district, were sufficient evidence of his signature to such bonds.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Signatures, § 2.]

Appeal from Superior Court, Stanislaus County; W. M. Conley, Judge.

Petition by A. Hewel for writ of mandate against B. P. Hogin, treasurer of the Modesto irrigation district. From a judgment for plaintiff, and from an order denying his motion for a new trial, defendant appeals. Modified, and, as modified, affirmed.

Dennett & Walthall, for appellant. M. O. Minor, for respondent.

McLAUGHLIN, J. In his petition for a writ of mandate herein, the petitioner, by apt averments, set forth the corporate capacity of the district of which defendant is treasurer, the issuance of certain bonds by it, the official character of defendant, and his refusal to pay certain interest coupons upon demand, notwithstanding he had then in his hands, as part of the bond fund, the sum of $10,000. It is particularly alleged that plaintiff owned four bonds of $500 each, which were part of certain bonds issued January 1, 1892, to which were attached interest coupons; that he also owned 12 interest coupons, which were a part of certain bonds issued January 1, 1890; that the interest coupons on said bonds were paid up to January 1, 1897, but not later; that on January 1, 1904, the aggregate sum of $1,096.40 was due him on account of coupons attached to bonds owned by him, and the 12 interest coupons detached from bonds of the prior issue. Of this sum $162.40 was for interest on said coupons after they became due and payable. It is further alleged that the payment of the several sums due on the coupons is a duty resulting from the office of defendant, and that plaintiff is the party beneficially interested in such payment. A general demurrer to this petition was overruled, and defendant, answering, denied every averment of the petition save the corporate character of the district and his official relation thereto. Of these denials all were based on lack of information or belief, save that at the time of the demand there was money in defendant's hands applicable to the payment of the sums claimed. In this connection it is alleged, "upon information and belief," that the board of directors never levied any assessment for the purpose of paying the bonds and coupons held by plaintiff. A demurrer to several special defenses pleaded in the answer was sustained, and the cause was tried on the issues above outlined. Judgment passed for plaintiff, and defendant appeals from the judgment and from the order denying his motion for a new trial.

The statement of the case contains many assignments of error, and numerous specifications of particulars in which the decision is against law; but we will notice only such points as were deemed worthy of discussion and argument in appellant's briefs. Humphrey v. Pope (Cal. App.) 82 Pac. 223; People v. Woon Tuck Wo, 120 Cal. 297, 52 Pac. 833. The first point made relates to the statute of limitations. The question was not raised by demurrer or answer, but during the course of the trial defendant applied to the court for leave to amend his answer in this particular. The court clearly indicated that the application would be denied, but it does not appear that any formal or final ruling was made. It is contended that this failure constituted reversible error, but under the circumstances it must be assumed that the application was denied. Summerville v. Kelliher, 144 Cal. 160, 77 Pac. 889. Anticipating this ruling, it is said that it was an abuse of discretion to refuse permission to amend. It does not appear from the complaint when the money applicable to the payment of these demands came into the hands of the defendant, and the answer contains an averment that no funds were, at any time, available for such purpose. Amendments setting up the bar of the statute of limitations are only allowed in furtherance of justice, and we cannot say that the ends of justice were defeated in this instance by refusing to allow an amendment which contained no affirmative matter, and really amounted to no more than a tardy demurrer to the complaint. Freehill v. Chamberlain, 65 Cal. 604, 4 Pac. 646; Pleasant v. Samuels, 114 Cal. 39, 45 Pac. 998; Wise v. Williams, 72 Cal. 548, 14 Pac. 204; Stuart v. Lander, 16 Cal. 372, 76 Am. Dec. 538; Cooke v. Spears, 2 Cal. 409, 56 Am. Dec. 348; Bank v. Heron, 122 Cal. 109, 54 Pac. 537; Bliss v. Sneath, 119 Cal. 528, 51 Pac. 848; Meyer v. Porter, 65 Cal. 70, 2 Pac. 884. We see no force in the point that the court was compelled to consider such defense, whether it was pleaded or not (Code Civ. Proc. § 1094).

It is next contended that there is no evidence tending to show that the coupons were ever signed by the secretary. It clearly appears that each coupon has the lithographic signature of the secretary and that such signature had been adopted by him. Pennington v. Baehr, 48 Cal. 565; Williams v. McDonald, 58 Cal. 529; McKee v. Vernon, 3 Dill. 210, Fed. Cas. No. 8,851; Grieb v. Cole, 60 Mich. 397, 27 N. W. 579, 1 Am. St. Rep. 533; Mezchen v. More, 54 Wis. 217, 11 N. W. 534. But, waiving this, every intendment aids the judgment and findings, and we are satisfied that there was no issue before the court on this point. The denial is based on information and belief, and we do not think that this form of denial is sufficient. Mulcahy v. Buckley, 100 Cal. 489, 35 Pac. 144; Weill v. Crittenden, 139 Cal. 489, 73 Pac. 238; County of Mendocino v. Peters (Cal. App.) 82 Pac. 1122.

The next point urged is that there is no evidence to show that defendant has in his hands funds available for the purpose of paying the demands in question. It appears that at the time plaintiff demanded payment, there was in the bond fund the sum of $12,442.52. It also appears that assessments were levied by resolution of the board of directors, for the purpose of paying interest on outstanding 5 and 6 per cent. bonds of the district, and that the balance in the bond fund was a portion of the money collected for this purpose. As the bonds held by plaintiff formed a part of the 6 per cent. bond issue, it seems clear that the money in the hands of the treasurer was subject to the payment of the coupons in question. and therefore it cannot be said that there is no evidence to sustain the conclusion of the court in this regard. Carter v. Tilghman, 119 Cal. 106, 51 Pac. 34. Even if the averment on information and belief raised an issue on the point, the court did not err in refusing to allow the defendant to show by parol testimony that the purpose of the assessments was other and different from the purpose as declared in the resolutions adopted by the board of directors at the time the assessments were levied. Nor did it err in refusing to admit the resolution of the board transferring all moneys to the fund applicable to the payment of interest on refunded bonds. The bonds and coupons held by plaintiff had not been refunded, and the board could not, by transfer immediately after his demand was made, defeat plaintiff's right to have money collected for that purpose applied to the payment of the coupons held by him. Carter v. Tilghman, supra; Higgins v. San Diego, 131 Cal. 303, 63 Pac. 470.

We find no error in other rulings on the admissibility of evidence, and it could serve no beneficial purpose to specify and discuss such alleged errors in detail.

Mandate will lie for the enforcement of the right here asserted. Code Civ. Proc. § 1085; Meyer v. Widber, 126 Cal. 254, 58 Pac. 532; Mitchell v. Patterson, 120 Cal. 286, 52 Pac. 589. The defendant had no absolute right to a trial before a jury, and it was no abuse of discretion to refuse to order disputed questions of fact to be so tried. Code Civ. Proc. § 1090; Woods v. Varnum, 85 Cal. 645, 24 Pac. 843; Cassiday v. Sullivan, 64 Cal. 266, 28 Pac. 234.

The plaintiff was not entitled to interest on the interest coupons. Davis v. Porter, 66 Cal. 659, 6 Pac. 746; Bates v. Gerber, 82 Cal. 550, 22 Pac. 1115; Kendall v. Porter, 120 Cal. 108, 45 Pac. 333, 52 Pac. 143; Sawyer v. Colgan, 102 Cal. 293, 36 Pac. 580. No provision of law gives the right to such interest, and the district of which defendant is treasurer has made no provision for the payment of the same. But it is urged that appellant is liable therefor by reason of his failure to pay the interest coupons when presented for payment. If it be conceded that he could, under any circumstances, be liable personally, such liability would be in the nature of a penalty or for damages, and we are of the opinion that this liability cannot be enforced through the medium of a writ of mandate.

The order denying a new trial is therefore affirmed, and the judgment appealed from is hereby modified by deducting therefrom the sum of $162.40, the amount of interest erroneously included therein, and by striking therefrom the provision for interest from the 1st day of January, 1904. As so modified the judgment is hereby affirmed, respondent to pay the costs of this appeal.

We concur: CHIPMAN, P. J.; BUCKLES, J.

On Rehearing.

McLAUGHLIN, J. This is an application for a writ of mandate commanding defendant as treasurer of Modesto irrigation district, to pay the interest on certain bonds. The petition sets forth the corporate organization and capacity of the district, the official relation of defendant thereto, and his refusal to pay certain interest coupons upon demand, notwithstanding that he had sufficient money in his hands available for such purpose. It appears therefrom that plaintiff is the owner and holder of four bonds for $500 each, issued by said district on January 1, 1902, bearing interest at the rate of 6 per cent. per annum, and that certain interest coupons attached to said bonds were due and payable at the time demand for payment was made. That he also owns 12 interest coupons for $15 each, which were detached from bonds for a like sum, bearing interest at the same rate, issued January 1, 1890. The aggregate sum claimed is $1,096.40, of which sum $162.40 is for interest on the interest coupons above mentioned, accruing after said coupons became due and payable. It is alleged generally, that the payment of the several sums included in the total demand is a duty resulting from the office held by defendant, and that the plaintiff is the party beneficially interested in such payment. A general demurrer to the petition was overruled, and the defendant answering, traversed all the averments of the petition, save those relating to the corporate capacity of the district, and defendant's official connection therewith. All of the denials, and most of the affirmative averments, were based on want of information or belief, but it was positively alleged that defendant at no time had in his hands money applicable to the payment of plaintiff's claim. The court sustained a demurrer to several special defenses set up in the answer, and the cause was tried on the pleadings above epitomized. Judgment was entered commanding the defendant to pay the full sum demanded, and he appeals from such judgment and from the order denying his motion for a new trial.

We will notice only the assignments of error and specifications of insufficiency of the evidence discussed in the briefs and argument. Humphrey v. Pope (Cal. App.) 82 Pac. 223; People v. Woon Tuck Wo, 120 Cal. 297, 52 Pac. 833. During the course of the trial, and after the plaintiff had rested his case, the defendant applied to the court for leave to amend his answer by alleging as a separate defense that the cause of action as to several of the coupons was barred by the provisions of section 337 of the Code of Civil Procedure. The court clearly indicated that the application would be denied, but it is insisted that the failure to make an additional formal ruling constitutes reversible error. Under the circumstances, and in view of what was said by the court, it must be assumed that the application was denied. Summerville v. Kelliher, 144 Cal. 160, 77 Pac. 889. There was no abuse of discretion in denying the application to amend. If, according to a contention to be noticed later, the court was bound to pass upon the question suggested in any event, then the amendment was entirely immaterial. If it was necessary to plead the bar of the statute specially, then such amendment amounted to no more than a tardy demurrer to the complaint. Amendments setting up the bar of the statute of limitations are allowed only in furtherance of justice, and we cannot say that the ends of justice were defeated in this instance by refusing to permit the amendment. Wise v. Williams, 72 Cal. 548, 14 Pac. 204; Stuart v. Lander, 16 Cal. 375, 76 Am. Dec. 538; Coake v. Spears, 2 Cal. 412, 56 Am. Dec. 348; Bank v. Heron, 122 Cal. 109, 54 Pac. 537; Bliss v. Sneath, 119 Cal. 528, 51 Pac. 848; Pleasant v. Samuels, 114 Cal. 38, 45 Pac. 998.

It was urged in the petition for rehearing that the facts pleaded and proven show that a number of the interest coupons became due and payable more than four years before the action was commenced, and it is argued that defendant as a public officer was bound to refuse payment as to such coupons. In other words, it is said that under the facts it was not defendant's duty, specially enjoined by law, to pay the "outlawed" coupons. As a conclusion from his premise and argument, counsel for appellant earnestly insists that in a proceeding of this kind against an officer of a municipal corporation, the bar of the statute of limitations is always an issue, whether it is pleaded or not. At the outset, we were impressed by the plausible and able argument of counsel in support of his position, but careful analysis and research have convinced us that the rule is, and should be, the other way. For many years, able lawyers in this state and elsewhere contended that a municipal corporation held its funds as a trustee for those having demands, for the payment of which the money was provided, and that it could not plead the statute of limitations against a person having a claim which was payable out of such funds. It was argued that a municipal corporation, like a bank, was simply the custodian of special funds, holding the same for the benefit of those who were or might be entitled thereto.

It is apparent at a glance that this contention was diametrically opposed to the contention here. The courts, however, declined to adopt that extreme, though reasonable view, and we understand the rule to be that the defense of the statute of limitations is a privilege personal to the debtor, and that a municipal corporation, in common with other debtors, may waive or avail itself of such defense in any legal proceeding. Code Civ. Proc. §§ 1089, 1091; Bates v. Gregory, 89 Cal. 398, 26 Pac. 891; Underhill v. Trustees, 17 Cal. 178; Barnes v. Glide, 117 Cal. 8, 48 Pac. 804, 59 Am. St. Rep. 153. But while this is the general rule, it has been pointedly held, in a case very similar to the case at bar, that "when payment is provided for out of a particular fund, or in a particular way, the debtor cannot plead the statute of limitations without showing that the particular fund has been provided or the method pursued." Sawyer v. Colgan, 102 Cal. 292, 36 Pac. 580. Instead of making any such showing in the proposed amendment, or elsewhere in his pleadings, appellant affirmatively alleged that no fund was at any time provided for the payment of the interest coupons in question. Our attention has not been directed to any statute forbidding payment of such demands after the bar of the statute has intervened, and as all municipal corporations and bodies act through public officers, it follows that, unless the statute of limitations is set up by demurrer or answer, in this or any other legal proceeding against a public officer, the defense must be deemed waived. The resolution adopted by the board of directors in 1903 shows on its face that an assessment was levied to pay the interest on "outstanding 6 per cent. bonds," and it is not pretended that money enough was not paid into the hands of defendant under such assessment to redeem the plaintiff's coupons. It nowhere appears that any money was available for such purpose earlier than 1902. This coupled with the further fact that no pretense is made that the bonds were barred by the statute, makes it certain that defendant was not prejudiced by the ruling refusing his application for leave to amend. Freehill v. Chamberlain, 65 Cal. 604, 4 Pac. 646; Meyer v. Porter, 65 Cal. 74, 2 Pac. 884; Bates v. Gregory, 89 Cal. 392, 26 Pac. 891; Sawyer v. Colgan, 102 Cal. 292, 36 Pac. 580; Barnes v. Glide, 117 Cal. 9, 48 Pac. 804, 59 Am. St. Rep. 153.

It is next contended that there is no evidence tending to show that the coupons were ever signed by the secretary of the irrigation district. As the denials touching this phase of the case are based on information and belief, there was no issue on that point. Mulcahy v. Buckley, 100 Cal. 489, 35 Pac. 144; Weill v. Crittenden, 139 Cal. 489, 73 Pac. 238; County of Mendocino v. Peters, (Cal. App.) 82 Pac. 1122. But as each coupon bears the lithographic signature of the secretary adopted by him, there is nothing in the point, anyway. Pennington v. Baehr, 48 Cal. 565; Williams v. McDonald, 58 Cal. 529; McKee v. Vernon County, 3 Dill. 210, Fed. Cas. No. 8,851; Grieb v. Cole, 60 Mich. 397, 27 N. W. 579, 1 Am. St. Rep. 533; Mezchen v. More, 54 Wis. 217, 11 N. W. 534.

The next point made is that there was no evidence to show that defendant had in his hands money available for the payment of the coupons when demand was made. As the coupons held by plaintiff were for interest on outstanding 6 per cent. bonds, it seems clear that a large portion, at least, of the sum of $12,442.50 in defendant's hands at that time, was available for the purpose of paying them. Carter v. Tilghman, 119 Cal. 106, 51 Pac. 34. The court did not err in refusing to allow the defendant to show by parol testimony that the purpose of the assessment levied was other and different from the purpose as disclosed in the resolutions adopted by the board of directors, at the time the assessment was levied. Nor did it err in refusing to admit the resolution of the board, transferring all moneys to the fund applicable to the payment of the interest on refunded bonds. The bonds and coupons held by plaintiff had not been refunded, and the board could not, by transfer, immediately after his demand was made, defeat plaintiff's right to have money collected for that purpose applied to the payment of the coupons held by him. Carter v. Tilghman, supra; Higgins v. San Diego, 131 Cal. 303, 63 Pac. 470.

We find no error in other rulings on the admissibility of evidence, and it could serve no useful or beneficial purpose to discuss each alleged error in detail.

Mandate will lie for the enforcement of the right here asserted. Code Civ. Proc. § 1085; Meyer v. Widber, 126 Cal. 254, 58 Pac. 532; Mitchell v. Patterson, 120 Cal. 286, 52 Pac. 589. The defendant had no absolute right to a trial by jury, and it was not an abuse of discretion to refuse to allow disputed questions of fact to be so tried. Code Civ. Proc. § 1090; Woods v. Varnum, 85 Cal. 645, 24 Pac. 843; Cassiday v. Sullivan, 64 Cal. 266, 28 Pac. 234.

The plaintiff was not entitled to interest on the interest coupons from the date of their maturity, or the demand made. Davis v. Porter, 66 Cal. 659, 6 Pac. 746; Bates v. Gerber, 82 Cal. 550, 22 Pac. 1115; Kendall v. Porter, 120 Cal. 108, 45 Pac. 333, 52 Pac. 143; Sawyer v. Colgan, 102 Cal. 293, 36 Pac. 580; Davis v. State, 121 Cal. 211, 53 Pac. 555. No provision of law establishes a liability for such interest, and the district of which defendant is treasurer has made no provision for the payment of the same. But it is urged that appellant is liable therefor by reason of his failure to pay the interest coupons on demand. If it be conceded that he could, under any circumstances, be personally liable for such interest, such liability would be in the nature of a penalty, or for damages, and we are clearly of the opinion that such a liability cannot be enforced through the medium of a writ of mandate.

The order denying a new trial is, therefore, affirmed, and the judgment appealed from is hereby modified by deducting therefrom the sum of $162.40, the amount of interest erroneously included therein, and by striking therefrom the provision for interest from the 1st day of January, 1904. As so modified, the judgment is hereby affirmed, the respondent to pay the costs of this appeal.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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RAUER'S LAW & COLLECTION CO. v. BRADBURY.

(Court of Appeal, First District, California. March 16, 1906.)

1. BROKERS — COMPENSATION — COMMISSIONS FROM BOTH PARTIES.

Where a broker, employed to sell land on a commission, receives a commission from the buyer without the knowledge of the seller, he cannot recover his commission from the seller.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, §§ 52–54.]

2. SAME—ACTION FOR COMPENSATION—PLEADING—ISSUES.

In an action for a broker's commissions, the only allegation in plaintiff's complaint showing a liability of the defendant was that within two years prior thereto the defendant became indebted to plaintiff's assignor in a certain sum for services rendered by him to the defendant, at his special instance and request. *Held*, that the only issue tendered by the complaint was an indebtedness existing, at the time the action was commenced, for certain undisclosed services, and on that issue it was competent for defendant to offer, and for the court to consider, any evidence which would tend to show that, even though the services were rendered, they did not create an indebtedness against the defendant, and defendant's failure to set up in his answer as a defense that assignor had received a commission from the purchaser did not preclude him from offering evidence thereof, or the court from considering its effect.

3. TRIAL — PROVINCE OF COURT — FINDINGS — SUFFICIENCY.

Findings which are a negation in identical language of the allegations of the complaint in the form of a common count in assumpsit are sufficient to support a judgment.

4. NEW TRIAL—ACCIDENT OR SURPRISE—DISCRETION OF COURT.

The court is justified in refusing a new trial on the ground of accident or surprise, unless satisfied from the affidavits that a different result would be reached.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 199.]

5. APPEAL — REVIEW — DISCRETION OF TRIAL COURT—NEW TRIAL.

The action of the trial court in denying a new trial will not be disturbed on appeal, unless it appears that there was an abuse of discretion.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3860–3876.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Rauer's Law & Collection Company against W. B. Bradbury. From a judgment in favor of defendant and an order denying a new trial, plaintiff appeals. Affirmed.

Jordan, Treat & Brann and Macks & Tomsky, for appellant. T. C. Kierulff, for respondent.

HARRISON, P. J. The plaintiff seeks herein to recover from the defendant the sum of $625 for services rendered by Guy T. Wayman, his assignor, as the agent of the defendant for the sale of a parcel of land in San Francisco. Judgment was rendered in favor of the defendant, and the plaintiff has appealed.

The facts as shown at the trial are that on October 14, 1902, the defendant, by an instrument in writing, employed Wayman as his sole and exclusive agent for the period of 20 days from that date to sell for him a certain parcel of land for the sum of $50,000, and at the same time executed to him another instrument, by which he promised to pay him a commission of 1¼ per cent. of such purchase price if the property should be sold in accordance therewith. Wayman did not make a sale within said time, but on November 7th he negotiated with Knickerbocker and Barker for a purchase of the lot by them, and received from them $500 as a deposit therefor, and on the same day stated to the defendant that he had sold the property to them, and presented to him an instrument signed by himself stating that he had "received from Knickerbocker $500, being a deposit on account of $50,000 for purchase price of property this day sold to him by Guy T. Wayman, agent of the owner, herein described, and subject to owner's approval"; the property described being that of the defendant. Being asked by the defendant how much he would get, Wayman replied $50,000. The defendant thereupon signed an approval of the sale at the foot of the receipt, and Wayman gave to him the $500, for which he gave Wayman his receipt as a deposit on account of the purchase price. The sale was thereafter carried into effect, and at its consummation Knickerbocker and Barker paid to the defendant $49,500. At the time of Wayman's negotiation with Knickerbocker and Barker he agreed with them that, if the sale was effected, he should receive from them $500 as a commission for his services, and when the sale was completed they paid him said $500 as said commission. Wayman, however, did not inform the defendant of this agreement, and the defendant did not learn of it until several days after the execution of the instrument of November 7th.

Upon these facts the court rightly held that Wayman was not entitled to any commission from the defendant for services rendered in connection with the sale of the property. The fiduciary relations between a principal and his agent preclude the latter from having any interest in the subject-matter of his agency adverse to that of his principal. In the employment of an agent the principal bargains for his disinterested skill and diligence, and, whenever the interests of the agent become antagonistic to those of his employer, he violates his obligation by continuing to act in his behalf without disclosing that fact. A broker, who is employed by the owner to sell his property, is, by the mere fact of accepting such employment, precluded from acquiring an interest in the property he is employed to sell. He cannot act as such agent in making a sale either to himself or where he is interested in the purchase, and he is equally precluded from having a personal interest in the result of the sale of which his principal is ignorant. Whenever he has an interest in making the sale which is antagonistic to that of his principal, he is unable to discharge his full duty to the latter, and by continuing to act as his agent, without disclosing to him the fact of such interest, he commits a fraud upon him which will deprive him of all right to compensation for his services. These principles will be found fully illustrated in the following authorities: Story on Agency, §§ 31, 210, 211; Mechem on Agency, § 952; Farnsworth v. Hemmer, 1 Allen (Mass.) 494, 79 Am. Dec. 756; Rice v. Wood, 113 Mass. 133, 18 Am. Rep. 459; Alvord v. Cook, 174 Mass. 120, 54 N. E. 499; Rice v. Davis, 136 Pa. 439, 20 Atl. 513, 20 Am. St. Rep. 931; Empire Ins. Co. v. American Ins. Co., 138 N. Y. 446, 34 N. E. 200; Scribner v. Collar, 40 Mich. 375, 29 Am. Rep. 541; Wadsworth v. Adams, 138 U. S. 380, 11 Sup. Ct. 303, 34 L. Ed. 984; Calmon v. Sarraille, 142 Cal. 638, 76 Pac. 486. The contract of October 14th, as was conceded by Wayman in his testimony, expired by limitation on November 3d, and the written agreement of the defendant to pay a commission to Wayman was limited to a sale made in accordance with the terms of that contract. For the purpose of effecting a sale of the property to Knickerbocker on November 7th, Wayman did not rely upon the authority given him in the contract of October 14th, but after obtaining from Knickerbocker the terms upon which he was willing to purchase the property, and before obtaining from him any agreement for its purchase, he sought to obtain from the defendant his consent to the sale upon terms differing from those named in the contract of October 14th. His undertaking to act as agent of Knickerbocker for procuring the purchase of the property was in effect a renunciation of his agency for the defendant to secure its sale. Carman v. Beach, 63 N. Y. 97; Walker v. Osgood, 98 Mass. 348, 93 Am. Dec. 168. Whether he is to be regarded as having been at this time the agent of Knickerbocker for the purchase of the property, or of the defendant for its sale, is immaterial. If he is to be considered as the agent of Knickerbocker, he is not entitled to commission from the defendant. The claim of the plaintiff, moreover, is based upon the proposition that Wayman was at that time acting as the agent of the defendant; and, if it be assumed that in his interview with him on November 7th he purported to be acting as his agent, it was incumbent upon him to give him full information of the terms upon which Knickerbocker was willing to purchase the property, including his agreement to pay a commission, and not to conceal any of its terms. The terms offered by Knickerbocker as then represented by him were not the same as those contained in the authorization of October 14th, and that instrument had expired by its own terms. The price named therein at which the defendant was willing to sell the property was not final, and it was the duty of Wayman, if he was acting as his agent, to disclose to him any fact within his knowledge that might result in procuring for him a greater price for the property. Ruckman v. Bergholz, 37 N. J. Law, 437; Carpenter v. Fisher, 175 Mass. 9, 55 N. E. 479. It is not improbable that, if he had informed the defendant that Knickerbocker was willing to pay $500 in addition to the $50,000 named in the receipt, the defendant would have declined the offer unless he should receive that additional $500 for himself. The failure of Wayman to disclose this fact to the defendant justified the court in holding that he was not entitled to any commission for his services. The fact that the defendant did not set up in his answer as a defense that Wayman had received a commission from the purchaser did not preclude him from offering evidence thereof, or the court from considering its effect. The only allegation in the plaintiff's complaint showing a liability of the defendant was that, within two years prior thereto, the defendant became indebted to Wayman in the sum of $625 for services rendered by him to the defendant, at his special instance and request. As this allegation gave no information of the nature of these services, the defendant could not anticipate the facts upon which the plaintiff would rely at the trial, and had no opportunity to present the issue upon which he offered the evidence until after the plaintiff's evidence had been introduced. Sterling v. Smith, 97 Cal. 343, 32 Pac. 320; Moore v. Copp, 119 Cal. 429, 51 Pac. 630. The only issue tendered by the complaint was an "indebtedness," existing at the time the action was commenced, for certain undisclosed services, and upon that issue it was competent for the defendant to offer, and for the court to consider, any evidence which would tend to show that, even though the services were rendered, they did not create an indebtedness against the defendant. See Oscanyon v. Arms Co., 103 U. S. 261, 26 L. Ed. 539.

For a similar reason the proposition of appellant that the findings are insufficient to support the judgment, upon the ground that the principal finding is merely a conclusion of law and not a finding of fact, is untenable. The finding is a negation in identical language of the allegation of the complaint. The only purpose of findings is to answer the questions put by the pleadings, and if the facts are stated in the findings in the same way that they are stated in the pleadings they are sufficient. Dam v. Zink, 112 Cal. 91, 44 Pac. 331; McCarthy v. Brown, 113 Cal. 15, 45 Pac. 14, and cases therein cited. It is a settled rule in this state that, in the absence of a special demurrer, a complaint in the form of the common counts in assumpsit is a sufficient statement of a cause of action (Minor v. Baldridge, 123 Cal. 187, 55 Pac. 783) and it must follow that findings in the same form are sufficient to support the judgment.

In his notice of motion for a new trial the plaintiff named as one of the grounds thereof "accident or surprise which ordinary prudence could not have guarded against," and specified the surprise to be the claim by the defendant that the acceptance by Wayman of a commission from the purchasers was a defense to the action; that such defense was not referred to in the answer, and was first made in the briefs by counsel after the evidence had been closed and the case submitted for argument. In support of the motion he filed affidavits tending to show that Wayman had received such commission with the knowledge and consent of the defendant. A sufficient reason for not having set forth this defense in the answer has already been given, but, as it evidently appeared to the superior court that, whatever may have been the surprise of the plaintiff, it could have been guarded against by ordinary prudence, it very properly denied the motion. It appears by one of the affidavits offered in reply to those on behalf of the appellant that the plaintiff's counsel was informed several months before the trial that the defendant took the position that Wayman was not legally entitled to recover a commission from him, for the reason that he had received a commission from the purchasers of the property. The cause was tried May 22, 1903, and on May 27th the defendant's brief was served upon the plaintiff, in which this defense was relied upon, and the cause was not decided until September 3d. If the plaintiff had been surprised at this defense and felt that he could overcome it by contrary evidence, he should have moved then, upon this ground, to set aside the submission of the cause for the purpose of introducing such evidence, and not have taken the chance of a decision and reserved his motion to be made in case it should be against him. Ferrer v. Home M. Ins. Co., 47 Cal. 416. Instead of so doing, however, in his brief before the superior court he urged the insufficiency of this defense. Moreover, it is not clear that the defense was not foreshadowed at the trial. While the defendant was testifying he was asked: "When you signed this contract did you understand that Mr. Wayman was the agent of the buyer of the property?" Counsel for plaintiff objected to the question, and his objection was sustained. In the cross-examination of Mr. Chapman, a witness for the plaintiff, he was asked: "Was there any intimation on the part of Mr. Bradbury, or something said upon the point, that Mr. Wayman was the agent of the buyer and not his agent, and for that reason he did not think he was liable?"

The affidavits tending to show that the defendant consented that Wayman might receive a commission from the purchasers were by Wayman and Chapman, both of whom were witnesses at the trial and could then have been examined in reference thereto. These affidavits were, moreover, directly contradicted by the affidavit of the defendant in his counter affidavit replying thereto. The court was justified in refusing a new trial, unless it was satisfied from the affidavits that a different result would be reached (Hayne on N. T. § 85; McGuire v. Drew, 83 Cal. 225, 23 Pac. 312), and, unless it appears that there was an abuse of discretion, its action in this respect will not be disturbed on appeal (Schellhouse v. Ball, 29 Cal. 605; Spottiswood v. Weir, 80 Cal. 448, 22 Pac. 289).

The judgment and order denying a new trial are affirmed.

We concur: COOPER, J.; HALL, J.

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BOWEN v. SIERRA LUMBER CO.

(Court of Appeal, Third District, California. March 23, 1906. Rehearing Denied by Supreme Court May 16, 1906.)

1. DEATH — ACTION FOR CAUSING DEATH — DAMAGES.

Under Code Civ. Proc. § 377, providing that in actions for death such damages may be given as under the circumstances of the case may be just, the amount of damages in an action for death is to be determined by considering the circumstances of the case, and there is no restriction as to the amount of damages, except that they must be just, and, unless it can be said that the damages awarded have been given under the influence of passion or prejudice, they will not be considered excessive.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 120-125.]

2. SAME—EXCESSIVE DAMAGES.

In an action under Code Civ. Proc. § 376, for negligent death, brought by decedent's only child, two years of age at the time of the death, it appeared that decedent at the time of his death earned $40 a month and board, that he was 27 years of age, that his expectation of life was 37 years, that the child was a female child, and that its mother was dead. *Held*, that an award of $5,000 as damages would not be set aside as excessive, under Code Civ. Proc. § 667, authorizing the setting aside of a verdict where excessive damages appear to have been given under the influence of passion or prejudice, merely because the child was in court at the trial.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 120-125, 129.]

3. EVIDENCE—EXPERT TESTIMONY—MATTER OF COMMON KNOWLEDGE.

The probable effect of the unsoundness of any of the timbers in a railroad trestle is not a matter of expert testimony; it being a matter of common knowledge that when there is an unsound timber in a trestle, the structure will be weakened thereby.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2310, 2311.]

4. SAME—COMPETENCY OF EXPERTS.

A witness, in an action for the death of an employé in consequence of a logging train falling through a trestle, who had had under his charge the building of a number of bridges and had drawn plans for trestle bridges similar to the one in question, was competent to testify that the principal timbers in a trestle should be joined by bolts instead of put together with nails.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2349, 2350.]

5. SAME—DEFECTIVE TRESTLE—QUESTION FOR JURY.

Where, in an action for the death of an employé in consequence of a logging train falling through a trestle, a witness testified to the manner of putting trestles together and compared the kind of trestle in question with other kinds, showing the difference between using nails or bolts, the question whether the trestle in question was safe though the principal timbers thereof were put together with nails instead of by bolts was for the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1021.]

6. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where, in an action for the death of an employé in consequence of a logging train falling through a trestle, the evidence showed that the decayed condition of the timbers in the structure contributed more than anything else toward causing the wreck, the error, if any, in permitting an expert witness to state that the trestle as originally constructed was not suitable for the purpose for which it was used because it was put together with nails only, was harmless.

7. EVIDENCE—EXPERT TESTIMONY — MATTERS OF COMMON KNOWLEDGE.

That the running of trains over a trestle will produce such a vibration as will loosen the nails with which the timbers in the trestle are put together is not a matter of common knowledge, but is a subject of expert testimony.

8. MASTER AND SERVANT — INJURY TO SERVANT — DEFECTIVE TRESTLE—EVIDENCE—ADMISSIBILITY.

Where, in an action for the death of an employé in consequence of a logging train falling through a trestle, the evidence showed that the principal timbers in the trestle were put together with nails, the testimony of an expert trestle builder that the timbers should be joined by bolts with a round head on one end and a nut on the other, and describing where the bolts should be used to strengthen the trestle, was admissible.

9. EVIDENCE—EXPERT TESTIMONY—STRENGTH OF TIMBERS.

An expert may testify with respect to the comparative strength of a solid timber of a specified size and stringers bolted together to form timber of the same size.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2316-2318.]

10. SAME—LIFE OF TIMBERS.

Where an expert trestle builder testified that he knew something about the life of red fir timber, he was competent to testify as to the average life of such timber in a trestle.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2355.]

11. SAME.

An expert trestle builder is competent to testify as an expert that the timbers decay first where they come in contact with each other, and is competent to state his reasons for his opinion.

12. WITNESSES — CROSS-EXAMINATION — IMPEACHMENT.

Where, in an action for the death of an employé in consequence of a logging train falling through a trestle, a witness testified that when he went to the wreck the following day he found the timbers of the trestle in fair condition, a question, on cross-examination, as to whether or not the witness had not stated to a person named in the presence of others at a place and time stated that the timbers in the trestle were rotten, was a proper impeaching question.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1228, 1229.]

13. MASTER AND SERVANT—INJURY TO SERVANT — DEFECTIVE TRESTLE—EVIDENCE—ADMISSIBILITY.

In an action for the death of an employé in consequence of a logging train falling through a trestle, it appeared that an inspection of the trestle had been made by defendant's employés two weeks before the accident, and that the inspection was made by sounding a few of the timbers which had any decaying indications from the outside, by striking with a bar. *Held*, that testimony that sounding was not the proper method to ascertain the soundness of the timbers, but that it was necessary to bore into them with an auger, was admissible.

14. SAME—INSTRUCTIONS.

A requested instruction, in an action for an injury to an employé, that where the evidence is equally consistent with the existence or nonexistence of negligence, "when the balance is even at to which party is at fault," plaintiff has not established a case by a preponderance of the evidence, may be modified by striking out the quoted words and inserting in their place the words "on the part of defendant," where the court charges on contributory negligence and states that plaintiff cannot recover if he contributed to the injury.

15. TRIAL—REQUESTS FOR INSTRUCTIONS—INSTRUCTIONS ALREADY GIVEN.

It is not error to refuse an instruction embraced in the instructions already given.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Jessie Irene Bowen, by her guardian ad litem, Robert H. Blunkall, against the Sierra Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

McCoy & Gans, for appellant. J. T. Matlock and W. P. Johnson, for respondent.

BUCKLES, J. This is an action for damages on account of the death of Jesse Bowen, plaintiff's father, alleged to have been caused by the train of defendant's on which he was braking, falling through a high trestle. The complaint alleges that: "Through defects in the construction, care, and preservation of said trestle and through the negligence of the defendant in allowing the timbers of which said trestle was constructed to become worn, rotten, and decayed, and without fault or negligence on the part of said Jesse Bowen, the trestle gave way, and the said track, locomotive, and train were precipitated to the ground and demolished, and the said Jesse Bowen was killed." The train was a "logging train" and the road over the said trestle a road used in running the logging trains carrying logs to defendant's mill. The complaint further alleges: "That plaintiff was entirely dependent upon her father for support, rearing, education, and protection; that she has been deprived of the society, comfort, and protection of her father by said wrongful acts of the defendant, and has, by reason of the said several wrongful acts of the defendant, been greatly injured and damaged." The plaintiff was about two years old at the time of her father's death and about four years old at the time of the trial. The mother of plaintiff died when plaintiff was only 17 days old and Mrs. Blunkall, the grandmother of the said child, had always had the care of the plaintiff. The complaint alleges: "That by reason of the said wrongful acts of the defendant, as herein alleged, she has been damaged in the sum of $10,000." The cause was tried by a jury, which rendered a verdict against the defendant for the sum of $5,000. The defendant moved for a new trial, which motion was denied. The appeal is from the order denying a motion for a new trial.

The appellant relies for a reversal upon the claim that the evidence does not support the verdict and that the damage is excessive, and errors of law at the trial. The testimony as to amount of damages was as follows: Mrs. Elizabeth Blunkall was called as a witness and testified that Jesse Bowen was her son-in-law, had married her youngest daughter; that he was 27 years old April 14, 1901, and that the plaintiff was the only child of her daughter and said Jesse Bowen, and was 17 days old when the mother died, and plaintiff had lived with her ever since; that plaintiff was two years old when the father was killed; that said child had known no other mother than the witness and was taken care of by her; that said Jesse Bowen supported the plaintiff in his lifetime, and she had no other support. J. C. Turner was called as a witness for plaintiff, and testified that at the time of his death Jesse Bowen was receiving as wages $40 per month and his board. The plaintiff introduced the American Table of Mortality, which showed that the expectation of life of a man of 27 years of age is 37.43 years. Appellant argues that this evidence was not sufficient to warrant a verdict for $5,000 damages, and that the jury, only nine of which agreed to it, were prejudiced and influenced by the presence of the child, the plaintiff, in court at the trial.

This action was brought under section 376 of the Code of Civil Procedure, which reads as follows: "A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a minor child, and a guardian for the injury or death of his ward, when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or death, or if such person be employed, by another person, who is responsible for his conduct, also against such other person." The latter part of section 377 of the Code of Civil Procedure also provides: "In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just." It will thus be seen that the amount of damages in a case like this, and the justness thereof, is to be determined by considering all the circumstances of the particular case, and there are no restrictions in this state as to the amount of damages in a case like the one at bar except that they must be just (not to exceed the amount claimed), and, unless it can be said that the damages in this case appear to have been given under the influences of passion or prejudice, they will not be considered excessive. Redfield v. Oakland C. S. Ry. Co., 110 Cal. 277, 42 Pac. 822. The verdict of a jury may be vacated and a new trial granted in the following cases: "(5) Excessive damages appearing to have been given under the influence of passion or prejudice." Section 667, Code Civ. Proc. How can it be said under the circumstances in this case that the sum of $5,000 is a larger sum than will compensate this little girl for the loss of her father, her natural protector? Appellant argues strenuously that there is nothing in the testimony to show what amount deceased contributed to the support of plaintiff, and nothing to show what she could reasonably expect from him had he lived. And that the evidence fails to show his earning capacity for any period. The facts shown by the testimony are that deceased earned at the time of his death the sum of $40 net a month. That the child was but two years old when its father died. That the mother was dead. That this was a female and the only child of its parents. The only thing in the case that is offered as tending to show that passion or prejudice had anything to do with causing the jury to fix the damages at $5,000 was that the child, the plaintiff, was in court at the trial and was seen by the members of the jury, and that the defendant was a corporation. To say the least, these are all violent presumptions, because there is not a single word in all the testimony tending to show and no evidence after the trial indicating that a single member of the jury or of the nine who found the verdict were in any way prejudiced or influenced because the plaintiff was a small child and in court. The child, being the plaintiff, had a right to be in court, and therefore it cannot be presumed it was brought there for the purpose of influencing or prejudicing the jury. Neither is there anything in the record to indicate that the jurors were in the slightest prejudiced against the defendant because it was a strong corporation and probably a rich one. The jurors were sworn to render a true verdict according to the evidence, and under this oath their duty was to be fair and impartial, and the presumption, in the absence of evidence to the contrary, is that each juror and the jury as a whole performed the duties devolving upon him and the whole. As said in Aldrich v. Palmer, 24 Cal. 513, the law does not attempt to lay down any precise rules for the admeasurement of damages in cases of this character, but, from the very necessity of the case, leaves their assessment to the good sense and unbiased judgment of the jury. "Their verdict, as in all other cases, is subject to review by the court, but it will never be disturbed unless the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate consideration of the jury." These rules have been followed by our Supreme Court in all subsequent decisions and are founded on reason and common sense. The object in such suits must be to obtain a reasonable and just compensation for the wrong inflicted, comprehending both the present when the one receiving the hurt survives, and his future and the future of the dependent one as in this case. An exact solution of the problem as to what is just compensation in these cases is difficult, if not impossible, and surely none can be more competent to make the solution than a jury, and neither the court trying the case nor this court has any right to substitute his or our opinion for that of the jury merely because we might happen to differ. We are of the opinion the damages are not excessive as the compensation to this plaintiff for the loss of her father.

The next assignment of error is that the evidence establishes the fact that the appellant was not negligent in the construction or maintenance of the bridge or trestle which fell, causing the death of Jesse Bowen; but that the train was caused to go through the trestle because of the negligence of the deceased and his co-employés in not properly fastening the logs which were being carried to the mill upon the cars, thus allowing them to roll about, causing the cars to fall through said trestle. There were 28 assignments of error as to the admission of testimony. The witness Gernon, by whom plaintiff sought to show the construction of the trestle, testified fully to the manner in which it was put up. In his details he testified to how guard rails are put on bridges and that there were none on this trestle. He also testified to their safety where used in preventing a car from going off the bridge or trestle. Five objections were made to this line of testimony, but after the engineer had testified and described how the cars went down, on motion of defendant all the testimony of Gernon relating to guard rails was stricken out. This disposes of defendant's exceptions 1, 2, 3, 4, and 5.

After having testified fully as to the manner of construction, Gernon was asked the following question: "What would be the probable effect of the unsoundness of any of the timbers supporting this bridge?" Defendant objects on the ground that the question was not one of expert testimony. The objection was overruled. The witness answered: "The bridge is only so strong as its weakest part—any portion which might be unsound, why, of course weakens the whole structure down to the strength of that defective part." We think that the objection that the matter was not expert testimony well taken. It is a matter of common knowledge that when there is unsound timber in a trestle where great weight comes upon it, such as running a train of cars loaded with saw logs over it, that the structure would be weakened thereby, and a juror who would not be able to reach the same conclusion indicated by the witness' answer would not be fit for a juror. But under the rule laid down in People v. Durrant, 116 Cal. 215–218, 48 Pac. 75, and followed in People v. Olsen (Cal. App.) 81 Pac. 676, the question and answer were absolutely without injury. This disposes of exception 8.

"Q. What were the elements of weakness, if any, in the construction of that bridge or trestle?" Objection was made by defendant on the grounds not material, not expert testimony, and that the witness had not shown himself to be an expert. Before the court ruled, the witness, to show that he was an expert, testified to having had under his charge the building of a number of bridges in Tehama county and that he had had charge of the building of some of the defendant's bridges, and that he had drawn the plans for them—for the trestle bridges similar to this one. The court overruled the objection, and the witness answered under the further objection (exceptions 9 and 10): "The bridge is put together with nails. It should—the principal timbers should—be joined by bolts," and proceeded further to show how the bridge or trestle should be put together. We think the witness has shown himself sufficiently qualified to testify as an expert and that the testimony was material. Continuing, the witness said: "This trestle was used to conduct logging trains from the logging camps to the mill to transport the logs from the logging camps to the mill. I was familiar with the size and the kind of loads to be hauled over it by the engines of the company." He answered that as originally constructed the bridge was not suitable and safe for the purpose for which it was used (exception 11), because it was put together with nails, without mortises or the timbers being boxed into each other, and without bolts, and is constructed upon a curve. (Exceptions 12, 13, and 14.) A witness may testify on questions of science, art, or trade when skilled therein. This witness had shown himself to be skilled in trestle and bridge building, and yet while the testimony may not have been strictly a question for an expert, yet in view of other testimony that there were rotten timbers in the trestle, we deem it a harmless error. Usually an expert cannot be asked whether a structure is a safe one, yet the cases all hold that the facts may all be elicited from the witness from which the conclusion inevitably follows. Sappenfield v. Main St., etc., R. R. Co., 91 Cal. 60, 27 Pac. 590. Here the witness had testified fully to the manner of putting the trestle together and had compared this kind of trestle with other kinds, shown the difference between using nails or bolts, etc., and we think it for the jury to have determined whether safe or not. But, as said above, in the light of the other testimony showing the rotten or decayed condition of some of the timbers in the structure which was discovered after the wreck, and which evidently contributed more than anything else toward the cause of the wreck, the error, if error at all, was not reversible error. Giraudi v. Electric Improvement Company, 107 Cal. 120, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114.

The fifteenth exception taken by defendant is to the ruling of the court allowing the witness to testify to the effect of vibration of the trestle caused by running trains over it. That running an engine and cars over a high trestle may be a matter of common knowledge, but that such vibration will loosen the nails with which it is put together is not a matter of common knowledge to the extent that all persons of ordinary understanding might know it, and therefore it would seem to be a matter to be detailed by one who had gained that peculiar knowledge by his experience with such conditions. There was no reversible error in this. This witness then proceeded to describe the kind of bolts he referred to as the bolts proper to use in fastening the timbers together, as bolts with a round head on one end and a nut on the other, and where these bolts should be used to strengthen the trestle. This was exception 16. The testimony was entirely proper, and no error was committed in admitting it. The witness was asked: "What would be the comparative strength between these two stringers and a solid piece of timber 8 by 14, and the reason?" Defendant objected. The court overruled the objection. (Exception 17.) Prior to this the witness had testified: "As to the stringers, there were 4 timbers, and they were in pairs, 2 on each side. Those timbers were 24 feet in length, 14 inches deep, and 4 inches broad and they were bolted together, 2 and 2." It is not a matter of general or common knowledge which is the stronger, if any difference. A person who is learned in the art of handling and placing timbers in a structure like a bridge or trestle would know, while a person generally, without such experience, might not know. In this view there was no legal objection to the question. The witness Gernon was allowed, over the objection of defendant, to testify to the life of timber placed in such a structure as this one. (Exceptions 18 and 19.) The evidence was that the timber used in this trestle was red fir and the witness had testified that he knew something about the life of such timber, and we think was competent to testify as to the average life of such timber. When asked what effect the elements would have on such timber defendant objected. (Exception 20.) The witness answered: That in the vicinity of defendant's mill, "red fir timber, where it comes in contact with the ground, is very short lived, the worst of anything except white fir. Have seen 12 by 12 timbers of it rot off completely in 5 years when it was in the ground. When it is constructed into a bridge, where it would decay first would be where it would come in contact one piece with the other." When asked why was this the case, the defendant objected to the question as being incompetent. (Exception 21.) The objection was overruled and the witness answered: "Whenever it rains and gets wet, it holds water in the joints and in the ends of the timbers * * * where two pieces cross each other there is where it will rot first." We think this an expert matter when the inquiry was to certain timber, red fir, and was therefore proper and competent.

Comer was a witness for the defendant and, on cross-examination, was asked: "Did you not say to George McIvor, and in the presence of his wife, Mrs. McIvor, and Olive Blunkall as McKay's sawmill, in Siskiyou county, California, on or about the month of June, 1902, that the timbers in that trestle were rotten and not fit for a dog to cross on, or words to that effect?" Defendant objected. (Exceptions 22 and 23.) This was an impeaching question, and seems to contain all that is required. On his direct examination he had testified that when he went to the wreck the next morning he found the timbers in fair condition. He had also testified that "frequently prior to that time [the wreck] we have doubled engines if we have difficult trains to haul" over the trestle. The objection was properly overruled.

The witness George McIvor and wife were witnesses for plaintiff. When asked if the witness Comer made certain statements in their presence, being the same impeaching question asked Comer on his cross-examination above stated, objection was made and overruled (exceptions 24, 25, and 26), and the witnesses answered that Comer did make such a statement. No legal objection is pointed out, and we are at a loss to understand how any could exist.

It is claimed the court erred in overruling defendant's objection to the testimony of witness Bierce as to whether or not the sounding of timbers would be a proper method to ascertain their soundness, and also what would be the proper method of examination. (Exceptions 27 and 28.) The witness answered he thought that sounding would not be the proper method, but to bore into the timbers with a bit or an auger would be the proper method. The objection was made on the ground that it is "irrelevant, immaterial, and incompetent, and not proper testimony." Why so is not pointed out and we are unable to see why not material, competent, and proper. The testimony clearly shows these facts. The wrecked trestle was built in the summer of 1889 and repaired at numerous times as decaying timbers were discovered. An inspection of the bridge had been made by an employé of defendant two weeks before the accident. The inspection was made by sounding a few of the timbers which had any decaying indications from the outside by striking with a bar. The trestle was 324 feet long, constructed on a curve; greatest height is 144 feet. The structure went down while a train of one engine and three cars loaded with saw logs was passing over it, on September 23, 1901, and in the wreck thus made Jesse Bowen, the father of plaintiff, then a brakeman on said train, was killed. After the wreck a number of the pieces of timbers in the trestle were found to be rotten at the ends, and some of the mud sills were rotten.

There is absolutely no testimony indicating that the deceased was negligent. An effort was made to show that the logs were loaded on the cars in a negligent manner by deceased and his fellow servants. This consisted in the evidence of several persons, witnesses in the employ of the defendant, testifying that Bundy, the engineer on the locomotive which drew the train that went down with the trestle, and was himself badly hurt, so that talking was difficult, had said soon after the wreck: "I looked back and saw the logs rolling in the chains. I thought they would tighten, but they did not, and kept on rolling; and I saw the car begin to tip over, and I opened wide the throttle of my engine to break loose from the train." The engineer emphatically denies having ever said this, and then testified to what he did see, as follows: "I saw the cars settling down on the inside. That was the car next to the engine, and about that time the whole trestle went down. At that time I was standing up and looking back at that end. I had not noticed anything else unusual about the train. There were three logs on the car next to the engine." One witness is sufficient against a dozen if he is believed and the dozen are not, and the jurors were there to observe the demeanor of each witness while giving his testimony, and judge between them where a conflict arises and to determine who spoke the truth. The jury evidently determined that engineer Bundy never made the statement attributed to him. There was a great deal of testimony as to the manner in which this trestle was constructed and some conflict as to the best method of putting up such a trestle. There was a substantial conflict in the evidence, also, as to the condition of the timbers. The life or safety of such timbers as were used in said trestle was shown to be from 5 to 15 years. There was evidence tending to show the best method of testing the larger timbers was by boring into them. No such test was made. When examined after the wreck all of the witnesses who made any kind of examination of the timbers found rot, but they differed as to the extent and what effect this rot would have on the strength of the trestle. These conflicts arising, the jury must determine and declare their finding by their verdict, and we have no right under the well-established rule in this state to disturb a verdict thus found.

Appellant complains of modification of its instructions by the court and refusal to give another. The first of these the court very properly refused to give because given in its own instructions. From an instruction containing the following: "It is a rule of law that where the evidence is equally consistent with the existence or nonexistence of negligence, *when the balance is even as to which party is at fault*, then the plaintiff has not made out a case by a preponderance of the evidence," the court modified the same by striking out the words italicized and inserted in their stead these words: "On the part of defendant," and then gave the instruction. This was as favorable to the defendant as the instruction was before being so modified; the court had fully instructed the jury on contributory negligence and that the plaintiff could not recover if he had contributed to the injury. In the following instruction asked by the defendant the court struck out the words in italics and gave the rest. "*The mere fact that an accident happened to Jesse Bowen or that he was killed does not entitle the plaintiff to a verdict.* The plaintiff has no right to any verdict in the case simply upon the assumption that said Bowen was injured in the wreck which occurred upon the defendant's road. This is not a case where a passenger, while riding in a car, had been injured by an accident resulting from some defect or negligence in the construction or operation of the road. In these passenger cases, as a rule, the law presumes negligence from the happening of the accident. But there is no such presumption in this case. The said Jesse Bowen in this case was in the employ of the defendant. You are, therefore, not to indulge any presumption nor to infer any negligence against the defendant simply because an accident happened and an injury was received." Without declaring whether the instruction, either in its original or modified form, correctly states the law, it is manifest that no harm could come to the defendant by striking out the first paragraph, for the substance is repeated in the very next sentence. The court refused to give defendant's instruction No. 4. This instruction relates to the weight of evidence, and the court had instructed the jury fully and very properly upon the weight of evidence. There was, therefore, no error in refusing the instruction. Further objections are made that the jury disregarded the instructions of the court in rendering its verdict for plaintiff. A careful reading of the instructions, considered along with the verdict, indicates that the jury applied the facts, as they were established to their minds, to the law as given them in the instructions by the court, and rendered their verdict in accordance therewith.

We see no reason for disturbing the verdict of the jury. The judgment is affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

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3 Cal. App. 268

MERKLEY v. WILLIAMS, County Auditor.

(Court of Appeal, Third District, California. March 17, 1906. Rehearing Denied by Supreme Court May 16, 1906.)

OFFICERS—SALARY—CONTEST.

Under Pol. Code, § 936, as amended by Act 1891, providing that, when the title of the incumbent of any office is contested, no warrant can thereafter be drawn or paid for any part of the salary, till such proceedings have been finally determined, "provided, however that this section shall not be construed to apply to any party to a contest * * * who holds the certificate of election * * * and discharges the duties of the office; but such party shall receive the salary of such office, the same as if no such contest was pending"—not only is the occupant of the office having a certificate of election and performing the duties of the office entitled to salary till final determination of the contest against him, but the successful contestant is not entitled to any salary accruing before such determination.

Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Mandamus proceedings by A. A. Merkley against L. P. Williams, auditor of Sacramento county, to compel the payment of petitioner's salary. From the judgment, petitioner appeals. Affirmed.

A. L. Shinn and R. L. Shinn, for appellant. A. M. Seymour, Dist. Atty., for respondent.

McLAUGHLIN, J. At the general election held in 1902, the petitioner and one Charles E. Trainor were rival candidates for the office of tax collector of Sacramento county. The board of supervisors canvassed the returns of said election and declared that Trainor had been elected to said office, and a certificate of election was issued accordingly. Petitioner thereupon commenced an action contesting the election of Trainor, and upon the trial of said action judgment was entered declaring that petitioner had been duly elected to such office, and canceling and annulling the certificate of election issued to Trainor. The latter appealed from the judgment, and on March 7, 1904, a remittitur from the Supreme Court affirming the same was filed in the superior court. On the following day the petitioner duly qualified as tax collector, and thereupon demanded that the respondent issue warrants for the salary incident to such office from the commencement of the term to April 1, 1904. This the auditor refused to do, and this proceeding was commenced in the superior court to compel such action. The respondent answered, and after a hearing the court, in addition to the facts above stated, found that the respondent had paid the salary to Trainor, who held the certificate of election, from the 7th day of January, 1903, to the 1st day of March, 1904. Judgment was entered, decreeing that petitioner was entitled to the salary only from the 7th day of March, 1904, and a writ of mandate was issued commanding the payment of the salary to petitioner from said date. The petitioner has appealed from the judgment, and demands reversal, on the ground that he is entitled to the salary prescribed by law for the entire term for which he was elected, notwithstanding the payments made to Trainor under the provisions of section 936 of the Political Code.

It is argued in his behalf: (1) That the rule prevailing in this state prior to the amendment of said section in 1891 was that the officer de jure was entitled to the salary for the full term whether he filled the office or not; (2) that the amendment in question did not change the rule, but merely provided for the compensation of an officer de facto during his incumbency; (3) that, if said amendment must be construed as depriving the officer de jure of the salary of an office during the pendency of a contest, it is in conflict with the fundamental law and therefore void.

There can be no doubt that the authorities fully support the first of the points above enumerated. The doctrine that "the salary annexed to a public office is incident to the title to the office, and not to its occupation and exercise," involving the proposition that a person elected to an office was entitled to the salary from the commencement of the term for which he was elected, regardless of the wrongful payment of such salary to another, was announced in two very early cases. Dorsey v. Smyth, 28 Cal. 25, and Carroll v. Siebenthaler, 37 Cal. 195. And as a logical sequence flowing from this doctrine, it was held in a number of cases that the person occupying an office and performing its duties, no matter how strong his claim as an officer de facto might be, was not entitled to compensation. Stratton v. Oulton, 28 Cal. 44; Burke v. Edgar, 67 Cal. 184, 7 Pac. 488; People v. Potter, 63 Cal. 128. These rules should constantly be borne in mind in construing said section 936 as amended, for the purpose of a law is always the most reliable guide to its proper interpretation, and the purpose of an amendment to a statute can usually be ascertained by a consideration of "the old law, the mischief, and the remedy." Prior to the amendment, the section in question read as follows: "When the title of the incumbent of any office in this state is contested by proceedings instituted in any court for that purpose, no warrant can thereafter be drawn or paid for any part of the salary, until such proceedings have been finally determined." The obvious purpose of this enactment was to preserve the salary for the person legally entitled thereto, and prevent its possible payment to another who claimed to hold the office de jure but was only a de facto officer. People v. Potter, 63 Cal. 127. Under the rule thus declared, it frequently happened that a person who believed, and holding a certificate of election or commission of office had a right to believe, himself entitled to the office, would perform the duties and assume the responsibilities thereof, and in the end be ousted without compensation for services rendered by himself and his deputies. This was, of course, a great hardship, and counsel here agree in saying that this was the mischief which the amendment was designed to remedy. But harmony of opinion ends here; appellant contending for the construction indicated in the second point above mentioned, and respondent stoutly maintaining, that it was never intended that two salaries should be paid, but that the salary should be paid to the person having a prima facie legal right to the office evidenced by a certificate of election or commission. The amendment out of which this contrariety of opinion arises consists of a proviso added to the original section reading as follows: "Provided, however that this section shall not be construed to apply to any party to a contest or proceeding now pending or hereafter instituted who holds the certificate of election or commission of office and discharges the duties of the office; but such party shall receive the salary of such office, the same as if no such contest or proceeding was pending." "A cardinal rule of interpretation is that a statute free from ambiguity and uncertainty needs no interpretation. This must be so, for all interpretation and construction is for the purpose of ascertaining the legislative will. When this is clear, interpretation is not allowable. In such case it cannot be argued that the result is unjust or against public policy. The statute itself is conclusive upon these subjects." Davis v. Hart, 123 Cal. 387, 55 Pac. 1060; Lewis' Sutherland Statutory Construction, §§ 389, 390.

The rule above quoted applies with conclusive force to this amendment. There is no room for construction or interpretation of the language used. It can mean but one thing, and that is that the party to the contest who holds the certificate of election or commission, and is discharging the duties of the office, "shall receive the salary of such office." This is clear from that portion of the amendment concluding with the words last quoted. But as if to remove all possible doubt, and place the matter beyond cavil, the words "the same as if no contest or proceeding was pending" were added. If no contest or proceeding was pending, the most captious would hardly question the right of the person holding the certificate of election or commission of office, and performing the duties of the office, to receive the salary annexed thereto by law. And the intent and purpose of the Legislature to continue such right, and maintain the status existing before the contest was commenced, during the pendency of the proceeding, is so clearly expressed that it would be nothing short of judicial usurpation of legislative functions for this court to attempt to give the language employed another and different meaning. If further light touching the legislative intent was required, the contemporaneous amendment of section 937 affords such light. That section, as originally enacted, first provided for immediate notice to the officers charged with the duty of drawing or paying salary warrants that a contest was pending. The evident purpose of this notice was to warn the officers in question that the payment of the salary of the office was suspended pending the determination of the contest. But by the amendment the significant words "except in cases included in the proviso to the foregoing section" were added. It is very clear to our minds from the foregoing analysis that the sole object and purpose of the amendment to section 936 was to provide for the payment of "the salary of such office" to the person whose legal right to hold it was attested by the certificate of election issued pursuant to law, until such evidence of legal right to occupy the office was canceled and annulled by judicial decree which awarded the office to another. And this, of course, excludes the idea that such other person should also be paid "the salary of such office," which under the law had already been paid to another.

It is earnestly contended that the interpretation we have given this legislation should be avoided, because it changes the rule which had obtained in this state for years and leads to absurd and unjust results. But the legislative department has the right to change laws whenever it is deemed expedient to do so. The usual, ordinary, and we may say the unvarying purpose of an amendment to a statute is to change or modify the rule of law thereby declared. It is only when the purpose of legislation is doubtful, or the meaning of language used is uncertain or obscure, that courts are privileged to adopt a construction in harmony with existing law, and act on the assumption that no radical change was intended. When the purpose and meaning is clear, the will of the Legislature is paramount and controlling, and courts will enforce the law according to its letter and spirit, unless it conflicts with the Constitution. The probable results and expediency of legislation are proper subjects for consideration by the proper department of government, but courts cannot invade the province of another department by setting up contrary views touching the unwisdom or injustice of constitutional law as an excuse for nullifying or transforming it. Waiving these reflections, however, we can see no injustice or absurdity in a rule which awards the salary of an office to the person performing the duties for which the compensation was provided, especially when such person is clothed by law with all the indicia of legal right to hold such office and enjoy its emoluments. Every candidate for public office becomes such with full knowledge, imputed by law, that, if the declaration of the canvassing board is against him, the salary will be paid to another until he can vindicate his legal right to hold such office in a proceeding instituted for that purpose. The contestant is privileged to pursue his calling pending the contest, while the incumbent must necessarily devote his time to the performance of the duties of an office, the responsibilities of which he has assumed under sanction of the law and every color of legal right. Under these conditions, abstract justice would hardly require that the compensation intended as a reward for the performance of public service should be denied to the person rendering such service, and granted to one who performed no service whatever, and who, pending the contest, had no apparent right to the office to which the compensation was annexed. Nor can fairness or justice require the payment of one salary to the person performing the duties, and another to one who not only performed no service, but who reaped the usual reward for service rendered in the pursuit of his ordinary vocation. The injustice to the public lurking in a rule requiring double compensation for the same service is far more apparent than any possible injustice accruing to one who voluntarily sought the position, and was presumably willing to comply with all conditions born of the law with which he must be held fully acquainted. The cases cited by appellant as supporting a contrary view are not in point. In Ward v. Marshall, 96 Cal. 155, 30 Pac. 1113, 31 Am. St. Rep. 198, the petitioner had been removed from office, and on appeal the judgment of removal was held erroneous. It was there held that the unauthorized removal did not interrupt his legal right to the office and its emoluments. In Bledsoe v. Colgan, 138 Cal. 34, 70 Pac. 924, the petitioner was claiming the salary as an incumbent, and besides, the closing sentence in the opinion, upon which appellant relies, did not receive the sanction of a majority of the court.

We do not think the third point enumerated can be sustained. The Legislature is given general power to provide for the election and compensation of county officers. In doing so it was necessary to provide some method for determining the result of elections and the issuance of a certificate or commission to the person declared elected. Having this power, and being charged with the duty of providing for the compensation of officers, we are of the opinion that it was within the scope of legislative power to provide that the compensation annexed to an office shall be paid to the incumbent who holds a certificate of election, until such certificate is annulled and canceled. Const. art. 2, §§ 5, 6; Wilson v. Fisher, 140 Cal. 188, 73 Pac. 850; Anderson v. Browning, 140 Cal. 222, 73 Pac. 986.

For the reasons above stated, and other reasons given in the case of Tout v. Blair (just decided by the District Court of Appeal for the Second District) 84 Pac. 671, the judgment appealed from is affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

SWEENEY v. DOYLE, County Auditor.

(Court of Appeal, Third District, California. March 17, 1906. Rehearing Denied by Supreme Court May 16, 1906.)

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Mandamus proceedings by William Sweeney against J. B. Doyle, auditor of Tuolumne county, to compel the payment of petitioner's salary. From the judgment, petitioner appeals. Affirmed.

J. P. O'Brien, for appellant. C. E. Dedrick, for respondent.

McLAUGHLIN, J. For reasons fully stated in Merkley v. Williams (this day decided) 84 Pac. 1015, the judgment is affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

DOTY v. WILLIAMS, County Auditor.

(Court of Appeal, Third District, California. March 17, 1906.)

Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Mandamus proceedings by Gillis Doty against L. P. Williams, auditor of the county of Sacramento, to compel the payment of petitioner's salary. From the judgment, petitioner appeals. Affirmed.

A. L. Shinn, for appellant. A. M. Seymour, Dist. Atty., for respondent.

McLAUGHLIN, J. For the reasons stated in Merkley v. Williams (this day decided) 84 Pac. 1015, the judgment is affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

Ex parte BOYNTON. (Cr. 1,337.) (Supreme Court of California. March 15, 1906.) In Bank. Application of one Boynton for writ of habeas corpus against E. M. Stone, superintendent of Napa State Hospital. Writ denied. Rece Clark, for petitioner.

PER CURIAM. Denied.

BEATTY, C. J. (dissenting). This is a petition for the writ of habeas corpus, filed in behalf of a man committed to the Napa Asylum for the Insane. The court has denied the writ, and I desire to state briefly the reasons for my dissent. Among the grounds upon which the validity of the commitment is assailed is this: That it does not appear from the record of the proceedings that any reasonable time was allowed the prisoner after his arrest for the production and examination of witnesses, as required by section 2168 of the Political Code. I think this objection is well founded. In the proceeding for the commitment of persons alleged to be insane, the superior court is a tribunal of special, statutory, and strictly limited jurisdiction, and its record of the proceeding—like the records of other tribunals of limited jurisdiction—ought to show compliance with all jurisdictional requisites. The law requires (Pol. Code, § 2168), among other things, that, when a person alleged to be insane is arrested, "he must be taken before a judge of the superior court, to whom said affidavit and warrant of arrest must be delivered to be filed with the clerk. The judge must then inform him that he is charged with being insane, and inform him of his rights to make a defense to such charge and produce any witnesses in relation thereto. The judge must by order fix such time and place for the hearing and examination in open court as will give reasonable opportunity for the production and examination of witnesses. Said order must be entered in the minutes of the court by the clerk and a certified copy of the same served on such person." These provisions are obligatory, and require more than a merely formal observance. In this case the prisoner was taken before the judge on the day of his arrest and the time of hearing fixed for 11:30 a. m. of the same day. There is nothing to show when the notice of the time so fixed was served on him. The recital in the commitment that it was duly served before the hearing does not, in my opinion, show that it afforded the prisoner any reasonable time for the production and examination of witnesses. From other parts of the record it appears that no witnesses were examined, and the certificate of the two medical examiners shows that they had no knowledge or information, by sworn testimony, in regard to the history of the patient or the cause of his supposed malady. The whole proceeding appears from the record to have been conducted with a degree of haste which, in many cases, would be extremely dangerous, and the fact stated in the return that notice of the hearing was duly served would be literally true if service was made 10 minutes before the hearing proceeded. Very possibly the evidence of this prisoner's insanity may have been patent, and the necessity of expediting the hearing may have been urgent; but the law was designed to guard against the gross injustice sometimes resulting from undue precipitancy in the conduct of such proceedings, and it is deprived of all efficacy if its behests are not substantially complied with. If, in a particular case, the condition of a person alleged to be insane is such as to render him incapable of calling witnesses, or of exercising any rational volition in respect to the hearing, and there appears to be a necessity for proceeding without delay, those facts ought to appear in the record of the proceedings; for, otherwise, it does not show compliance with the statute. Entertaining these views, I think the case presented calls for a hearing.

WISHON v. SUPERIOR COURT OF TULARE COUNTY et al. (S. F. 3,190.) (Supreme Court of California. March 24, 1906.) Department 1. Application for a writ of review by Mary E. Wishon against the superior court of Tulare county and another to annul proceedings adjudging petitioner guilty of contempt. Judgment set aside. Maurice E. Power, for petitioner. Charles G. Lamberson, for respondents.

SHAW, J. This is an application for a writ of review to annul certain proceedings in the superior court adjudging the petitioner guilty of contempt and imposing upon her a fine. Upon the application for an alternative writ this court took the matter under advisement, and upon the issuance thereof rendered an opinion which is reported in the case entitled Wishon v. Superior Court, 138 Cal. 73, 70 Pac. 1007. It was there decided that upon the facts alleged in the petition the order complained was beyond the jurisdiction of the superior court, and consequently void. Thereupon an order was made directing the respondent to certify the full record to this court, and that in the meantime proceedings upon the judgment of contempt be restrained. The record was duly certified to this court as directed, and the case now stands submitted for the action of this court upon the record so certified. The facts appearing in the record are not in any material respect different from those alleged in the petition upon which the opinion hereinbefore rendered by this court in the case was rendered. Upon the authority of that decision we hold that the proceedings should be annulled. It is ordered and adjudged that the judgment of the superior court of Tulare county, state of California, rendered on April 24, 1902, in the case in that court entitled J. H. Stufflebeem v. Mary Adelsbach et al., and purporting to adjudge the petitioner, Mary E. Wishon, guilty of contempt of said superior court, and that she pay a fine for said contempt, be, and the same is, hereby vacated, annulled and set aside.

We concur: SLOSS, J.; ANGELLOTTI, J.

CAMPBELL v. CAMPBELL. (Court of Appeal, Second District, California. March 5, 1906.) Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge. Action by Charles Campbell against Maria Campbell. From a judgment for plaintiff, defendant appeals. Affirmed. Davis, Rush & Willis and Isidore B. Dockweiler, for appellant. George M. Holton and Newman Jones, for respondent.

SMITH, J. The plaintiff and defendant were married April 8, 1895, and the suit is brought to quiet the title of the plaintiff to two lots of land referred to in the appellant's brief as "the Fourteenth Street Property" and the "Los Angeles Street Property." The former was purchased October 2, 1896, and the latter December 5, 1901; and both were conveyed by the vendor to the defendant. On the latter tract there is a balance due of $4,000, with interest, secured by mortgage on the land and the note of the plaintiff and defendant. The court finds, in effect, that both properties were purchased with the personal earnings of the plaintiff since the marriage, and were conveyed to the defendant upon the express understanding and agreement that they should be and remain community property of the parties. The judgment was for the plaintiff. The appeal is from the judgment and from an order denying the defendant's motion for a new trial. The only point made in the appellant's brief is that the findings of the court are not justified by the evidence, or, more specifically, that under the existing law the presumption is in favor of the wife, and that the testimony of the plaintiff, being self-serving in its nature, was not sufficient to overcome this presumption and to justify the finding of the court against it. But in this case the testimony of the plaintiff, which is in itself sufficiently probable, is strongly confirmed by the conveyance of two other lots to his wife—which with the lots in question constituted all the real property purchased by him during coverture—and by her reconveyance of all of them except the lot last described in the complaint. We are of the opinion, therefore, that the findings of the court are fully supported by the evidence. The judgment and order appealed from are affirmed.

We concur: GRAY, P. J.; ALLEN, J.

FAIRBANKS, MORSE & CO. v. WARD et al. (HARPER-REYNOLDS CO. et al., Interveners). Court of Appeal, Second District, California. June 7, 1905.) Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge. Action by Fairbanks, Morse & Co. against Mary Leonard Ward and others, in which the Harper-Reynolds Company and another intervened. From a judgment for plaintiff, and an order denying a motion for a new trial, Mary Leonard Ward, defendant, appeals. Motion to dismiss the appeal. Submission of the motion set aside; hearing continued. H. W. Nisbet, for appellant. John Satterwhite, for respondent.

PER CURIAM. Motion to dismiss appeal of Mary Leonard Ward from the judgment and order denying her motion for a new trial herein. Ordered that the submission of this motion be set aside, and the hearing of the same continued, to be heard, together with the appeal of other defendants in this case (No. 75 on the calendar).

Dismissed by stipulation.

WEST KEY NUMBER SYSTEM